CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, August 9, 1990

Appeal No. AP-89-134

IN THE MATTER OF an application heard on December 14, 1989, pursuant to section 51.19 of the *Excise Tax Act*, R.S.C., 1970, c. E-13;

AND IN THE MATTER OF a notice of decision of the Minister of National Revenue dated March 30, 1989, with respect to a notice of objection filed pursuant to section 51.17 of the *Excise Tax Act*.

BETWEEN

A.G. GREEN CO. LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal declares that the appellant is not eligible to claim a refund under section 44 of the *Excise Tax Act* for the federal sales tax portion of the purchase price that it paid for equipment and materials used in its bakery and butchery operations.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-89-134

A.G. GREEN CO. LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Whether alleged misinformation from officials at Revenue Canada is sufficient to entitle appellant to a refund of the federal sales tax portion of the purchase price paid for materials and equipment used in its bakery and butchery operations - Whether the appellant is eligible to claim a refund under section 44 of the Excise Tax Act - Whether this amount is considered as taxes imposed by or under the Excise Tax Act - Whether the appellant filed its refund claim within the statutorily prescribed period.

DECISION: *The appeal is dismissed. Despite the information provided by Revenue Canada officials, the amounts paid by the appellant are not taxes as that word is used in section 44 of the Excise Tax Act. Because the appellant did not pay the taxes, it is not an eligible claimant; it is therefore not necessary for the Tribunal to consider whether the appellant has filed its refund claim in time.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*December 14, 1989*
Date of Decision:	*August 9, 1990*
Tribunal Members:	*Robert J. Bertrand, Q.C., Presiding Member* *Sidney A. Fraleigh, Member* *Kathleen E. Macmillan, Member*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Donald G. Barnes, for the appellant* *Bruce S. Russell, for the respondent*
Cases Cited:	*Hobart Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise, [1985] D.T.C., 5440; Granger v. Employment and Immigration Commission [1986] 3 F.C., 70, affirmed [1989] 1 S.C.R., 141; The Attorney General of Canada v. Royden Young et al., Federal Court of Appeal File Number A-978-88; Geocrude Energy Inc. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 2937; Walbern Agri-Systems Ltd. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 3000; Price (Nfld.) Pulp & Paper Limited v. The Queen, [1974] 2 F.C., 436; Saugeen Indian Band v. The Queen, 2 T.C.T., 4033, affirmed Federal Court of Appeal, File Number A-1227-88.*

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Statutes Cited: *An Act to Amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof, S.C., 1986, c. 9, subss. 23(3), 23(5), s. 34; Excise Tax Act, R.S.C., 1970, c. E-13, subss. 27(1), 29(1), s. 44, par. 1(a)(i), Part XIII, Schedule III; R.S.C, 1985, c. E-15, subss. 50(1), 51(1), s. 68; S.C., 1980-81-82-83, c. 68, s. 15.*

Excise Tax Memorandum: *ET 313.*

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-89-134

A.G. GREEN CO. LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT J. BERTRAND, Q.C., Presiding Member
SIDNEY A. FRALEIGH, Member
KATHLEEN E. MACMILLAN, Member

REASONS FOR DECISION

SUMMARY

The appellant is a retailer of butchery and bakery products. The issue in this appeal is whether it was entitled to claim a refund of the federal sales tax portion of the purchase price paid for machinery and equipment used in its butchery, bakery and delicatessen operations.

In 1985, the appellant added bakery, butchery and delicatessen operations to its grocery business in Little Current, Ontario. In making this expansion, the appellant purchased tools, equipment and materials for use in the production of bakery and butchery products. The appellant was invoiced at federal sales tax included prices. The appellant claims that it was informed by officials at the Department of National Revenue for Customs and Excise (Revenue Canada) that it could claim a refund and that it had four years to do this. However, when it filed the claim, under section 44 of the *Excise Tax Act* (the Act),[1] it was informed first by Revenue Canada officials that it was not an eligible claimant, and second, by the Minister of National Revenue that it had not filed its refund claim within the statutorily prescribed period.

The Tribunal finds that despite the information provided by Revenue Canada officials, the amounts paid by the appellant to its suppliers were not taxes as that word is used in section 44 of the Act. Because the appellant did not pay the taxes, it was not an eligible claimant. As the appellant was not an eligible claimant, it was not necessary for the Tribunal to consider whether the appellant had filed its refund claim in time.

1. R.S.C., 1970, c. E-13; now R.S.C., 1985, c. E-15, s. 68, as amended.

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THE LEGISLATION

The relevant legislative provisions, as they read during the period between May 1, 1985, and December 31, 1986, the assessment period, are as follows:

The Exemption Provisions

Excise Tax Act

27(1)[2] *There shall be imposed, levied and collected a consumption or sales tax ... on the sale price of all goods*

(a) produced or manufactured in Canada ...

29(1)[3] *The tax imposed by section 27 does not apply to the sale or importation of the goods mentioned in Schedule III ...*

SCHEDULE III

PART XIII

PRODUCTION EQUIPMENT, PROCESSING MATERIALS AND PLANS

1.All the following:

(a) machinery and apparatus sold to or imported by manufacturers or producers for use by them primarily and directly in

i) the manufacture or production of goods ...

The Refund Provisions

Before March 4, 1986, the legislative provisions governing this refund claim read as follows:

44(7.1)[4] *Subject to subsection (7), no refund of moneys paid or overpaid in error, whether by reason of mistake of fact or law or otherwise, and taken into account as taxes imposed by this Act shall be granted under this section unless application in writing therefor is made to the Minister by the person entitled to the refund within four years after the time the moneys were paid or overpaid.*

Subsection 44(7.1) was repealed and replaced by a different refund provision by an enactment that came into force on March 4, 1986. That Act is called *An Act to Amend the Excise*

2. *Ibid*., now subs. 50(1).
3. *Ibid*., now subs. 51(1).
4. R.S.C., 1970, c. E-13, as amended by S.C., 1980-81-82-83, c. 68, s. 15.

Tax Act and the Excise Act and to amend other Acts in consequence thereof[5] (the Act of 1986). The refund provision was replaced by subsection 23(3) of the Act of 1986, which stated as follows:

> *44(7.1) No refund of moneys paid or overpaid in error, whether by reason of mistake of fact or law or otherwise, and taken into account as taxes imposed by this Act shall be granted under this section unless application in writing therefor is made to the Minister by the person entitled to the refund within two years after the time the moneys were paid or overpaid.*

By virtue of subsection 23(5) of the Act of 1986:

> *... Subsection [23](3) shall be deemed to have come into force on May 24, 1985 and applies in relation to a refund or deduction that is granted or a payment that is made after May 23, 1985, except that in respect of a transaction or event entitling a person to apply for the refund, deduction or payment that occurred before May 24, 1985 the references in subsections ... [44](7.1) of the said Act, as enacted by subsection [23](3), to "two years" shall be read as references to "four years".*

Finally, by virtue of section 34 of the Act of 1986, subsection 44(7.1) was repealed and replaced on May 1, 1986, by the present refund provision. The refund provision reads as follows:

> *44. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after he paid the moneys ...*

THE FACTS

The facts in this case have been gathered from documents submitted in evidence, the testimony of Mr. A.G. Green, a 50-percent shareholder and the appellant's Chief Executive Officer, of Mr. Donald Barnes, a chartered accountant and the appellant's agent in these proceedings, and of Mr. Patrick Hayes, a retired federal sales tax auditor who, during the assessment period in issue, worked in the North Bay office of the Department of National Revenue for Customs and Excise (Revenue Canada).

In 1985, the appellant added bakery, butchery and delicatessen operations to its grocery business in Little Current, Ontario. In making this expansion, the appellant purchased tools, equipment and materials for use in the production of bakery and butchery products. Specifically, the subject goods consisted of ovens, component parts used to build walk-in refrigeration units (compressors, evaporators, pipes, valves, wiring, etc.), materials used in the installation of the ovens and refrigeration units, and proofing pans, depanning tables, etc.

The subject goods were purchased through M. Loeb Limited (Loeb) of Sudbury, Ontario. Loeb is a central buyer of equipment for retail operations like the appellant's. Loeb canvasses

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5. S.C., 1986, c. 9.

potential suppliers to provide the buyer with the lowest priced equipment. It charges a commission of 2 percent for its efforts in getting the best price available.

In this case, the appellant submitted purchase orders to Loeb for the subject goods in March 1985, based on quotations from potential vendors gathered by Loeb before that time. The quotations were sought after Loeb and the appellant had produced a design plan for the expanded operations.

The manufacturers supplying the ordered goods invoiced the Loeb head office in Ottawa (IGA Canada Ltd.) between the period May 1985 and August 1986 at federal sales tax included prices. IGA Canada Ltd. then sent the invoices to Loeb. In turn, Loeb invoiced the appellant and added the 2-percent commission. The appellant paid Loeb for the goods and the charged commission. The appellant paid the invoices between May 1985 and October 1985. It would appear, although the evidence is not clear on this point, that possibly one or two invoices were paid before May 23, 1985.

In early November 1986 a provincial retail sales tax auditor informed Mr. Green that the purchased goods may have been federal sales tax exempt and, thus, that the appellant might be entitled to a refund of the tax paid. After speaking to Loeb's comptroller on the matter, who professed that he was not aware that a refund claim could be made, Mr. Green instructed Mr. Barnes to contact the North Bay office of Revenue Canada and verify whether the appellant was entitled to a refund of federal sales tax, which Mr. Barnes did on November 12, 1986, and on several subsequent occasions.

Mr. Barnes said that he asked Mr. Hayes whether the items purchased were federal sales tax exempt, and if so, what procedures the appellant had to follow in making a refund claim. Mr. Barnes testified that Mr. Hayes informed him that the appellant could claim a refund. Mr. Hayes testified that he had no recollection of the conversations because he took some 20 to 25 telephone calls a day.

According to Mr. Barnes, Mr. Hayes sent to the appellant a refund claim form (form N-15) and an excise memorandum (ET 313) published by Revenue Canada. The refund claim form contained some comments in Mr. Hayes handwriting. In particular, under the section of the claim form entitled "Reason for Refund," Mr. Hayes wrote "tax paid goods - end use under exempt conditions." Mr. Hayes explained that this phrase was included because, during the assessment period in question, it was the policy of Revenue Canada to process refund claims filed by unlicensed manufacturers, such as the appellant, who were end-use purchasers of multi-purpose goods (eg. wiring, cables, pipe valves and fittings, lumber, building supplies, etc.).

Describing multi-purpose goods as goods that can be used under either taxable or tax exempt conditions, Mr. Hayes said that this policy was subject to the proviso that the refund claim was filed within the proper time prescribed in the Act; that the goods were purchased at federal sales tax included prices; and that the goods were used by the end-use purchaser under tax-exempt conditions. He said that this policy was in effect even though the end user of the goods did not pay or remit federal sales tax directly to Revenue Canada.

The memorandum ET 313 was first published on December 1, 1975, and contains amendments to February 8, 1985. It sets forth several criteria that Revenue Canada requires to be met in order for a refund claim to be successfully completed.

According to Mr. Barnes, the excise memorandum sent to the appellant also contained several underlined passages. Mr. Barnes stated that, while he did most of the underlining following his conversations with Mr. Hayes, Mr. Hayes may have underlined other passages in the memorandum. Mr. Hayes denied having underlined any passages in the memorandum.

Mr. Barnes claimed that Mr. Hayes told him that a refund claim could be made on goods acquired on a tax paid basis and incorporated into the construction of production equipment subsequently used under tax-exempt conditions.

One item underlined by Mr. Barnes reads "Persons entitled to a refund of taxes must file their refund claim within four years of the time when the refund first became payable." Mr. Barnes testified that Mr. Hayes informed him that the appellant had four years in which to file the claim. That is why Mr. Barnes underlined the portion of ET 313 dealing with refund claim time limitations. Mr. Barnes further testified that Mr. Hayes did not state that this limitation period only applied to purchases made before May 24, 1985.

Mr. Hayes said that he never would have commented that there was a four-year refund claim limitation period without mentioning that the period was shortened to two years for purchases made after May 23, 1985. Mr. Hayes said that the change in limitation period was extremely significant and was often discussed within the North Bay office and with outside callers.

Mr. Barnes and Mr. Green determined that the appellant satisfied Revenue Canada's refund claim eligibility requirements contained in ET 313. In particular, and on the basis of the mailed documents and conversations, they concluded that the appellant was required to obtain goods on a tax-paid basis that were subsequently used under tax-exempt conditions and that the appellant was an unlicensed manufacturer or producer that incorporates pipe, pipe fittings and valves, hose or tubing and fittings, electric wire, cable, conduit, and fittings into production equipment.

Mr. Barnes claimed that he was also told by Mr. Hayes to provide copies of invoices and how to compute the federal sales tax portion of the various purchase prices of the subject goods. Mr. Hayes did not recall having spoken to Mr. Barnes on these matters. However, Mr. Hayes testified that, while it is not mandatory for a refund claimant to append invoices to the claim, he often recommends to claimants to do so to expedite the refund assessment process.

On January 2, 1987, the appellant filed a claim for a refund of provincial retail sales tax levied on goods that included the subject goods. The provincial claim was not accompanied by copies of the sales invoices. The claim was approved on January 20, 1987, and the appellant then received a cheque from the provincial government for the full amount of its refund claim.

On November 18, 1987, the appellant submitted a claim for $6,737.60, representing the total federal sales tax portion of the invoiced purchase prices of the subject goods. According to Mr. Barnes, the appellant delayed in filing the federal claim because it had to assemble the relevant invoices. The claim was received by Revenue Canada on November 20, 1987.

In filing its refund claim, the appellant contended that the subject goods are machinery and apparatus used primarily and directly in the production of goods pursuant to clause 1(*a*)(i), Part XIII, Schedule III of the Act and thus should have been purchased exempt of federal sales tax.

On December 17, 1987, Revenue Canada rejected the refund claim because "As a manufacturer of unconditionally exempt goods (re: butchering operations), you [the appellant] are

entitled to direct exemption from your suppliers on qualifying production equipment, subject to time limitations."

The appellant filed a notice of objection with the Minister of National Revenue (the Minister), which was received by the Minister on February 8, 1988. On March 30, 1989, the Minister issued a notice of decision confirming the original refund claim determination. The basis for the rejection of the refund claim is as follows:

> *To be eligible for a refund of any sales tax in this instance, the refund application had to be filed in writing not later than four years after those transactions occurring on or before May 23, 1985, or, not later than two years after any sales became eligible for refund on those transactions after May 23, 1985.*
>
> *As no evidence was provided to confirm that you acquired title to any of the goods on or before May 23, 1985, and as your application was not filed within the two year time limit required for any subsequent transactions, your refund did not meet the statutory time limit requirements of the Excise Tax Act.*

Not satisfied with this response, the appellant filed an appeal with the Tribunal on April 17, 1989.

THE ISSUE

The issue in this appeal is whether the appellant is entitled to claim a refund pursuant to section 44 of the Act for the federal sales tax portion of the invoiced purchase prices of the subject goods.

The appellant argued that it is entitled to claim the refund because it was misinformed by Mr. Hayes about the period in which it could file a refund claim and the manner in which it should proceed in making that claim. The appellant contended that, when it contacted the North Bay office of Revenue Canada, it was informed that it could obtain a federal sales tax refund if it filed a claim, with supporting documents (e.g. invoices), within four years. The appellant contended that, if it had not been so informed, it would not have waited until all the supporting documentation was gathered some time in November 1987 and would have filed the claim simultaneously with the provincial sales tax refund claim in January 1987. If it had done so, the appellant argued, it would not have been out of time in filing its claim.

The appellant argued that because this turn of events was unjust, the Tribunal should adopt the date of filing of the provincial retail sales tax claim in January 1987 as the date when the appellant filed a federal sales tax refund claim.

Alternatively, the appellant argued that the limitation period governing its refund claim should commence on December 20, 1985. On that date, Revenue Canada issued a ruling (1100/3-1), based on the decision of the Federal Court of Appeal in *Hobart Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*,[6] that retail butchers are retail manufacturers and thus, according to the appellant, are eligible for tax-exempt status. Therefore, the appellant argued that, as a retail manufacturer, it was entitled to claim a refund on any federal

6. [1985] D.T.C., 5440.

sales tax paid in respect of its retail manufacturing operations. Because the appellant's refund claim was filed in November 1987, it argued that its claim falls within the two-year limitation period.

Finally, the appellant argued that the Minister's decision rendered on March 30, 1989, regarding the appellant's refund claim, indicates that the Minister views the four-year limitation period to be applicable to transactions in which title has passed before May 24, 1985. The appellant urged the Tribunal to consider that title passed when the appellant committed itself to purchasing the goods in issue. This, the appellant submitted, would be approximately three months before each invoice date. Using this date, the appellant argued, the Tribunal could determine which transactions fell within the four-year limitation period and, thus, on which transactions a refund claim could be based.

The respondent argued that the appellant is not entitled to the refund and presented three arguments in support of his position. First, the respondent argued that, while Mr. Barnes had undoubtedly provided the Tribunal with his best recollection of his dealings with the North Bay office of Revenue Canada, it is highly unlikely that Mr. Hayes misinformed Mr. Barnes about time limitations for filing refund claims. The respondent based this contention on Mr. Hayes' long experience in dealing with the public on matters relating to the Act and the fact that time limitations for filing refund claims are such an important matter.

However, even if Mr. Hayes had misinformed Mr. Barnes, the respondent argued that Canadian courts, and in particular the Federal Court of Appeal in its decisions in *Granger v. Employment and Immigration Commission*[7] and *The Attorney General of Canada v. Royden Young et al.*,[8] have consistently held that the Crown is not bound by representations made to taxpayers by Revenue Canada officials, if such representations are contrary to the provisions of the law. The Crown must apply the law, even if such application causes financial hardship.

Second, the respondent argued that the appellant is not an eligible refund claimant pursuant to section 44 of the Act. Relying on the Tribunal decision in *Geocrude Energy Inc. v. The Minister of National Revenue*,[9] the respondent argued that only the entity paying the tax is, if otherwise qualified, entitled to a refund. The respondent contended that the appellant had not paid the taxes for which it seeks a refund, and accordingly it is ineligible to receive the refund claimed.

However, the respondent noted, Revenue Canada had an administrative policy in effect during the assessment period in question entitling claimants, such as the appellant, to a refund of the federal sales tax portion of the purchase price paid on multi-purpose goods used under tax-exempt conditions. The respondent argued that the policy is not applicable to the present appeal because there is no evidence before this Tribunal to indicate that the subject goods are multi-purpose goods.

Finally, the respondent argued that even if the subject goods are multi-purpose goods, the appellant is not eligible to claim a refund in respect of goods on which federal sales tax was paid after May 23, 1985, since it mailed its refund claim in November 1987. The respondent argued

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7. [1986] 3 F.C., 70, *affirmed* [1989] 1 S.C.R., 141.
8. Unreported, Court No. A-978-88.
9. Unreported, Appeal No. 2937.

that subsections 23(3) and 23(5) and section 34 of the Act of 1986, read with the present refund provision in section 44 of the Act, provide a clear indication of Parliament's intention to allow a refund claimant two years to file a claim in respect of transactions for which federal sales tax was paid after May 23, 1985.

However, the respondent argued that the four-year limitation period for filing refund claims on transactions for which federal sales tax was paid before May 24, 1985, is an accrued right, protected from subsequent amendments to the Act that abolished the four-year period. The respondent based this contention on subsection 43(c) of the *Interpretation Act*[10] and the Ontario Court of Appeal decision in *Re Falconbridge Nickel Mines Ltd. and the Minister of Revenue for Ontario.*[11] Thus, the respondent conceded that, if the subject goods are multi-purpose goods, the appellant would be eligible under Revenue Canada's administrative policy to claim a refund on transactions for which federal sales tax was paid before May 24, 1985.

DECISION

While the Tribunal sympathizes with the appellant's situation, the Tribunal nevertheless considers that the appeal should be dismissed in view of the facts in issue, the relevant jurisprudence and the applicable legislation.

With respect to the appellant's argument that it is entitled to the refund because it was misinformed about its eligibility to claim a refund and about the time it had to file a refund claim, the Tribunal notes that it must apply the applicable law to this case even if a Revenue Canada official had misinformed the appellant on the way the Act operates regarding federal sales tax refund claims. Also, if the applicable law does not permit the appellant to claim a refund, then the fact that the appellant was misinformed is not sufficient to change the conclusion specified in the law.

This proposition was set forth in the Tribunal decision of *Walbern Agri-Systems Ltd. v. The Minister of National Revenue*.[12] In the case, the Tribunal stated (at p. 5) the following regarding its position on misinformation vis-à-vis liability to pay sales tax:

> *Whether or not the appellant was misled by officials of the Department and whether or not it received the Excise News is irrelevant to the determination of the liability for tax of a person required to pay it. It is settled law that misinformation by officials of the Department does not excuse a person from paying nor constitute a reason for avoiding tax liability.*

The Tribunal based its comments on the decision of Mr. Justice Pratte of the Federal Court of Appeal in the Granger case (*supra*) that was subsequently upheld by the Supreme Court of Canada.[13]

Therefore, the Tribunal considers that the appellant can claim a federal sales tax refund if, and only if, it is entitled to do so pursuant to the relevant provisions of the Act.

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10. R.S.C., 1985, c. I-21.
11. 32 O.R. (2d), 240.
12. Unreported, Appeal No. 3000.
13. *Supra* note 4, *per* Mr. Justice Lamer at p. 141.

In the Geocrude case (*supra*), the Tribunal extensively canvassed the history of the refund provision on which the appellant's claim is based, that is, section 44 of the Act, and the relevant case law interpreting that section. This was done with the view to determining whether an end user of goods is eligible to claim a refund for the federal sales tax portion of the purchase price paid for those goods.

In examining the history of section 44 of the Act, the Tribunal made the following comments (at pp. 8-9):

> *Section 44 of the Act originates from S.C. 1943-1944, c. 11. In those days, the federal sales tax refund provisions for sales tax paid in error were numbered subsections 105(1) and 105(6). They are worded in an almost identical manner to the words found in paragraph 44(1)(c) and subsection 44(7.1) of the Act, as they read immediately before their repeal and replacement by the current section 44.*
>
> *A common thread running through these refund provisions since 1943 is that, as a condition to claiming a refund, monies, for which the claim was made, must have been taken into account as taxes imposed by or under the Act.*

One case that the Tribunal examined in analyzing this phrase was the Federal Court of Appeal decision of *Price (Nfld.) Pulp & Paper Ltd. v. The Queen.*[14] In this case, the Court dealt with the issue of whether Price (Nfld.) Pulp & Paper Ltd., a purchaser of paper making machinery that was constructed from its component parts by the manufacturer/supplier of the goods, could claim a refund of federal sales tax because the machinery was subsequently held to be tax-exempt by amending legislation. As part of the transaction between the manufacturer/supplier and the purchaser, Price (Nfld.) Pulp & Paper Ltd. was required to pay a price that included an amount for federal sales tax paid by the manufacturer/supplier to the Crown.

Mr. Justice Thurlow, speaking for the Court, held that the amending legislation was not retroactive to the tax already paid and said (at pp. 441-442):

> *... even if it is accepted that the tax already paid became non-exigible and therefore returnable ... the appellant [i.e. the purchaser] in my opinion has established no right against the Crown to recover the amount claimed. The fact as asserted by counsel that the appellant was the only person interested in obtaining reimbursement of the money is not, in my opinion, sufficient to afford the appellant a right of action therefor against the Crown because no tax was imposed upon or received from the appellant, and in my view it cannot be affirmed that as against the Crown the appellant was ever the owner of the money which the Crown received from Dominion Engineering Works Limited [i.e. the manufacturer/supplier] as payments of the tax.* (Emphasis added)

The principle underlying this decision was enunciated by Madam Justice Reed in the Federal Court of Canada, Trial Division decision of *Saugeen Indian Band v. The Queen.*[15] In that case, the Indian band purchased several commodities on a federal sales tax included basis. The

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14. [1974] 2 F.C., 436.
15. 2 T.C.T., 4033.

appellant then applied for a refund under the Act for the sales tax portion of the purchase price based on its Indian status under the *Indian Act*. The main issue raised before the Trial Division was whether the *Indian Act* operated to exempt Indian bands from the incidence of tax, thereby entitling the appellant to a refund of the federal sales tax portion of the purchase price paid to the vendors of those commodities.

The court rejected the appeal, in part, because it did not consider that the federal sales tax portion of the purchase price paid by the appellant to the vendors of the commodities constituted a tax imposed under the Act.

This case was appealed by the Saugeen Indian Band to the Federal Court of Appeal. On December 7, 1989, that Court unanimously affirmed the Trial Division decision.[16]

The Court considered the issue before it (at p. 3) as follows:

> *... It is common ground that in every case where the sales tax is paid the actual payment is made by a manufacturer, wholesaler or licensed retailer, as the case may be. It is also common ground that the tax is usually passed on to the consumer. The issue is whether this passing on of the tax to the end-user of a commodity, when it occurs, is a matter of contract or of law.*

Quoting, with approval, the comments of Mr. Justice Thurlow, the court, through Mr. Justice MacGuigan, answered the issue (at pp. 9-13) as follows:

> *The very point at issue in the case at bar, it seems to me, has already been decided by this Court in Price.... [The] decision by this Court ... is ... binding on us.*
>
> *I would therefore conclude on this point that the appellant cannot be said to be taxed by the Excise Tax Act, even though the burden of the tax is undoubtedly passed on to it, as several of the invoices made explicit. What the appellant paid was not the tax as such, but commodity prices which included the tax. This is sufficient, for constitutional purposes, to make the tax indirect. But it is not enough, for tax purposes, to establish the appellant as the real taxpayer.*
>
> ...
>
> *In my view the fact that several provisions of the Act allow exemptions or refunds to certain end-users cannot be taken as a rule for the others, or a guide to the intention of the statute as a whole. That intention has already been established by this Court in Price. As a result, sales taxes under the Excise Tax Act must be taken, not as taxes on property, but as taxes on business transactions, levied at the time of the transaction.*

In short, the amounts paid by the appellant to its suppliers for federal sales tax are not considered taxes, as that word is used in the refund provision upon which this appeal is based; that is, section 44 of the Act. The amounts are considered part of the market price of the commodities purchased. The amounts paid are "a matter of contract" between A.G. Green Co. Limited and its suppliers.

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16. *Saugeen Indian Band v. The Queen* (unreported), Court File Number A-1227-88.

Because the appellant did not pay tax within the meaning of section 44 of the Act, it is not an eligible claimant and, thus, is not entitled to a refund of the sales tax portion of the purchase price of the subject goods.

Since the appellant is not an eligible claimant, the Tribunal does not consider it necessary to consider whether the appellant has filed its refund claim within the statutorily prescribed time limits.

CONCLUSION

For all the foregoing reasons, the Tribunal does not consider that the appellant is entitled to claim a refund for the federal sales tax portion of the invoiced purchase prices of the goods that are the subject of this appeal. Accordingly, the appeal is dismissed.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member