CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 31, 1991

Appeal No. AP-90-004

IN THE MATTER OF an appeal heard on June 4, 1991, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated March 30, 1990, with respect to a notice of objection filed under section 81.15 of the *Excise Tax Act*.

BETWEEN

ISLAND COASTAL SERVICES LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. The municipality of North River, Prince Edward Island, applied for a refund of the taxes it paid on the goods incorporated into its municipal sewer system after the statutorily prescribed two years following the transfer of property in those goods. Accordingly, its claim is statutorily barred. (Member Fraleigh dissenting)

Michèle Blouin
Michèle Blouin
Presiding Member

John C. Coleman
John C. Coleman
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-90-004

ISLAND COASTAL SERVICES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act by Island Coastal Services Ltd. from a decision of the Minister of National Revenue disallowing an objection and confirming a determination. On March 21, 1989, the municipality of North River, Prince Edward Island, that was assigned the right to the refund monies by the appellant, filed a claim for a tax refund for the tax paid on goods incorporated into the municipal sewer system. By Notice of Determination dated April 28, 1989, the Deputy Minister of National Revenue for Customs and Excise disallowed the claim on the basis that the statutory period of two years within which the refund could be claimed had expired. By notice of objection, the municipality claimed that the time limit for refund purposes should run from the time it received the "statutory declaration." It also claimed that any failure on its part to comply with the time limit in effect was due to its reliance on information and outdated memoranda provided by Revenue Canada. By Notice of Decision dated March 30, 1990, the Minister of National Revenue confirmed the determination on the basis that the refund must be claimed within two years from the date of sale of the sewer system which was deemed to have occurred on November 26, 1986, the date of its substantial completion. On April 10, 1990, the municipality, on behalf of Island Coastal Services Ltd., appealed that decision to this Tribunal.

***HELD**: The appeal is dismissed. The municipality of North River, Prince Edward Island, applied for a refund of the taxes it paid on the goods incorporated into its municipal sewer system after the statutorily prescribed two years following the transfer of property in those goods. Accordingly, its claim is statutorily barred. (Member Fraleigh dissenting)*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*June 4, 1990*
Date of Decision:	*October 15, 1991*
Tribunal Members:	*Michèle Blouin, Presiding Member* *Sidney A. Fraleigh, Member* *John C. Coleman, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Eldon I. Sentner, for the appellant* *Gilles Villeneuve, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-90-004

ISLAND COASTAL SERVICES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
SIDNEY A. FRALEIGH, Member
JOHN C. COLEMAN, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

At issue in this appeal is whether the municipality of North River, Prince Edward Island (the municipality), by power of attorney assigned to it by the appellant, Island Coastal Services Ltd., filed its claim for a refund of the tax paid on the purchase of goods to be incorporated into the municipal sewer system within the time prescribed by section 68.2 of the *Excise Tax Act*[1] (the Act). If such filing is found to have occurred outside the prescribed time as a result of reliance by the municipality on alleged outdated memoranda and incorrect advice provided by the respondent, the Tribunal must determine if this alters the consequence of the late filing.

The relevant sections of the Act for purposes of this appeal are:

> *50.(1) There shall be imposed, levied and collected a consumption or sales tax ... on the sale price or on the volume sold of all goods*
>
> *(a) produced or manufactured in Canada*
>
> ...
>
> *(ii) payable, in a case where the contract for the sale of the goods ... provides that the sale price or other consideration shall be paid to the manufacturer or producer by instalments ... by the producer or manufacturer at the time each of the instalments becomes payable in accordance with the terms of the contract ...*
>
> *68.2 Where tax under Part III or VI has been paid in respect of any goods and subsequently the goods are sold to a purchaser in circumstances that, by virtue of the nature of that purchaser or the use to which the goods are to be put or by virtue of both such nature and use, would have rendered the sale to that purchaser exempt or relieved from that tax under subsection ... 51(1) ..., an amount equal to the amount of that tax shall, subject to this Part, be paid to the person who sold the goods to that purchaser if the person who sold the goods applies therefor within two years after he sold the goods.*

1. R.S.C., 1985, c. E-15.

FACTS AND EVIDENCE

This is an appeal under section 81.19 of the Act by Island Coastal Services Ltd. from a decision of the Minister of National Revenue (the Minister) disallowing an objection and confirming a determination. On March 21, 1989, the municipality that was assigned the right to the refund monies by the appellant filed a claim for a refund of the tax paid on goods incorporated into the municipal sewer system. By Notice of Determination dated April 28, 1989, the Deputy Minister of National Revenue for Customs and Excise disallowed the claim on the basis that the statutory period of two years, within which the refund could be claimed, had expired.

By notice of objection, the municipality claimed that the time limit for refund purposes should run from the time it received the "statutory declaration." It also claimed that any failure on its part to comply with the time limit in effect was due to its reliance on information and outdated memoranda provided by Revenue Canada. By Notice of Decision dated March 30, 1990, the Minister confirmed the determination on the basis that the refund must be claimed within two years from the date of sale of the sewer system, which was deemed to have occurred on November 26, 1986, the date of its substantial completion. On April 10, 1990, the municipality, on behalf of Island Coastal Services Ltd., appealed that decision to this Tribunal.

At the hearing, the municipality was represented by its administrative officer, Mr. Eldon Sentner, who also served as witness. He testified that on August 30, 1986, Island Coastal Services Ltd. entered into a contract with the municipality for the construction of phase I of the municipal sewer system. On December 17, 1986, the consultant engineers to the municipality confirmed that substantial completion of the work had been reached on November 26, 1986. A certificate of inspection was signed on February 9, 1987, by the consultant engineers confirming that the contractor had completed the construction of the sewer system in agreement with the contract. The last progress payment for this work was made on March 2, 1987, leaving an outstanding amount owing on the contract of $49,182.59, representing the statutory holdback. The statutory declaration of the contractor, prepared at the time of application for release of the holdback monies or security deposit, was sworn on March 18, 1987, and, according to the witness, received on March 23, 1987. The application for refund of all taxes paid for the goods was signed on March 21, 1989. The claim covered the period from August 20, 1986, to February 9, 1987.

The witness stated that, on November 15, 1987, he contacted the local office of Revenue Canada, Customs and Excise (the Department), requesting information on claiming a refund of sales tax paid by the appellant on behalf of the municipality for goods incorporated into phase I of the sewer system. In early February 1988, claim forms along with Excise Memoranda ET-313 and ET-403 were received from the Department. Mr. Sentner said that these forms were accompanied with the comment that they were the most up-to-date memoranda available. Excise Memorandum ET-313 indicated that the appellant had four years within which to file a claim for refund.

The witness testified that in the fall of 1988 he again contacted the Department inquiring if any additional information was available with regard to the refund procedure. He was advised that an official from the Department would visit the municipality on his next trip to the province. This visit occurred in early March 1989, at which time Mr. Sentner was informed that the limitation period had been changed to two years. Island Coastal Services Ltd., by power of attorney, assigned its rights to the refund monies to the municipality. Then, on March 21, 1989, the refund claim was filed by the municipality.

Counsel for the respondent brought no witness or evidence to contradict the testimony of Mr. Sentner.

ARGUMENTS

Counsel for the municipality, in both his oral argument and later submissions, argued that, pursuant to section 68.2 of the Act, the municipality had a tax-exempt status. Counsel submitted that the commencement date of the two-year period is the date of the sale of the goods which occurred when property in the goods passed. Property passed according to the intention of the parties, that is ascertained having regard to the terms of the contract, the conduct of the parties and the circumstances of the case. As the contract is silent on the question of when property passed, the Tribunal must look elsewhere to determine the intention of the parties. In this regard, counsel referred to the transcript noting that Mr. Sentner suggested that the municipality would not take final acceptance of the goods until final payment was made in June of 1988. Counsel further argued that the date of delivery of the statutory declaration of the contractor, namely, March 23, 1987, may also be considered as the starting date of the two-year period.

Counsel for the municipality argued, in the alternative, that if the municipality had missed the statutorily prescribed time period within which it could file for a refund of tax paid on the materials incorporated into its municipal sewer system it had done so because it had relied on outdated memoranda and incorrect advice provided by the Moncton regional office of Revenue Canada. On this basis, it asked the Tribunal to reverse the finding of the Minister. In his written submissions, counsel also argued that the Tribunal has equitable jurisdiction equivalent to that of a superior court.[2]

Counsel for the respondent argued that the appellant has the onus of establishing that it is entitled to the exemption it is claiming.[3] Counsel argued that the commencement date of the two-year period must be the date of sale of the goods to the municipality. He submitted that the date of sale was prior to March 18, 1987, and the appellant, by applying for a tax refund on March 21, 1989, was outside the two-year limitation.

Counsel for the respondent argued that, because the contract is silent on the question of when property passed, the Tribunal must look to the circumstances of the transaction. In this regard, counsel noted that the contract stipulates that substantial completion was set for November 20, 1986; that the Certificate of Substantial Completion dated December 17, 1986, states that substantial completion was reached on November 26, 1986; that a certificate of inspection dated February 9, 1987, states that the sewer system has been completed in accordance with the drawings and specifications; that a statement of account dated March 23, 1987, indicates that the final payment, being progress payment number four, was made on March 2, 1987, leaving only the 15 percent statutory holdback remaining unpaid; and finally, that the Statutory Declaration dated March 18, 1987, states that all accounts for labour, products, machinery, etc., in the construction of the sewer system have been paid in full except the holdback monies properly retained. With regard to the holdback, counsel submitted that it has nothing to do with the purchase and sale of the goods.

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2. *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.), subs. 17(2).
3. *Gustavson Drilling (1964) Limited v. The Minister of National Revenue*, [1977] 1 S.C.R. 271.

The respondent further argued that estoppel does not apply against the Crown and that even if Revenue Canada misinformed the municipality about the deadline for filing the appeal, the Tribunal has no equitable jurisdiction allowing it to find in favour of the municipality.

REASONS

Under section 68.2 of the Act, the municipality, by the power of attorney granted to it by the appellant, had two years after it purchased the goods for its sewer system to apply for a refund of the tax paid on those goods. The transfer of property in the goods did not occur at a single instance and payment was made by instalments over the construction period. It has been the practice of Revenue Canada to allow a person to delay filing for a refund until the completion of the construction project. It therefore accepted the date of completion of the project as the starting point of the period of limitation. Therefore, according to Revenue Canada, the municipality had two years from the completion of the project within which to file for a refund of the taxes paid on the construction materials.

The application for refund of taxes paid by the municipality was signed on March 21, 1989, which represents the earliest date the Tribunal could consider it as actually having applied for the refund. The issue before the Tribunal, therefore, was whether the construction project was completed before March 21, 1987. Or, alternatively, whether the last transfer of property in the goods to be incorporated into the sewer system occurred before this date.

The majority of the Tribunal is in agreement with counsel for both parties that the transfer of property was to occur according to the intention of the parties, which can be ascertained having regard to the terms of the contract, the conduct of the parties and the circumstances surrounding the transaction. Having regard to the facts of the case, which were not in dispute, the majority of the Tribunal finds that the last transfer of property occurred prior to March 21, 1987. Accordingly, the municipality applied for the refund outside the statutorily prescribed time.

The majority of the Tribunal notes that Revenue Canada did not dispute the municipality's contention that it had been misinformed by its officers about the deadline for applying for a refund. The majority of the Tribunal regrets that it does not have equitable jurisdiction allowing it to find in favour of the municipality that has acted on incorrect advice or information from the Department.

CONCLUSION

The appeal is dismissed. The municipality applied for a refund of the taxes it paid on the goods incorporated into its municipal sewer system after the statutorily prescribed two years following the transfer of property in those goods to it. Accordingly, its claim is statutorily barred.

Michèle Blouin
Michèle Blouin
Presiding Member

John C. Coleman
John C. Coleman
Member

DISSENTING VIEWS OF MEMBER FRALEIGH

My dissent is based entirely on what should be a reasonable expectation by a taxpayer when he is attempting to determine his tax liability.

The uncontested facts in this case are quite simple:

1. Revenue Canada sent to this taxpayer, the municipality, official memoranda containing information which it knew to be false.

2. Revenue Canada subsequently confirmed to the municipality that the information it had been given was correct.

It is my contention that the taxpayer should have been able to rely on the information contained in the official Revenue Canada memoranda that it received upon request, to determine its tax liability to the Crown.

Surely Revenue Canada cannot be allowed to hide behind the doctrine of estoppel to trample the rights of a taxpayer.

I would therefore allow the appeal on the grounds that the municipality should have been able to reasonably expect that information contained in official Revenue Canada memoranda supplied at its request would enable it to determine its tax liability to the Crown.

Sidney A. Fraleigh
Sidney A. Fraleigh
Member