

Ottawa, Wednesday, November 20, 1991

**Appeal No. AP-90-102**

IN THE MATTER OF an appeal heard on August 29, 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 August 14, 1990, with respect to a  
notice of objection filed under section 81.15 of the  
*Excise Tax Act*.

**BETWEEN**

**SEAWAY INDUSTRIAL & AUTOMOTIVE SUPPLIES LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Presiding Member

John C. Coleman  
John C. Coleman  
Member

Michèle Blouin  
Michèle Blouin  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

*UNOFFICIAL SUMMARY*

**Appeal No. AP-90-102**

**SEAWAY INDUSTRIAL & AUTOMOTIVE SUPPLIES LTD.**                      **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**                                      **Respondent**

*This appeal is commenced under section 81.19 of the Excise Tax Act. The appellant, during an audit conducted on its premises at the end of 1989, was informed by an official from Revenue Canada, Customs and Excise, that taxes had been paid in error. The appellant could have calculated sales tax on the cost of goods rather than on their sale price. Following a claim, the appellant obtained a refund for taxes paid in error in 1988 and 1989. The question addressed by the Tribunal in this appeal is whether the appellant can be allowed, pursuant to subsections 81.1(7) to (9) of the Excise Tax Act, a credit for taxes paid in error in 1986 and 1987.*

**HELD:** *The appeal is dismissed. The Tribunal is of the view that the conditions set forth in subsection 81.1(9) of the Excise Tax Act are not met in the present instance.*

*Place of Hearing:                                      Ottawa, Ontario*  
*Date of Hearing:                                      August 29, 1991*  
*Date of Decision:                                    November 20, 1991*

*Tribunal Members:                                Sidney A. Fraleigh, Presiding Member*  
*John C. Coleman, Member*  
*Michèle Blouin, Member*

*Counsel for the Tribunal:                      Robert Desjardins*

*Clerk of the Tribunal:                          Nicole Pelletier*

*Appearances:                                      J.P. Sarault, for the appellant*  
*Gilles Villeneuve, for the respondent*

**Appeal No. AP-90-102**

**SEAWAY INDUSTRIAL & AUTOMOTIVE SUPPLIES LTD. Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE Respondent**

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

**REASONS FOR DECISION**

The question the Tribunal has to address in this appeal is whether the appellant is entitled to a refund of taxes paid in error for the years 1986 and 1987.

In September 1986, the appellant was issued a wholesaler's sales tax license, which came into effect on October 1, 1986. In December 1989, during an audit conducted on the appellant's premises, Mr. Huy Do of Revenue Canada, Customs and Excise, informed Mr. J. Paul Sarault, the appellant's President, that an error had been made by the company with respect to its sales tax calculations. This official advised Mr. Sarault that the appellant could have calculated sales tax on the cost of goods purchased for resale rather than on their sale price. Following Mr. Do's visit and after Revenue Canada had established that there were no taxes left owing at that time, a notice of assessment covering 1986 to 1989 inclusively went out to the appellant.

Mr. Sarault was also informed by Mr. Do during his visit to the appellant's premises that he could claim a refund for taxes paid in error. In a letter dated January 8, 1990, Mr. Sarault claimed a refund for the years 1987, 1988 and 1989 totalling \$25,368.93. By Notice of Reassessment dated February 21, 1990, Revenue Canada refunded the appellant the sum of \$13,258.27 for taxes overpaid in error for the period from January 1988 to December 31, 1989. To ensure consistency, this second notice covered the same period as the one mentioned in the first notice issued by Revenue Canada, i.e., March 1, 1986, to December 31, 1989. In the Notice of Objection signed on February 28, 1990, the appellant stated that the refund should have amounted to approximately \$25,000.00. The objection was rejected by Revenue Canada on August 14, 1990, on the basis that the appellant's situation did not meet the criteria laid down in subsection 81.1(9) of the *Excise Tax Act* (the Act).

The refund of taxes allowed by Revenue Canada, as stated above, covered the years 1988 and 1989. The question the Tribunal must address is whether the appellant is entitled to a credit for the years 1986 and 1987. This would represent the difference between the amount claimed by the appellant - \$25,000.00 - and the amount already allowed by Revenue Canada and duly received by the appellant - \$13,258.27.

Section 68 of the Act deals with the refund of taxes paid in error:

*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 the payment of the moneys.<sup>1</sup>*

Essentially, section 68 provides that where a person has paid taxes in error, by reason of a mistake of fact or law or otherwise, an amount equal to the sums so paid will be paid to the taxpayer provided that the taxpayer applies for a refund within two years after the payment of the moneys taken into account as taxes. The Tribunal wishes to emphasize that section 68 stipulates a two-year statutory limit. The entitlement that can be refunded to a taxpayer is solely the sums that he paid in error within the period of two years prior to the date of his claim for refund. This is the general rule.

In the case at hand, the appellant acted quite promptly, once he had been advised by Revenue Canada of the error and of the possibility of formulating a claim for a refund. Its claim for refund is stated in Mr. Sarault's above-mentioned letter dated January 8, 1990. The respondent went back two years from January 1990 and, following a reassessment, allowed a refund of \$13,258.27 for the period running two years back from January 1990.

An exception to the two-year rule is provided in subsections 81.1(7) to (9) of the Act. Pursuant to those provisions, the statutory limit is then extended from two to four years. Subsection 81.1(9) is of particular importance, as it provides that:

*The aggregate of the credits that may be allowed to the person being assessed shall not exceed the aggregate of the taxes, interest, penalty or other sums, if any, remaining unpaid by that person for the period beginning four years before the day on which the notice of assessment is sent to him and ending immediately before two years before that day.<sup>2</sup>*

The appellant may not obtain a credit for taxes paid in error in 1986 and 1987 unless it meets the clear conditions set forth in this subsection.

Mr. Do testified that Revenue Canada, once it discovered the appellant's error, looked at the possible application of subsection 81.1(9) to the circumstances of the appellant, but came to the conclusion that, as there were no taxes owing and payable by the appellant for the years 1986 and 1987, no portion of the overpayment could be credited to the appellant for those years. Mr. Do's testimony on this point is important; it was not contradicted by the appellant. Given that there was no tax reassessment for the years 1986 and 1987 and that there were no taxes owing and payable by the appellant for those years, Revenue Canada could not go back beyond the two-year period provided by section 68 of the Act.

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

2. *Ibid.*

The appellant argued that the law is assymetrical; that if it had owed taxes going back several years, the respondent would not be limited to recovering only taxes owed in the most recent two-year period. The appellant expressed the hope that the Tribunal, as a matter of equity, would allow it to recover the full amount of its overpayment and not simply that related to the two-year assessment period. Unfortunately, the provisions of subsection 81.1(9) of the Act are clear, and the Tribunal has no jurisdiction allowing it to ignore the law.

Therefore, in light of the foregoing, the Tribunal is of the opinion that the appellant is not entitled to a credit for taxes paid in error in 1986 and 1987. The appeal is dismissed.

Sidney A. Fraleigh

Sidney A. Fraleigh  
Presiding Member

John C. Coleman

John C. Coleman  
Member

Michèle Blouin

Michèle Blouin  
Member