



Ottawa, Monday, February 10, 1992

**Appeal No. AP-90-107**

IN THE MATTER OF an appeal heard on October 9, 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 June 26, 1990, with respect to a  
notice of objection served under section 81.15 the  
*Excise Tax Act*.

**BETWEEN**

**TIMMINS TIRE SALES LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed. The Tribunal refers the assessment back to the Minister of National Revenue to confirm what percentage of the volume credits is attributable to tax-exempt sales. Such volume credits must be subtracted from the wholesale price of the tires to determine the actual sale price on which tax was payable and, therefore, the amount of sales tax paid by the appellant on the tax-exempt tires for which it was entitled to a refund.

Robert C. Coates, Q.C.  
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Presiding Member

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-90-107**

**TIMMINS TIRE SALES LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The appellant, Timmins Tire Sales Ltd. (Timmins), is a large volume dealer in tires, located in Timmins, Ontario. It is a major distributor for Goodyear Tires (Goodyear), which supplies approximately 95 percent of its tires. Approximately 10 percent of Timmins' tire sales were made on a tax-exempt basis, and customers were given an immediate reduction on the invoice price, representing the federal sales tax component. As Timmins purchased the tires from Goodyear on a tax-included basis, it applied for a rebate of the tax it paid on the tax-exempt sales.*

*The formula adopted by Timmins for the refunds was developed with the assistance of auditors from the Department of National Revenue, Customs and Excise (Revenue Canada). For several years, Revenue Canada accepted and processed all refund claims as filed, and at no time did it question the refund claim methodology and calculations used by Timmins. However, Timmins was assessed on the basis that it used "an incorrect tax factor" in calculating its refunds and that it did not take into consideration volume discounts given to it by Goodyear.*

**HELD:** *The appeal is allowed. The Tribunal refers the assessment back to the Minister of National Revenue to confirm what percentage of the volume credits is attributable to tax-exempt sales. Such volume credits must be subtracted from the wholesale price of the tires to determine the actual sale price on which tax was payable and, therefore, the amount of sales tax paid by the appellant on the tax-exempt tires for which it was entitled to a refund.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: October 9, 1991*  
*Date of Decision: February 10, 1992*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member*  
*Kathleen E. Macmillan, Member*  
*Sidney A. Fraleigh, Member*

*Counsel for the Tribunal: David M. Attwater*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: Bernard G. Roach, for the appellant*  
*Gilles Villeneuve, for the respondent*

**Appeal No. AP-90-107**

**TIMMINS TIRE SALES LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

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

**REASONS FOR DECISION**

The appellant, Timmins Tire Sales Ltd. (Timmins), is a large volume dealer in tires, located in Timmins, Ontario, having sales of between five and six million dollars each year. It is a major distributor for Goodyear Tires (Goodyear), which supplies approximately 95 percent of its tires. Mr. Ron Smith, who acted as office manager and accountant for the appellant during the audit period, testified that approximately 10 percent of the appellant's tire sales were made on a sales-tax-exempt basis to purchasers in the logging industry who were entitled to tax-exempt purchases of machinery and equipment. When such a tax-exempt sale was made, the customer was given an immediate reduction on the invoice price representing the federal sales tax component. As Timmins purchased the tires from Goodyear on a tax-included basis, it applied, each month, to the Department of National Revenue, Customs and Excise (Revenue Canada) for a rebate of the tax it paid on the tax-exempt sales.

Between 1985 and 1988, Revenue Canada conducted approximately 12 field audits of the appellant's business. It was stated in evidence by Mr. Smith and Mr. J. Martin, the latter acting as secretary treasurer of Timmins during the audit period and who has since acquired all the shares of Timmins, that the formula adopted by Timmins for the refunds was developed with the assistance of Revenue Canada auditors. Revenue Canada accepted and processed all refund claims as filed, and at no time did it question the refund claim methodology and calculations used by the appellant. However, on an audit involving a new auditor, the refund formula was challenged.

By notice of assessment dated February 8, 1989, covering the period July 1, 1985, to May 31, 1988, Revenue Canada assessed the appellant for a total of \$54,115.79. The grounds for the assessment were the appellant's use of "an incorrect tax factor" in calculating its refunds. In the notice of decision, the Minister of National Revenue (the Minister) confirmed the assessment, adding that the appellant, in calculating its refunds, did not take into consideration volume credits given to it by Goodyear.

Mr. Martin testified that at one time Goodyear listed the sales tax content of each tire it sold to Timmins. However, that practice ceased and it became necessary to estimate the federal sales tax content. This estimation was complicated by a volume credit given to the appellant by Goodyear. The bonus was based on the volume sale of passenger, light truck, heavy truck and farm tires. Twice a year, Timmins would receive a credit of between \$12,000 and \$15,000 from Goodyear, the receipt merely indicating "product bonus." It did not indicate what amount was related to the tax-exempt sales.

When Timmins applied to Revenue Canada for a refund of sales tax, it did not know what its volume credit would be. Nor could it determine what portion of the credit was related to tax-exempt sales. Mr. Martin testified that it was impossible to know exactly how much was paid for a tire. As such, Timmins did not factor in the volume credits and applied for a tax refund using the wholesale price of the tires to calculate the sales tax content. The witness testified that the Revenue Canada auditors were aware of the method used by the appellant to calculate its sales tax refund.

The issues in this appeal are:

- (1) did the appellant properly compute its sales tax refunds; and if not,
- (2) is Revenue Canada, in its assessment of the appellant, estopped from employing a methodology different from that used by the appellant after such methodology was approved through continuous audits by officials of Revenue Canada?

Counsel for the appellant argued that Timmins properly computed its sales tax refund entitlement pursuant to the provisions of the *Excise Tax Act* (the Act)<sup>1</sup> and the advice received from Revenue Canada field auditors. Counsel submitted that the assessment was arbitrary and without legislative support.

In the alternative, counsel submitted that Revenue Canada, having reviewed, considered and accepted the appellant's refund calculations for three years, and having conducted numerous field audits, is estopped from reversing its position. To do so would be inequitable and cause severe financial hardship to the appellant.

Counsel recognized that the Crown cannot be bound by representations and interpretations that are inconsistent with the Act and regulations that are given to taxpayers by representatives of Revenue Canada. It argued, however, that this exception to the rule of estoppel does not apply, as the Act does not provide guidance on how to compute a tax refund. Nor does the Act or any regulation stipulate that volume discounts should be taken into account.

Counsel for the respondent argued that the onus is on the appellant to establish that the assessment is wrong. Counsel argued that the appellant's witnesses admitted that volume credits were not taken into account in the calculation of tax refunds and, therefore, the refunds were greater than the tax paid on the tires. Counsel further argued that estoppel does not apply against the Crown and that the Tribunal does not have equitable jurisdiction.

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

Goodyear sold tires to Timmins on the basis of a wholesale price which, according to Mr. Martin, was similar for all distributors across Canada. The witness further testified that it was the volume of tires purchased from Goodyear that determined the actual price that a distributor would pay for a tire. It was through the volume credits provided by Goodyear that a distributor would pay less than the wholesale price for a tire.

Pursuant to section 50 of the Act, tax is imposed on the "sale price" (or volume sold) of all goods produced or manufactured in Canada. In this case, "sale price" is represented by the actual price paid by Timmins for the tires, which is a function of the wholesale price minus any volume credits. As such, Timmins was, pursuant to the Act, obliged to estimate the volume credit associated with its tax-exempt sales and factor that into its refund claims. Merely because the task would be difficult does not relieve the taxpayer from the obligation of performing it. Nor could the representations of an auditor for Revenue Canada relieve the taxpayer of such an obligation. As the appellant did not factor the volume credits into its refund claims, it received refund payments in excess of the tax it paid. Pursuant to section 81.39 of the Act, such overpayments are deemed to be taxes under the Act, payable by the appellant.

In the Tribunal's view, based on sales figures entered into evidence by the appellant and not contested by counsel for the respondent, Revenue Canada's assessment of tax owing appears to be overstated by a considerable margin. As noted by the witnesses for the appellant, only a fraction of the volume rebates relate to the tax-exempt sales. However, because of the magnitude of the assessment, it is possible that an excessive amount of the rebates was attributed to the tax-exempt sales.

Counsel for the respondent called no witnesses, although counsel for the appellant had intended to cross-examine the auditor who performed the audit resulting in the assessment. In this regard, counsel for the appellant informed the Tribunal that he was advised that the auditor would be present at the hearing, and counsel relied on this assurance. However, contrary to this assurance, the auditor was not present at the hearing. As such, counsel's efforts were thwarted and any assistance the auditor might have provided to the Tribunal was not available.

Accordingly, the appeal is allowed. The Tribunal refers the assessment back to the Minister to confirm what percentage of the volume credits is attributable to tax-exempt sales. Such volume credits must be subtracted from the wholesale price of the tires to determine the actual sale price on which tax was payable and, therefore, the amount of sales tax paid by the appellant on the tax-exempt tires for which it was entitled to a refund.

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