CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 19, 1993

Appeal No. AP-91-109

IN THE MATTER OF an appeal heard on October 21, 1992, 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 April 12, 1991, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

18127 ALBERTA 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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-91-109

18127 ALBERTA LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue. The issue is whether the appellant can claim a refund of federal sales tax paid with respect to various specific costs relating to a project and calculated using the "identification method," where those costs were previously deducted as non-tax factors in previous refund claims relating to the same project and calculated using the formula or "simplified method."

HELD: *The appeal is dismissed. The appellant had the choice either to keep records of all the tax that it paid on goods and claim a refund of those amounts, which is generally referred to as the "identification method," or to use the formula or "simplified method," as provided for under section 76 of the Excise Tax Act and section 3 of the Formula Refunds Regulations, and calculate its refund claim in accordance with the conditions established in Excise Memorandum ET 405. The appellant chose to use the formula or "simplified method" to calculate the previous refund claims relating to the project and could not later decide to use the "identification method" to calculate the final refund claim relating to the same project. Further, the Tribunal cannot now examine the costs and their tax component which underlie the amounts that the respondent deducted as non-tax factors in the previous determinations of refunds of federal sales tax, as requested by the appellant.*

Place of Hearing:	*Edmonton, Alberta*
Date of Hearing:	*October 21, 1992*
Date of Decision:	*March 19, 1993*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Arthur B. Trudeau, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Vic Intenberg, for the appellant* *Linda Wall, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-109

18127 ALBERTA LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of a determination of the Minister of National Revenue (the Minister).

The issue is whether the appellant can claim a refund of federal sales tax paid with respect to various specific costs relating to a project and calculated using the "identification method," where those costs were previously deducted as non-tax factors in previous refund claims relating to the same project and calculated using the formula method, or "simplified method" as referred to by the respondent.

On October 21, 1992, an adjournment was granted to the appellant on the direction that certain conditions be met. The Tribunal issued an order on October 30, 1992, outlining these conditions. The appellant failed to meet the conditions by filing its brief after the time stipulated in the order. Accordingly, the Tribunal proceeded to consider the merits of the appeal on the basis of the written documents filed on October 21, 1992, pursuant to rules 5 and 29 of the *Canadian International Trade Tribunal Rules*,[2] as stated in the order.

The following is a summary of the facts gleaned from the notices of determination, objection and decision, the respondent's brief and representations made at the hearing on October 21, 1992.

The appeal arises as a result of an application by the appellant for a refund in the amount of $58,456.50 under section 68.2 of the Act for goods sold under exempt conditions pursuant to section 2 of Part VIII of Schedule III to the Act during the period from May 1, 1982, to January 16, 1990.

The appellant is a general contractor which was awarded a series of contracts between 1982 and 1990 for the construction of the Medicine Hat Regional Hospital (the Project). The appellant filed four refund applications under section 68.2 of the Act to recover federal sales tax paid on the materials used in the Project. The first three applications were in respect of payments relating to contracts for various phases of the Project. Since the payments were progress payments, they were based on budget figures and not on the actual costs. Those refund claims were calculated using the "simplified method" set out in Excise Memorandum ET 405[3] (ET 405).

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1. R.S.C. 1985, c. E-15.
2. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.
3. Certified Public Hospitals, Department of National Revenue, Customs and Excise, February 28, 1989.

In the final refund claim relating to the Project, the appellant claimed $58,456.50, of which the Department of National Revenue (Revenue Canada) only allowed $3,560.66. The Minister, in a notice of decision dated April 12, 1991, stated that the full refund claim was disallowed because the appellant's claim was calculated using actual cost data relating to the Project as a whole, which the respondent referred to as the "identification method." In calculating the claim, the appellant deducted the amounts received on previous refund claims that were calculated using the "simplified method." The Minister stated that the appellant's method of calculation was inconsistent with the policy prescribed in ET 405 which provides that, in a series of contracts, a consistent method of calculation must be used. Further, the Minister stated that the method of calculation was also inconsistent with the "identification method" since the appellant only identified some of the actual costs, which resulted in a blending of the methods.

The appellant's argument was taken from letters dated June 1 and July 24, 1990, which were sent by representatives of Intenberg Anderson & Associates Ltd., on the appellant's behalf, to the respondent and which were included as part of the respondent's brief. In these letters, reference is made to the fact that the contract payments for the Project, that were included in previous refund claims, were based upon budget figures, and costs were allocated under broad categories that did not necessarily reflect the true nature of the costs. For example, reference is made to the fact that landscaping amounts were deducted from the contract payment in the previous claims when the "simplified method" was used to calculate the refund because they were considered non-tax factors. It is argued, in these letters, that the full amount for landscaping should not have been deducted because the general budget heading of landscaping included other items, such as asphalt paving and construction of concrete curbs and gutters, which have a significant tax content. As a result, it was argued that the appellant should be allowed to claim the tax paid in respect of these actual costs that were, in its opinion, previously incorrectly deducted as ineligible amounts under the "simplified method."

The respondent referred to the fact that the appellant, in claiming a refund of tax paid under section 68.2 of the Act, can choose to calculate its refund claim using either the "simplified method," as permitted by a Revenue Canada policy set out in ET 405, or the "identification method," which is based upon the actual costs and actual tax paid, as set out in section 68.2 of the Act. It is the respondent's position that, based upon the policy established in ET 405, once a refund claimant chooses a particular method of calculation in respect of one contract of a series of contracts in a project, this method must be used consistently in calculating all refund claims relating to the same project.

The respondent referred to the Tribunal's decision in *Beacon Christian High School v. The Minister of National Revenue*[4] and argued that it is distinguishable from the appeal being considered here because the parties in that case agreed that the payments made by the school reflected the work that was done. The respondent submitted that, in that appeal, the issue related to the tax content of the eligible payments and not, as in this appeal, to the eligibility of the payments themselves.

The Tribunal dismisses the appeal for reasons consistent with those previously expressed by the Tribunal in *County of Wheatland No. 16 v. The Minister of National Revenue.*[5] The appellant in that appeal had undertaken a project to construct a school. Prior to the completion of the project, the appellant had submitted claims for refunds of federal sales tax paid using the "simplified method." The appellant then calculated the final refund claim using the "identification method." The Tribunal, in that case, found that the appellant had made a choice to use the "simplified method" to calculate the previous claims for refunds of federal sales tax, that it could not later revert to the use of the "identification method" to calculate the final refund

4. Appeal No. AP-90-003, June 1, 1992.
5. Appeal No. 2894, January 13, 1992.

claim relating to the same project and that it could not ask the Tribunal to examine the exclusions decided upon in the determination of the federal sales tax refunds.

In this appeal, the appellant had two choices with respect to the method to use to calculate its refund entitlement: it could have kept records of all the tax that it paid on goods and claimed a refund of those amounts, which is generally referred to as the "identification method;" or it could have used the "simplified method," as authorized under section 76 of the Act and section 3 of the *Formula Refunds Regulations*,[6] and calculated its refund claim in accordance with the conditions established for that method as set out in ET 405. The Tribunal finds that the evidence filed clearly indicates that the appellant chose to use the "simplified method" to calculate its previous refund claims. The evidence also indicates that the respondent accepted the method chosen by the appellant and applied the formula set out in ET 405 using the numbers provided to it by the appellant. Accordingly, the appellant must use the "simplified method" to calculate the final refund claim for the Project.

The Tribunal considered the decision in *Beacon Christian High School* as identified by the respondent and found that the type of transactions considered in that appeal were significantly different from those being considered in this appeal. In the *Beacon Christian High School* case, the Tribunal considered whether labour that was received at no cost should be included without distinction in the total contract payment for purposes of applying the "simplified method." The Tribunal held that there was no indication in Excise Memorandum ET 406[7] that the provision of labour at no cost was considered when the "simplified method" was established nor that the use of the "simplified method" would properly reflect such a transaction.

However, in this appeal, the "simplified method" prescribed in ET 405 specifically provides for landscaping costs. Subparagraph 19(*a*) of ET 405, under the general heading "Formula Method for Use by Contractors in Calculating Refund," specifically stipulates that the "[t]otal of payments or progress payments on contracts for the construction of the hospital which qualifies for sales tax exemption" is not to include landscaping. In applying the "simplified method" in ET 405, amounts described as landscaping costs are, therefore, to be deducted as non-tax factors, and no analysis is required to be conducted in relation to the costs and the respective tax components underlying what have been described by the claimant as landscaping costs.

Accordingly, the appeal is dismissed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member

6. Consolidated Regulations of Canada, 1978, Vol. VI, c. 591.
7. Schools, Universities, Public Libraries and Student Residences, Department of National Revenue, Customs and Excise, June 28, 1985.