



Ottawa, Tuesday, March 2, 1993

Appeal No. AP-92-012

IN THE MATTER OF an appeal heard on December 14, 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 February 12, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BERT HENRY (KELOWNA) LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

John C. Coleman
John C. Coleman
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-012

BERT HENRY (KELOWNA) LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant paid federal sales tax in error. The respondent refunded only part of the amount claimed by the appellant. The remainder was disallowed on the ground that the application for refund had not been made within two years of the date of payment of the moneys, as required by section 68 of the Excise Tax Act.

HELD: *The appeal is dismissed. With respect to moneys paid in error prior to February 1989, the appellant did not comply with the limitation period prescribed by section 68 of the Excise Tax Act. The Tribunal cannot refuse to apply the law, even on grounds of equity.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: December 14, 1992
Date of Decision: March 2, 1993*

*Tribunal Members: Charles A. Gracey, Presiding Member
John C. Coleman, Member
Arthur B. Trudeau, Member*

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Janet Rumball

Appeal No. AP-92-012

BERT HENRY (KELOWNA) LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
JOHN C. COLEMAN, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

This appeal was filed under section 81.19 of the *Excise Tax Act*¹ (the Act) from a decision of the Minister of National Revenue (the Minister) confirming a notice of determination which partially disallowed a request for refund submitted by the appellant.

As requested by the parties, the Tribunal deals with this case on the basis of the materials on file and an agreed statement of facts. The appellant is a wholesale distributor of confectioneries, tobacco, paper and other products. Due to a computer programming error, the appellant erroneously paid an amount of \$43,766.14 in federal sales tax on out-of-stock items. The appellant applied for a refund for the whole amount paid in error from July 1987 to December 1990. By notice of determination dated April 19, 1991, the Minister allowed the appellant's application in the amount of \$24,411.49, an amount representing sales tax paid in error from February 1, 1989, to November 30, 1990. The remainder of the refund application relating to tax paid prior to February 1, 1989, was disallowed on the ground that the application for refund had not been made within two years of the date of payment of the moneys, as required by section 68 of the Act.

The issue in the present appeal is whether the appellant is entitled to a refund of the remainder of the moneys paid in error.

In a letter dated July 29, 1992, sent to the Tribunal, the appellant acknowledged that one of its employees, when programming the company's computer, had made a serious error. The appellant also contends that the two-year limitation period leads to a gross injustice because, if it owed moneys to the Department of National Revenue, the government would have the benefit of a longer period to claim such moneys (i.e. six years).

One of the arguments put forth by the respondent is that the appellant has the onus to establish that the determination is incorrect. The respondent contends that, in order to discharge this onus of proof, the appellant must show that every constituent element necessary to qualify for an exemption is present and that every condition required by the exempting provision has been satisfied. The respondent underlines that taxing statutes cannot be construed so as to avoid the effects of the legislation. Finally, the respondent argues that the appellant did not comply with the limitation period in respect of the moneys paid prior to February 1989 and,

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

therefore, did not meet the statutory requirement established by section 68 of the Act to obtain a refund of those moneys.

Having reviewed the facts and considered the arguments, the Tribunal is of the opinion that the appeal must be dismissed. The record clearly indicates that the appellant did not comply with the limitation period prescribed by section 68 of the Act with respect to the sum paid in error prior to February 1989. The Tribunal, as argued by the respondent, has no discretion to alter or waive the two-year limitation period. As stated in a previous decision,² the Tribunal's jurisdiction does not allow it to grant equitable relief. In other words, the Tribunal cannot refuse to apply the law, even on grounds of equity.

The appeal is dismissed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

John C. Coleman

John C. Coleman
Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

2. *C.C. Color Corporation of Canada Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-91-108, August 4, 1992.