

Ottawa, Tuesday, October 13, 1992

Appeal No. AP-91-236

IN THE MATTER OF an appeal heard on August 12, 1992,
under section 81.19 of the *Excise Tax Act*, R.S.C. 1985,
c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of
National Revenue dated February 14, 1992, with respect to
a notice of objection served under section 81.15 the
Excise Tax Act.

BETWEEN

**315823 ONTARIO LIMITED
T/A STORZ CANADA**

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau

Member

Desmond Hallissey

Desmond Hallissey

Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-91-236

**315823 ONTARIO LIMITED
T/A STORZ CANADA**

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant raised three issues in its appeal: (1) whether the Ontario Ministry of the Solicitor General, Office of the Fire Marshal (the Ministry) is a "municipality" within the meaning of section 2 of the Excise Tax Act (the Act) thus qualifying sales to the Ministry for an exemption from the payment of sales tax pursuant to subsection 51(1) and Part XII of Schedule III to the Act; (2) whether firemen's coats and boots sold to the Ministry are included within the clothing and footwear of Part XV of Schedule III to the Act thus exempting them from the imposition of sales tax pursuant to subsection 51(1) of the Act; and (3) whether the rate of sales tax applicable to the sale of goods to Supply and Services Canada is the rate in effect on the date of importation of the goods or on the date of delivery of the goods to the purchaser.

***HELD:** The appeal is dismissed. The Ministry is not a municipality for purposes of the Act. Though the firemen's coats and boots may be exempt pursuant to Part XV of Schedule III to the Act, they were not included within the assessment. The proper recourse for return of any moneys paid as taxes in error on their sale would include an application under section 68 of the Act within two years of their delivery to the purchaser. Tax is payable by a licensed wholesaler at the time of delivery of the goods to the purchaser.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: August 12, 1992
Date of Decision: October 13, 1992*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Arthur B. Trudeau, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Janet Rumball

*Appearances: Morley S. Wolfe, Q.C., for the appellant
Brian Tittmore, for the respondent*

Appeal No. AP-91-236

**315823 ONTARIO LIMITED
T/A STORZ CANADA**

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ARTHUR B. TRUDEAU, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal of an assessment made pursuant to section 81.19 of the *Excise Tax Act*¹ (the Act) based on an agreed statement of facts and written submissions of the parties. The appellant was assessed for federal sales tax, penalty and interest totalling \$28,711.97 at May 31, 1991, in respect of sales made by the appellant during the assessment period from July 1, 1987, to December 31, 1990.

The appellant is a licensed wholesaler under the Act and carries on the business of importing and selling firefighting equipment under the name Storz Canada. During the period covered by the assessment, it sold adapters, hose couplings, hoses, strainers, pumps, suction hoses, valves and hose spanner wrenches to the Ontario Ministry of the Solicitor General, Office of the Fire Marshal (the Ministry). The equipment was for use by the Unorganized Communities of Northern Ontario through the Unorganized Communities Fire Protection Program. The appellant sold firemen's coats and boots with steel toes to the Ministry. It also sold fire hose adapters or couplings to Supply and Services Canada for delivery to Canadian Forces Supply Depots at CFB Toronto and CFB Moncton. The couplings were imported by the appellant on December 21, 1989, and were delivered to the Canadian Forces Supply Depots at Toronto and Moncton on January 4, 1990, and January 16, 1990, respectively. Federal sales tax was paid on the sale of hose spanner wrenches, a first-aid kit, a hose clamp with bracket and the firemen's coats and boots.

The appellant raised three issues in its appeal:

- (1) whether the Ministry is a "municipality" within the meaning of section 2 of the Act thus qualifying sales to the Ministry for an exemption from the payment of sales tax pursuant to subsection 51(1) and Part XII of Schedule III to the Act;
- (2) whether the firemen's coats and boots sold to the Ministry are included within the clothing and footwear of Part XV of Schedule III to the Act thus exempting them from the imposition of sales tax pursuant to subsection 51(1) of the Act; and

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

- (3) whether the rate of sales tax applicable to the sale of goods to Supply and Services Canada is the rate in effect on the date of importation of the goods or on the date of delivery of the goods to the purchaser.

During the assessment period, the Act at subsection 2(1) and its predecessor² defined "municipality" to mean:

(a) *an incorporated city, metropolitan authority, town, village, township, district or rural municipality or other incorporated municipal body however designated, or*

(b) *such other local authority as the Governor in Council may determine to be a municipality for the purposes of this Act.*

On December 17, 1990, the definition was amended,³ adding "county" to paragraph (a) and changing the reference to the "Governor in Council" in paragraph (b) to the "Minister," meaning the Minister of National Revenue.

The appellant submitted that the Ministry falls within paragraph (b) of the definition of "municipality" as defined in the Act and its predecessor. The Governor in Council for Ontario has defined municipality⁴ to include "a board, commission or other local authority exercising any power with respect to municipal affairs or purposes." For purposes of preventing fires, fighting fires and providing for the safety of firemen, the Ministry is the local authority exercising that power with respect to municipal affairs or purposes in the Sudbury Fire Protection Complex. Thus, the goods qualify for an exemption from sales tax pursuant to subsection 51(1) and Part XII of Schedule III to the Act.

The appellant asserted that the firemen's coats and boots sold to the Ministry are included within the clothing and footwear of Part XV of Schedule III to the Act and are thus exempt from sales tax pursuant to subsection 51(1) of the Act. As such, the tax paid on these items should be returned to the appellant or it should be entitled to a credit therefor.

With regard to the applicable rate of sales tax, the appellant explained that the couplings were contracted for purchase by Supply and Services Canada on or about August 2, 1989, which contract was amended on October 11, 1989. The couplings were purchased and imported by the appellant on December 21, 1989. However, because of delays over the winter holiday season, they were not delivered to the Canadian Forces Supply Depots at Toronto and Moncton until January 4, 1990, and January 16, 1990, respectively. The appellant argued that, as it quoted the tax rate in effect in 1989 when contracting with Supply and Services Canada, based on purchases made and paid for in 1989, the rate in effect in 1989 should be applicable.

Counsel for the respondent argued that neither the Ontario Ministry of the Solicitor General nor the Ministry falls within the definition of municipality. Neither institution is an incorporated municipal body of the type enumerated in paragraph (a), and based on principles of statutory interpretation, neither institution is an "other incorporated municipal body however designated."

As "Governor in Council" is not defined in the Act, reference must be made to the definition as provided in the *Interpretation Act*,⁵ which specifies that Governor in Council in an

2. *Excise Tax Act*, R.S.C. 1970, c. E-13, as amended.

3. S.C. 1990, c. 45, s. 1(2).

4. Regulation 904, under the *Retail Sales Tax Act*, R.S.O. 1980.

5. R.S.C. 1985, c. I-21, s. 35(1).

act of Parliament means Governor General of Canada. As such, while the Governor in Council for Ontario may have defined municipality under the *Retail Sales Tax Act* of Ontario as encompassing local authorities "exercising any power with respect to municipal affairs or purposes," this does not qualify the Ministry of the Solicitor General nor the Office of the Fire Marshal as a municipality for purposes of the federal act. Nor has the Minister of National Revenue designated the bodies as a municipality.

With regard to the second issue, counsel for the respondent asserted that firemen's coats and boots such as those sold by the appellant are tax exempt under Part XV of Schedule III to the Act. He noted, however, that the appellant has paid tax on those items and that they were not included in the assessment. As this proceeding is an appeal of the assessment, the tax status of those goods should not be considered. The appellant would be required to apply for a refund under section 68 of the Act for moneys paid in error. However, the two-year limitation imposed by that section expired on or about March 31, 1990.

With regard to the rate of tax applicable to sales to Supply and Services Canada, counsel argued that the rate applicable was that in effect on the date of delivery of the goods. Counsel referred to paragraph 50(1)(c) of the Act which states that tax shall be imposed on the sale price of all goods "sold by a licensed wholesaler, payable by him at the time of delivery to the purchaser." Counsel maintained that the appellant is a licensed wholesaler.

The Tribunal is in agreement with the arguments expressed by counsel for the respondent and dismisses the appeal. Very briefly, the Tribunal does not view the definition of municipality for purposes of the *Retail Sales Tax Act* of Ontario to be relevant to its definition under the Act. With regard to the second issue, the Tribunal agrees that the proper process would have included an application for refund of moneys paid in error pursuant to section 68 of the Act. It notes from the appellant's brief, however, that the invoices for sales that the appellant claims were tax exempt are all dated on or before March 29, 1989. As refund claims under section 68 must be made within two years after payment of the moneys paid in error, such a refund should have been claimed within two years from the time of delivery of the goods to the purchaser, which probably occurred before or soon after March 29, 1989. Consequently, the appellant would now be statute barred from applying for a refund under section 68. With regard to the last issue, the Tribunal adds that the rate of tax was increased⁶ on June 1, 1989, to 13.5 percent from 12 percent and not on January 1, 1990, as suggested by counsel for the appellant, thus rendering invalid the appellant's argument.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member

6. S.C. 1989, c. 22, s. 3(2).