CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, January 14, 1993

Appeal No. AP-92-047

IN THE MATTER OF an appeal heard on November 19, 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 16, 1992, relating to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

NGOC-TRIEU PHOTOLAB 1-HOUR **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

John C. Coleman
John C. Coleman
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michèle Blouin
Michèle Blouin
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-92-047

NGOC-TRIEU PHOTOLAB 1-HOUR **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant carries on business as a small manufacturer of photofinishing and photographic prints. On June 5, 1987, it entered into a 61-month lease-to-purchase agreement with respect to photo-developing equipment to be used for film development and processing purposes. The lease agreement expired on the last day of the 61st month of the agreement, on which date the appellant had the right to purchase the said equipment for one dollar. On or about February 6, 1991, the appellant filed a refund claim in the amount of $9,518.26 for sales tax paid on the equipment. The respondent denied the appellant's claim on the basis that it should have claimed the tax refund within two years after it first used the equipment since the Department of National Revenue considers such a lease as a purchase because the lease exceeds one year.

HELD: *The appeal is allowed. Counsel for the respondent relied upon a ruling based on a provision of the Excise Tax Act that was repealed at the time of the contract. Moreover, a ruling is nothing more than an administrative interpretation, and such interpretation cannot overrule a statutory provision. Subsection 68.28(2) of the Excise Tax Act clearly states that the taxpayer must apply "within two years" after the purchase of the goods. Consequently, the appellant's refund claim dated February 6, 1991, was not filed late, but in advance. In fact, the appellant did purchase the equipment, and given that there is no issue as to the amount of sales tax that was paid under the contract, the Tribunal finds that the appellant is entitled to a refund of sales tax pursuant to subsection 68.28(2) of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*November 19, 1992*
Date of Decision:	*January 14, 1993*
Tribunal Members:	*John C. Coleman, Presiding Member* *Sidney A. Fraleigh, Member* *Michèle Blouin, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Trieu Ngoc-Nguyen, for the appellant* *Wayne D. Garnons-Williams, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-047

NGOC-TRIEU PHOTOLAB 1-HOUR **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

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

REASONS FOR DECISION

This is an appeal 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 determination that denied a refund of sales tax claimed by the appellant.

The appellant, Ngoc-Trieu Photolab 1-Hour, carries on business as a manufacturer or producer of photofinishing and photographic prints and is considered a small manufacturer under the Act. On June 5, 1987, it entered into a 61-month lease-to-purchase agreement starting on June 1, 1987, with respect to photo-developing equipment to be used for film development and processing purposes. The last payment was due on the last day of the 61st month of the agreement, and the contract provided for an option to purchase the equipment for one dollar.

On or about February 6, 1991, the appellant filed a refund claim in the amount of $9,518.26 for tax paid on the equipment. On June 12, 1991, the refund claim was denied on the basis that it was filed outside the two-year time limitation. On September 3, 1991, the appellant filed a notice of objection to that determination on the grounds that it was advised by officials of the Department of National Revenue (Revenue Canada) to present its refund claim on the date that it would be the legal owner of the equipment. On April 16, 1992, the Minister confirmed the notice of determination of the Deputy Minister of National Revenue for Customs and Excise on the basis that the appellant should have claimed the tax refund within two years after the appellant first used the equipment since Revenue Canada considers such an agreement as a purchase because the lease exceeds one year.

The appellant argued before the Tribunal that, in presenting its refund claim in February 1991, that is, a few years after it entered into the agreement and had first used the equipment, it acted in good faith, relying upon advice that it received from Revenue Canada officials.

Counsel for the respondent argued that the appellant's refund claim is statute barred pursuant to the two-year time limitation provided by subsection 68.28(2) of the Act. Counsel also argued that the Tribunal has no jurisdiction to consider principles of common law or equity, that

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

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the Crown is not bound by interpretations given to taxpayers by authorized officials and that the onus is on the appellant to show that the respondent's decision is incorrect.

However, the true issue in this appeal, in the Tribunal's view, is whether the respondent is correct in disallowing the refund claim on the grounds that the refund claim should have been filed within two years from the date the appellant first used the equipment in question.

In this regard, counsel for the respondent relied upon a Revenue Canada ruling that he said was made public and was available through excise tax bulletins. The ruling states that "The department will treat a lease as a purchase, provided the period of the lease is for at least one year." The ruling also provides that a written lease "may be used as authority for the refund claim subsequent to the first use of the production equipment under exempt conditions." Counsel for the respondent therefore submitted that, according to the ruling, the appellant should have filed its refund claim within two years from the first day that it used the equipment that it rented, that is, before June 1, 1989.

The Tribunal has several comments to make concerning the ruling on which counsel for the respondent relied. First, as noted at the hearing, the ruling states that it takes authority from former subsection 47.2(2) of the Act. The Tribunal notes that section 47.2 came into force on November 13, 1981,[2] that it was amended in 1986,[3] and, finally, that it was repealed the same year.[4] Therefore, section 47.2 on which the ruling submitted by the respondent takes authority was non-existent in 1987, the time at which the appelant entered into the lease-to-purchase agreement at issue. As a minimum, the ruling should have been replaced or updated. This alone would be sufficient to reject counsel's argument, apart from the fact that such administrative interpretation as the ruling has no statute in law and can certainly not overrule a provision of the Act. It is worth noting, in this respect, that in 1986 the wording of former section 47.2 was repeated in an entirely new section numbered section 44.29, now section 68.28, which entered into force on May 1, 1986,[5] and which also dealt with refund payments to small manufacturers as did former section 47.2 of the Act.

Subsection 68.28(2) of the Act reads as follows:

> *Where tax under Part VI has been paid in respect of any qualified goods and the goods have been purchased or imported by a person of a class prescribed pursuant to subsection (3) for the sole use of that person and not for resale, an amount equal to the amount of that tax shall, subject to this Part, be paid to that person if he applies therefor within two years after that purchase or importation of the goods.*
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> [Emphasis added]

The Tribunal understands the logic underlying the respondent's position that the date on which a taxpayer starts to use equipment that it rents under a lease-to-purchase agreement should be used as the starting date to calculate the two-year time limitation of subsection 44.29(2) of the Act. Indeed, subparagraph 50(1)(*a*)(ii) of the Act, which deals with the liability of a

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2. *An Act to amend the statute law relaing to certain taxes*, S.C. 1980-81-82-83, c. 104, ss 10 and 15(2).
3. *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof*, S.C. 1986, c. 9, s. 28.
4. *Ibid.*, s. 34.
5. *Supra*, note 3, s. 34(2).

producer or manufacturer of goods that are rented and ultimately sold through a "hire-purchase contract," provides that sales tax must be paid by such persons at the "time each of the instalments becomes payable in accordance with the terms of the contract," whether the contract "provides that the goods are to be delivered or property in the goods is to pass before or after payment of any or all instalments." Given that the producer of the equipment is liable to remit sales tax on each instalment and that, in practice, the person who rents such equipment is likely to have to pay sales tax on each instalment, it would appear that the respondent took the view that the same principle should apply with respect to a sales tax refund.

However, this is not what the Act states. For purposes of sales tax refunds, subsection 68.28(2) of the Act clearly provides that an amount equal to the tax paid shall be refunded to the taxpayer "if he applies therefor within two years after that purchase." In the case at point, the contract signed by the appellant provided that, "on the last day of the 61st month ... of the lease," the appellant had the right to purchase the equipment, an option that was exercised in July 1992, according to Mr. Trieu-Ngoc Nguyen's testimony. As a result, the appellant's refund claim dated February 6, 1991, was not filed late, but in advance.

Given that the appellant did purchase the equipment, that there is no issue as to the amount of sales tax that was paid under the contract and, lastly, that the appellant has filed a refund claim in the appropriate form and time limit, the Tribunal finds that the appellant is entitled to a refund of sales tax pursuant to subsection 68.28(2) of the Act.

In light of the foregoing, the Tribunal allows the appeal. The appellant is entitled to a refund of sales tax in the amount of $9,518.26.

John C. Coleman
John C. Coleman
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michèle Blouin
Michèle Blouin
Member