CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 18, 1994

Appeal No. AP-92-065

IN THE MATTER OF an appeal heard on November 1, 1993, 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

SIMON AND JEAN CLARKE **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

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

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-065

SIMON AND JEAN CLARKE **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the appellants are entitled to a federal sales tax new housing rebate under section 121 of the Excise Tax Act. Specifically, the Tribunal must determine whether construction or substantial renovation of the appellants' home had begun prior to January 1, 1991. On this date, excavation of the basement and electrical ditches had occurred, and the fill had been hauled away. The appellants claimed that, according to the construction industry and Statistics Canada, construction activity includes excavation. In contrast, counsel for the respondent argued that construction activity does not include excavation and that construction had not begun before January 1, 1991, because the footings to the complex had not been poured.

HELD: *The appeal is allowed. The Excise Tax Act does not contain a definition of the word "construction," and in order to resolve the issue in this appeal, the Tribunal was required to give that word a meaning. In defining the word, the Tribunal sought a common and grammatical meaning consistent with the Excise Tax Act and with the context in which it is found. The Tribunal believes that the definitions advanced by counsel for the respondent are too restrictive and inconsistent with both the construction industry's and Statistics Canada's definition. In advancing the industry's definition of the word "construction," the appellants provided numerous publications that consistently included excavation within the activity of construction of a building.*

Place of Hearing:	*Calgary, Alberta*
Date of Hearing:	*November 1, 1993*
Date of Decision:	*March 18, 1994*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Anthony T. Eyton, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Simon and Jean Clarke, for the appellants* *Brian Tittemore, for the respondent*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-065

SIMON AND JEAN CLARKE **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ANTHONY T. EYTON, Member
ROBERT C. COATES, Q.C., 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) rejecting an application for a federal sales tax (FST) new housing rebate made under section 121[2] of the Act. On May 27, 1991, the appellants filed an FST new housing rebate application in the amount of $4,767. By notice of determination dated July 9, 1991, the Minister rejected the application on the basis that construction of the appellants' house had not started before January 1, 1991. Responding to a notice of objection, the Minister issued a notice of decision dated April 16, 1992, rejecting the objection and confirming the determination.

The issue in this appeal is whether the appellants are entitled to a rebate under the FST new housing rebate program under section 121 of the Act. Specifically, the Tribunal must determine whether construction or substantial renovation of the appellants' home had begun prior to January 1, 1991.

At the hearing, Mrs. Jean Clarke spoke on behalf of the appellants. She explained that, on December 1, 1990, a contract was signed with Chandler Homes Development Ltd. for the construction of a new residential home. By January 1, 1991, the basement and electrical ditches had been dug, and the fill had been hauled away. During cross-examination, Mrs. Clarke confirmed that the footings to the building had not been poured by this date because of abnormally cold weather conditions. She noted that several unsuccessful attempts by both the appellants and the builder were made in late 1990 to get information from the Department of National Revenue (Revenue Canada) on the FST new housing rebate program. Specifically, information regarding the respondent's policy that the footings must be in place by January 1, 1991, for an applicant to be entitled to the rebate was not provided to them, though many requests for such information had been made.

Mrs. Clarke asserted that she and her husband took reasonable steps to acquaint themselves with the FST new housing rebate program. They relied on GST-Memorandum 900-1,[3] which did not indicate that construction is considered to be started

1. R.S.C. 1985, c. E-15.
2. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27, s. 7.
3. New Housing, Department of National Revenue, Customs and Excise, September 7, 1990.

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before 1991 if the footings to the building are in place by January 1, 1991. Mrs. Clarke claimed that the respondent's policy as to when construction began only came to the appellants' attention when they applied for the rebate in May 1991. In fact, the definition of the word "construction" is not contained in the legislation and was not available until after January 1, 1991, thus preventing the appellants from conducting their affairs so as to be entitled to the rebate.

In providing a definition of "construction," Mrs. Clarke referred to a decision[4] of the Federal Court - Trial Division, which was contained in the respondent's brief, within which "construction" was respectively defined by Statistics Canada and the National Building Code to mean:

> *creation, renovation and repair and demolition of immobile structures,...*
>
> *erection, repair, alteration, enlargement, addition, demolition, removal, excavation, with respect to a building.*[5]

In addition, Mrs. Clarke argued that, according to the industry, construction includes the excavation of a basement.

Counsel for the respondent argued that the onus of proving that the respondent's determination was incorrect is on the appellants . If the appellants do not discharge this onus, the appeal must fail.

Counsel for the respondent noted that the rebate for which the appellants applied is only available with respect to a "specified single unit residential complex." The meaning of this expression is contained in subsection 121(1) of the Act, which provides, amongst other things, that construction of the complex must have been started before 1991. Counsel asserted that Section A of the rebate application form clearly states that construction is considered to have started before 1991 if the footings to the complex are in place on January 1, 1991.

Counsel for the respondent acknowledged that the word "construction" is not defined in the Act and offered several dictionary definitions of the word. On the basis of these definitions, he concluded that, in the context of the rebate provisions, construction should be defined to mean the act of fitting together, framing or building. It should not include excavation, which is the act of digging out soil and leaving a hole. In addition, counsel submitted that the respondent is not bound by the representations made and interpretations given to taxpayers by officials of Revenue Canada if such representations and interpretations are contrary to the clear peremptory provisions of the law.

In order to be entitled to the FST new housing rebate, the appellants had to establish that construction of their home began before 1991. The uncontroverted evidence was that excavation of the basement and electrical ditches had occurred and that the fill had been hauled away before January 1, 1991. The appellants claimed that, according to the construction industry and Statistics Canada, construction activity includes excavation. In contrast, counsel for the

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4. *The Board of Trustees of Calgary School District No. 19 v. Her Majesty the Queen*, [1991] 1 C.T.C. 217, unreported, Federal Court - Trial Division, Court File No. T-2364-87, October 30, 1990.
5. *Ibid.* at 223.

respondent argued that construction activity does not include excavation and that construction had not begun before January 1, 1991, because the footings to the complex had not been poured.

The Act does not contain a definition of the word "construction," and in order to resolve the issue in this appeal, the Tribunal was required to give that word a meaning. In defining the word, the Tribunal sought a common and grammatical meaning consistent with the Act and with the context in which it is found. The Tribunal believes that the definitions advanced by counsel for the respondent are too restrictive and inconsistent with both the construction industry's and Statistics Canada's definition. In the Tribunal's view, it is appropriate to adopt the meaning of construction that is used by the construction industry. In advancing the industry's definition of the word "construction," the appellants provided numerous publications that consistently included excavation within the activity of construction of a building.

Accordingly, the appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

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