CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, April 8, 1993

**Appeal No. AP-92-093**

IN THE MATTER OF an appeal heard on January 14, 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 August 7, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**474245 ONTARIO LIMITED**
**O/A STAR CUSTOM CONCRETE** **Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

## DECISION OF THE TRIBUNAL

The appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

John C. Coleman
John C. Coleman
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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*UNOFFICIAL SUMMARY*

**Appeal No. AP-92-093**

**474245 ONTARIO LIMITED**
**O/A STAR CUSTOM CONCRETE** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act from a determination of the Minister of National Revenue. The issue in this appeal is whether the appellant should be granted a refund in the amount of $25,187.47 for the period from January 1, 1986, to March 5, 1989, where its claim was allegedly submitted after the two-year limitation period specified in section 68 of the Excise Tax Act. A preliminary issue to be determined is whether a letter to a minister constitutes an application for refund or a notice of appeal.*

***HELD:*** *The appeal is dismissed. A letter sent to a minister requesting that clause 46(c)(ii)(B) of the Excise Tax Act (formerly clause 26(6)(c)(ii)(B)) be amended to allow users of mobile mixing trucks to deduct transportation costs from the sale price prior to calculating the sales tax payable cannot be construed as an application for refund under section 68 of the Excise Tax Act or a notice of appeal under section 81.19 of the Excise Tax Act. The appellant filed its refund claim on March 6, 1991, and pursuant to the two-year limitation period under section 68 of the Excise Tax Act, it is only eligible for a refund of amounts paid in the two years prior to the application for refund.*

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|---|---|
| *Place of Hearing:* | *Ottawa, Ontario* |
| *Date of Hearing:* | *January 14, 1993* |
| *Date of Decision:* | *April 8, 1993* |
| *Tribunal Members:* | *Desmond Hallissey, Presiding Member*<br>*John C. Coleman, Member*<br>*Lise Bergeron, Member* |
| *Counsel for the Tribunal:* | *Shelley Rowe* |
| *Clerk of the Tribunal:* | *Janet Rumball* |
| *Appearances:* | *René and Nicole Beaulieu, for the appellant*<br>*Michèle Mann, for the respondent* |

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

**Appeal No. AP-92-093**

**474245 ONTARIO LIMITED**
**O/A STAR CUSTOM CONCRETE** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
JOHN C. COLEMAN, Member
LISE BERGERON, Member

## REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from a determination of the Minister of National Revenue (the Minister). The issue in this appeal is whether the appellant should be granted a refund in the amount of $25,187.47 for the period from January 1, 1986, to March 5, 1989, where its claim was submitted after the two-year limitation period specified in section 68 of the Act. Further, the issue is whether a letter to the then Minister may be construed as an application for refund under section 68 of the Act or a notice of appeal under section 81.19 of the Act.

The appellant sells concrete, on an all-inclusive price basis, which it produces at the various job sites of its customers using mobile mixing trucks. The trucks are divided into four compartments which are loaded with cement, sand, stone or gravel, and water. The trucks are then driven to the customer's job site where the concrete is mixed and poured.

The basis of the appellant's position relates to the fact that it had been in contact with Elmer MacKay, the Minister at that time, and three other members of Parliament in February 1986 with respect to the issue of the payment of federal sales tax (FST) on the transportation costs relating to travel between its premises and the customer's job site. By letter dated June 9, 1986, Mr. Michael H. Wilson, Minister of Finance, responded that the law could not be amended to provide for the deduction of such transportation costs.

The appellant did not ask the Department of National Revenue to reconsider the matter and continued to pay FST imposed on an amount including the transportation costs until after September 1990, when the Tribunal released the decision in *Pick-A-Mix Concrete Limited v. The Minister of National Revenue*.[2] The appeal involved a request similar to that of the appellant, and the Tribunal decided that the appellant in that appeal was eligible for a deduction of the transportation costs incurred between its premises and the customer's construction site. Subsequent to this decision, on March 6, 1991, the appellant filed a refund claim in the amount of $43,705.03 for FST paid in error, since the tax was calculated with respect to amounts that included transportation costs.

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1. R.S.C. 1985, c. E-15.
2. Appeal No. 3093, September 25, 1990.

From the information provided in the parties' briefs and submissions made at the hearing, the parties agreed that the respondent allowed the appellant a refund of $18,517.56, but disallowed the claim for amounts paid prior to March 6, 1989, on the basis that the claim was made outside of the two-year limitation period. However, the parties did not agree on when the appellant had given the respondent notice of its claim.

In his submissions to the Tribunal, the appellant's representative, Mr. René Beaulieu, argued that the appellant had "appealed" to the Minister of Finance in its letter to Elmer MacKay dated February 6, 1986 (the letter), and that it should not now be penalized for filing a refund claim for amounts paid in error outside of the two-year limitation period.

The respondent argued that the onus is on the appellant to demonstrate that the determination and decision were incorrect, and that it is entitled to the refund claimed. Section 68 of the Act requires that refund claims be filed within two years of the payment of taxes. Since the appellant did not file its claim within the two-year limitation period and the Tribunal does not have equitable jurisdiction to waive or extend a limitation period, the appellant is not eligible for the refund claimed.

The Tribunal notes that, as a pre-condition to the commencement of an appeal under section 81.19 of the Act, the appellant must have served a notice of objection under section 81.15 or 81.17 of the Act. The letter requesting changes to the treatment of mobile mixing trucks and transportation deductions cannot, therefore, be construed as a notice of appeal because, at the time it was written, the appellant had not yet filed its refund claim and could not have served a notice of objection.

Further, the letter cannot be construed as an application for a refund claim. Section 68 of the Act very clearly sets out three criteria for claiming a refund of moneys paid in error. First, the moneys must have been paid "by reason of mistake of fact or law or otherwise." Second, the moneys must "have been taken into account as taxes, penalties, interest or other sums under [the] Act." Finally, the application for the refund must be made "within two years after the payment of the moneys." The respondent has accepted that the appellant met the first two criteria. The question is whether the appellant met the third criterion.

The appellant submitted that it should have been allowed a refund in respect of moneys paid subsequent to the letter, since it was at that time that the Minister had notice of its claim. However, section 72 of the Act specifically addresses the issue of what constitutes an application for a refund under section 68 of the Act. Subsection 72(2) provides that:

> *An application shall be made in the prescribed form and contain the prescribed information.*

This subsection of the Act is the basis for Excise Memorandum ET 313 (Memorandum ET 313) entitled Application for Refund[3] which prescribes what forms are to be used to claim a refund under section 68 of the Act. Paragraph 11 of Memorandum ET 313 provides that the prescribed form for making an application is Form N15 entitled Application for Refund/Deduction of Federal Sales and/or Excise Taxes. The letter sent by the appellant to the Minister was, therefore, not in the prescribed form for an application for a refund.

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3. Department of National Revenue, Customs and Excise, February 20, 1989.

The limitation period set out in section 68 of the Act is two years after the payment of the moneys. Since the Tribunal has no equitable jurisdiction to ignore or vary a limitation period such as the one prescribed under section 68 of the Act on the basis that it would be fair or just, the time-frame to be considered in determining the appellant's entitlement to a refund must be two years prior to the filing of the refund application in the prescribed form, or March 6, 1989, to March 6, 1991. The appellant, therefore, is not entitled to a refund for moneys paid prior to March 6, 1989, and this appeal is dismissed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

John C. Coleman
John C. Coleman
Member

Lise Bergeron
Lise Bergeron
Member