CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, May 26, 1995

Appeal Nos. AP-92-210 and AP-92-211

IN THE MATTER OF appeals heard on October 26, 1994, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated August 21, 1992, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

CROSS LAKE BAND OF INDIANS AND BLOODVEIN INDIAN BAND **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-92-210 and AP-92-211

CROSS LAKE BAND OF INDIANS AND BLOODVEIN INDIAN BAND **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in these appeals is whether each appellant filed its refund application within the statutory time period provided in section 68.26 (formerly section 44.27) of the Excise Tax Act.

***HELD**: The appeals are dismissed. The Tribunal is of the opinion that the materials in issue were "purchased" on behalf of the schools on the date on which progress payments were made by the Department of Public Works to the contractors that built the schools. The date of each progress payment is, therefore, the date from which the time period for filing any refund application must be calculated. The Tribunal is of the view that the refunds allowed by the respondent cover all refunds for which applications were made within the statutory time limit.*

Place of Hearing:	*Saskatoon, Saskatchewan*
Date of Hearing:	*October 26, 1994*
Date of Decision:	*May 26, 1995*
Tribunal Members:	*Lyle M. Russell, Presiding Member* *Arthur B. Trudeau, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Warren Baker, for the appellants* *Christopher Rupar, for the respondent*

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-92-210 and AP-92-211

CROSS LAKE BAND OF INDIANS AND BLOODVEIN INDIAN BAND **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

These two appeals under section 81.19 of the *Excise Tax Act*[1] (the Act), of two determinations that rejected federal sales tax (FST) refund applications, were heard together, as they involved similar facts and the same provision of the Act.

The appellant in Appeal No. AP-92-210 is an Indian band residing in Manitoba. The appellant, the Department of Indian Affairs and Northern Development (DIAND) and the Department of Public Works (PWC) entered into an agreement to build a school to be used by the appellant. The project brief[2] for the school describes the role of each party as follows: (1) the appellant as "the ultimate user;" (2) DIAND as "the funding, and operating agency;" and (3) PWC as "the design agency." DIAND also engaged PWC to manage construction of the school through a specific service agreement. The memorandum of understanding between DIAND and PWC makes clear that PWC was responsible for planning and administering the actual construction of the school (i.e. responsible for arranging contacts with the contractors that actually built the school). Payments to the contractors that performed the work were made on a progress basis by PWC. It appears that PWC then billed DIAND for the amount of these payments, and DIAND drew down on the appellant's proceeds from a contribution agreement between the appellant and the Government of Canada.

The evidence indicates that all payments to the contractors that built the school were made between April 1984 and February 1989. The appellant's refund application was received on March 31, 1989. The application was for a refund of all FST included in the cost of materials in the progress billings submitted by contractors and incurred in the construction of the school. The claim was for $255,944.15. By notice of determination dated August 21, 1989, the respondent allowed, in part, the appellant's refund application. By notice of objection served on November 17, 1989, the appellant objected to the notice of determination. By notice of decision dated August 21, 1992, the respondent varied the determination and allowed a further portion of the refund application. The respondent's decision indicates that a refund was

1. R.S.C. 1985, c. E-15.
2. See Exhibit B-5. This exhibit relates only to the Bloodvein Band project. The appellants' representative agreed that a similar document exists for the Cross Lake Band project, which describes the parties' roles in the same manner.

allowed in respect of progress payments made between April 30, 1987, and April 30, 1989, i.e. payments made within two years of the date of the refund application. The respondent also allowed a refund in respect of payments made on or before May 23, 1985, but not in respect of payments made more than four years prior to the date of the refund application.[3] The amount in dispute is $35,594.82.

The appellant in Appeal No. AP-92-211 is also an Indian band residing in Manitoba. The appellant, DIAND and PWC entered into an agreement to build a school to be used by the appellant. The project brief for the school describes the role of each party as follows: (1) the appellant as "the ultimate user;" (2) DIAND as "the funding, and operating agency;" and (3) PWC as "the design agency." DIAND also engaged PWC to manage construction of the school through a specific service agreement. The memorandum of understanding between DIAND and PWC makes clear that PWC was responsible for planning and administering the actual construction of the school (i.e. responsible for arranging contacts with the contractors that actually built the school). Payments to the contractors that performed the work were made on a progress basis by PWC. It appears that PWC then billed DIAND for the amount of these payments, and DIAND drew down on the appellant's proceeds from a contribution agreement between the appellant and the Government of Canada.

The evidence indicates that all payments to the contractors that built the school were made between August 1984 and March 1987. The appellant's refund application was received on November 30, 1988. The application was for a refund of all FST included in the cost of materials in the progress billings submitted by contractors and incurred in the construction of the school. The claim was for $103,500.00. By notice of determination dated August 21, 1989, the respondent allowed, in part, the refund application. By notice of objection served on November 17, 1989, the appellant objected to the notice of determination. By notice of decision dated August 21, 1992, the respondent varied the determination and allowed a further portion of the refund application. The respondent's decision indicates that a refund was allowed in respect of progress payments made between November 30, 1986, and November 30, 1988, i.e. payments made within two years of the date of the refund application. The respondent also allowed a refund in respect of payments made on or before May 23, 1985, but not in respect of payments made more than four years prior to the date of the refund application.[4] The amount in dispute is $53,494.14.

The issue in these appeals is whether each appellant filed its refund application within the statutory time period provided in section 68.26 (formerly section 44.27) of the Act.

The relevant portions of section 68.26 of the Act read as follows:

> *68.26 Where tax under Part VI has been paid in respect of any materials and the materials have been purchased by or on behalf of*
>
> *(a) a school, university or other similar educational institution for use exclusively in the construction of a building for that institution,*
>
> *an amount equal to the amount of that tax shall, subject to this Part, be paid to that institution ... if it applies therefor within two years after the materials were purchased.*

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3. May 23, 1985, is the date on which an amendment to the Act reducing the time period for filing a refund application from four years to two years came into force.
4. *Ibid.*

The appellants were represented by their tax consultant, Mr. Warren Baker. The appellants' representative argued that the respondent's decisions in these cases contravened both the stated administrative policy of the Department of National Revenue (Revenue Canada) and ministerial correspondence outlining that policy. This policy, according to the appellants' representative, while not always applied consistently across the country, has for many years allowed applicants to choose between two methods of claiming FST refunds in respect of building contracts where payments are spread out over the period of construction. They could either apply for a refund in respect of each progress payment within two (or four) years of making such payment or wait until the final payment was made and then file, within two (or four) years of that date, a refund application in respect of all payments, even though all but the last payment might be outside the specified time limit. Thus, the appellants' position is that, if the final payment under any contract is made within the two- (or four-) year time limit, all payments under that contract should qualify for a refund.

The appellants' representative also submitted that, if the Tribunal were to rule that time limits should be calculated from the date of each progress payment, the relevant dates should be those on which funds were transferred on behalf of the appellants from DIAND to PWC, rather than the dates on which PWC paid the contractors.

Citing the Tribunal's decision in *West Shore Constructors Ltd. v. The Minister of National Revenue*[5] and various contract documents relating to the building of the schools in issue, counsel for the respondent submitted that the relevant date for purposes of section 68.26 of the Act is the date on which the materials were supplied by the contractor for the construction project or, more specifically, the date on which property in the materials was transferred from the contractor to Her Majesty under the terms of the contractor's contract with PWC. He argued that, consistent with the *West Shore* decision, progress billings or payments should be taken as evidence as to when materials were transferred to Her Majesty, and the dates of such payments should be used to calculate the time limit for filing refund applications. In his view, the dates on which funds were transferred between two federal government departments (DIAND and PWC) is not relevant because both are agents of the Crown, and they share responsibility with the appellants for project management.

The Tribunal must first determine when the materials in issue were "purchased" for purposes of section 68.26 of the Act. As noted by the Tribunal in *West Shore*, the supply of materials under a contract for construction is a sale (or purchase) for purposes of claiming a refund of FST.[6] To determine when the transfer of property or, in other words, when the sale or purchase took place, the Tribunal looked to the terms of the contracts between the parties. In this case, as in *West Shore*, the contracts between PWC and the construction companies contain General Condition 13. This clause provides that all material acquired, used or provided by the contractors for the contracts becomes the property of Her Majesty for purposes of the work "from the time of their acquisition, use or provision." The date of purchase is, therefore, the date on which the materials were acquired for use in the school projects, and the refund period begins on that date.

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5. Appeal No. 3066, February 2, 1990.

6. See, for example, *The King v. Dominion Bridge Co. Ltd.*, [1940] S.C.R. 487; and *The Queen v. Stevenson Construction Co. Ltd.* (1978), [1979] C.T.C. 86 (F.C.A.).

In the instant case, the evidence does not indicate when the materials were actually acquired for use in the school projects. In these circumstances, the Tribunal is of the opinion that the best evidence of these dates are the progress payments by which PWC paid for the materials used in the construction of the schools. Therefore, entitlement to a refund only exists in respect of progress payments for which application for the refund was made within two years of the date of each such payment, i.e. the dates on which the materials were "purchased." In this case, the Tribunal finds that the appellants have received refunds for payments that qualify on this basis, and, thus, the appeals must fail.

Furthermore, the Tribunal is of the opinion that the transfer of funds from DIAND to PWC (i.e. the dates of such transfers) is not relevant in determining the issue before it because it does not relate to the transfer of property in the construction materials to the Crown. In addition, the Tribunal does not find a statutory basis for the position that only one payment needs to be made within the two-year time limit and that, having found such payment, all payments relating to the project made outside the time limit qualify for the refund. It would appear from Exhibit B-7 that, following the decision in *West Shore,* Revenue Canada ceased giving schools the option of calculating tax refund time limits from the date of final payment or completion of the project and began to apply a uniform policy of calculating the time limit from the date of each progress payment. While the Tribunal understands the confusion that may have flowed from this change in administrative policy, it notes that it is not directly applicable to the issue of entitlement under the relevant provision of the Act.

Accordingly, the appeals are dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member