

Ottawa, Tuesday, December 14, 1993

Appeal No. AP-92-245

IN THE MATTER OF an appeal heard on May 18, 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 September 14, 1992, with respect
to a notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

GILCAM ENTERPRISES LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-245

GILCAM ENTERPRISES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of an assessment of the Minister of National Revenue dated February 14, 1992, adjusting the amount to which the appellant was entitled with respect to its claim for a federal sales tax inventory rebate under section 120 of the Excise Tax Act. The issue is whether the respondent correctly found that the goods in inventory, for which the federal sales tax inventory rebate claim was made, were construction materials under Schedule IV to the Excise Tax Act and, therefore, qualified for a federal sales tax inventory rebate calculated on the basis of the 5.6-percent tax factor as opposed to the 8.1-percent tax factor set out in section 3 of the Federal Sales Tax Inventory Rebate Regulations.

HELD: *The appeal is dismissed. The Tribunal finds that the goods held in inventory were construction materials under section 4 of Part I of Schedule IV to the Excise Tax Act and paragraphs 2(f), (i), (j) and (n) of the Construction Materials Sales Tax Regulations and, therefore, that the applicable tax factor for purposes of the appellant's federal sales tax inventory rebate claim is 5.6 percent.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 18, 1993
Date of Decision: December 14, 1993

Tribunal Members: Michèle Blouin, Presiding Member
W. Roy Hines, Member
Lise Bergeron, Member

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Janet Rumball

Appearances: Bernard G. Roach, for the appellant
Ian McCowan, for the respondent

Appeal No. AP-92-245

GILCAM ENTERPRISES LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
W. ROY HINES, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of an assessment of the Minister of National Revenue (the Minister) dated February 14, 1992, adjusting the amount to which the appellant was entitled with respect to its claim for a federal sales tax (FST) inventory rebate under section 120 of the Act.² The issue is whether the respondent correctly found that the goods in inventory, for which the FST inventory rebate claim was made, were construction materials under Schedule IV to the Act and, therefore, qualified for an FST inventory rebate calculated on the basis of the 5.6-percent tax factor as opposed to the 8.1-percent tax factor set out in section 3 of the *Federal Sales Tax Inventory Rebate Regulations*³ (the Regulations).

The appellant is a corporation which distributes the following hydro-electric supplies to customers, such as Ontario Hydro and various municipal public utility commissions, for use predominantly in the repair, maintenance and/or upgrading of existing hydro-electric installations:

1. Hardware, including machine bolts, devices, cableguards, straps, staples, transformer mounts, ground anchor rods, oval eye bolts, double arming bolts (usually found on hydro poles);
2. Wire and cable, i.e. primary and secondary wire for underground and overhead;
3. Transformers, i.e. oil-filled units used in the transformation of power from a primary voltage to a secondary one (units are usually pole mounts or pad mounts seen on hydro poles);
4. Streetlighting and poles, including fixture, photocell and bracket, mounted on poles along roadways, as well as cement, wood, steel and aluminum poles;

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

2. S.C. 1990, c. 45, s. 12.

3. SOR/91-52, December 18, 1990, Canada Gazette Part II, Vol. 125, No. 2 at 265.

5. Insulators and line switches, i.e. porcelain and epoxy insulators used to protect poles and lines;
6. Connectors and related products for splicing and connection of overhead and underground power lines; and
7. Safety goods, tools, etc., including high-voltage rubber gloves, blankets, line guards, etc., insulating tapes, and tools, such as screwdrivers, pliers, hammers and wrenches.

According to the appellant, it paid FST at the rate of 9 percent on purchases of approximately 90 percent of its inventory and at the rate of 13.5 percent on purchases of the balance of the inventory. The Minister reduced the assessment and corresponding interest and penalty to take into account the inventory for which FST was paid at the rate of 13.5 percent, and that part of the inventory is not in issue in this appeal. It included street-lighting fixtures and accessories, safety goods and tools, and other goods, such as steel guy wire, electrical tape, marking paints, test kits and nicopress sleeves, as set out in the inventory summary attached to the letter, dated June 3, 1992, from the appellant's accountant, Mr. E. Michael Irwin, C.A., to the Department of National Revenue (Revenue Canada).

Mr. Robert McGillis, President of the appellant, testified that officials of Revenue Canada provided him with a copy of GST-Memorandum 900⁴ (the Memorandum) and a booklet entitled Goods Listing for Federal Sales Tax Inventory Rebate Claims published by Revenue Canada, which he used as a guide for completing the appellant's FST inventory rebate application. He reviewed the lists of goods in the booklet to determine the applicable tax factor and concluded that, since the inventory did not fall into any of the lists of goods, it should be included in the general category and qualify for an FST inventory rebate calculated using the tax factor of 8.1 percent. In his view, the goods in inventory did not consist of "Building Supplies and Construction Materials" within the description set out in the booklet.

Mr. McGillis concluded that the goods in inventory did not consist of construction material, since they did not "become part of houses, buildings, or other structures." He stated that, with the exception of electrical wire which represented only part of the total inventory, the goods held in inventory were not included in the definition for "Building Supplies and Construction Materials." This conclusion was reviewed and confirmed by his accountant, Mr. Irwin, and by an official of Revenue Canada in an unrecorded telephone conversation.

Counsel for the appellant argued that the goods held in inventory by the appellant were for use in the repair and maintenance of existing hydro-electric installations and did not "become part of houses, buildings, or other structures," as set out in the description in the booklet. On that basis, the appellant concluded that the goods were hardware and/or industrial equipment and supplies and, therefore, qualified for the 8.1-percent general prescribed tax factor used to calculate the FST inventory rebate, as provided under paragraph 3(h) of the Regulations.

Counsel for the appellant submitted that there is no indication in the Memorandum or the booklet issued by Revenue Canada that the applicable prescribed tax factor is dependent on whether FST was paid at the rate of 13.5 percent or 9 percent and that employees of the

4. Federal Sales Tax Inventory Rebates, Department of National Revenue, Customs and Excise, March 25, 1991.

appellant had contacted officials of Revenue Canada, who confirmed that 8.1 percent was the correct prescribed tax factor.

Counsel for the respondent argued that, according to Schedule IV to the Act and the *Construction Materials Sales Tax Regulations*,⁵ the goods in the appellant's inventory were construction materials and, therefore, only qualify for an FST inventory rebate at the rate of 5.6 percent times the value of the inventory, as set out in the Regulations. Further, counsel argued that the fact that officials of Revenue Canada may have made representations that the applicable tax factor was 8.1 percent does not prevent Revenue Canada from now applying the correct tax factor of 5.6 percent.

After having considered the evidence and submissions of the parties, the Tribunal is of the view that the Minister correctly determined that the goods held in inventory were construction materials under Schedule IV to the Act and the *Construction Materials Sales Tax Regulations* and, therefore, that the applicable tax factor for purposes of the appellant's FST inventory rebate claim is 5.6 percent. In order for goods held in the appellant's inventory to have been subject to the FST rate of 9 percent when they were purchased, it must first have been determined that they were construction materials and equipment for buildings pursuant to Schedule IV to the Act, as set out in paragraph 50(1.1)(b) of the Act:

Tax imposed by subsection (1) is imposed

...

(b) in the case of goods enumerated in Schedule IV (Construction Materials and Equipment for Buildings), at the rate of nine per cent.

Otherwise, the goods would have been subject to the imposition of FST at the rate of 13.5 percent. Paragraph 3(a) of the Regulations provides that the prescribed tax factor for determining the FST inventory rebate in respect of goods included in Schedule IV to the Act is 5.6 percent:

For the purposes of subsection 120(5) of the Act, the prescribed tax factors in respect of the following classes of goods are:

(a) in the case of goods included in Schedule IV to the Act, 5.6%.

Both the rate of 9 percent initially paid and the rate of 5.6 percent used to calculate the FST inventory rebate are applicable to goods included under Schedule IV to the Act. Section 4 of Part I of Schedule IV to the Act lists the following as constituting construction materials:

Electric conducting and telecommunication wire and cable; transformers, circuit breakers and related electrical equipment designed for permanent installation in a system for the supply of electricity.

Paragraphs 2(f), (i), (j) and (n) of the *Construction Materials Sales Tax Regulations* further provide that, for the purposes of Part I of Schedule V (now Schedule IV), construction materials include:

5. C.R.C. 1978, c. 587.

(f) equipment and hardware, not provided for in section 4 of Part I of Schedule [IV] to the Excise Tax Act, designed for permanent installation in a system for the supply of electricity;

...

(i) hangers, strapping and supports designed for permanent installation with electric conducting wire and cable;

(j) strut channel and fittings for strut suspension systems designed for permanent installation and use as support for electric conducting wire and cable or piping in buildings;

...

(n) light brackets designed for mounting on poles and components for light standards not including light fixtures.

In the Tribunal's view, the goods held in inventory and described by the appellant as hardware, wire and cable, transformers, streetlight brackets and poles, insulators and porcelain and epoxy line insulators, and connectors and related products qualify as construction materials under section 4 of Part I of Schedule IV to the Act and paragraphs 2(f), (i), (j) and (n) of the *Construction Materials Sales Tax Regulations*.

The appeal is dismissed. The Tribunal finds that the goods held in inventory were construction materials under section 4 of Part I of Schedule IV to the Act and paragraphs 2(f), (i), (j) and (n) of the *Construction Materials Sales Tax Regulations* and, therefore, that the applicable tax factor for purposes of the appellant's FST inventory rebate claim is 5.6 percent

Michèle Blouin

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Presiding Member

W. Roy Hines

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