

Ottawa, Tuesday, May 10, 1994

**Appeal No. AP-92-360**

IN THE MATTER OF an appeal heard on November 5, 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 December 18, 1992, with respect to a  
notice of objection served under section 81.17 of the *Excise  
Tax Act*.

**BETWEEN**

**NORTH PEACE CULTURAL SOCIETY**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Anthony T. Eyton

Anthony T. Eyton  
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh  
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-360**

**NORTH PEACE CULTURAL SOCIETY**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue dated April 3, 1992, that rejected an application for a refund of federal sales tax on the basis that the application was filed outside the time limit prescribed under the Excise Tax Act. The application was dated March 13, 1992, and covered the period from November 24, 1988, to March 23, 1990. The issue in this appeal is whether the appellant filed its refund application within the two-year limitation imposed under section 68.26 of the Excise Tax Act.*

**HELD:** *The appeal is allowed. The date of the sale of the goods is the date of the total completion of the project. The Tribunal finds that the evidence shows that, on March 16, 1990, the date of the last progress certificate from the architect to the appellant, money was still owed by the appellant for work which had not been completed. Part of this work included the verification of the fire alarm equipment, which was done on March 27, 1990. The Tribunal, therefore, finds that the appellant filed its refund application within the two-year limitation imposed under section 68.26 of the Excise Tax Act.*

*Place of Hearing: Calgary, Alberta  
Date of Hearing: November 5, 1993  
Date of Decision: May 10, 1994*

*Tribunal Members: Anthony T. Eyton, Presiding Member  
Sidney A. Fraleigh, Member  
Robert C. Coates, Q.C., Member*

*Counsel for the Tribunal: Joël J. Robichaud*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Brian Anderson, for the appellant  
Brian Tittlemore, for the respondent*

**Appeal No. AP-92-360**

**NORTH PEACE CULTURAL SOCIETY**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member  
SIDNEY A. FRALEIGH, Member  
ROBERT C. COATES, Q.C., Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of a determination of the Minister of National Revenue (the Minister) dated April 3, 1992, that rejected an application for a refund of federal sales tax (FST) in the amount of \$36,098.38 on the basis that the application was filed outside the time limit prescribed under the Act. The application was dated March 13, 1992, and covered the period from November 24, 1988, to March 23, 1990. The appellant served a notice of objection dated July 2, 1992. The Minister confirmed the determination in a notice of decision dated December 18, 1992. The issue in this appeal is whether the appellant filed its refund application within the two-year limitation imposed under section 68.26 of the Act.

The appellant is a non-profit organization. It entered into a contract with Hegge Construction Ltd. (Hegge) to have an arts centre/library built in Fort St. John, British Columbia. The architect was Howard/Yano Partners Architects Inc. Construction commenced in 1988. At various stages during the construction, Hegge issued progress certificates to the architect. On June 13, 1989, Hegge issued Progress Certificate No. 10, showing that the project was 100-percent complete. It showed that Hegge was still owed \$142,362.00. It also showed a 10-percent holdback of \$138,964.31. The total revised contract included \$15,962.15 for Change Order Nos. 1 to 3. Following the issuance of this progress certificate by Hegge to the architect, the latter issued its Progress Certificate No. 10 to the appellant certifying that Hegge was entitled to a payment of \$97,762.00 for the billing period ending on June 22, 1989. Thereafter, the architect issued three more progress certificates to the appellant at different intervals authorizing the payment of monies to Hegge. Progress Certificate No. 13, the last to be issued by the architect to the appellant, certified that Hegge was entitled to a payment of \$10,000.00 for the billing period ending on March 16, 1990. At that point, Hegge was still owed \$2,000.00.

On October 28, 1992, the architect sent a letter to E.G. Tkachuk & Associates Limited, which, from the material presented, appeared to be a representative of the appellant, regarding the construction of the arts centre/library by Hegge, indicating that the project had been substantially completed as of June 19, 1989. The letter also indicated that a deficiency list had been prepared and that contract formalities relating to the substantial performance of the project had been undertaken.

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

On May 7, 1993, the architect sent a letter to IBA Corporate Services Ltd. (IBA), which, from the material presented, also appeared to be a representative of the appellant, indicating that Progress Certificate No. 13 issued on March 16, 1990, was the final billing, which represented confirmation of total completion of the project. It also indicated that, at that date, \$2,000.00 had been held back until it could be verified that the work had been totally completed.

At the hearing, the appellant was represented by Mr. Brian Anderson, who also served as the only witness. He introduced several documents into evidence in support of his allegation that the application for a refund of FST was filed within the statutorily prescribed time. These documents included a letter from L.W. Hryciuk of Arctic Electric Ltd. to IBA dated October 20, 1993, indicating that the electrical contract for the arts centre/library, which included the installation and verification of the fire alarm equipment, was completed in March 1990. There was also a "Certificate of Verification" of the fire alarm equipment for the arts centre/library dated March 27, 1990. Part of the electrical contract, which Mr. Anderson testified was a subcontract, was also introduced into evidence. It stated that the electrical contract would not be considered substantially complete prior to the verification. A letter from the architect to IBA dated November 3, 1993, indicating that Progress Certificate No. 13 identified outstanding work, which included the fire alarm verification, was also introduced into evidence. This letter indicated that the fire alarm verification was part of the original contract, which, at the date of Progress Certificate No. 13, had not been done, that the fire alarm verification was done on March 27, 1990, and that this work completed the project. Finally, a letter from the architect to the appellant dated March 16, 1990, indicating that Progress Certificate No. 13 included a holdback of \$2,000.00 to cover the fire alarm verification and some sidewalk work, was introduced into evidence.

Mr. Anderson relied on Ruling 5325/8-5 active of the Department of National Revenue (Revenue Canada) which states that "if the evidence shows that the refund claim was filed on the basis of a progress billing AND that this claim is related to the final billing period, the refund claim period cannot commence later than the end of that billing period.<sup>2</sup>" He argued that, in accordance with this ruling, the commencement date of the two-year period was the date of total completion of the construction project, and not June 19, 1989, the alleged date of substantial completion of the project. He argued that the evidence showed that the contract was not completed until March 27, 1990, the date of the fire alarm verification. Mr. Anderson submitted that, on June 13, 1989, the date on which Progress Certificate No. 10 was issued by Hegge to the architect, the contract had not been completed. There was still some construction work which had to be done. He submitted, therefore, that this date could not be considered as the commencement date.

Counsel for the respondent argued that the commencement date of the two-year period must be the date of the sale of the goods to the appellant. Relying on the letter from the architect dated October 28, 1992, counsel submitted that the arts centre/library was substantially completed on June 19, 1989. Relying on Progress Certificate No. 10 issued by Hegge to the architect, he submitted that the last sale of goods to the appellant took place on June 13, 1989, and, consequently, that the refund claim is statute-barred. Relying also on the letter from the architect dated October 28, 1992, counsel argued that Progress Certificate Nos. 11, 12 and 13 were not for the sale of goods and transfer of property, but related only to billings and payments for change orders, deficiencies and the release of holdback monies.

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2. Time-Limit for Refunds - Progress Billings and Progress Payments, April 24, 1990.

For the purposes of this appeal, the relevant provisions are found at section 68.26 of the Act, which states:

*Where tax under Part VI has been paid in respect of any materials and the materials have been purchased by or on behalf of*

...

*b) any organization for use exclusively in the construction of a building for that organization that is to be used exclusively or mainly as a public library operated by or on behalf of that organization on a non-commercial basis,*

...

*an amount equal to the amount of that tax shall, subject to this Part, be paid to that institution, organization or corporation if it applies therefor within two years after the materials were purchased.*

The commencement date of the two-year period must be the date of the sale of the goods to the purchaser, which must be determined according to the intention of the parties. This can be ascertained having regard to the terms of the contract, the conduct of the parties and the circumstances surrounding the transaction.<sup>3</sup> Where the contract is silent as to the time that the property in the goods was to pass, the Tribunal must refer to other factors in order to determine the intention of the parties with respect to the moment of transfer of property or the date of sale. In this case, the contract was not entered into evidence. While the departmental ruling cannot be determinative of the issue in this case and is not binding on the Tribunal, the Tribunal has examined the facts in light of that ruling.<sup>4</sup> It appeared, both at the hearing and in the written submissions, that the parties were relying on the ruling and offering their explanation of how it should be interpreted.

When the transfer of property in the goods does not occur at a single instance and payment is made by instalments over the construction period, it has been the practice of Revenue Canada to allow a person to delay the filing of a refund application until the completion of the construction project. In this case, Revenue Canada accepted June 19, 1989, referred to in the letter of October 28, 1992, from the architect to E.G. Tkachuk & Associates Limited as the date of substantial completion of the project and as the commencement date of the period of limitation. Mr. Anderson argued on behalf of the appellant that the commencement date should be March 27, 1990, the date of total completion of the project.

The application for a refund of FST paid by the appellant was signed on March 13, 1992, which represents the earliest date on which the Tribunal could consider that the appellant actually applied for the refund. The issue before the Tribunal, therefore, is whether the construction project was completed before March 13, 1990, or, alternatively, whether the last transfer of property in the goods occurred before this date.

The Tribunal cannot find any authority for the respondent's proposition that the date of completion of the project is the date of substantial completion. It, therefore, agrees with the appellant that the date of completion of the project is the date of total completion. The Tribunal also notes that the date of the final billing period could be any of five dates. It could

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3. See, for instance, *Island Coastal Services Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-90-004, October 31, 1991.

4. See, for instance, *West Shore Constructors Ltd. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. 3066, February 2, 1990.

be June 13, 1989, the date of the final billing from Hegge to the architect, June 22, 1989, the date of Progress Certificate No. 10 from the architect to the appellant authorizing the payment of part of the monies owed to Hegge, or any of the following dates: August 22, 1989, October 25, 1989, or March 16, 1990, the dates of the last three progress certificates from the architect to the appellant authorizing payment of the remaining monies owed to Hegge.

Having accepted that the date of the sale of the goods is the date of total completion of the project, the Tribunal finds that the evidence shows that, on March 16, 1990, the date of the last progress certificate from the architect to the appellant, money was still owed by the appellant for work which had not been completed. Part of this work included the verification of the fire alarm equipment, which was done on March 27, 1990. The Tribunal, therefore, finds that the appellant filed its refund application within the two-year limitation imposed under section 68.26 of the Act.

Accordingly, the appeal is allowed. Having considered the request of counsel for the respondent in the event that the the appeal was allowed, the Tribunal refers the determination back to the Minister so that an audit of the appellant can be conducted to determine the refund to which it is entitled.

Anthony T. Eyton  
Anthony T. Eyton  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Robert C. Coates, Q.C.  
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