CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, March 31, 1994

Appeal No. AP-93-033

IN THE MATTER OF an appeal heard on October 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 March 29, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

788870 ONTARIO LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Nicole Pelletier
Nicole Pelletier
Acting Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-033

788870 ONTARIO LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant provides food and beverage services to the Dalhousie Yacht Club in St. Catharines, Ontario. Under section 120 of the Excise Tax Act, the appellant filed an application for a federal sales tax inventory rebate with the respondent. Subsection 120(8) of the Excise Tax Act provides that such applications must be filed before 1992. The appellant mailed its application to the respondent in an envelope, which bore the postal meter date of January 8, 1992. However, the appellant submitted that the rebate application was mailed prior to 1992, and hence was filed on time. The respondent contended that the meter date on the envelope was conclusive evidence of when the rebate application was mailed and that, having been mailed in 1992, the rebate application was statute-barred. The Tribunal has to determine whether the appellant's rebate application was filed in accordance with subsection 120(8) of the Excise Tax Act.

HELD: *The appeal is allowed. The Tribunal finds that the word "filed" in subsection 120(8) of the Excise Tax Act is not a defined term. The Tribunal concludes that it has jurisdiction to determine what meaning to ascribe to that term. The Tribunal finds that mailing a rebate application could constitute filing within the meaning of subsection 120(8) of the Excise Tax Act.*

Notwithstanding the meter date of January 8, 1992, the Tribunal was persuaded by the testimony of the appellant's witnesses and the physical evidence introduced by the appellant that the appellant's rebate application had been mailed, and thus filed, prior to 1992.

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*October 18, 1993*
Date of Decision:	*March 31, 1994*
Tribunal Members:	*Charles A. Gracey, Presiding Member* *Kathleen E. Macmillan, Member* *Arthur B. Trudeau, Member*
Counsel for the Tribunal:	*John L. Syme*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Graham Pobjoy, for the appellant* *James Stringham, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-033

788870 ONTARIO LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
KATHLEEN E. MACMILLAN, Member
ARTHUR B. TRUDEAU, 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) under subsections 72(4) and 120(6) of the Act.[2] The issue in this appeal is whether the appellant's application for a federal sales tax (FST) inventory rebate was filed before 1992, as prescribed by subsection 120(8) of the Act.

The respondent maintained that the application was filed beyond the time limit set out in the Act, as evidenced by the postage meter date of January 8, 1992, which appears on the envelope in which the application was mailed. The appellant contended that the application was mailed in December 1991, but that the postage meter had been advanced to reflect a later date for a legitimate business purpose. There is no issue as to the legitimacy of the appellant's claim for the refund beyond the question of time limitations in filing.

The appellant is contracted to provide food and beverage services to the Dalhousie Yacht Club (the Club) in St. Catharines, Ontario.

Two witnesses appeared at the hearing on behalf of the appellant. The first was Mrs. Anne M. Rosler, Manager of the Club, who explained the office operation and recalled the events of late December 1991. Mrs. Rosler testified that, on Friday, December 27, 1991, she changed the date of the postage meter to read January 8, 1992. According to her testimony, she advances the date of the postage meter each month in order to prestamp empty envelopes addressed to the club's approximately 300 members. The prestamped envelopes are then stuffed by a commercial printing firm which produces the Club's monthly newsletter. This procedure is followed because, once stuffed, the envelopes are too thick to pass through the postage meter. According to Mrs. Rosler, the printing firm advises her near the end of each month of which date to stamp on the envelopes. The appellant submitted into evidence a copy of Mrs. Rosler's office calendar which showed that the monthly newsletter was mailed on January 8, 1992, and that she had changed the postage meter on December 27, 1991.

Mrs. Rosler testified that she did not discover the fact that she had left the postage meter advanced until several days later, in early January 1992. In response to questions from the

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. 6.

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Tribunal, Mrs. Rosler acknowledged that she had mistakenly left the postage meter advanced on other occasions as well.

Mrs. Rosler explained that she was the only person who had the postage meter key, which was necessary for its operation, and that she left the key in the meter when she was in the office. Consequently, she testified, it was impossible for anyone else to use the postage meter when she was not in the office. As long as the key was in the postage meter, both the date and the postage amount could be changed. The meter did not keep a record of when it was used, only a tabulation of the amount spent.

According to Mrs. Rosler, Ms. Lissa Haynes, the appellant's part-time bookkeeper, was in the office on December 28, 1991, and ran several letters through the postage meter that day. Mrs. Rosler was not able to tell, however, if the rebate application addressed to the Department of National Revenue (Revenue Canada) was one of the letters run through the postage meter.

The second witness was Ms. Lissa Haynes, who testified that she ran the refund application through the postage meter at the Club on Saturday, December 28, 1991, and mailed it on the way home from work later that day. At the time, she did not notice the date indicated on the postage meter. To support her testimony, Ms. Haynes provided the Tribunal with a computer log indicating that she had worked for six hours on that date.

Ms. Haynes maintained that she could not have used the postage meter on January 8, 1992, the date stamped on the envelope containing the rebate application. She only works for the appellant on Saturdays and on Wednesday evenings, as she has another full-time job. Because Mrs. Rosler is not in the office on Wednesday evenings, the only time that Ms. Haynes is able to use the postage meter is on Saturday during the day. Letters that she mails at other times must be stamped with ordinary postage stamps.

With respect to the postage amount, Ms. Haynes stated in cross-examination that letters mailed in December 1991 would have required postage of 40 cents, and a 42-cent stamp would have been necessary for letters mailed in January 1992. In the documents available to the Tribunal, the stamp on the envelope in question appears to read 40 cents. The documents also indicate Revenue Canada's receipt stamp dated January 10, 1992.

The respondent called no witnesses, but presented the Tribunal with a copy of an annual report by Canada Post Corporation (Canada Post) citing an independent study of delivery times. The results of the study showed that, at the relevant time, between 97 and 98 percent of the mail going between major urban centres in the same province was delivered within three days.

In argument, counsel for the appellant contended that sufficient evidence had been led to demonstrate that the rebate application was filed before 1992. He questioned whether the Tribunal had adequate proof that the envelope stamped by Revenue Canada as having been received on January 10, 1992, was actually received on that date and noted that no witnesses were available to testify to that effect. Counsel pointed out that, if the letter had been mailed in January 1992, as maintained by the respondent, it would have been returned because of insufficient postage. Finally, counsel argued that, if the appellant had been intent on deceiving Revenue Canada as to the time of filing, it would have predated rather than postdated its rebate application.

Counsel for the respondent argued that there are two issues before the Tribunal. The first is evidentiary in nature and concerns when the rebate application was mailed. The second is a legal question as to what constitutes filing.

On the evidentiary question, counsel for the respondent submitted that there is no dispute that the envelope was postmarked January 8, 1992, and was received by Revenue Canada on January 10, 1992. It is inconceivable that the application would have taken from December 28, 1991, to January 10, 1992, to travel between St. Catharines, Ontario, and Hamilton, Ontario. In support, counsel cited the study of mail delivery times reported in Canada Post's annual report. In counsel's view, the evidence indicates, on the balance of probabilities, that the application was mailed sometime in early January.

On the legal question regarding the meaning of filing, counsel for the respondent acknowledged that the Governor in Council has not prescribed any regulations describing how to file an application with the Minister. However, counsel referred the Tribunal to Excise Memorandum ET 313[3] (Memorandum ET 313) which states that the date stamped or marked on the envelope by the post office will be accepted as the date on which the application was filed. In the present case, January 8, 1992, is the date stamped and, hence, the date of application. Consequently, counsel for the respondent submitted that the appellant's rebate application is statute-barred. Finally, counsel argued that the Tribunal has no authority to waive or extend the time periods set out in the Act. However, the Tribunal does not regard Memorandum ET 313 as either a legally binding means or the only means of determining when an application was mailed and thus filed.

The Tribunal agrees with counsel for the respondent that it lacks the jurisdiction to waive the time limitations set out in section 120(8) of the Act. However, the Tribunal is of the view that it does have jurisdiction to determine the meaning of the word "filed" in subsection 120(8) of the Act. In this regard, the Tribunal notes that, for the purposes of subsection 120(8) of the Act, neither the word "file" nor "filed" is defined in the Act or the *Interpretation Act*.[4] Counsel for the respondent did put into evidence Memorandum ET 313 which arguably provides some guidance as to when mailing constitutes filing.

In the Tribunal's view, a postmark alone might well serve to establish the date on which an application was mailed. However, in the present case, the Tribunal had testimony from two sworn witnesses regarding the circumstances surrounding the mailing of the appellant's rebate application. The Tribunal accepts the testimony of Mrs. Rosler that the postage meter was mistakenly left postdated and her explanations for this occurrence. Furthermore, the Tribunal was satisfied by the evidence led by the appellant concerning work schedules and office routine, and accepts Ms. Haynes' sworn testimony that she mailed the rebate application on December 28, 1991. The Tribunal also observes that the envelope bore a 40-cent stamp and would probably have been returned because of insufficient postage had it been mailed in 1992.

The Tribunal found these witnesses to be forthright and credible and was persuaded by their evidence and the physical evidence led by the appellant that the application was filed prior to 1992.

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3. Application for Refund, Department of National Revenue, Customs and Excise, February 20, 1989.
4. R.S.C. 1985, c. I-21.

The Tribunal considered the respondent's arguments concerning mail delivery times. However, general study results do not permit the Tribunal to extrapolate to individual instances.

With respect to the significance of Revenue Canada's receipt stamp dated January 10, 1992, the Tribunal did not receive any evidence regarding the mail receipt practices at the offices of Revenue Canada in Hamilton, Ontario. Without some information on those practices, the January 10, 1992, receipt stamp is of marginal assistance in determining when Revenue Canada actually received the appellant's rebate application.

On the basis of the foregoing, the Tribunal cannot rule out the possibility that the rebate application took considerably longer than three days to travel between St. Catharines, Ontario, and Hamilton, Ontario, over the busy holiday season or that the envelope remained unopened at Revenue Canada's offices for several days.

Accordingly, the appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member