

Ottawa, Tuesday, June 7, 1994

Appeal No. AP-93-089

IN THE MATTER OF an appeal heard on January 10, 1994,  
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 June 9, 1993, with respect to a notice  
of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**HERGERT ELECTRIC LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed. The Tribunal refers the matter back to the Minister of National Revenue for reconsideration of the appellant's federal sales tax inventory rebate application on its merits.

Anthony T. Eyton

Anthony T. Eyton  
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau  
Member

Sidney A. Fraleigh

Sidney A. Fraleigh  
Member

Michel P. Granger

Michel P. Granger  
Secretary

*UNOFFICIAL SUMMARY*

Appeal No. AP-93-089

**HERGERT ELECTRIC LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The issue in this appeal is whether the appellant's application for a federal sales tax inventory rebate was filed with the Minister of National Revenue before 1992.*

***HELD:** The appeal is allowed. The Tribunal has determined that an application is "filed" when it is mailed and that the date of the postmark on the envelope containing the application is evidence of the date of mailing. The full postmark was not legible and, therefore, the Tribunal lacked clear evidence of the date of mailing. On the basis of the evidence suggesting that the envelope containing the application was not handled in the normal manner, the sworn testimony of the appellant's witness and the lack of incontrovertible proof of the legible date of the postmark, the Tribunal finds that the application was mailed and filed before 1992.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: January 10, 1994  
Date of Decision: June 7, 1994*

*Tribunal Members: Anthony T. Eyton, Presiding Member  
Arthur B. Trudeau, Member  
Sidney A. Fraleigh, Member*

*Counsel for the Tribunal: David M. Attwater*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Brian M. Hergert, for the appellant  
Anne M. Turley, for the respondent*

Appeal No. AP-93-089

**HERGERT ELECTRIC LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member  
ARTHUR B. TRUDEAU, Member  
SIDNEY A. FRALEIGH, 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) rejecting an application for a federal sales tax (FST) inventory rebate made under section 120<sup>2</sup> of the Act. The issue in this appeal is whether the appellant's application was filed with the Minister before 1992.

By application dated November 30, 1991, the appellant claimed a rebate of \$3,832.53 with respect to its tax-paid inventory as of January 1, 1991. The postmarked date on the envelope containing the application was illegible. However, the application was received by the respondent on January 28, 1992. By notice of determination dated June 2, 1992, the appellant's rebate application was rejected on the basis that it was filed outside the statutorily prescribed time limit. Responding to this, on July 14, 1992, the appellant served a notice of objection. On June 9, 1993, the respondent issued a notice of decision confirming the determination.

For the purposes of this appeal, the relevant legislation reads as follows:

*120. (3) Subject to this section, where a person who, as of January 1, 1991, ... has any tax-paid goods in inventory at the beginning of that day,*  
*(a) where the tax-paid goods are goods other than used goods, the Minister shall, on application made by the person, pay to that person a rebate in accordance with subsections (5) and (8).*

*120. (8) No rebate shall be paid under this section unless the application therefor is filed with the Minister before 1992.*

Mr. Brian M. Hergert, President of Hergert Electric Ltd., represented the appellant at the hearing and provided evidence on its behalf. He explained the practice at the appellant's office with regard to taking mail to the post office and testified that he deposited the envelope containing the application into a mail chute on the exterior of the post office in Bradford, Ontario, on December 12, 1991. In depicting the rural post office with which the appellant deals, Mr. Hergert described numerous problems, such as lost and late-delivered mail.

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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.

In support of these allegations, several letters were submitted to the Tribunal prior to the hearing which were addressed to the appellant from its suppliers complaining of slow mail delivery.

During cross-examination, Mr. Hergert indicated that he has experienced problems with the post office for approximately four to five years and, on occasion, has used alternatives to the postal system, such as registered mail and courier services. He added, however, that some registered mail has not reached its destination, and a courier service will not guarantee the delivery of important documents, such as tender bids, by a particular date. He was confident of the date of mailing because a notation was added to his agenda. The agenda was not brought to the hearing.

In argument, Mr. Hergert observed that the decisions affecting his entitlement to the FST inventory rebate have been based on an illegible postmark over which the appellant had no control. In addition, the appellant has no control over the delivery of the application.

Counsel for the respondent argued that, in determining whether the FST inventory rebate application was filed before 1992, regard must be had to the date of the postmark on the envelope containing the rebate application.<sup>3</sup> The date of the postmark is evidence of the date of filing of the application. As the postmark is illegible, the Tribunal must rely on the other available evidence. First, Mr. Hergert testified as to the date of mailing. However, he did not bring in his agenda in support of this testimony. Second, the application was stamped by the Department of National Revenue (Revenue Canada) in Toronto, Ontario, on January 28, 1992. In this regard, counsel asserted that it is inconceivable that an application mailed on December 12, 1991, would reach its destination on January 28, 1992. Finally, the Tribunal has the four letters from the appellant's suppliers complaining of tardy mail delivery.

With regard to these letters, counsel for the respondent argued that they do not represent the best evidence of problems with mail delivery, and there was no opportunity to cross-examine the authors of the letters. In addition, counsel argued that they have no probative value and, as such, should not be taken into evidence and considered by the Tribunal. However, as a preliminary matter, the Tribunal ruled that the letters were admissible.

The Tribunal notes that the central issue in this appeal is the date on which the appellant filed its application for the FST inventory rebate. In previous decisions, the Tribunal has determined that an application is "filed" when it is mailed and that the date of the postmark on the envelope containing the application is evidence of the date of mailing.

In the present case, Mr. Hergert testified that his wife, who is Office Manager of Hergert Electric Ltd., completed and signed the rebate application on November 30, 1991. After having had an opportunity to review the application, Mr. Hergert personally took the envelope containing the application to the Bradford post office on December 12, 1991. Mr. Hergert testified that he has had numerous problems of delayed mail deliveries and postulated that such problems must explain why an envelope mailed on December 12, 1991, only reached Revenue Canada on January 28, 1992.

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3. *Lakhani Gift Store v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-92-167, November 15, 1993; and *Vern Glass Company (1976) Limited v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-92-221, December 13, 1993.

The Tribunal believes that the only important piece of evidence is the envelope in which the application was mailed. The full postmark is not legible and, therefore, the Tribunal lacks clear evidence of the date of mailing. However, the postmark on the envelope seems to indicate that it was stamped in Toronto, and not in Bradford. This, together with the fact that the envelope was oversized (and could not likely be processed in the computerized sorting system) and was probably sorted manually, and subject to the delays inherent in the holiday season mail rush, suggests that the envelope was not handled in the normal manner. On the basis of these facts, the sworn testimony of Mr. Hergert and the lack of incontrovertible proof of the legible date of the postmark, the Tribunal finds that the application was mailed and filed before 1992.

Accordingly, the appeal is allowed. The Tribunal refers the matter back to the Minister for reconsideration of the appellant's FST inventory rebate application on its merits.

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