CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, August 31, 1994

Appeal No. AP-93-272

IN THE MATTER OF an appeal heard on April 18, 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 July 12, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

DELCAN CORPORATION **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
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-93-272

DELCAN CORPORATION **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant and its subsidiary, Delcan International Corporation, are engaged in the business of providing consulting engineering services in Canada and abroad. In the course of its activities, the appellant's subsidiary agreed to provide its client, Martin International, with certain computer hardware and software for delivery in Hong Kong. The appellant's subsidiary imported computer hardware into Canada for the sole purpose of testing its performance and then exported the goods. Upon importation, federal sales tax was paid in the amount of $43,755.03. After exportation of the goods, the appellant applied for a refund of the federal sales tax under section 68.1 of the Excise Tax Act because the goods were exported. The refund application was partially rejected on the ground that three of the shipments for exportation were made after the coming into force of the Goods and Services Tax. The appellant maintained that its refund application could be considered a federal sales tax inventory rebate application under subsection 120(3) of the Excise Tax Act. The issue in this appeal is whether the refund application filed by the appellant was correctly rejected.

HELD: *The appeal is allowed. The Tribunal concludes that, at the time of the determination, section 68.1 of the Excise Tax Act still applied. There was no legal basis on May 13, 1992, the date of the determination, to reject the refund application as filed, since subsection 70.1(3) of the Excise Tax Act, which limits a full refund of federal sales tax under certain conditions when goods are exported and a refund application is filed under section 68.1 of the Excise Tax Act, was only enacted in June 1993.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*April 18, 1994*
Date of Decision:	*August 31, 1994*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Arthur B. Trudeau, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Anne Jamieson*
Parties:	*Sharon A. Bennett, for the appellant* *Brian Tittemore, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-272

DELCAN CORPORATION **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
DESMOND HALLISSEY, 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) rejecting a federal sales tax (FST) refund application filed by the appellant. The determination was later confirmed by the Minister, hence this appeal before the Tribunal. In accordance with rule 25 of the *Canadian International Trade Tribunal Rules*,[2] the Tribunal, having given public notice of its intention, disposed of the matter on the basis of written submissions before it on April 18, 1994.

The issue in this appeal is whether the refund application filed by the appellant was correctly rejected. This issue involves the consideration of whether a refund application filed under another section of the Act can be considered an application for an FST inventory rebate under subsection 120(3) of the Act[3] and whether there was any legal basis for rejecting the refund application as filed.

The facts of this case are gathered from the documents on file and an agreed statement of facts filed by the parties on January 7, 1994. The appellant and its subsidiary, Delcan International Corporation, are engaged in the business of providing consulting engineering services in Canada and abroad. In the course of its activities, the appellant's subsidiary agreed to provide its client, Martin International, with certain computer hardware and software for delivery in Hong Kong. Pursuant to the agreement with Martin International, the appellant's subsidiary imported computer hardware into Canada for the sole purpose of testing its performance. Upon importation, the appellant's subsidiary paid FST in the amount of $43,755.03. In accordance with the agreement, the computer hardware was exported to Hong Kong in four shipments between November 12, 1990, and March 18, 1991, as illustrated below.

1. R.S.C. 1985, c. E-15.
2. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.
3. S.C. 1990, c. 45, s. 12.

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Date Shipped	Year of Export	Value of Goods
November 12, 1990	1990	$101,329.11
December 6, 1990	1991	$210,354.36
January 18, 1991	1991	$101,329.11
March 18, 1991	1991	$15,576.52

The parties agreed that, on January 1, 1991, the appellant's subsidiary had, in its inventory, the computer hardware relating to the last three shipments mentioned above. Moreover, there was an understanding between the appellant and its subsidiary that the former would be authorized to apply on behalf of the latter for a refund of the FST paid upon importation. Consequently, the appellant initiated steps with the Department of National Revenue (Revenue Canada) to obtain the refund. Those steps included communications with Revenue Canada, Martin International and the customs broker involved in the transaction. On May 21, 1991, the appellant filed a refund application under section 68.1 of the Act in the amount of $43,755.03 on the ground that the goods, on which FST had been paid, were not for personal use in Canada, but for resale and export. On July 17, 1991, a determination rejected the refund application on the ground that the details of import entries and the application were not filled out.

On December 10, 1991, the appellant filed another refund application for the same amount and based on the same ground. On April 24, 1992, Mr. J. Elkabas, a Revenue Canada official, visited the appellant's premises to verify the application. Upon returning to his office, Mr. Elkabas contacted the appellant to advise it that two separate applications should have been filed, one for goods exported prior to January 1, 1991, and one for goods exported after December 31, 1990. Mr. Elkabas also advised the appellant that the application in respect of the last three shipments should have been amended to comply with procedures that were instituted with the coming into force of the Goods and Services Tax (GST). The appellant was further advised that the deadline for filing an FST inventory rebate application in respect of those shipments had expired on December 31, 1991. On May 13, 1992, a second determination partially approved the application in the amount of $16,570.24. The remaining sum of $27,184.79 was rejected on the ground that goods exported after December 31, 1990, did not qualify for a refund of FST. On July 17, 1992, the appellant served a notice of objection respecting that determination. In its notice, the appellant essentially maintained that it was under the impression that the appropriate means of recovery of the FST paid on the imported computer hardware, which was subsequently exported, was by filing an application for a drawback of duties with Revenue Canada. Furthermore, Revenue Canada did not advise the appellant before April 1992 that this procedure was not satisfactory. The appellant also indicated that only on or about that date was it advised that the deadline for filing an FST inventory rebate application had expired.

On July 12, 1993, the Minister confirmed the determination on two grounds. The first reason invoked by the Minister was the time limit set forth in subsection 120(8) of the Act and the fact that the appellant had not yet filed an application under subsection 120(3) of the Act. The second reason was that the appellant had not met the conditions of subsection 70.1(3) of the Act,[4] a provision with retroactive application relating to goods exported after 1990. The Minister was of the view that the appellant had not met the conditions of that provision, which provides that a refund of tax under section 68.1 of the Act shall not be paid to a person

4. S.C. 1993, c. 27, s. 3(1).

in respect of goods exported after 1990, unless: (1) the person had possession of the goods in Canada at the end of 1990 and was not a registrant under the GST provisions of the Act; or (2) the person imported and had possession of the goods in Canada at the end of 1990 and was not entitled to be paid a rebate in respect of the goods under section 120 of the Act, and the goods suffered damage or deterioration at any time before the goods were released, were of inferior quality to those in respect of which the person paid tax, were defective or were not the goods ordered by the person.

In her written argument to the Tribunal, counsel for the appellant took the position that the application dated December 10, 1991, should be considered an application filed under subsection 120(3) of the Act. Counsel argued that subsection 120(6) makes subsection 72(2) applicable to an application for an FST inventory rebate. As subsection 72(2) provides that an application shall be made in the prescribed form, and the appellant did file its application in the prescribed form, counsel concluded that the appellant had filed an application under subsection 120(3) of the Act.

Counsel for the respondent argued, in this regard, that the appellant's position is, in effect, suggesting that subsections 72(3) and 120(6) of the Act be interpreted to render the application something that it is not, namely, an application under section 120 rather than under section 68.1 of the Act. Counsel contended that the only effect of subsection 120(6) of the Act is to allow the same procedures regarding the determination of refund applications to be used in the determination of FST inventory rebate applications under section 120 of the Act. Counsel added that a specific application form for an FST inventory rebate exists, but that it was not used by the appellant, nor was all of the information requested on this form supplied by the appellant.

Counsel for the respondent also explained that, since the coming into force of subsection 70.1(3) of the Act, a person is not entitled to a refund of tax under section 68.1 of the Act in respect of goods exported from Canada after December 31, 1990, unless that person meets the requirements of paragraphs 70.1(3)(*a*) and (*b*) of the Act. As the appellant's subsidiary was a GST registrant on January 1, 1991, and there is no evidence that the computer hardware that it exported met the other exclusionary conditions of paragraph 70.1(3)(*b*) of the Act, counsel suggested that, after December 31, 1990, the appellant was only able to recover, as a rebate, a portion of the FST content of those goods provided, *inter alia*, the goods met the requirements of section 120 of the Act, i.e. that they be tax-paid goods held in inventory as of that date and that the rebate application be filed before 1992. Since the application was filed with respect to another refund provision of the Act, counsel maintained that the appellant was not entitled to the rebate.

Counsel for the respondent also argued that representations and interpretations given to taxpayers by Revenue Canada officials cannot bind the Crown if they are contrary to the clear and peremptory provisions of the law. Relying on the Tribunal's decision in *Charco Industries v. The Minister of National Revenue*,[5] counsel finally contended that a failure on the part of Revenue Canada officials to provide advice or information cannot entitle a taxpayer to a relief under the Act which has not been sought and which is not otherwise available.

The Tribunal agrees with counsel for the respondent with respect to his first and last arguments, but cannot agree with the position taken with respect to the application of

5. Appeal No. AP-89-033, April 4, 1991.

subsection 70.1(3) of the Act, which was enacted long after the appellant applied for a refund under section 68.1 of the Act and a determination was made in this regard.

Prior to analysing the law applicable to this case, the Tribunal wishes to point out that the awkward situation in which the appellant was placed due to the coming into force of the GST could have been resolved within the administrative review mechanism set forth in the Act and that it is concerned that this was not the case. One fails to understand why no relief was granted to the appellant, which had undertaken some negotiations with Revenue Canada officials during 1991, but was only told in April 1992 that the proper route, i.e. the filing of an FST inventory rebate application to obtain a portion of the FST paid with respect to the computer hardware, was no longer available as the statutory time limit of subsection 120(8) of the Act would apply to such application. At that time, Revenue Canada officials were apparently of the view that section 68.1 of the Act would be amended and that a full refund of the FST for goods exported after the coming into force of the GST would not be available. It is worth noting, in this regard, that Mr. Elkabas, the Revenue Canada official who first examined the appellant's refund application, advised the appellant on April 24, 1992, that it would have to amend its application in order to comply with procedures that were instituted upon implementation of the GST. Mr. Elkabas also told the appellant that the refund application that it had filed prior to 1992, under section 68.1 of the Act, could be amended. In all likelihood, the Revenue Canada official meant that it could have been converted into a rebate application under subsection 120(3) of the Act since he referred to the time limit as set forth in subsection 120(8) of the Act. Mr. Elkabas added that the time limit had expired, which is, in fact, a contradiction because, if the application could have been amended, the date of filing should have been considered to be December 10, 1991, the date of filing of the refund application at issue.

First and foremost, the crux of this case is that the determination rejecting the refund application simply states that "Exports after December 31, 1990.... are not subject to refund of Federal Sales Tax by N15," the expression "N15" referring to the application form submitted by the appellant. There was no other explanation for the rejection of the appellant's application at that time, and the Tribunal can reasonably infer from that statement that the determination relied on some kind of policy or announcement that the regime covering the refund of FST for the exportation of goods would change as a result of the coming into force of the GST. Still, on May 13, 1992, the date of the determination, there was no legal basis to reject the application, as subsection 70.1(3) of the Act, which limits the application of section 68.1 of the Act, was only assented on June 10, 1993. It is also relevant to note that, as a matter of fact, the Minister's decision, in which reference is made to subsection 70.1(3) of the Act, was issued on July 12, 1993, that is, one month after the coming into force of that provision and fourteen months after the determination.

In the Tribunal's view, that subsection 70.1(3) of the Act was deemed to be effective on December 17, 1990, does not change the fact that, at the time of the determination, section 68.1 of the Act still applied; its effect was not otherwise limited by subsection 70.1(3) of the Act. The Tribunal notes, in this regard, that this is not a case where Parliament clarifies retroactively the meaning of a provision, as in the case of *Jostens Canada Ltd. and Jostens of Quebec Ltd. v. The Minister of National Revenue*,[6] where the Tribunal concluded that it had no choice but to consider the retroactive amendment. This is a case of a determination which, at best, is based on an announcement that an amendment will be made with respect to the refund of FST respecting goods exported from Canada after December 31, 1990. In a few words, the Tribunal considers

6. Canadian International Trade Tribunal, Appeal No. AP-92-195, April 28, 1994.

that the appellant should benefit from the refund provision of the Act as it stood when the appellant applied for a refund of FST and a determination was made in this regard. That the regime covering those refunds was about to be modified was, indeed, irrelevant to the determination.

In view of the fact that this is an appeal of a determination made on May 13, 1992, and that the basis on which rests the determination at issue did not exist at that time, the Tribunal allows the appeal.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Desmond Hallissey
Desmond Hallissey
Member