

Ottawa, Friday, July 15, 1994

Appeal No. AP-93-279

IN THE MATTER OF an appeal heard on April 6, 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 April 15, 1993, with respect to a
notice of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

THE SATELLITE STATION

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Michèle Blouin
Michèle Blouin
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-93-279

THE SATELLITE STATION

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant's application for a federal sales tax inventory rebate, dated December 20, 1991, was rejected on the ground that the envelope in which it was mailed was postmarked January 7, 1992. The sole issue in this appeal is whether the appellant's application is statute-barred under subsection 120(8) of the Excise Tax Act, which provides that no rebate shall be paid unless the application is filed with the Minister before 1992.

HELD: *The appeal is allowed. The secondary evidence tendered by counsel for the respondent as proof of the postmarked date, that is, handwritten notes made by the audit officer concerning the rebate application, is inadmissible because there was no evidence that the envelope was lost and that a diligent search had been made for the envelope. For that reason, and considering the testimony under oath of the appellant's witness as to the regular mailing practice in the appellant's office, it is likely that the application was mailed on December 20, 1991, that is, the day on which it was signed. Consequently, the application for the federal sales tax inventory rebate was filed within the statutory time limit.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: April 6, 1994

Date of Decision: July 15, 1994

Tribunal Members: Michèle Blouin, Presiding Member

Arthur B. Trudeau, Member

Sidney A. Fraleigh, Member

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Anne Jamieson

Appearances: C. Christopher DeLeon, for the appellant

Joanne Newton, for the respondent

Appeal No. AP-93-279

THE SATELLITE STATION

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, 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*¹ (the Act) of a determination that rejected an application for a federal sales tax (FST) inventory rebate filed by the appellant. The determination was later confirmed by the Minister of National Revenue (the Minister).

The sole issue in this appeal is whether the appellant's application for an FST inventory rebate is statute-barred under subsection 120(8) of the Act, which provides that no rebate shall be paid unless the application is filed with the Minister before 1992.

The facts, which give rise to this appeal, can be briefly summarized as follows. Although the appellant's application is dated December 20, 1991, it was rejected on the ground that the envelope in which it was mailed was postmarked January 7, 1992. The envelope, however, has been lost.

At the hearing, Mr. C. Christopher DeLeon testified on behalf of the appellant. He mentioned that Ms. Margaret DeLeon prepared the rebate application, which was put in a self-addressed envelope supplied by the Department of National Revenue (Revenue Canada). The address on the envelope was London, Ontario, where he said the application was sent. He was later informed by Revenue Canada that the application was received at its district office in Waterloo, Ontario. Mr. DeLeon testified that he does not know who actually mailed the envelope. He explained that the regular mailing practice in the appellant's office is that, almost every day, letters are put together, stamped by hand with a regular stamp and, finally, mailed. The mailing is done by anyone who is going to the post office on a particular day to deliver or pick up the mail. Although he had no proof that the application was mailed on December 20, 1991, and while admitting that he did not mail it himself, Mr. DeLeon still affirmed that the application was mailed on that day.

The Tribunal also heard the testimony of Mr. Jamie Smith, an audit officer with Revenue Canada. As part of his functions, Mr. Smith was responsible for processing FST inventory rebate applications. Mr. Smith testified that the date of the postmark on the envelope that was attached to the application was January 7, 1992, hence his decision that the application was not eligible. He explained, in this regard, that he had recorded his finding on his audit working

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

papers which were introduced as Exhibit B-2. Mr. Smith also testified that the entire audit package was reviewed by the unit's audit manager and that, if the envelope had been missing, the entire package would have been returned to him with questions. Mr. Smith added that, if the envelope had been addressed to and received at the London district office, it would have been date-stamped by that office and, thereafter, sent by interoffice mail to the Waterloo district office. Given that the date stamped on the application also indicates Kitchener-Waterloo, he testified that he would assume that the application was received directly by the Waterloo district office. Mr. Smith did not remember the address on the envelope and explained, at the hearing, that he recalled the postmark because of a notation on his working papers.

In argument, Mr. DeLeon contended, on behalf of the appellant, that there were no specific instructions regarding the filing of the application that indicated that it had to be received, or that proof had to be given that it was posted, prior to January 1, 1992. He also contended that the fact that the application was sent in a self-addressed envelope to the London district office may have caused the application to go astray and that the appellant should not be penalized. He finally contended that whatever was received on January 7, 1992, at the Waterloo district office was not the appellant's application.

Counsel for the respondent argued that the appellant's rebate application is statute-barred. Counsel pointed out that, in *Lakhani Gift Store v. The Minister of National Revenue*,² the Tribunal held that an application is filed under section 120 of the Act on the day that it is mailed and that the date of the postmark is evidence of the date of the mailing. Counsel mentioned that the appellant was unable to bring any evidence to the contrary. She also argued that the contemporaneous notes made by the audit officer are the next best evidence available of the date on which the application was filed. Counsel added that, since the envelope was lost, the Tribunal must accept these notes as secondary evidence. Counsel finally argued that the Tribunal has no jurisdiction to apply principles of equity, as it only has the power granted to it by its enabling statute and other legislation.

The Tribunal considers, on balance, that the appeal must be allowed. In doing so, obviously, it attaches great credibility to the appellant's witness. The Tribunal finds Mr. DeLeon's testimony, as to the mailing practice in the appellant's office, straightforward and reliable. The Tribunal notes, in this regard, that the appellant's explanations have not changed one iota since objecting to the determination that rejected the rebate application. Moreover, during cross-examination and in response to the Tribunal's questions, Mr. DeLeon's answers were given frankly and without hesitation.

This is not to say that the testimony of Mr. Smith raises any doubt as to his good faith at the hearing or at the time that he performed the audit. However, the Tribunal notes that Revenue Canada's practice with respect to the processing of FST inventory rebate applications required that the envelope containing the application be kept. In this case, it is alleged that the envelope was lost. Counsel for the respondent, therefore, tendered as next best evidence of the alleged postmarked date, the contemporaneous notes made the audit officer. The Tribunal notes, however, that counsel has failed to provide any explanation as to the loss of the envelope, notwithstanding, as mentioned above, that it was normal practice to keep such envelopes. Also absent is any evidence of a diligent search for the envelope.

2. Canadian International Trade Tribunal, Appeal No. AP-92-167, November 15, 1993.

In *The Law of Evidence in Canada*, the authors write that "Whether the inference of loss will be drawn by the court depends upon the sufficiency of the evidence of the search made to find it."³ Furthermore, in *Beukenkamp v. The Minister of Consumer and Corporate Affairs*,⁴ the Federal Court - Trial Division found the production of photocopies of original documents inadmissible because, *inter alia*, there was no evidence of their loss and of a diligent search for the originals.

In this case, because the Tribunal does not have access to the envelope that the respondent's officer was expected to keep, it does not have the opportunity to verify the appellant's allegations, not only that the application was mailed on December 20, 1991, but also that it was sent in a self-addressed envelope to Revenue Canada in London, which fact may also have a bearing on this case. The Tribunal notes that the evidence is that an address label with Revenue Canada's Waterloo address, which was to be applied on the return envelope for the filing of the application, was incorrectly applied on the rebate application form, which may well explain that the appellant used an envelope addressed to London. Those are inferences, but inferences taken from the evidence because one piece of the puzzle is missing, due to the respondent's failure. For these reasons, and considering Mr. DeLeon's testimony, the Tribunal considers that it is likely that the application was mailed on the day that it was signed.

For the foregoing reasons, the appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

3. J. Sopinka, S.N. Lederman, Q.C., & A.W. Bryant (Toronto and Vancouver: Butterworths, 1992) at 933.

4. [1973] F.C. 1401 at 1408.