

Ottawa, Thursday, November 24, 1994

Appeal No. AP-93-303

IN THE MATTER OF an appeal heard on May 17, 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 September 29, 1993, with respect to a
notice of objection served under section 81.17 of the *Excise
Tax Act*.

BETWEEN

RYERSON POLYTECHNICAL INSTITUTE

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 to complete any outstanding steps in processing the appellant's rebate application.

Lise Bergeron

Lise Bergeron
Presiding Member

Charles A. Gracey

Charles A. Gracey
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-303

RYERSON POLYTECHNICAL INSTITUTE

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant is a post-secondary educational institution located in Toronto, Ontario. On September 16, 1992, the Minister of National Revenue received the appellant's application for a federal sales tax new housing rebate filed under section 121 of the Excise Tax Act. The application, which relates to student residences built by the appellant, was for a rebate in the amount of \$1,048,081.82. On the envelope in which the application was mailed is the appellant's postage meter stamp dated September 14, 1992, and a Canada Post Corporation postmark which is not fully legible. Under subsection 121(3) of the Excise Tax Act, rebate applications had, among other requirements, to be filed "before September 15, 1992." The issue in this appeal is whether the appellant's rebate application was filed within the statutory time limit set forth in section 121 of the Excise Tax Act.

HELD: *The Tribunal agrees with counsel for the respondent that the Tribunal's previous statements relating to when an application is filed, including the decisions which he cited, can be summarized as standing for the proposition that, absent any compelling evidence to the contrary to indicate that an application had been mailed on an earlier date, the date of filing should be considered to be the date of mailing of the application, as evidenced by a postmark. In this case, the Tribunal is of the opinion that there is compelling evidence that indicates that the appellant's rebate application was mailed on September 14, 1992. Accordingly, the appeal is allowed, and the Tribunal refers the matter back to the Minister of National Revenue to complete any outstanding steps in processing the appellant's rebate application.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: May 17, 1994
Date of Decision: November 24, 1994*

*Tribunal Members: Lise Bergeron, Presiding Member
Charles A. Gracey, Member
Robert C. Coates, Q.C., Member*

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

*Appearances: Morris Cooper, for the appellant
Brian Tittlemore, for the respondent*

Appeal No. AP-93-303

RYERSON POLYTECHNICAL INSTITUTE

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LISE BERGERON, Presiding Member
CHARLES A. GRACEY, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of a decision of the Minister of National Revenue (the Minister) dated September 29, 1993.

The appellant is a post-secondary educational institution located in Toronto, Ontario. On September 16, 1992, the Minister received the appellant's application for a federal sales tax (FST) new housing rebate filed under section 121 of the Act. The application, which relates to student residences built by the appellant, was for a rebate in the amount of \$1,048,081.82. On the envelope in which the application was mailed is the appellant's postage meter stamp dated September 14, 1992, and a Canada Post Corporation (Canada Post) postmark which is not fully legible. Under subsection 121(3)² of the Act, rebate applications had, among other requirements, to be filed "before September 15, 1992."

By notice of determination dated November 30, 1992, the Minister disallowed the appellant's refund claim. The appellant served a notice of objection on December 14, 1992. By decision dated September 29, 1993, the Minister upheld the determination on the basis that the appellant's application was filed outside the time limit prescribed under the Act.

The issue in this appeal is whether the appellant's rebate application was filed within the statutory time limit set forth in section 121 of the Act.

At the outset of the hearing, the Tribunal asked counsel for the respondent to clarify whether the Minister accepted that, besides the statutory time limit, the appellant's rebate application otherwise satisfied all the other requirements under the Act. Counsel indicated that the Minister was not prepared to accept this because the appellant's application had not been fully processed when the decision was rendered.

Counsel for the appellant submitted that the decision makes clear that the only outstanding matter, subject to the Minister's calculations as to the amount of the rebate being confirmed, is the issue of whether the rebate application was filed within the statutory time limit.

Mrs. Nancy Ozaruk, Vice-President of Bergen Associates Inc. (Bergen), testified on behalf of the appellant. Bergen is a sales tax consulting firm that works with charitable organizations and educational institutions. The appellant has been one of Bergen's clients for approximately

1. R.S.C. 1985, c. E-15.
2. S.C. 1993, c. 27, s. 7.

18 years, and Bergen was its authorized agent in this matter. Mrs. Ozaruk explained that Bergen has two offices, one in Yorkville, in downtown Toronto, Ontario, and one in Concord, north of Toronto. She is responsible for the Concord office.

Mrs. Ozaruk stated that she received the rebate application from her brother, Mr. Douglas Bergen, shortly after it was signed on September 4, 1992. The appellant's application was one of five signed applications that she was holding, pending the outcome of another application relating to a university that had been filed in October 1991.

Mrs. Ozaruk testified that she mailed the applications on September 14, 1992, between 4:00 and 4:30 p.m. at a mailbox that she always uses, located in a plaza near her office. She stated that she had done this because, earlier in the afternoon, her brother, who seemed anxious, had called and asked her to mail the applications that day because he had heard rumours that the Act might be amended. Mrs. Ozaruk stated that she stamped the envelopes using the office postage meter prior to mailing them. Mrs. Ozaruk also indicated that she remembered the approximate time at which she mailed the envelopes containing the applications because she wanted to make sure that they were mailed prior to the last pickup at that mailbox, which was at 5:00 p.m. In addition, she remembered the day as being a Monday because she had been to physiotherapy in the morning, and she booked these appointments on Mondays.

Mrs. Ozaruk stated that her brother called her the next day to confirm that the applications had been mailed on September 14, 1992. At that time, he told her that the amendments about which he had been concerned had, in fact, been introduced and required that rebate applications be filed before September 15, 1992.

During cross-examination, Mrs. Ozaruk stated her belief that, if the applications had been mailed before 5:00 p.m. on September 14, 1992, they would have been postmarked that day. In response to questions from the Tribunal, she further discussed the reasons for the applications not being filed previously. She indicated her understanding that the applications could have been filed until 1995, for the appellant to be entitled to the rebate. Mrs. Ozaruk confirmed that she is the only person who uses the postage meter at her office.

Mr. Bergen, Vice-President of Bergen, also testified on behalf of the appellant. He stated that he has been with Bergen for the past 19 years and that he was the person at Bergen most involved in dealing with the appellant's rebate application and that he had secured the signed application from the appellant on September 4, 1992.

Mr. Bergen indicated that Mrs. Ozaruk held the appellant's rebate application with the others because most of the other applications related to clients of his sister. Further, he stated that these were being held pending the outcome of a previous application that he had filed for a university.

Mr. Bergen testified that he had heard rumours through various contacts in law services and tax law publication businesses that led him to conclude that amendments might be made to the Act. With specific regard to September 14, 1992, he stated that these contacts, as well as sources in the Department of National Revenue (Revenue Canada), indicated that amendments would possibly be introduced that day. In the early afternoon of September 14, 1992, Mr. Bergen reached a point where his concern led him to speak to his sister and instruct her to mail the applications. Mr. Bergen also testified that he spoke with Mr. Stanley Farber of Revenue Canada on September 15, 1992, and that, although he had obtained a copy of the proposed amendments, he did not admit it to Mr. Farber. He said he did this because he was concerned about speaking to Mr. Farber in an open manner with respect to the rebate applications of the appellant and others. Mr. Bergen confirmed that he spoke to his sister on September 15, 1992, and she informed him that she had mailed the applications on the previous day.

During cross-examination, Mr. Bergen stated that he did not discuss the applications of the appellant and others with Mr. Farber on September 15, 1992. Mr. Bergen confirmed that he spoke with Ms. Astrid Smith-Remy, the appeals officer in this case, on June 25, 1993, and in that conversation, he stated that he had found out about the legislative amendments on September 14, 1992. Mr. Bergen also confirmed that he told Ms. Smith-Remy that his sister had mailed the applications "up north" on September 14, 1992.

During the course of questioning, at the request of the Tribunal, counsel for the respondent produced the envelope in which the application was mailed, and it was entered as an exhibit. With respect to the stamp and postmark on the envelope, counsel for the appellant indicated that the parties agreed that the postage meter stamp was dated September 14, 1992, but that they did not agree that the postmark was dated September 15, 1992.

Mr. Farber, who has been Manager, Real Property Unit, Policy and Legislation at Revenue Canada since April 1992, testified on behalf of the respondent. Mr. Farber explained that his unit is responsible for providing guidance to the various Goods and Services Tax (GST) regional and district offices with respect to interpretations of the legislation concerning the GST and related FST rebates. Mr. Farber stated that he became involved in the appellant's file during an inquiry by a district office with respect to the October 1991 application. The district office had raised concerns about the application because there would have been a rebate payable in respect of an amount for which a refund had already been paid, and no GST would be payable. Mr. Farber was asked by the district office to speak to Mr. Bergen about the application and remained in contact with him from time to time about the status of the application.

With respect to Mr. Farber's telephone conversation with Mr. Bergen on September 15, 1992, Mr. Farber testified that he told Mr. Bergen that the October 1991 application would be accepted, subject to verification of certain calculations, and that applications filed after September 14, 1992, would be rejected. He also testified that, during the conversation, Mr. Bergen indicated that he did not have the legislative amendments and that he faxed Mr. Bergen a copy of the relevant portions of the Ways and Means motion³ after the call was completed.

During cross-examination, Mr. Farber confirmed that, in the course of his dealings with Mr. Bergen prior to September 14, 1992, he had asked him whether he was aware of other such applications being brought forward.

Ms. Smith-Remy, Senior Appeals Officer, Toronto Regional Office, Revenue Canada, also testified on behalf of the respondent. Ms. Smith-Remy has held her position since November 1991 and was the appeals officer assigned to the appellant's case. She confirmed that she met with Mr. Bergen and the individual who signed the application on behalf of the appellant on June 22, 1993. She stated that this meeting dealt primarily with ways of determining the proper postmark on the envelope containing the application. As a result of this meeting, Ms. Smith-Remy spoke with Mr. Bergen by telephone on June 25, 1993. It was during this conversation that Mr. Bergen informed Ms. Smith-Remy that the application had been mailed by his sister "somewhere up north" on September 14, 1992.

During cross-examination, Ms. Smith-Remy stated that, in her view, Mr. Bergen's answers to her questions about when and where the application was mailed were vague. More specifically, she wanted to know at what mailbox the application was mailed so that this could be checked, because the Canada Post postmark on the envelope appeared to her to be dated September 15, 1992. Ms. Smith-Remy stated that she was not prepared to accept the postage

3. Tabled on Monday, September 14, 1992, Sessional Paper No. 343-1/310F.

meter stamp as a postmark because the meter could be manipulated. Ms. Smith-Remy agreed that the appellant's application was stamped "Received" by Revenue Canada's "Toronto Core Excise" office, which is located in the same building as her office, on September 16, 1992, and agreed that, while there is no way of knowing at what time on September 16, 1992, the application was actually received by that office, it may have been received in the morning of that day. In response to questions from the Tribunal, Ms. Smith-Remy stated that, in her view, the second number on the Canada Post postmark could not be a 3, 4 or 6 and was therefore a 5.

In argument, counsel for the appellant submitted that the Tribunal has previously found that the date of mailing of an application is the date of filing of that application for purposes of the Act. The evidence, he stated, indicates that the application was received by Revenue Canada's "Toronto Core Excise" office on September 16, 1992, which he suggested was consistent with the appellant's evidence that the application was mailed on September 14, 1992. He noted that Mr. Bergen provided an explanation as to why the appellant's application had not been filed previously and submitted that Mr. Bergen's concerns with respect to the respondent had proved to be well-founded, as reflected in Mr. Farber's admission that he attempted to find out from Mr. Bergen if other applications had been filed. Counsel suggested that it made sense to await the outcome of the October 1991 application, to see which methodology was used in calculating the rebate, because of the amount of effort involved in using either methodology.

Counsel for the appellant submitted that Mrs. Ozaruk's clear and unequivocal testimony with regard to the mailing of the application on September 14, 1992, had gone unchallenged by the respondent. He pointed out that, although the Minister was aware of this evidence in June 1993, the Minister had not pursued it, as no one from Revenue Canada had ever spoken to Mrs. Ozaruk. In addition, he suggested that the evidence showed that the Minister had not inquired as to whether it was physically possible to receive something in downtown Toronto on September 16, 1992, that had been mailed from anywhere in Metropolitan Toronto on September 15, 1992.

Counsel for the respondent submitted that the Tribunal has previously indicated that the term "file" should be interpreted in a consistent manner and that, in this regard, a postmark is evidence of the date on which an application is mailed and thus filed.⁴ He submitted that, as the envelope in this case was postmarked by Canada Post on September 15, 1992, this date should be considered as the day on which the application was filed, absent any compelling evidence to the contrary to indicate that the application had, in fact, been mailed on an earlier date.

With respect to Mrs. Ozaruk's evidence, counsel for the respondent suggested that there was an inconsistency in her evidence, in that she agreed that, if the application had been mailed before 5:00 p.m., it would have been stamped September 14, 1992. Counsel suggested inconsistencies in Mr. Bergen's testimony, including when he actually determined that there had been an amendment to the legislation and when the application was actually mailed. Counsel submitted that, based on the inconsistencies in Mr. Bergen's testimony, there is no compelling evidence before the Tribunal that would detract from the date of the Canada Post postmark on the envelope, i.e. September 15, 1992, and that this date should be taken as the date on which the application was actually mailed and thus filed. Finally, counsel submitted that, if the Tribunal found for the appellant, the matter should be referred back to the Minister in order for the application to be processed in the regular manner.

4. *Moto Optical Ltd. v. The Minister of National Revenue*, Appeal No. AP-92-283, February 23, 1994; and *Lakhani Gift Store v. The Minister of National Revenue*, Appeal No. AP-92-167, November 15, 1993.

In reply, counsel for the appellant submitted that the evidence showed that Revenue Canada officials took the view that the inconclusive Canada Post postmark was determinative of the issue and ignored the legible postage meter stamp, which is dated September 14, 1992. Counsel noted that the term "postmark" is not defined in any statute and submitted that the issue in this matter cannot be subject to the vagaries of Canada Post, as to whether it postmarks something the next day if it is picked up after a certain hour.

It is clear to the Tribunal that, under section 121 of the Act, the application in this matter had to be filed before September 15, 1992, for the appellant to be entitled to the rebate. The parties agreed that the issue before the Tribunal is whether the application was mailed on September 14, 1992.

The Tribunal agrees with counsel for the respondent that its previous statements relating to when an application is filed, including the decisions that he cited,⁵ can be summarized as standing for the proposition that, absent any compelling evidence to the contrary to indicate that an application had been mailed on an earlier date, the date of filing should be considered the date of mailing of the application, as evidenced by a postmark. In this case, the Tribunal is of the opinion that there is compelling evidence that indicates that the appellant's application was mailed on September 14, 1992. The Tribunal is persuaded by the testimony of Mrs. Ozaruk that she mailed the application on September 14, 1992. The Tribunal notes that her evidence was unchallenged at the hearing and, as the evidence shows, it was never directly investigated by the respondent's officials during the period of time in which this matter was being investigated, even though they were aware of this evidence from June 1993. This conclusion is also consistent with Bergen's postage meter stamp. Further, in the Tribunal's opinion, even if Mrs. Ozaruk did mail the application after the final Canada Post pickup that day, be it before or after 5:00 p.m., the evidence still establishes that she mailed it on September 14, 1992.

Accordingly, the appeal is allowed. The Tribunal is of the view that, as counsel for the respondent advised the Tribunal that the appellant's application had not been completely processed by the respondent, this matter is referred back to the Minister to complete any outstanding steps in processing the appellant's rebate application.

Lise Bergeron
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Presiding Member

Charles A. Gracey
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Member

5. *Ibid.*, see also *Vern Glass Company (1976) Limited v. The Minister of National Revenue*, Appeal No. AP-92-221, December 13, 1993.