



Ottawa, Wednesday, November 2, 1994

Appeal No. AP-93-304

IN THE MATTER OF an appeal heard on May 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 September 3, 1993, with respect to a
notice of objection served under section 81.17 of the *Excise
Tax Act*.

BETWEEN

CABLECOR DATA LINES LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part. The Tribunal refers the matter back to the respondent for calculation and refund, if appropriate, of the penalties and interest paid in error by the appellant, in a manner consistent with this decision.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Anthony T. Eyton

Anthony T. Eyton

Member

Raynald Guay

Raynald Guay

Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-304

CABLECOR DATA LINES LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

On October 5, 1992, the appellant filed an application for refund of federal sales tax alleged to have been paid in error in the amount of \$39,031.41. The refund application covered the period between November 1, 1989, and December 31, 1990. In a notice of determination, the Minister of National Revenue allowed a refund of \$6,270.88. In response to the appellant's notice of objection, the amount of the refund was adjusted to \$14,759.16. The balance was disallowed on the basis that payments of federal sales tax for the period between November 1, 1989, and December 31, 1990, had been made prior to October 5, 1990, and, therefore, the appellant's application for refund had been filed outside the two-year limitation period prescribed by section 68 of the Excise Tax Act. In its refund application, the appellant included a claim for overpayments of federal sales tax on which it had been required to pay penalties and interest because it made these payments late. In a notice of decision, the Minister of National Revenue refunded the amounts of overpayment, but it is unclear whether the penalties and interest calculated against these amounts were also refunded.

The two issues in this appeal are: (1) whether the appellant is entitled to a refund of federal sales tax paid in error prior to October 5, 1990; and (2) whether the appellant is entitled to a refund of penalties and interest paid against overpayments of federal sales tax, which overpayments were subsequently refunded by the Minister of National Revenue.

HELD: *The appeal is allowed in part. On the first issue, the Tribunal concludes that the appellant is not entitled to a refund of federal sales tax for the payments made prior to October 5, 1990. A person is only entitled to claim a refund of federal sales tax paid in error within two years of payment of those amounts under section 68 of the Excise Tax Act. On the second issue, the Tribunal concludes that the appellant is entitled to a refund of penalties and interest paid after October 5, 1990, against overpayments of federal sales tax, which overpayments were refunded pursuant to the notice of decision.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: May 18, 1994
Date of Decision: November 2, 1994*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Anthony T. Eyton, Member
Raynald Guay, Member*

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

*Parties: Douglas E. Evans, for the appellant
Joanne W. Newton, for the respondent*

Appeal No. AP-93-304

CABLECOR DATA LINES LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ANTHONY T. EYTON, Member
RAYNALD GUAY, 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) that rejected in part an application for refund of federal sales tax (FST) claimed to have been paid in error. There are two issues in this appeal. The first issue is whether the appellant is entitled to a refund of FST paid in error for the period between November 1, 1989, and May 4, 1990, which was denied by the Minister on the basis that the refund application was filed outside the two-year limitation period, as set out in section 68 of the Act. The second issue is whether the appellant is entitled to a refund of penalties and interest paid against overpayments of FST for the period between May 5 and December 31, 1990, which overpayments were refunded to the appellant pursuant to the Minister's notice of decision dated September 3, 1993.

This appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*,² on the basis of the Tribunal's record, including an agreed statement of facts and briefs submitted by the parties.

In the agreed statement of facts, it is indicated that the appellant was, at all material times, a manufacturer of computer and telecommunications cable assemblies and interconnect equipment. The appellant filed an application on October 5, 1992, for a refund of FST alleged to have been paid in error in the amount of \$39,031.41 for the period between November 1, 1989, and December 31, 1990. In a notice of determination, the Minister allowed the application in part in the amount of \$6,270.88, but disallowed the balance on the basis that it related to goods that had been sold prior to October 5, 1990, and, therefore, the application was filed outside the statutory time limit in respect of those goods. The appellant served a notice of objection in response to the Minister's notice of determination on February 18, 1993. The Minister allowed the objection in part and adjusted the amount of the refund to \$14,759.16. The Minister made the adjustment on the basis that the two-year limitation period runs from the date of payment of the taxes as opposed to the date of sale of the goods. The refund covered by the Minister's notice of decision was for the period between May 5 and December 31, 1990. The balance was disallowed on the basis that the payments of FST for the period between November 1, 1989, and

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.

May 4, 1990, were made prior to October 5, 1990, and, therefore, the application in respect of these moneys had not been filed within the prescribed limitation period.

The appellant stated in its notice of objection that it had paid FST on the sale price of jobbed goods, even though the Act only requires FST to be paid on the cost price of such goods. The appellant paid the higher amount because of the inability of its computer systems to isolate jobbed goods from those manufactured and sold by it. Although recognizing that overpayments were being made, due to business pressures throughout 1990 and 1991, the appellant was unable, until early 1992, to manually review and identify the overpayments on transactions between November 1, 1989, and December 31, 1990.

While the appellant continued to make regular FST payments until August 1990, which included amounts of overpayment, it withheld further payments pending determination of the overpayments of FST. However, the appellant paid the outstanding amounts between January 4 and February 8, 1991. The appellant alleged that it paid the amounts of FST owing on the understanding that it would be able to claim all overpayments of FST between November 1, 1989, and December 31, 1990, provided its application was made within two years of making its first payment towards the outstanding amount. Because these payments were late, the appellant was assessed penalties and interest against the full amounts of the payments, which included overpayments of FST. By early 1992, the appellant's business was sufficiently stabilized in order for it to conduct a manual review of its transactions to identify the items on which FST was overpaid for the period between November 1, 1989, and December 31, 1990. This review took approximately nine months, and the appellant's refund application was filed with the Department of National Revenue (Revenue Canada) on October 5, 1992.

For purposes of this appeal, the relevant provision of the Act states as follows:

68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.

The appellant argued that it relied on the respondent's assurance that it would be able to claim all overpayments of FST between November 1, 1989, and December 31, 1990, provided it applied for a refund within two years of January 4, 1991. Therefore, by filing its application on October 5, 1992, the appellant considered it to have been filed within the prescribed time limit. In the alternative, the appellant argued that, even if it did not file its refund application within the prescribed limitation period, extenuating circumstances, such as the major restructuring of the business as a result of the effects of the recession and the time-consuming process of manually reviewing individual transactions in order to calculate the overpayments of FST, caused the delay in filing the application. Therefore, on the basis of fairness, it ought to be able to recover the amounts of FST that it paid in error.

In the respondent's brief, it is argued that the Tribunal has no jurisdiction to waive or extend the limitation period set out in section 68 of the Act. The Tribunal is bound by the law and cannot provide equitable relief even if application of the law results in financial hardship to the appellant. Furthermore, the Crown is not bound by representations made to taxpayers by Revenue Canada officials if such representations are contrary to the express provisions of the law. The respondent did not address the second issue pertaining to the appellant's entitlement to a refund of penalties and interest.

The Tribunal is of the opinion that the appellant's application for refund of overpayments of FST made before October 5, 1990, is statute-barred. Section 68 of the Act provides that an application for refund of moneys paid in error must be made within two years after payment of the moneys. Since the appellant's refund application was filed on October 5, 1992, the appellant is not entitled to recover overpayments of FST for the period between November 1, 1989, and May 4, 1990, as these payments were made before October 5, 1990. Furthermore, the Tribunal is a creature of statute; its powers or jurisdiction is circumscribed by legislation. Although the Tribunal sympathizes with the appellant, it does not have the jurisdiction to deviate from the law and take principles of equity into account in rendering its decision.³

Turning to the second issue, the Tribunal is of the opinion that the appellant is entitled to a refund of penalties and interest paid after October 5, 1990, which were calculated against overpayments of FST made between May 5 and December 31, 1990. Under section 68 of the Act, a person is entitled to a refund of penalties and interest paid in error, provided an application for refund is made within two years of payment of those amounts. The Tribunal is of the view that the penalties and interest assessed against overpayments of FST made between May 5 and December 31, 1990, were paid in error, as the overpayments themselves were considered to have been paid in error and were refunded to the appellant pursuant to the Minister's notice of decision dated September 3, 1993. As the appellant filed its application for refund on October 5, 1992, any penalties or interest paid in error after October 5, 1990, should be refunded. The Tribunal was not able to determine, on the basis of the documentation before it, whether the respondent had in fact refunded these penalties and interest to the appellant.

Accordingly, the Tribunal allows the appeal in part and returns the matter to the respondent to review the appellant's application and to refund any penalties and interest paid by the appellant after October 5, 1990, against overpayments of FST, which overpayments were refunded by the Minister pursuant to the notice of decision dated September 3, 1993, if such penalties and interest have not already been refunded to the appellant.

Robert C. Coates, Q.C.
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Presiding Member

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Member

Raynald Guay
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Member

3. *Joseph Granger v. Canada Employment and Immigration Commission*, [1986] 3 F.C. 70, affirmed [1989] 1 S.C.R. 141.