

Ottawa, Wednesday, January 11, 1995

Appeal No. AP-93-391

IN THE MATTER OF an appeal heard on August 25, 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 23, 1993, with respect to a
notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

RESTORITE BEDDING CANADA LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton

Anthony T. Eyton
Member

Desmond Hallissey

Desmond Hallissey
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-391

RESTORITE BEDDING CANADA LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether the appellant is entitled, under section 81.1 of the Excise Tax Act (the Act), to a credit of the federal sales tax that it paid on alleged bad debts written off in its books of account.

***HELD:** The appeal is dismissed. Under subsection 81.1(8) of the Act, the Minister of National Revenue may allow a credit where an amount would be payable to the person being assessed pursuant to section 68.21 of the Act. In the Tribunal's view, the appellant did not establish its entitlement to a credit under subsection 81.1(8) of the Act. In particular, the appellant did not prove that, in accordance with generally accepted accounting practices, the debts in issue had become, in whole or in part, bad debts and that it had, accordingly, written them off in its books of account.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: August 25, 1994
Date of Decision: January 11, 1995*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Anthony T. Eyton, Member
Desmond Hallissey, Member*

Counsel for the Tribunal: Heather A. Grant

Clerk of the Tribunal: Anne Jamieson

*Appearances: Peter Herman, for the appellant
Lyndsay Jeanes, for the respondent*

Appeal No. AP-93-391

RESTORITE BEDDING CANADA LTD.

Appellant

and

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TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ANTHONY T. EYTON, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of an assessment of the Minister of National Revenue, by which the appellant was assessed \$16,307.00 in unpaid taxes, interest and penalty. The assessment was made pursuant to an audit covering the period from September 30, 1986, to August 31, 1988. According to the respondent, the audit showed that the appellant did not remit any federal sales tax (FST) or tax returns for the assessment period, even though it charged FST during that time in the amount of \$9,826.42. In its notice of objection, the appellant argued that the assessment should have taken into account bad debts written off by the appellant during the fiscal period ending February 28, 1988. In the notice of decision, the respondent disallowed the objection and confirmed the assessment on the grounds that there was no statutory basis upon which to vary or vacate the assessment based on available information.

The appellant did not provide the Tribunal with a concise statement of the grounds for appeal or the statutory provisions on which it relied prior to the hearing. Therefore, counsel for the respondent assumed that the appellant was relying primarily on section 68.21 of the Act as the basis for its appeal and made her submissions accordingly. At the hearing, the appellant's representative still did not clarify the statutory basis for the appeal.

In the Tribunal's view, the appellant seeks relief under section 81.1 of the Act, specifically a credit for the FST that it paid on alleged bad debts written off in its books of account. In order to be entitled to a credit under subsections 81.1(7) to (10) of the Act, at a minimum, for the purposes of this appeal, the appellant must be entitled to a refund under section 68.21 of the Act if it is taken to have applied for a refund on the day on which the notice of assessment was sent to it and if the reference in the section to "two years" were read as a reference to "four years."

It should be noted, however, that whether or not relief is granted under section 81.1 of the Act remains at the discretion of the respondent, and the Tribunal cannot force the exercise of that discretion.

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

Subsection 68.21(2) of the Act provides, in part, that:

Where ... tax ... has been paid by a licensed manufacturer ... and the manufacturer has established, in accordance with generally accepted accounting practices, that any debt owing to him in respect of the sale has become in whole or in part a bad debt and has accordingly written off the debt as a bad debt in his books of account, an amount equal to the proportion of the amount of that tax that the amount of the debt written off is of the price for which the goods were sold shall, subject to this Part, be paid to that manufacturer if he applies therefor in the two years after the end of his fiscal period during which the debt was so written off.

The appellant was a manufacturer of mattresses and box springs until it ceased operations in 1988. Mr. Peter Herman, a chartered accountant, was the appellant's representative in this appeal and testified on its behalf. Mr. Herman testified that he was hired by the appellant after the FST assessment was made and that the appellant had become inoperative largely due to uncollected debts. He explained that he had originally attempted to claim a "deduction" of the FST portion of debts that were written off to reduce the appellant's FST liability. However, the application was rejected on the basis that it was filed outside the statutorily prescribed time. Mr. Herman stated that he subsequently attempted to reduce the appellant's FST liability by objecting to the assessment on the basis that the respondent should have taken into account the FST portion of debts that were written off.

Mr. Herman also testified that the respondent misplaced all the supporting documentation that had been submitted with the appellant's notice of objection and that he was unable to provide the respondent with substitute documentation before the assessment was confirmed. Further to questions by the Tribunal, Mr. Herman referred to the appellant's 1988 financial statement and two handwritten statements in support of the fact that an amount in excess of \$60,000 was, in fact, written off as bad debts by the appellant. The Tribunal noted that the three amounts in the statements were inconsistent with one another.

During cross-examination, Mr. Herman was unable to provide the Tribunal with any evidence to support the appellant's allegations that documentation sent to the Department of National Revenue (Revenue Canada) was, in fact, misplaced. Mr. Herman was also unable to provide the Tribunal with a copy of the appellant's original application for a "deduction" of the FST portion of bad debts which were written off or with the appellant's books of account.

Mr. Parker Woods, an auditor with Revenue Canada who conducted the audit of the appellant, appeared as a witness for the respondent. Mr. Woods testified that at no time during the audit, or subsequent to it, did an officer or owner of the appellant suggest that there were any uncollectable accounts. Mr. Woods explained to the Tribunal the process by which an auditor verifies whether a business has uncollectable accounts written off in its books for which a "deduction" for bad debts from the FST liability would be allowed. Mr. Woods testified that, if bad debts were written off in the books of account, the balance indicated in the accounts receivable column would be nil. Mr. Woods then referred the Tribunal to a letter written by Mr. Herman on May 4, 1990, in which Mr. Herman stated that, at the end of February 1987, "[a]ccounts receivable of \$41,746 was almost entirely uncollectible." Mr. Woods explained that, if this amount did in fact constitute bad debts written off, the accounts receivable column would indicate nil, and not \$41,746. He further testified that, when a person wants to recover FST paid on bad debts, that person must complete and

submit a specific form within two years of the fiscal period in which the amounts were written off as bad debts. In the appellant's case, Mr. Woods claimed that no such form was ever submitted.

In argument, the appellant's representative contended that the respondent wrongly characterized the relief that the appellant is seeking and, consequently, the basis of this appeal. The representative stated that, while the relief sought may technically be characterized as a "set-off," in fact, the appellant is asking the Tribunal to waive the statutorily imposed time limit for claiming a "set-off." The Tribunal explained to the representative that it has no jurisdiction to waive a statutorily prescribed time. However, when the Tribunal subsequently asked the representative to consider the criteria for relief under subsection 68.21(2) of the Act and to give his opinion as to whether the appellant meets the requirements, he declared that the appellant did fulfill all the requirements. He argued that the bad debts written off were *bona fide* to the best of his knowledge and that they were written off at the time that the financial statement was prepared on November 22, 1990. As such, the representative considered that the appellant fell within the two-year time limit set out in the provision.

Counsel for the respondent argued that the appellant is not contesting its basic liability for the assessed tax; rather it is asking the Tribunal for equitable relief in the form of a waiver of the statutorily prescribed time, which the Tribunal has no jurisdiction to grant. In counsel's view, the appellant's purpose in so doing is to have the FST portion of the appellant's alleged uncollectable accounts and bad debts set off against the amount of the tax assessment. Counsel contended that at no time during the assessment did the appellant raise the issue of bad debts with the auditor. Moreover, in counsel's view, the appellant did not present any evidence to support its claim that there were, in fact, bad debts because it did not submit the requisite form to the respondent. Counsel reviewed the requirements for establishing entitlement to a "set-off" under subsection 68.21(2) of the Act for the benefit of the Tribunal and argued that the appellant had not established that it met all of these requirements. In particular, counsel emphasized the fact that the appellant did not apply for a "set-off" within the requisite two years from the end of the fiscal year in which any alleged write-offs took place. Counsel also argued that the appellant did not present any evidence to support its allegations that the documentation which it submitted to Revenue Canada was misplaced by Revenue Canada officials.

After having considered the evidence and the relevant provisions of the Act, the Tribunal finds that the appellant has not established its entitlement to a credit for the FST portion of bad debts. In order to establish its entitlement to a credit, the appellant must show that every statutory condition necessary has been met. Furthermore, the onus is on the appellant to prove that the respondent's assessment is incorrect; otherwise, the appeal must fail. One of the key criteria for a credit of FST under subsection 81.1(8) of the Act is entitlement to a refund under subsection 68.21(2) of the Act. Under this latter provision, a manufacturer must establish, in accordance with generally accepted accounting practices, that the debts in issue have become, in whole or in part, bad debts and that they were accordingly written off as bad debts in its books of account. In this case, the appellant did not provide the Tribunal with satisfactory evidence to support a finding in its favour on this point. The lists of receivables allegedly written off and the financial statement submitted by the appellant in support of its claim are insufficient and unreliable for the purposes of establishing that the amounts in issue were, in fact, bad debts in accordance with generally accepted accounting practices, which were subsequently written off in the books of account. Moreover, the testimony of the respondent's witness supports the view that these amounts were not, in fact, bad debts within the meaning of subsection 68.21(2) of the Act. For the foregoing reasons, the Tribunal finds that the appellant is

not entitled to a refund under subsection 68.21(2) of the Act and, therefore, does not meet the criteria for a credit under subsection 81.1(8) of the Act.

Accordingly, the appeal is dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Anthony T. Eyton
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Member

Desmond Hallissey
Desmond Hallissey
Member