

Ottawa, Friday, July 21, 1995

Appeal No. AP-94-147

IN THE MATTER OF an appeal heard on March 21, 1995, 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 21, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

**PROVINCIAL TREASURER
ALBERTA DEPARTMENT OF HEALTH**

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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-147

**PROVINCIAL TREASURER
ALBERTA DEPARTMENT OF HEALTH**

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue dated February 23, 1993, that rejected an application for refund of federal sales tax in the amount of \$51,113.04. The issue in this appeal is whether the appellant is entitled to a refund of federal sales tax on the purchase of tax-paid goods used in the construction of an addition to a nursing home owned by Northcott Lodge Nursing Home Ltd. More particularly, the Tribunal must determine whether the appellant purchased or imported the tax-paid goods for purposes of section 68.19 of the Excise Tax Act.

HELD: *The appeal is dismissed. Subsection 68.19(1) of the Excise Tax Act clearly provides that “Her Majesty in right of a province” must have “purchased or imported the goods” to be entitled to a refund of tax. In this appeal, the evidence shows that the appellant did not purchase the goods used in the construction of the addition to the nursing home. Northcott Lodge Nursing Home Ltd. purchased and paid for the goods. The fact that the appellant funded 70 percent of the construction project is irrelevant. It is true that taxing statutes must not be interpreted too strictly, that they should be read in light of their true object and that any doubt that the Tribunal might have as to whether a refund should be granted must be resolved in favour of the taxpayer. However, in this appeal, the Tribunal finds that the appellant is clearly not entitled to the refund, as the conditions of section 68.19 of the Excise Tax Act have not been met.*

*Place of Hearing: Winnipeg, Manitoba
Date of Hearing: March 21, 1995
Date of Decision: July 21, 1995*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Arthur B. Trudeau, Member
Lyle M. Russell, Member*

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Anne Jamieson

*Appearances: Brian L. Anderson, for the appellant
Anne M. Turley, for the respondent*

Appeal No. AP-94-147

**PROVINCIAL TREASURER
ALBERTA DEPARTMENT OF HEALTH**

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ARTHUR B. TRUDEAU, Member
LYLE M. RUSSELL, 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 dated February 23, 1993, that rejected an application for refund of federal sales tax (FST) in the amount of \$51,113.04. The appellant served a notice of objection dated April 5, 1993, that was disallowed by the respondent in a decision dated April 21, 1994.

On June 25, 1990, Northcott Lodge Nursing Home Ltd. (Northcott) entered into a contract with Sommer Bros. Contractors Ltd. (Sommer) for the construction of an addition to a nursing home operated by Northcott in Ponoka, Alberta, at the request of the provincial government. Northcott paid the contractor and was reimbursed 70 percent of the cost of the project by the province of Alberta. The appellant was not a party to the contract. The application for a refund of FST was rejected on the basis that the appellant did not purchase or import the goods used in the construction of the addition to the nursing home.

The issue in this appeal is whether the appellant is entitled to a refund of FST on the purchase of tax-paid goods used in the construction of an addition to a nursing home owned by Northcott. More particularly, the Tribunal must determine whether the appellant purchased or imported the tax-paid goods for purposes of section 68.19 of the Act, which provides, in part, as follows:

68.19 (1) Where tax under Part III, IV or VI has been paid in respect of any goods and Her Majesty in right of a province has purchased or imported the goods for any purpose other than

(c) use by Her Majesty in that right, or by any agents or servants of Her Majesty in that right, in connection with the manufacture or production of goods or use for other commercial or mercantile purposes,

an amount equal to the amount of that tax shall, subject to this Part, be paid either to Her Majesty in that right or to the importer, transferee, manufacturer, producer, wholesaler, jobber or other dealer, as the case may require, if Her Majesty or the dealer applies therefor within two years after Her Majesty purchased or imported the goods.

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

At the hearing, the appellant's representative accepted the facts as set out in paragraphs 3 to 11 of the respondent's brief. He did not call any witnesses. The representative attempted to refer to information contained in certain letters that had been filed with the Tribunal. Counsel for the respondent objected to the introduction of this information into evidence on the basis that it could not be subjected to cross-examination. Although the Tribunal normally accepts hearsay evidence, it agreed with counsel's objection. The Tribunal was of the view that there was absolutely no basis upon which the information contained in the letters could be tested, as there were no witnesses present at the hearing.

The appellant's representative referred to paragraphs 7 and 35 of Excise Memorandum ET 404² (Memorandum ET 404) and argued that, although the appellant did not directly purchase the goods used in the construction of the addition to the nursing home, it can still be considered the purchaser of these goods for purposes of section 68.19 of the Act. According to the representative, the appellant, which requested that the addition be built and which paid for 70 percent of the cost of the project, must be considered the beneficial owner of the nursing home. Northcott simply acted as an agent for the province in providing nursing home services to the residents. He argued that, if Crown funds are used for the benefit of the public, taxation should not occur. As such, the appellant should be entitled to the refund although it did not purchase the goods directly. The representative referred to a decision of the Federal Court of Canada in *The Board of Trustees of Calgary School District No. 19 v. Her Majesty the Queen*³ and argued that taxing provisions should be read in light of their true object. He argued that, in certain instances, as in this appeal, a refund provision must be intended to grant relief against indirect taxation. Finally, the representative argued that the goods used in the construction of the addition to the nursing home were not purchased for "commercial or mercantile purposes."

Counsel for the respondent argued that, in order to be entitled to a refund of FST under section 68.19 of the Act, the province must have "purchased or imported" the tax-paid goods. In this appeal, Northcott, the owner of the nursing home, paid for the goods used in the construction of the addition to the nursing home. The appellant was not a party to the contract between Northcott and Sommer for the construction of the addition to the nursing home. The appellant did not pay for the full cost of the goods, nor was it under any obligation to do so. According to counsel, the fact that the appellant funded 70 percent of the construction project does not make it the purchaser of the goods. In the event that the Tribunal finds that the appellant did purchase the goods, counsel argued that the appellant is still not entitled to a refund of FST under section 68.19 of the Act because the goods were purchased for "commercial or mercantile purposes."

Subsection 68.19(1) of the Act clearly provides that "Her Majesty in right of a province" must have "purchased or imported the goods" to be entitled to a refund of tax. In this appeal, the evidence shows that the appellant did not purchase the goods used in the construction of the addition to the nursing home. Northcott purchased and paid for the goods. The fact that the appellant funded 70 percent of the construction project is irrelevant. Furthermore, in the Tribunal's view, reference to paragraphs 7 and 35 of Memorandum ET 404 is also irrelevant, as these paragraphs do not deal with section 68.19 of the Act. It is true that taxing statutes must not be interpreted too strictly, that they should be read in light of their true object and that any doubt that the Tribunal might have as to whether a refund should be granted must be

2. Provincial Governments, Department of National Revenue, Customs and Excise, March 15, 1989.

3. [1991] 1 C.T.C. 217, Federal Court of Canada – Trial Division, Court File No. T-2364-87, October 30, 1990.

resolved in favour of the taxpayer.⁴ However, in this appeal, the Tribunal finds that the appellant is clearly not entitled to the refund, as the conditions of section 68.19 of the Act have not been met.

Accordingly, the appeal is dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau

Member

Lyle M. Russell

Lyle M. Russell

Member

4. See, for example, *Stuart Investments Limited v. Her Majesty the Queen*, [1984] 1 S.C.R. 536.