CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, December 3, 1996

Appeal No. AP-94-119

IN THE MATTER OF an appeal heard on September 11, 1996, 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 March 31, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

INLAND RE-REFINING COMPANY LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-94-119

INLAND RE-REFINING COMPANY LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* of a determination and an assessment of the Minister of National Revenue that rejected, in part, the appellant's application for a refund of federal sales tax (FST) paid on materials and equipment purchased to construct a facility for the collection and recycling of used and contaminated oils, water, filters, glycol and other petroleum-based products. The appellant purchased these items from its suppliers, inclusive of FST. Most of these items were purchased after the appellant became a licensed manufacturer.

HELD: The appeal is dismissed. Under the *Excise Tax Act*, with certain exceptions, only a person who has, in error, paid money which has been taken into account as taxes may claim an FST refund. The appellant is not entitled to a refund with respect to the items purchased after it became a licensed manufacturer, as the FST component of the price that it paid to its suppliers was not taken into account as taxes. The appellant's suppliers, not the appellant, were required to remit these amounts to the Department of National Revenue, and such moneys, when remitted, would be taken into account as taxes. The Tribunal is of the view that the items purchased prior to the appellant becoming a licensed manufacturer were not consumed or expended directly in the process of manufacture or production of goods and are, therefore, not exempt from FST.

Places of Hearing:	Hull, Quebec, and Dartmouth, Nova Scotia
Date of Hearing:	September 11, 1996
Date of Decision:	December 3, 1996
Tribunal Members:	Lyle M. Russell, Presiding Member Arthur B. Trudeau, Member Charles A. Gracey, Member
Counsel for the Tribunal:	John L. Syme
Clerks of the Tribunal:	Anne Jamieson and Margaret Fisher
Appearances:	Leonard A. Reilly, for the appellant Lyndsay K. Jeanes, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-119

INLAND RE-REFINING COMPANY LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of a determination and an assessment, both of which were made in connection with the appellant's federal sales tax (FST) refund application dated December 19, 1991.

The appellant is in the business of collecting and recycling used and contaminated oils, water, filters, glycol and other petroleum-based products. The appellant began constructing a facility to process these materials prior to September 1, 1990. Construction was completed at some point after that date. The appellant became a licensed manufacturer under the Act on September 1, 1990. In order to construct the facility, the appellant purchased various equipment and materials from suppliers. The price paid by the appellant to its suppliers included an amount in respect of the purchase price of the goods and an amount in respect of FST.

The appellant applied for an FST refund in respect of tax paid on the materials and equipment used to construct its facility. The respondent granted the appellant a partial refund. The respondent disallowed that part of the refund relating to items purchased after the appellant became a licensed manufacturer and items which were determined to be "real property." The appellant served a notice of objection to the determination; however, the determination was confirmed. The appellant subsequently received a notice of assessment of overpayment in the amount of $5,199.26 on its original FST refund.

The issue in this appeal is whether the appellant is entitled to an FST refund in respect of tax paid on those items used in the construction of its facility.

Counsel for the respondent raised a preliminary issue regarding the Tribunal's jurisdiction to hear the appeal insofar as it related to the respondent's notice of assessment. At the outset of the hearing, the Tribunal invited the parties to make submissions on this issue. Counsel argued that, as the appellant had never served a notice of objection to the assessment, it could not appeal the assessment under section 81.19 of the Act.[2] With respect to the jurisdictional issue, the appellant's representative submitted that the appellant

1. R.S.C. 1985, c. E-15.
2. Section 81.19 of the Act states that "[a]ny person who has served a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, may, within ninety days after the day on which the notice of decision on the objection is sent to him, appeal the assessment or determination to the Tribunal."

had always maintained that it was entitled to the entire amount claimed in its FST refund application. He argued that, as the appellant had objected to the determination and the assessment was merely an amendment of that determination, it was open to the appellant to appeal both the determination and the assessment.

The Tribunal reserved its decision regarding jurisdiction and heard the appeal on its merits. Having now had an opportunity to consider the issue, the Tribunal is of the view that the appellant did not have the right to maintain an appeal in respect of the assessment. Section 81.19 of the Act provides a right of appeal to persons who have been assessed; however, a necessary precondition to the exercise of that right is the service of a notice of objection under section 81.15 of the Act. The fact that an assessment relates to the same subject matter as a previous determination does not alter this requirement. The Tribunal notes, however, that the issues in dispute in that part of the appeal relating to the assessment are the same as those raised in the appellant's notice of objection.

The appellant's representative testified that, as the appellant's facility is not enclosed within a building or other structure, it is exposed to the elements. The facility was, therefore, constructed in such a way as to minimize the risk that materials being processed would spill or overrun as a result of rainfall. The facility includes holding tanks and a drainage system, which are secured to a concrete base or foundation. The base has slightly raised edges which, in the event of a spill, are intended to prevent the escape of any materials being processed.

In argument, the appellant's representative expressed frustration at the difficulty in obtaining the information necessary to determine whether or not the appellant had a valid refund claim. He argued that the appellant is entitled to a refund under section 1 of Part XIII of Schedule III to the Act, as it is a manufacturer of fuels, lubricants, oil and associated materials. He also argued that the appellant's operation is similar to certain operations in the mining industry, where tailings which are produced as part of the production process are recovered. He submitted that the materials used in constructing the facilities necessary for such mining operations are exempt from FST under section 1 and that, to ensure consistency in the application of the legislation, the appellant should also be exempt. Finally, the representative argued that, pursuant to section 68 of the Act, the appellant is entitled to recover the money that it paid as taxes, as those moneys were paid in error.

Counsel for the respondent divided her argument into two parts. She first addressed the appellant's entitlement to a refund of the FST paid on items purchased by it after it became a licensed manufacturer. On this point, she argued that it is clear from the scheme of the Act that it is only the person who actually remits FST to the Department of National Revenue (Revenue Canada), except in the case of a "small manufacturer or producer" under section 68.28 of the Act, who is entitled to apply for a refund. With respect to those materials purchased by the appellant when it was considered to be a "small manufacturer," i.e. before it became a licensed manufacturer, counsel led the Tribunal through paragraphs 1(*a*), 1(*b*) and 1(*b*.1) of Part XIII of Schedule III to the Act upon which the appellant sought to rely. She submitted that none of them applied to the appellant's circumstances. In particular, counsel noted that each of the three paragraphs applies to certain kinds of "machinery and apparatus." Counsel submitted, on that basis, that the concrete structures that form part of the appellant's facility, which she argued were "real property," do not fall within any of the said paragraphs.

Section 68 of the Act provides as follows:

> 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.

In order to obtain a refund under section 68 of the Act, a person must have "paid ... moneys in error" and those moneys must have "been taken into account as taxes." The appellant purchased certain materials from its suppliers. Part of the purchase price paid by the appellant was an amount in respect of FST. However, under the Act, it was the appellant's suppliers, not the appellant, that were required to remit these amounts to Revenue Canada. It was those moneys that, once remitted, would have been taken into account as taxes. Had the suppliers failed to remit moneys paid to them in respect of FST, Revenue Canada's only recourse would have been to pursue the suppliers. Revenue Canada would have had no basis for pursuing the appellant.[3]

In previous cases, where the Tribunal had to consider a person's right to obtain a refund under section 68 of the Act, it consistently maintained that persons, such as the appellant, who purchase goods from a supplier and pay FST to the supplier in respect of those goods, are not entitled to a refund under section 68. These decisions follow the principles enunciated by the Supreme Court of Canada in *Her Majesty the Queen* v. *M. Geller Incorporated*[4] and by the Federal Court of Appeal in *Price (Nfld.) Pulp and Paper Limited* v. *The Queen*.[5] Accordingly, the Tribunal is of the view that the appellant is not entitled to an FST refund in respect of the materials that it purchased after it became a licensed manufacturer.

As noted, the appellant also sought a refund in respect of a relatively small quantity of items which it purchased prior to becoming a licensed manufacturer. In monetary terms, two thirds of this amount relates to concrete and boiler building trusses. The respondent rejected the appellant's application for these items on the basis that they are "real property." The balance of the items are a variety of miscellaneous parts and equipment. They were disallowed on the basis that they were not "for use ... directly."

The appellant's representative argued that the concrete and boiler building trusses that it purchased qualified for an exemption under section 2 of Part XIII of Schedule III to the Act as "[m]aterials ... consumed or expended by manufacturers or producers directly in ... the process of manufacture or production of goods." In support of this contention, he relied on the Tribunal's decision in *BHP-Utah Mines Ltd.* v. *The Minister of National Revenue*.[6] In that case, the Tribunal found that materials used in the construction of a barrier built to prevent water from entering a mine site qualified for an exemption. The primary issue was whether or not the materials in question had been used "directly" in the process of manufacture or production of goods. In finding that there was a direct connection between the barrier and production, in addition to relying on the physical proximity of the barrier to the mine site, the Tribunal relied on the fact that the

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3. *Alpha Fuels Limited* v. *The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-264, April 6, 1992.
4. [1963] S.C.R. 629.
5. [1974] 2 F.C. 436.
6. Appeal No. AP-91-047, March 19, 1993.

construction of the wall was a necessary preparatory measure for the removal of ore and the fact that the wall would continue to be necessary for as long as the mine was in operation.

In this case, the Tribunal is not satisfied that the concrete and boiler building trusses were consumed or expended directly in the various items produced by the appellant. The concrete structures are the foundation upon which the appellant's facility is built. As noted, the structures have slightly raised edges which are designed to prevent the escape of any materials being processed. The Tribunal accepts that these structures do serve a preventative function and that any material which may spill onto the structures would be channelled into a drainage system and ultimately find its way back into the production process. However, the Tribunal is not satisfied that this is the structures' primary function. In the Tribunal's view, the structures' primary function is to serve as a foundation or base for the facility and, as such, they cannot be fairly characterized as materials consumed or expended directly in the process of manufacture or production of goods. The Tribunal is similarly not satisfied that the trusses used in constructing the facility were consumed or expended directly in the process of manufacture or production of goods.

The appellant's representative did not introduce any evidence or make argument regarding the miscellaneous items that the appellant purchased prior to obtaining a licence. As noted, there is a broad range of items, all of which the respondent determined were not "for use ... directly." It would appear from the record[7] that most of these expenditures were either for services, such as drilling monitor holes and repairing equipment, or for the purchase of items, such as methane, acetylene, electrodes and lumber, which would have been used in the construction of the facility. Again, the Tribunal is not satisfied that there is a sufficient nexus between the use to which these items were put and the production of goods for these items to qualify as materials consumed directly in the process of manufacturing goods.

Accordingly, the appeal is dismissed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

7. Appellant's brief, Exhibit 8.