

Ottawa, Thursday, August 3, 1995

**Appeal No. AP-94-154**

IN THE MATTER OF an appeal heard on December 13, 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 June 22, 1994, with respect to a notice of  
objection served under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**EMPIRE IRON WORKS LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Anthony T. Eyton  
Anthony T. Eyton  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

Lise Bergeron  
Lise Bergeron  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-94-154**

**EMPIRE IRON WORKS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The appellant is a manufacturer of structural steel and miscellaneous metal products used in buildings. The appellant was licensed for federal sales tax purposes and is now registered under the Goods and Services Tax. The issue in this appeal is whether the appellant is entitled to relief from the penalties assessed on late remittances of federal sales tax.*

***HELD:** The appeal is dismissed. With respect to whether the Tribunal has the authority to waive penalties assessed under the Excise Tax Act, the Tribunal agrees that it has no jurisdiction to vary penalties and interest, except to the extent that an assessment, on which penalties and interest have been assessed, is itself varied. Although the Tribunal feels some sympathy for the appellant, it has no authority to question the assessment of penalties in this case.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: December 13, 1994  
Date of Decision: August 3, 1995*

*Tribunal Members: Anthony T. Eyton, Presiding Member  
Raynald Guay, Member  
Lise Bergeron, Member*

*Counsel for the Tribunal: Hugh J. Cheetham*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Campbell J. McIntyre, for the appellant  
Josephine A.L. Palumbo, for the respondent*

**Appeal No. AP-94-154**

**EMPIRE IRON WORKS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member  
RAYNALD GUAY, Member  
LISE BERGERON, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of a decision of the Minister of National Revenue dated June 22, 1994.

The appellant is a manufacturer of structural steel and miscellaneous metal products used in buildings. The appellant was licensed for federal sales tax (FST) purposes and is now registered under the Goods and Services Tax (GST).

In August 1992, the appellant waived the time limit within which the respondent could complete an assessment under the Act for the period from July 1, 1988, to December 31, 1990. By notice of assessment dated April 16, 1993, the appellant was initially assessed for payment of taxes on various building projects, for late remittances in the period referenced above, and for penalties and interest. Subsequently, the assessment amounts were paid by means of credits relating to the amounts assessed and the late remittances. In addition, the appellant was allowed a refund for part of the penalties and interest assessed. As a result of the credits and the refund, the amount of penalties assessed was reduced to \$34,792.61, and the amount of interest owing was reduced to \$62,303.01. By notice of objection dated March 17, 1994, the appellant requested a review and reversal of \$27,539.80 in respect of the penalties assessed on the late remittances. By decision dated June 22, 1994, the respondent rejected the appellant's objection and confirmed the penalties assessed on the late remittances.

The issue in this appeal is whether the appellant is entitled to relief from the penalties assessed on late remittances of FST.

The appellant was represented by Mr. Campbell J. McIntyre, Assistant Secretary Treasurer of Empire Iron Works Ltd. The appellant's representative explained that the appellant felt that the respondent gave relief in respect of penalties to people who have voluntarily paid all their taxes. He was of the view that

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

the so-called “fairness package<sup>2</sup>” introduced in 1993 was reflective of the respondent’s general policy in this regard. The representative testified that the appellant had difficulty remitting the taxes in issue in a timely manner because it had reduced staff levels during the recession and then, for a period of time during which business increased, found it difficult to keep its bookkeeping up to date.

During cross-examination, the appellant’s representative agreed that the appellant could have taken steps to ensure that its bookkeeping was kept up to date. He also agreed that the conditions which caused the failure to remit taxes were not associated with illness, disaster or misinformation from the Department of National Revenue. Finally, he agreed that the payment of the penalties at issue had not caused the appellant to declare bankruptcy or to cease operations.

In argument, the appellant’s representative acknowledged that the appellant was not putting forward a technical argument, but rather speaking to what it saw as the unfairness of the assessment of penalties on the late remittances. He referenced section 281.1 of the Act, which provides for the waiver of penalties where a person who voluntarily remits taxes is prevented from doing so in a timely manner due to extraordinary circumstances. Although this provision was enacted after the audit period at issue, the representative suggested that it should be applied in this case. Further, he submitted that circumstances which were extraordinary to the appellant, namely, the reduced staff levels because of the recession, did in fact exist. In addition, the representative noted that one of the provisions of the Act provides for the reversal of penalties if security is in place and that the respondent held security for any outstanding arrears at all relevant times.

The appellant’s representative also submitted that the appellant was not trying to avoid paying any amounts due to the respondent, as reflected by the waiver that it signed, allowing the audit to be completed for the full audit period.

Counsel for the respondent first examined the statutory provisions applicable to this case. She submitted that subsection 79(1) of the Act, under which the penalties were assessed, is mandatory in its language and that the exceptions in subsections 79(1.1) to (3) are not applicable in this case.

With respect to the “fairness package,” counsel for the respondent submitted that section 281.1 of the Act only gives the respondent the power to waive or cancel penalties in respect of the GST and not in respect of other taxes, such as the FST involved in this case.

In the alternative, counsel for the respondent argued that section 281.1 of the Act could only apply to penalties arising on or after the day on which it came into force, that is, December 17, 1990, and, therefore, could not be applicable to this appeal. In support of this position, counsel relied on the decision of the Federal Court of Canada in *Gary and Joan Montgomery v. The Minister of National Revenue*.<sup>3</sup> In addition, counsel submitted that the appellant had not established the conditions for the application of section 281.1 of the Act,

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2. Referring to a policy announced by the respondent by means of a press release issued August 17, 1993. The policy was described as providing for the waiver of penalties where a person who voluntarily remits taxes is prevented from doing so in a timely manner due to extraordinary circumstances. The policy was subsequently reflected in amendments to the *Income Tax Act* (subsection 220(3.1)) and the *Excise Tax Act* (section 281.1).

3. [1994] 2 C.T.C. 57, Federal Court of Canada - Trial Division, Court File No. T-2818-93, May 2, 1994.

as it had not established any extraordinary circumstances beyond its control which specifically caused its failure to remit the FST owing in a timely manner. Finally, counsel submitted that, if the “fairness package” were to be applied in this case, it is only within the respondent’s discretionary authority to waive or cancel penalties and that the proper form for reviewing the exercise of that discretion is not the Tribunal, but rather the Federal Court of Canada - Trial Division by means of a judicial review application. In support of this position, counsel relied on the decision of the Federal Court of Canada in *Estate of the Late Henry H. Floyd v. The Minister of National Revenue*.<sup>4</sup>

The Tribunal agrees with counsel for the respondent’s argument as to why the “fairness package” is not applicable to the facts of this case. Section 281.1 of the Act relates to GST payments, not FST payments, and, therefore, is not applicable.

With respect to whether the Tribunal has the authority to waive penalties assessed under the Act, the Tribunal agrees that it has no jurisdiction to vary penalties and interest, except to the extent that an assessment, on which penalties and interest have been assessed, is itself varied.<sup>5</sup> Although the Tribunal feels some sympathy for the appellant, it has no authority to question the assessment of penalties in this case.

Accordingly, the appeal is dismissed.

Anthony T. Eyton  
Anthony T. Eyton  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

Lise Bergeron  
Lise Bergeron  
Member

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4. [1993] 2 C.T.C. 322, Federal Court of Canada - Trial Division, Court File No. T-3086-92, September 30, 1993.

5. See, for instance, *Les Presses Lithographiques Inc. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. 2997, June 26, 1989; and *Les Ateliers Yves Bérubé Inc v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-93-239, March 11, 1994.