CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, April 2, 1996

Appeal No. AP-94-315

IN THE MATTER OF an appeal heard on August 28, 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 December 14, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

GILLIN ROAD GROUP HOME
C/O BRANTFORD AND DISTRICT ASSOCIATION FOR COMMUNITY LIVING **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Lyle M. Russell
Lyle M. Russell
Member

Anita Szlazak
Anita Szlazak
Member

Michel P. Granger
Michel P. Granger
Secretary

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-94-315

GILLIN ROAD GROUP HOME
C/O BRANTFORD AND DISTRICT ASSOCIATION FOR COMMUNITY LIVING **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 March 25, 1994. The issue in this appeal is whether the respondent properly determined the amount of federal sales tax refundable to the appellant in respect of a newly constructed house purchased by it for use as a group home. The appeal proceeded by way of written submissions under rule 25 of the Canadian International Trade Tribunal Rules.

***HELD**: The appeal is dismissed. The applicable regulations provide the respondent with the discretion to determine the appropriate percentage to be applied against the sale price of goods for purposes of estimating the amount of federal sales tax to be refunded. The Tribunal is not persuaded that, in this case, the respondent acted beyond his authority or erred in exercising his discretion under those regulations. The Tribunal is also of the view that the appellant did not meet certain statutory conditions necessary to qualify for a federal sales tax new housing rebate.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*August 28, 1995*
Date of Decision:	*April 2, 1996*
Tribunal Members:	*Anthony T. Eyton, Presiding Member* *Lyle M. Russell, Member* *Anita Szlazak, Member*
Counsel for the Tribunal:	*John L. Syme*
Clerk of the Tribunal:	*Anne Jamieson*
Parties:	*Ralph Underwood, for the appellant* *Anne M. Turley, for the respondent*

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-315

GILLIN ROAD GROUP HOME
C/O BRANTFORD AND DISTRICT ASSOCIATION FOR COMMUNITY LIVING **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
LYLE M. RUSSELL, Member
ANITA SZLAZAK, 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 March 25, 1994. The issue in this appeal is whether the respondent properly determined the amount of federal sales tax (FST) refundable to the appellant in respect of a newly constructed house purchased by it for use as a group home. The appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*.[2] The parties submitted an agreed statement of facts, from which the facts herein are taken.

On August 24, 1990, the appellant purchased a home (the house) for use as a "group home" for persons who are mentally and/or physically handicapped and living in the Brantford, Ontario, area. The cost of the house included FST. The appellant is a "certified institution" as defined in section 68.24 of the Act. It holds a valid certificate as a non-profit organization or charity issued by the Minister of National Health and Welfare on March 10, 1992, but effective as of April 1, 1991. On May 22, 1992, the appellant filed an application under subsection 68.24(7) of the Act for a refund of the FST paid on the materials used to construct the house and on the furnishings and equipment purchased for the house.

In that application, the appellant elected to use the so-called "simplified method" to calculate the amount of FST paid in respect of the house. The appellant calculated the FST content as 3.27 percent of the cost of the house, exclusive of land cost, and claimed a refund of $6,681.37. By notice of determination dated June 19, 1992, the respondent allowed, in part, the appellant's refund application. The appellant does not take issue with the respondent's decision to reduce the appellant's refund at that time.

On February 22, 1994, the appellant filed a second application for an FST refund in respect of the house. With this second application, the appellant sought to obtain a further refund of FST by using the refund calculation contemplated by section 121 of the Act. By notice of determination dated March 25, 1994, the respondent rejected the appellant's second refund application.

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.

333 Laurier Avenue West | Ottawa, Ontario K1A 0G7 | (613) 990-2452 Fax (613) 990-2439
333, avenue Laurier ouest | Ottawa (Ontario) K1A 0G7 | (613) 990-2452 Téléc. (613) 990-2439

Under section 68.24 of the Act, a certified institution may recover the FST paid in respect of goods purchased for the sole use of the institution and not for resale, provided the institution applies for a refund within two years of having purchased the goods. A refund under this section may be calculated in one of two ways. The applicant chooses which method to use. The first method is referred to administratively as the "identification method." It is based on the strict wording of the Act and requires that the exact amount of FST paid by an applicant be determined using invoices or suppliers' records.

Where the exact amount of FST paid by an applicant cannot be determined, section 76 of the Act authorizes the respondent, with the consent of the applicant, to determine the amount of FST to be refunded in the manner prescribed by the *Formula Refunds Regulations*[3] (the Regulations). The manner prescribed by the Regulations is known administratively as the "simplified method." When this method is used to calculate the amount of FST included in contracts to construct new buildings, the "contract price" (i.e. the total progress payments under the contract exclusive of any payment for land and certain other costs, such as legal and architects' fees) is reduced by a percentage prescribed by the respondent to extract non-taxable price factors and, thus, to arrive at the "taxable value of materials" used in the construction of the building. This value is then multiplied by a prescribed sales tax factor to arrive at an amount which approximates the amount of FST actually paid on the construction materials. The sales tax factor prescribed by the respondent for use by certified institutions was 3.27 percent.

The appellant's representative first submitted that the respondent had erred in determining the percentage (i.e. 3.27 percent) to be applied against the value of materials used in constructing the house. The representative argued that the methodology employed by the respondent in arriving at that percentage was flawed, in that the respondent:

- failed to take into account that certified institutions are located in a variety of types of buildings; and
- did not consider a sufficiently broad sample of certified institution and building types.

The second argument of the appellant's representative is set out in paragraph 22 of the appellant's brief and reads as follows:

> *If [the appellant] had not purchased the house in question, and the builder was not able to sell it until 1991 (when GST would have been applicable), the builder would have been eligible to file a refund claim under the FST New Housing Rebate Program.*[4] *This Program was established to avoid double taxation on newly constructed houses built in 1990, but not sold until 1991. Without this Rebate Program, such houses would have been subject to both FST and GST. If such a house was sold in the first three months of 1991, a refund of two-thirds of the estimated FST was allowed; if such a house was sold in April, May or June of 1991, a refund of one-third of the estimated FST was allowed; and no refund was allowed for any such house sold after June 30/91.*

The appellant's representative submitted that the object of subsection 68.24(7) of the Act is to provide certified institutions with a full refund of all FST paid by them. Using the percentage prescribed

3. C.R.C. 1978, c. 591.
4. Section 121 of the Act.

under the new housing rebate program would effectively double the estimated amount of FST paid in respect of the house. The representative submitted that "[s]omething is terribly wrong when one refund method produces a result that is more than double the result of another refund method for the very same item."

Counsel for the respondent submitted that the respondent is authorized to determine the sales tax factor to be used for the purposes of the simplified method. In counsel's submission, having elected to use the simplified method for determining its FST refund, the appellant cannot now claim an additional refund.

With respect to the appellant's argument based on the new housing rebate program, counsel for the respondent submitted that, under that program, a refund of FST could be paid on a new house only where, *inter alia*:

- tax under Part IX (Goods and Services Tax) is payable in respect of the sale;[5] and
- the person first takes possession of the house after 1990 and before 1995.[6]

Counsel submitted that the appellant did not meet either of those two conditions.

The Tribunal is of the view that this appeal must fail. The onus is on the appellant to establish that it is entitled to the refund claimed and that the respondent's determination is incorrect.[7] The Tribunal cannot accept that a person, having applied for and received an FST refund in respect of a house, may subsequently seek an additional FST refund in respect of the same house.

With respect to the first line of argument of the appellant's representative, subsection 3(2) of the Regulations provides the respondent with the discretion to determine the appropriate percentage to be applied against the sale price of goods for purposes of estimating the amount of FST paid and, thus, determining the amount to be refunded. The Tribunal is not persuaded that the respondent erred in determining that a factor of 3.27 percent was appropriate in respect of certified institutions. *Dufferin Association for Community Living and Crane Drive Residence c/o Elmira & District Association for the Retarded v. The Minister of National Revenue*[8] were appeals under section 81.19 of the Act. As in this appeal, in *Dufferin*, the appellants argued that the sales tax percentage determined by the respondent under subsection 3(2) of the Regulations underestimated the amount of FST paid in respect of houses purchased by the appellants for use as group homes. The Tribunal concluded that, while the national survey conducted by the respondent in arriving at the sales tax factor was limited, it had no reason to believe that the respondent had acted outside his authority in determining that factor. On that basis, the appeals were dismissed. In this appeal, the Tribunal is similarly of the view that there is insufficient evidence before it upon which to conclude that the respondent acted beyond his authority or erred in determining 3.27 percent to be an appropriate factor in respect of certified institutions.

---

5. See paragraph 121(2)(*b*) of the Act.
6. See paragraph 121(2)(*c*) of the Act.
7. *Unicare Medical Products Inc. v. The Deputy Minister of National Revenue for Customs and Excise* (1990), 3 T.T.R. 152 at 155, Canadian International Trade Tribunal, Appeal Nos. 2437, 2438, 2485, 2591 and 2592, June 21, 1990.
8. Canadian International Trade Tribunal, Appeal Nos. AP-91-011, AP-91-012, AP-91-013 and AP-91-021, February 18, 1994.

With respect to the second argument of the appellant's representative, the Tribunal agrees with counsel for the respondent that the appellant simply did not meet certain statutory conditions necessary to qualify for an FST new housing rebate.

For the foregoing reasons, the appeal is dismissed.

Anthony T. Eyton
Anthony T. Eyton
Presiding Member

Lyle M. Russell
Lyle M. Russell
Member

Anita Szlazak
Anita Szlazak
Member