

Ottawa, Friday, March 29, 1996

Appeal No. AP-94-233

IN THE MATTER OF an appeal heard on January 8, 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 October 5, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**ADULT DEVELOPMENTAL PROGRAM  
C/O NEWMARKET AND DISTRICT ASSOCIATION  
FOR COMMUNITY LIVING**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Desmond Hallissey  
Desmond Hallissey  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

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

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-94-233**

**ADULT DEVELOPMENTAL PROGRAM  
C/O NEWMARKET 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 August 6, 1993, that rejected the appellant's application under subsection 68.24(7) of the Excise Tax Act for a refund of federal sales tax of \$3,667.65 paid in respect of the construction of the foundation and exterior building structure of a unit in an industrial/commercial mall. The issue in this appeal is whether the Minister of National Revenue correctly determined that the appellant was not entitled to a refund of federal sales tax.*

***HELD:** The appeal is dismissed. The Tribunal is not persuaded by either the agreed statement of facts or the submissions in the appellant's brief that the requirements for a refund under subsection 68.24(7) of the Excise Tax Act have been met. The Tribunal was not provided with any evidence to show that, when the lessor purchased goods for the construction of the exterior structure of the unit at issue, it did so on behalf of the appellant. Moreover, the evidence before the Tribunal indicates that the lessor, and not the appellant, was constructing the exterior structure of the unit at issue at the time of the purchase of the goods in issue.*

*Place of Hearing: Ottawa, Ontario*

*Date of Hearing: January 8, 1996*

*Date of Decision: March 29, 1996*

*Tribunal Members: Desmond Hallissey, Presiding Member  
Raynald Guay, Member  
Robert C. Coates, Q.C., Member*

*Counsel for the Tribunal: Shelley Rowe*

*Clerk of the Tribunal: Anne Jamieson*

*Parties: Ralph Underwood, for the appellant  
Susan G. Tataryn, for the respondent*

**ADULT DEVELOPMENTAL PROGRAM  
C/O NEWMARKET AND DISTRICT ASSOCIATION  
FOR COMMUNITY LIVING**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member  
RAYNALD GUAY, Member  
ROBERT C. COATES, Q.C., Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of a determination of the Minister of National Revenue (the Minister) dated August 6, 1993, that rejected the appellant's application for a refund of federal sales tax (FST) of \$3,667.65 paid in respect of the construction of the foundation and exterior building structure of a unit in an industrial/commercial mall (Unit No. 103, 1110 Stellar Drive, Newmarket, Ontario) leased to it by Polar Select Holdings (Polar). The refund was claimed under subsection 68.24(7) of the Act which provides, in part, as follows:

*(7) Where tax under Part VI has been paid in respect of any goods and a non-profit organization or charity to which a certificate was subsequently issued ... or a person acting on behalf of such an organization or charity, has purchased the goods within two years before the specified day for the sole use of the organization or charity and not for resale and the organization or charity was constructing a building for its own use at the time of the purchase, an amount equal to the amount of that tax shall, subject to this Part, be paid to that organization or charity if it applies therefor within two years after the day on which the certificate was issued to the organization or charity.*

The issue in this appeal is whether the Minister correctly determined that the appellant was not entitled to a refund of FST.

At the joint request of the appellant and respondent, the appeal proceeded by way of written submissions under rule 25 of the *Canadian International Trade Tribunal Rules*<sup>2</sup> on the basis of the Tribunal's record, including the parties' briefs and the agreed statement of facts.

The agreed statement of facts provides that the appellant is a registered charitable organization for purposes of the Act and was issued a "certified institution" certificate effective April 1, 1990. The statement further provides that, in October 1989, the appellant entered into an agreement with Polar to lease the unit at issue for a period of five years. The unit at issue was erected by Polar between October 1987 and October 1988, and the construction costs of the foundation and building shell attributable to the portion leased by the appellant are \$135,338. Upon signing the lease, the appellant made leasehold improvements in the amount of \$150,000 to the unit to meet its vocational needs, and the FST paid in respect of these improvements was refunded to the appellant. On November 8, 1991, the appellant submitted a refund claim for FST paid in respect of the erection of the outside structure of the unit.

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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.

The appellant's representative submitted in the appellant's brief that it was not clear what the reasons were for rejecting the appellant's application for a refund and that the only reason given in the Minister's decision was that, "[b]ased on the facts related to your case, there is no authority in the Act to effect a sales tax refund for the tax content of the construction costs incurred by the builder of the premises." He surmised that there may have been four possible reasons why the Minister would believe that the Act did not authorize a refund: (1) the Minister may have believed that another tenant previously occupied Unit No. 103; (2) the application for refund was filed outside the prescribed time limit; (3) the appellant was not "constructing a building" in the period prior to obtaining its certificate; and (4) the unit as leased goods did not constitute a "purchase."

With respect to the issue of previous occupancy of the unit, counsel for the respondent submitted that the unit, with the exterior structure finished and the interior unfinished, sat vacant and unoccupied from October 1988 until the appellant signed the lease with Polar and took occupancy of the unit in the fall of 1989.

The appellant's representative submitted that, under subsection 68.24(7) of the Act, an application for a refund of FST must be filed within two years after the day on which the certificate was issued to the organization or charity. It was argued that, since the appellant's certificate was issued on July 5, 1990, it had until July 4, 1992, to file its application. Given this time frame, it was submitted that the appellant's application, which was filed on November 8, 1991, was filed within the prescribed time limit.

It was submitted by the appellant's representative that the phrase "constructing a building" should be interpreted to include the furnishing, equipping and renovating of existing buildings. Moreover, he argued that since the refund claims for all other pre-certification construction of the interior of the unit had been paid, its refund claim in respect of the construction of the exterior structure should also have been paid.

Finally, the appellant's representative submitted that, pursuant to subsection 52(3) of the Act, as well as certain administrative policies<sup>3</sup> of the Department of National Revenue (Revenue Canada), leases are considered to be purchases for the purpose of the imposition of FST and that the appellant, as a certified institution, should have been refunded FST paid in respect of the lease.

Counsel for the respondent submitted that the appellant's refund claim was not rejected for any of the first three reasons identified by the appellant's representative. However, with respect to the fourth reason suggested by the representative, counsel argued that it had not been demonstrated that Polar was a manufacturer or producer as required by subsection 52(3) of the Act. As a result, the appellant could not rely on subsection 52(3) of the Act to deem the lease signed by it to be a sale. Moreover, counsel submitted that, even if the lease were deemed to be a sale, the sale of real property would not be subject to FST under the Act.

In response, the appellant's representative submitted that FST was paid on all building materials included in the construction costs paid by Polar and is now being passed on to the appellant as part of its monthly rent. The representative submitted that, if the Tribunal finds that the appellant did not purchase the goods for use in the construction of the exterior structure of the unit at issue, Polar purchased those goods on the appellant's behalf. Reference was made to Revenue Canada Ruling 5315/41-1<sup>4</sup> which, it was argued, permits refunds of FST if there is in existence, prior to the completion of construction of the building, an agreement of some kind identifying the certified institution as being the party on whose behalf the building is being constructed. The representative submitted that, since the interior construction of the unit was not

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3. Department of National Revenue, Customs and Excise, Excise Memorandum ET 309, Rental of Machinery and Equipment, June 21, 1989; Excise Memorandum ET 315, Diversions, March 9, 1990; and Excise Memorandum ET 404, Provincial Governments, March 15, 1989.

4. Refund: Certified Institution, Construction of a Building to be Leased, October 23, 1986.

completed when the appellant signed the lease with Polar, the construction of the exterior structure of the unit at issue falls within the scope of Revenue Canada Ruling 5315/41-1.

Finally, the appellant's representative referred to the general principles for interpreting tax legislation set out by the Supreme Court of Canada in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*.<sup>5</sup> Applying these general principles, he argued that the basic intent and purpose of section 68.24 of the Act is to provide relief from FST to charitable organizations operating programs that qualify as certified institutions and that section 68.24 of the Act should be given a liberal interpretation in favour of the appellant.

In order to be entitled to a refund under subsection 68.24(7) of the Act, the appellant must demonstrate that the requirements of that provision have been satisfied. The Tribunal observes that there are several requirements under subsection 68.24(7) of the Act, including: (1) the non-profit organization or charity must be certified; (2) the non-profit organization or charity, or a person acting on behalf of such an organization or charity, must have purchased goods, for which FST has been paid, and for the sole use of that organization or charity; and (3) the organization or charity must have been constructing a building for its own use at the time of the purchase. There is no issue between the parties concerning the first requirement. However, the Tribunal is not persuaded by either the agreed statement of facts or the submissions in the appellant's brief that the second and third requirements have been met. The Tribunal was not provided with any evidence to show that, when Polar purchased goods for the construction of the exterior structure of the unit at issue, it did so on behalf of the appellant. Moreover, the agreed statement of facts and the submissions before the Tribunal indicate that Polar, and not the appellant, was constructing the exterior structure of the unit at issue at the time of the purchase of the goods in issue. In the Tribunal's view, the fact that Polar completed only the construction of the exterior structure of the unit at issue does not change the fact that, at the time of the purchase, Polar was constructing a building.

In light of the foregoing, the appeal is dismissed.

Desmond Hallissey

Desmond Hallissey  
Presiding Member

Raynald Guay

Raynald Guay  
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member

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5. [1994] 3 S.C.R. 3.