CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, March 6, 1996

Appeal No. AP-95-050

IN THE MATTER OF an appeal heard on November 23, 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 March 10, 1995, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BDR SPORTSNUTRITION LABORATORIES LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Desmond Hallissey
Desmond Hallissey
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-95-050

BDR SPORTSNUTRITION LABORATORIES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is a distributor of vitamins and food supplements. In the course of 1991, it prepared an application for a federal sales tax inventory rebate in respect of goods held in inventory as of January 1, 1991. The issue in this appeal is whether the appellant filed its application for the rebate within the time limit prescribed by subsection 120(8) of the Excise Tax Act.

***HELD**: The appeal is allowed. The credibility of the evidence adduced by the appellant before the Tribunal is central to the determination of this case. Having carefully reviewed the evidence as a whole, the Tribunal is of the view that the application for the federal sales tax inventory rebate was filed by the appellant before 1992, i.e. within the statutorily prescribed time limit.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*November 23, 1995*
Date of Decision:	*March 6, 1996*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Desmond Hallissey, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Robert Desjardins*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Kelly L. Ramsay, for the appellant* *Janet Ozembloski, for the respondent*

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-95-050

BDR SPORTSNUTRITION LABORATORIES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
DESMOND HALLISSEY, Member
LISE BERGERON, 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 October 6, 1994.

The appellant is a distributor of vitamins and food supplements. It has been a Goods and Services Tax (GST) registrant since January 1, 1991. In the course of 1991, it prepared an application for a federal sales tax (FST) inventory rebate in the amount of $6,485.39 in respect of goods held in inventory as of January 1, 1991. As contended by the appellant, this application was mailed on October 9, 1991. By notice of determination dated October 6, 1994, the respondent rejected the appellant's rebate application on the basis that it was filed beyond the time limit prescribed by subsection 120(8) of the Act. This subsection provides that no rebate shall be paid under section 120 of the Act unless the application is filed before 1992. By notice of objection dated November 16, 1994, the appellant objected to this determination. By notice of decision dated March 10, 1995, the respondent confirmed the determination on the grounds that the evidence indicated that the FST inventory rebate application had not been filed before 1992.

The Tribunal has to determine whether the appellant filed its application for an FST inventory rebate before 1992.

The President of BDR Sportsnutrition Laboratories Ltd., Mr. Harry D. Bentley, appeared as witness on behalf of the appellant. A summary of the facts presented by this witness in the course of his testimony follows. Mr. Bentley indicated to the Tribunal that he first became aware of the FST inventory rebate program in December 1990. A few months later, on June 4, 1991, an employee of the appellant, Mr. Devon McKenzie, went to the North Toronto office of the Department of National Revenue (Revenue Canada) to make the first quarter GST payment and to pick up the information package pertaining to the FST inventory rebate. On October 8, 1991, the application prepared by Mr. McKenzie was checked for accuracy by the appellant's accountant, Mr. John Burigana. After going over the figures and ensuring the use of the right percentages, the accountant returned the application to Messrs. Bentley and McKenzie. Then, in the afternoon of October 9, 1991, upon going home, Mr. McKenzie dropped the FST inventory rebate application in a mailbox. It was not sent by registered mail as, according to Mr. Bentley, it is not a

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

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

requirement and it is costly. According to the relevant log book (Exhibit A-1) kept by the appellant, Mr. Burigana called the appellant a few days later to confirm the mailing of the application.

The first inquiry made by the appellant to Revenue Canada with respect to the FST inventory rebate application was made in April 1992. The name and telephone number of Mr. Glen Wagner were given to the appellant. Mr. Bentley told the Tribunal that he called Mr. Wagner in April, May, June and August 1992. The witness indicated that evidence of these calls could be found in the log book. No call was ever made by Mr. Wagner, as he had left his position. On November 19, 1992, the North Toronto office of Revenue Canada called the appellant. A few days later, on December 2, 1992, a discussion took place between Mr. McKenzie and Mr. Geronimo of Revenue Canada. The latter indicated that he would look for the appellant's FST inventory rebate application. It would appear that Mr. Geronimo never asked the appellant for a copy of the application. Mr. Bentley told the Tribunal that there was no further contact between the appellant and Revenue Canada until October 1993. However, in the interval, the appellant received GST statements of arrears. The appellant received a letter dated October 26, 1993, from Ms. J. Clayton, an employee in the Toronto West office of Revenue Canada. The purpose of this letter was to advise the appellant of its failure to file GST returns. In a discussion with Ms. Clayton, Mr. Bentley told her that the appellant was withholding the GST remittances because it had not yet received the FST inventory rebate. Ms. Clayton asked for a copy of the rebate application sent by the appellant. Mr. Bentley told the Tribunal that he delivered this copy in person to Ms. Clayton's office on October 29, 1993. Ms. Clayton mentioned to Mr. Bentley that someone from Revenue Canada would call the appellant. In early December 1993, Mr. Brown from the Mississauga office of Revenue Canada called the appellant's office. He indicated that someone from the North Toronto office would call with regard to the rebate application. On January 27, 1994, Mrs. Hill, a GST collector from the Mississauga office of Revenue Canada, called the appellant. In a further conversation, Mrs. Hill apparently told the witness that Mr. Brown was looking after the appellant's account. A telephone call to Mr. Brown revealed that Mr. Roy Restofti was now in charge of the account.

In the spring of 1994, Mr. Bentley wrote to his Member of Parliament, Mr. Sergio Marchi, to request his help regarding the appellant's FST inventory rebate (Exhibit A-12). On March 29, 1994, the appellant received a call from Mrs. Donna Abalos of the Mississauga office of Revenue Canada. She requested the appellant's financial statements for 1990. At the request of Mr. Sodia of Revenue Canada, a meeting was held in the Mississauga office on August 17, 1994, to discuss the FST inventory rebate application. Another meeting with that officer was subsequently organized, as Mr. Sodia had questions about the 1990 year-end financial statement. The purpose of this meeting was to substantiate the fact that the rebate application had been mailed by the appellant. Were present at this second meeting, on September 1, 1994, Messrs. Bentley, McKenzie and Burigana, as well as Mrs. Abalos and Mr. Sodia.

In the notice of determination dated October 6, 1994, Mrs. Abalos indicated that the second meeting had not produced additional corroborative evidence that the FST inventory rebate application had been submitted before 1992.

In the course of cross-examination, Mr. Bentley acknowledged that the FST inventory rebate was of crucial importance to the appellant. Given this importance, Mr. Bentley was asked to explain the appellant's lack of action with respect to the application between December 1992 and December 1993. As he indicated, the appellant knew that it would receive an FST inventory rebate. The course of action chosen by the

appellant was to offset the FST inventory rebate against the amount of GST owed to the government. Indeed, no payment of GST was made by the appellant to Revenue Canada from the second quarter of 1991 to the second quarter of 1994. Mr. Bentley indicated that the entire amount was finally offset in the second quarter of 1994.

The appellant's representative submitted that the appellant filed its FST inventory rebate application within the statutory time limit. After expressing her disagreement with the respondent's presentation of the facts and after highlighting relevant parts of the evidence, she argued that Revenue Canada had failed in its duties in a number of areas. More specifically, she identified eight such failures, such as the lack of accountability of the officers, the inadequacy of the communication system, the absence of a proper administrative system for handling inquiries, the lack of a proper system to deal with the FST forms, the lack of supervision of the officers and the lack of clarity of the officers' responsibilities. She also questioned the adequacy of Revenue Canada's log of action. On this point, she mentioned that Revenue Canada had not provided any evidence regarding the existence of a "contact log" with the Canadian public. She argued that Revenue Canada does not have the necessary policies and procedures in place to provide services to the public. In her view, given the lack of evidence on the part of Revenue Canada, the *prima facie* evidence provided by the appellant must be taken as true and correct.

Counsel for the respondent first noted the absence of direct evidence from Mr. McKenzie, namely, the person who allegedly mailed the FST inventory rebate application. She rejected the appellant's contention that the latter's *prima facie* evidence must be taken as true and correct. She submitted that there is a complete lack of corroborative information (e.g. covering letter, receipt of registered mail) to indicate that the application was filed on time. In her view, "the log books are not proof of anything.[2]" No proof was adduced as to the accuracy of these log books. She also submitted that people in business since 1979, the year of the appellant's inception, should have taken extra steps with respect to the FST inventory rebate application, especially in light of the crucial importance of the rebate to companies. In this connection, she also argued that the appellant should have taken action between December 1992 and December 1993. Furthermore, she contended that the appellant should keep better records.

Counsel for the respondent argued that the onus is on the appellant to establish that it is entitled to the rebate and that the respondent's determination is incorrect. In her view, the appellant has not discharged this onus. The appellant has failed to show that every statutory condition necessary to qualify for the rebate has been satisfied. In this respect, she drew the Tribunal's attention to two of its decisions, namely, *Jim's Motor Repairs (Calgary) Ltd. v. The Minister of National Revenue*[3] and *Orleans Glass Inc. v. The Minister of National Revenue*.[4] She submitted that the appellant failed to comply with subsection 120(8) of the Act, in that its application was received by the respondent only on October 29, 1993. Finally, she argued that there is no provision in the Act entitling the Tribunal to waive or extend statutory time limits.

The credibility of the evidence adduced by the appellant before the Tribunal is central to the determination of this case. Having carefully reviewed the evidence as a whole, the Tribunal concludes that it establishes that the application for the FST inventory rebate was filed by the appellant before 1992, i.e. within

---

2. Transcript of Argument, November 23, 1995, at 14.
3. Appeal No. AP-93-068, February 28, 1994.
4. Appeal No. AP-93-345, September 22, 1994.

the statutorily prescribed time limit. Though it would have been preferable for the appellant to call Mr. McKenzie as a witness or to offer unequivocal corroborative evidence, such as a registered mail receipt, the Tribunal remains persuaded, on the basis of the detailed testimony of Mr. Bentley, that the mailing of the appellant's application occurred before 1992. In weighing the evidence, the Tribunal has particularly noted the apparent confusion between the offices of Revenue Canada (North Toronto and Mississauga) which dealt with the appellant in respect of the FST inventory rebate application. This may perhaps explain why the appellant's original application was not formally received and recorded by Revenue Canada. Furthermore, as a document dated June 8, 1992, and prepared by Revenue Canada (FST Inventory Rebates - "Lost claims" - Exhibit A-14) would suggest, there existed a certain problem with respect to the loss of original rebate applications sent by numerous GST registrants. In the Tribunal's view, the appellant has discharged its onus of proof.

In light of the foregoing, the appeal is allowed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Desmond Hallissey
Desmond Hallissey
Member

Lise Bergeron
Lise Bergeron
Member