

Ottawa, Thursday, July 3, 1997

Appeal No. AP-94-348

IN THE MATTER OF an appeal heard on March 17, 1997, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated December 2, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

SCHOOL DISTRICT NO. 10 (ARROW LAKES)

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

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

Patricia M. Close
Patricia M. Close
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-348

SCHOOL DISTRICT NO. 10 (ARROW LAKES)

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the *Excise Tax Act* of two determinations of the Minister of National Revenue that rejected two applications for refunds of federal sales tax made under section 68.26 of the *Excise Tax Act*. The issue in this appeal is whether the appellant is entitled to refunds of federal sales tax for materials used in the Nakusp Secondary School building renovation project. More particularly, the Tribunal must determine whether the materials were “for use exclusively in the construction of a building,” as provided in section 68.26 of the *Excise Tax Act*.

HELD: The appeal is allowed. Counsel for the respondent conceded that the additions to the existing Nakusp Secondary School building were new construction within the meaning of paragraph 68.26(a) of the *Excise Tax Act*, except for the addition of a chain link fence and the moving of portables. The Tribunal accepts the testimony of the project architect that approximately 36 percent of the value of the project was new construction. This percentage includes an amount for the chain link fence and an amount for the moving of the portables, which, in the Tribunal’s view, properly form part of the new construction.

Place of Hearing:	Vancouver, British Columbia
Date of Hearing:	March 17, 1997
Date of Decision:	July 3, 1997
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Patricia M. Close, Member Lyle M. Russell, Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Susanne Grimes
Appearances:	Christopher J. Cradock-Henry, for the appellant Janet Ozembloski, for the respondent

Appeal No. AP-94-348

SCHOOL DISTRICT NO. 10 (ARROW LAKES)

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
PATRICIA M. CLOSE, Member
LYLE M. RUSSELL, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of two determinations of the Minister of National Revenue dated December 11, 1987, that rejected two applications for refunds of federal sales tax (FST) made under section 68.26 of the Act. The appellant objected to both notices of determination. The respondent disallowed the objections in decisions dated December 2, 1994. The total amount claimed in this appeal is \$18,886.77.

The appellant's applications for refunds were rejected on the basis that the goods in issue were not "for use exclusively in the construction of a building," as provided in section 68.26 of the Act. In the respondent's opinion, the appellant was unable to establish that a new building or new additions were constructed, and the renovations undertaken did not include structural improvements.

The issue in this appeal is whether the appellant is entitled to refunds of FST pursuant to section 68.26 of the Act for materials used in the Nakusp Secondary School building renovation project. More particularly, the Tribunal must determine whether the materials were "for use exclusively in the construction of a building," as provided in section 68.26 of the Act.

For purposes of this appeal, the relevant provision of the Act provides, in part, as follows:

68.26 Where tax under Part VI has been paid in respect of any materials and the materials have been purchased by or on behalf of

(a) a school, university or other similar educational institution for use exclusively in the construction of a building for that institution,

an amount equal to the amount of that tax shall, subject to this Part, be paid to that institution, organization or corporation if it applies therefor within two years after the materials were purchased.

During the period from 1985 to 1987, the appellant employed an architectural firm to undertake building renovations at the Nakusp Secondary School in Nakusp, British Columbia. The project was described in several documents and on some of the blueprints as Nakusp Secondary School Renovations, Project No. 85111. At first, the project architect, Mr. Thomas Richard Thorburn, said that approximately 20 percent of the total contract was new construction. Several years later, he informed the appellant's

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

representative that the new construction value of the project was 38.07 percent, or approximately \$670,000 of the total contract amount of \$1,760,064.85.

At the hearing, Mr. Thorburn testified on behalf of the appellant. He explained that the work performed at the Nakusp Secondary School involved a single lump sum contract for both additions and renovations. By additions, he meant that new sections with new foundations, new roofs, new windows, new doors, new floors, etc., were added to the existing building. These new areas were built at different locations around the existing building. The area of new construction was roughly 7,000 sq. ft. Mr. Thorburn explained that, when he was first approached by the appellant's representative to provide a breakdown of the cost of the new construction versus the cost of the renovations, he took a guess because he did not know why he was being asked to do this. Subsequently, he conducted a more detailed analysis and came up with a figure of 38.07 percent of the total value of the work performed for new construction and the balance for renovations.

In cross-examination, Mr. Thorburn agreed that he had slightly overestimated the percentage of the total contract allocated to new construction. He should not have included the addition to the original gymnasium storage area. Therefore, the new construction value of the project was estimated at \$640,000, or approximately 36 percent of the total contract amount, instead of 38.07 percent. Mr. Thorburn explained that an area called "fenced and covered compound" was considered new construction, even though it was not fully walled, because it had a full roof with a wire or chain link fence secured area. He testified that this area would be used to store wood products, automobiles or machinery for the school's wood or metal workshops. He had also included an amount for what he called "relocating portables," because it was part of the work performed to clear the site for the new construction.

The appellant's representative relied on the evidence of the project architect that approximately 36 percent of the contract was new construction in support of his argument that the appellant is entitled to refunds of FST pursuant to section 68.26 of the Act. Relying on the decision of the Federal Court of Appeal in *Board of Education of Calgary School District No. 19 v. Minister of National Revenue*,² he argued that the additions to the existing school building constitute new construction.

In light of the testimony of the project architect, counsel for the respondent conceded that the additions to the existing school constituted new construction, except for the addition of a chain link fence and the moving of the portables, which, counsel argued, do not fall within the definition of "new construction" laid out by the Federal Court of Appeal in *Calgary School District No. 19*.

Paragraph 68.26(a) of the Act provides that, where tax under Part VI has been paid in respect of any materials and the materials have been purchased by or on behalf of a school, university or other similar educational institution for use exclusively in the construction of a building for that institution, an amount equal to the amount of that tax shall be paid to that institution, organization or corporation if it applies therefor within two years after the materials were purchased.

In *Calgary School District No. 19*, the Federal Court of Appeal agreed with the findings of the trial judge that "construction of a building," within the meaning of the statute, refers to the "bringing into existence of a new structure" (be it a completely new edifice or an addition to an existing one), but does not include the renovation of an old building already in use for educational purposes.³ Counsel for the respondent conceded, and the Tribunal agrees, that the additions to the existing Nakusp Secondary School building were

2. (1994), 170 N.R. 339, Court File No. A-554-91, May 31, 1994.

3. *Ibid.* at 340.

new construction within the meaning of paragraph 68.26(a) of the Act. The Tribunal accepts the testimony of the project architect that approximately 36 percent of the value of the project was new construction. This percentage includes an amount for the chain link fence and an amount for the moving of the portables, which, in the Tribunal's view, properly form part of the new construction.

Accordingly, the appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Patricia M. Close

Patricia M. Close
Member

Lyle M. Russell

Lyle M. Russell
Member