

Ottawa, Friday, August 29, 1997

**Appeal No. AP-95-132**

IN THE MATTER OF an appeal heard on March 18, 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 June 8, 1995, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**W.K. INVESTMENTS LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Lyle M. Russell  
Lyle M. Russell  
Presiding Member

Dr. Patricia M. Close  
Dr. Patricia M. Close  
Member

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

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-95-132**

**W.K. INVESTMENTS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* of three determinations of the Minister of National Revenue that rejected applications for federal sales tax new housing rebates. Two of the applications for rebate were dated January 18, 1995, and were received by the Department of National Revenue on January 19, 1995. The third was dated February 20, 1995, and was received on February 28, 1995. The issue in this appeal is whether the appellant's federal sales tax new housing rebate applications were filed within the time limit prescribed under subsection 121(4) of the *Excise Tax Act*.

**HELD:** The appeal is dismissed. The Tribunal finds that there was insufficient evidence to sustain the position that the applications were mailed before 1995, that is, on September 8 or 9, 1994. In light of the fact that the Director of W.K. Investments Ltd. testified that he was aware of the deadline of December 31, 1994, the Tribunal would have expected him to have at least sent photocopies of the originals to the Department of National Revenue in late December when he learned that they had not been received, rather than wait until January 18, 1995, to submit original applications. The Tribunal finds that the applications for rebate were not filed within the statutory time limit prescribed under subsection 121(4) of the *Excise Tax Act*.

Place of Hearing: Vancouver, British Columbia  
Date of Hearing: March 18, 1997  
Date of Decision: August 29, 1997

Tribunal Members: Lyle M. Russell, Presiding Member  
Dr. Patricia M. Close, Member  
Robert C. Coates, Q.C., Member

Counsel for the Tribunal: Joël J. Robichaud

Clerk of the Tribunal: Susanne Grimes

Appearances: David Paradis, for the appellant  
Janet Ozembloski, for the respondent

**Appeal No. AP-95-132**

**W.K. INVESTMENTS LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member  
DR. PATRICIA M. CLOSE, 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 three determinations of the Minister of National Revenue that rejected applications for federal sales tax (FST) new housing rebates. Two of the applications for rebate were dated January 18, 1995, and were received by the Department of National Revenue (Revenue Canada) on January 19, 1995. The third application was dated February 20, 1995, and was received on February 28, 1995. The respondent rejected the appellant's applications totaling \$19,353.43 on the basis that they were not filed before 1995, as prescribed under subsection 121(4) of the Act. The appellant served notices of objection which were disallowed by the respondent in decisions dated June 8, 1995. The issue in this appeal is whether the appellant's FST new housing rebate applications were filed within the time limit prescribed under subsection 121(4) of the Act.

For purposes of this appeal, the relevant legislative provision is subsection 121(4) of the Act, which reads as follows:

(4) A rebate in respect of a residential complex shall not be paid under this section to a person where the person fails to apply to the Minister for the rebate in prescribed form and manner before 1995 or where a rebate under this section in respect of the complex was paid to any other person entitled thereto.

At the hearing, Mr. Eddie Chiu, Director of W.K. Investments Ltd., testified on behalf of the appellant. Mr. Chiu explained that the appellant developed and sold condominium units in Vancouver, British Columbia, during the transition period from the FST to the Goods and Services Tax (GST). Mr. Chiu explained that he personally prepared all of the applications for rebate which were filed with Revenue Canada on behalf of the appellant. Mr. Chiu testified that he would normally place the application forms in envelopes, seal them and mail them to Revenue Canada. He explained that, out of the 30 units for which applications were filed, the three at issue are the only ones for which the appellant did not receive rebates. Mr. Chiu identified three application forms dated September 8, 1994. He testified that he placed these three forms and one other form in an envelope which he gave to the appellant's only other employee, Ms. Ann Chen. According to Mr. Chiu, Ms. Chen took the envelope to the post office and mailed it. The envelope had to be taken to the post office in order to determine the amount of postage. At the time of the hearing, Ms. Chen was no longer employed by the appellant. Mr. Chiu testified, however, that she was a very reliable employee. Mr. Chiu identified a receipt from the post office dated September 9, 1994, which was entered into evidence. He testified that he paid Ms. Chen \$1.40, the amount identified on the receipt. He remembered not having given Ms. Chen any money when he sent her to the post office.

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

Mr. Chiu explained that some time passed without hearing back from Revenue Canada. He said that he did not think that this was too unusual. He presumed that the delay was a result of Revenue Canada having a heavy workload or Revenue Canada's decision to offset the rebate money against other money that the appellant owed Revenue Canada. Mr. Chiu testified that he did not forget the rebates, because the appellant needed the money to pay some of its bills. He said that some time after Christmas 1994, still not having heard back from Revenue Canada, he contacted a Revenue Canada official, who informed him that the appellant's applications had not been received. Mr. Chiu therefore re-drafted the applications in early January 1995 and hand delivered them to Revenue Canada's office in order to avoid mail problems.

In cross-examination, Mr. Chiu explained that there are only three applications for rebate at issue, because the fourth application to which he referred in examination in chief had previously been mailed to Revenue Canada. He testified that he had known, from the time that the GST replaced the FST, that applications for FST new housing rebates had to be filed before 1995. He said that a letter dated February 8, 1995, sent to Revenue Canada under his signature which indicated that the first time that he became aware of this was the day on which he received the notice of determination dated February 3, 1995, was incorrect. Mr. Chiu explained that he asked a friend to draft the letter, because his English was not good enough. He testified that he did not re-file the applications for rebate immediately after discovering that they had not yet been received because he thought that they would eventually be received or that maybe he had talked to the wrong person at Revenue Canada. Mr. Chiu explained that he did not re-draft and re-file the applications for rebate until January 18, 1995, because, after Christmas, he went away on a business trip which lasted approximately three weeks. One of the applications had to be re-submitted because certain documents were missing. This is why it was dated February 20, 1995. Mr. Chiu said that he re-drafted the applications because he was under the impression that Revenue Canada did not accept photocopies.

Based on Mr. Chiu's testimony, the appellant's representative argued that the FST new housing rebate applications were mailed on September 8 or 9, 1994, and that the reason that Revenue Canada did not receive them before 1995 could only be that they were lost in the mail. The representative referred to subsection 79.2(3) of the Act in support of his argument that an application for rebate is considered filed on the day on which it is mailed. He also referred to a similar provision under the *Income Tax Act*.<sup>2</sup>

The appellant's representative also relied on the decision of the Tax Court of Canada in *Erroca Enterprises Limited v. The Minister of National Revenue*.<sup>3</sup> In that case, the respondent imposed penalties against the taxpayer corporation for failing to file an income tax return within the prescribed time. The taxpayer appealed to the Tax Court of Canada, contending that it had mailed its return on time. The respondent contended that a return was not received from the taxpayer until one was demanded. The taxpayer's appeal was allowed. The Tax Court of Canada was satisfied with the credibility of the witnesses testifying on behalf of the taxpayer that the tax returns had been mailed within the prescribed time provided under the *Income Tax Act*. Furthermore, the taxpayer had never before had problems with Revenue Canada, and it had nothing to gain by delaying the filing of its return. The representative argued that Mr. Chiu's situation is similar and that the Tribunal should accept his evidence that the applications for rebate were mailed before 1995.

Counsel for the respondent argued that the appellant had not discharged its onus in the present case. In her view, there was no direct evidence that the applications for rebate were actually mailed on September 8 or 9, 1994. Unfortunately, Ms. Chen, Mr. Chiu's assistant, did not testify. Furthermore, there was no indication that the receipt from the post office dated September 9, 1994, was in fact a receipt for postage purchased to mail the applications at issue. Counsel argued that it was odd that Mr. Chiu waited

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2. R.S.C. 1985 (5th Supp.).

3. [1986] 2 C.T.C. 2425.

until January 18, 1995, to re-draft and re-file the applications for rebate. If Mr. Chiu was aware of the deadline, then he should have made sure that the applications had, in fact, been filed before he left on his business trip. Counsel also noted that a month passed before the third application dated February 20, 1995, was re-submitted by Mr. Chiu to Revenue Canada.

Counsel for the respondent argued that subsection 121(4) of the Act clearly provides that no rebate shall be paid where a person fails to apply to the respondent for a rebate before 1995. Since the applications were dated January 18 and February 20, 1995, and were received by Revenue Canada on January 19 and February 28, 1995, the appeal must fail. She argued that the Tribunal is bound by and must apply the law and that it has no authority to waive or extend statutory time limits and no authority to grant equitable relief in determining appeals. In the alternative, counsel argued that, if the Tribunal finds that the applications were filed before 1995, the matter should be sent back to the respondent to determine whether the appellant is entitled to the rebates.

Relying on Revenue Canada's departmental policy and section 79.2 of the Act, the Tribunal has held that an application for an FST inventory rebate under subsection 120(8) of the Act is considered to have been filed by a taxpayer on the day on which it was mailed and that the date of the postmark is evidence of the date of mailing.<sup>4</sup> This would also apply in the case of an application for an FST new housing rebate under subsection 121(4) of the Act. In the present case, the Tribunal did not have a postmarked envelope before it. The Tribunal is unable to conclude that the receipt from the post office dated September 9, 1994, is evidence of the date of mailing of the applications. The Tribunal finds that there was insufficient evidence to sustain the position that the applications were mailed before 1995, that is, on September 8 or 9, 1994. In light of the fact that Mr. Chiu testified that he was aware of the deadline of December 31, 1994, the Tribunal would have expected him to have at least sent photocopies of the originals to Revenue Canada in late December when he learned that they had not been received, rather than wait until January 18, 1995, to submit original applications. The Tribunal finds that the applications for rebate were not filed within the statutory time limit prescribed under subsection 121(4) of the *Excise Tax Act*.

Accordingly, the appeal is dismissed.

Lyle M. Russell  
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4. See, for example, *Lakhani Gift Store v. The Minister of National Revenue*, Appeal No. AP-92-167, November 15, 1993.