CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, September 4, 1997

Appeal No. AP-96-012

IN THE MATTER OF an appeal heard on May 27, 1997, 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 January 31, 1996, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

JORWALT BUILDING DESIGNERS LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Arthur B. Trudeau
Arthur B. Trudeau
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-96-012

JORWALT BUILDING DESIGNERS LTD. **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 that rejected the appellant's application for a federal sales tax new housing rebate on the basis that the appellant filed the rebate application outside the statutorily prescribed time limit.

HELD: The appeal is allowed. In this case, the Tribunal finds that the application was mailed to the Department of National Revenue on or about October 13, 1994. While subsection 79.2(3) of the *Excise Tax Act* provides that the date of the postmark is evidence of the date of mailing, and no such postmark exists in this case, the Tribunal does not believe that this provision prevents it from making a finding that an application was filed, in the absence of a postmark, on the basis of other compelling evidence. In this particular appeal, the Tribunal is persuaded by the sworn testimony of the appellant's witness that the application was indeed filed on or about October 13, 1994, and, therefore, that the appellant's application for rebate was made prior to 1995.

Place of Hearing:	Vancouver, British Columbia
Date of Hearing:	May 27, 1997
Date of Decision:	September 4, 1997
Tribunal Members:	Charles A. Gracey, Presiding Member Raynald Guay, Member Arthur B. Trudeau, Member
Counsel for the Tribunal:	Heather A. Grant
Clerk of the Tribunal:	Ivy Lai
Appearances:	Colin A. Millar, for the appellant Jan Brongers, 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-96-012

JORWALT BUILDING DESIGNERS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
RAYNALD GUAY, Member
ARTHUR B. TRUDEAU, 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 that rejected the appellant's application for a federal sales tax (FST) new housing rebate on the basis that the appellant filed the rebate application outside the statutorily prescribed time limit.

The appellant is a developer of new housing. Mr. Henry Tait, a retired accountant, was responsible for the appellant's tax matters at all relevant times. The following summarizes the essence of Mr. Tait's testimony regarding the sequence of events pertaining to the appellant's efforts to obtain the FST rebate.

The application for FST rebate pertains to the sale of the building located at 1560 Mathers Avenue, West Vancouver, British Columbia. The appellant built the house at that location and subsequently sold it to George and Rosalie Grills in 1991. Pursuant to the contract of purchase and sale, the Grills assigned their rights to the FST rebate to the appellant. An application for the FST rebate was made on or about December 27, 1991, by the appellant. No response to the application from the Department of National Revenue (Revenue Canada) was received by the appellant. Therefore, Mr. Tait wrote a letter to Revenue Canada in July 1992 inquiring about the status of the application, enclosing a recently completed rebate application. Mr. Tait subsequently learned that all correspondence from Revenue Canada regarding the first application in December 1991 had been addressed to the Grills since, as the purchasers of the house, they were the usual applicants for the rebate. The appellant finally received a notice from Revenue Canada indicating that the FST rebate application, sent in July 1992, had been rejected on the basis that it required the original signatures of the Grills. This was the case even though a copy of the bill of sale had been submitted along with the application which showed that the Grills had assigned the rights to the FST rebate to the appellant.[2] In conferring with an official at Revenue Canada, Mr. Tait was advised to obtain the Grills' signatures and to resubmit the application. Mr. Tait assumed that this meant that the application that had been sent in December 1991 would remain open until these signatures were obtained, in spite of receiving a notice of determination from the respondent dated September 18, 1992, which indicated that the appellant's

1. R.S.C. 1985, c. E-15.
2. The relevant clause in the bill of sale reads as follows: "The purchase price is to include the Goods and Services Tax which is to be borne by the vendor. The purchaser will assign to the vendor all goods and services and federal sales tax credits available to the purchaser." *Transcript of Public Hearing*, May 27, 1997, at 69-70.

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

claim "has been adjusted by $8,625.00" and that the amount approved in respect of the claim was "Nil." According to Mr. Tait, his assumption that the file would remain open was supported by verbal assurances of officials at Revenue Canada

The relationship between the appellant and the Grills began to deteriorate after the sale of the house, and the Grills refused to sign the rebate application. When the Grills initiated judicial proceedings against the appellant for various matters arising under the contract of purchase and sale, the appellant counterclaimed, requesting an order compelling the Grills to sign the rebate application. A court order to this effect was issued on August 11, 1994. In the interim period, Mr. Tait had sent a letter to Revenue Canada advising it of the status of the court proceedings and asking it to keep the file open.

The Grills' signatures were finally obtained on October 4, 1994, by the appellant's lawyer, on two different versions of the rebate application form. The two different versions of the application form are marked "GST 212E (91/03)" and "GST 212E (92/03)." For the sake of clarity, the former version will be referred to as the "old form," while the latter version will be referred to as the "new form." One of the versions was submitted, on or about October 13, 1994, and included a copy of the assignment. Mr. Tait explained that, at no time, did he send documentation to Revenue Canada by registered mail and that no one had raised the issue with him. Furthermore, during the course of sending the most recent application to Revenue Canada, he believed that he was only supplying missing documentation to support the original application and, therefore, did not need to send the application by registered mail.

In attempting to verify the status of the appellant's rebate application in early January 1995, Mr. Tait was informed by an official at Revenue Canada that no such application had been received and that a copy of the application should be resubmitted. He was further advised that a considerable number of files had been misplaced during the relocation of the unit responsible for processing such applications from Ottawa, Ontario, to Prince Edward Island and that it was conceivable that the appellant's files had been mislaid. The appellant resubmitted a copy of the application for rebate in that same month, but the application was rejected on the basis that it had not been filed before January 1, 1995, as required by the legislation, and, furthermore, on the basis that it was not an original copy of the application.

In cross-examination, Mr. Tait could not state with any certainty whether the old form or the new form was sent to Revenue Canada on or about October 13, 1994, although he acknowledged that a copy in the record of the new form was date stamped by Revenue Canada on February 10, 1995, while a copy of the old form on the record was date stamped July 17, 1995. Mr. Tait was also unable to state with any accuracy who had filled in various sections of both the old form and the new form or to explain why the old form was signed by M.J. Tait, Mr. Tait's wife, as the builder's authorized representative, on September 21, 1994, while the new form was signed on October 13, 1994. He suggested, however, that the discrepancy in the dates of signature was likely due to the manner in which he and the lawyer went about obtaining the Grills' signatures, as well as paying the Grills for deficiencies in the house validated by the court, and that different parts of the application form were likely filled in at different times. With respect to the rebate application submitted by the appellant in July 1992, Mr. Tait acknowledged that the notice of determination was never appealed.

Counsel for the appellant submitted that, in order for the appellant to be successful in its appeal, there are two findings of fact that the Tribunal must make: (1) that the appellant's rebate application was received by Revenue Canada prior to January 1, 1995; and (2) that the application consists of the appropriate documents showing the appellant's entitlement to the rebate. In counsel's view, the facts show that both of

these criteria were met. Specifically, the application was received by Revenue Canada on July 6, 1992, and documents in support of the application had indicated that the appellant had been assigned the rights to the rebate. Although counsel acknowledged that the application was not sent by registered mail, it was in fact received by Revenue Canada. Counsel further argued that this application was, according to Revenue Canada officials, kept open while Mr. Tait obtained the balance of the documentation required. The delay in obtaining the required documentation was not the appellant's fault, but that of the Grills, ultimately requiring a court order compelling the Grills to sign the rebate application.

Counsel for the appellant further argued that the application sent to Revenue Canada in October 1994 was not, and ought not to be, treated as a new application. Rather, it should be viewed as forming part of the appellant's original application. In this respect, the application submitted in October 1994 ought to be considered as simply completing the documentation required for the appellant's original application. The fact that the October documentation was not sent by registered mail is of no consequence, as this requirement was never enforced by Revenue Canada in its dealings with the appellant.

Counsel for the respondent submitted that there are two issues in this appeal: (1) whether the appellant applied for the FST rebate prior to 1995; and, if not (2) whether the appellant is entitled to a rebate on equitable or other grounds. Counsel went on to outline the statutory filing requirements for FST new housing rebate applications set out in the Act. With reference to subsection 121(4) of the Act, counsel submitted that no rebate shall be paid under section 121 unless the application is filed with the respondent before 1995. Subsection 121(6) goes on to provide that Parts VI and VII of the Act apply to applications under section 121 as if the applications were made under section 72. Subsection 72(3) further specifies that "[a]n application shall be filed with the Minister in such manner as the Governor in Council may, by regulation, prescribe." Counsel submitted that this section was previously considered by the Tribunal in *Lakhani Gift Store* v. *The Minister of National Revenue*.[3] In its decision in that appeal, the Tribunal stated that it would assume that Parliament intended a uniform definition of the word "filed" to be applied throughout the Act and made reference to another section of the Act in order to interpret its meaning. Specifically, the Tribunal referred to section 79.2, which provides that "[w]here a person who is required by this section to file a return with the Minister does so by mailing the return, the return shall be deemed to have been filed with the Minister on the day on which the return was mailed and the date of the postmark is evidence of that day." Counsel argued that the onus rests with the appellant to prove its entitlement to the rebate, as does the burden of proof.

In reviewing the facts of this case, counsel for the respondent submitted that, while it is unclear what happened to the appellant's rebate application of October 1994, it is clear that it was not received by the respondent prior to 1995. Furthermore, the application was not sent by registered mail, as required pursuant to a note included on the application form.[4] Consequently, the appellant did not comply with the prescribed limitation period for filing the rebate application. As there is no provision in the Act which gives the respondent the authority to waive or extend, or otherwise alter, the statutory deadline, the respondent had no

3. Appeal No. AP-92-167, November 15, 1993.

4. The relevant note on the new form, which is virtually identical to the one on the old form, reads as follows: "When Section A-1 of this form is completed, this form, together with a copy of the assignment of the rebate, must be served on, or sent by registered mail to, the Minister of National Revenue. Registered mail may be sent to, or personal service may be made on, the Minister at your local Excise office. Service of the notice of the assignment is not effected until acknowledgement of the notice is sent by registered mail to the builder, by the Minister."

choice in this matter and simply could not issue the rebate without violating the Act. Counsel further submitted that the Tribunal similarly does not have the power to extend or waive the deadline, or grant equitable relief.[5]

In addressing the arguments of counsel for the appellant that the application sent by the appellant in December 1991 and/or July 1992 remains "open," counsel for the respondent made the following arguments opposing this position: (1) the July 1992 rebate application is not at issue, as the appellant did not appeal the notice of determination pertaining to the application; (2) the rebate application allegedly sent in December 1991 was never received by Revenue Canada; (3) the persons entitled to the rebate had not filed the 1992 application; (4) the bill of sale submitted by the appellant as evidence of the assignment of the rights to the rebate to the appellant only indicated that the Grills had undertaken to make this assignment, but not that this was as yet done; and (5) the testimony of the appellant's witness regarding the alleged representations of officials at Revenue Canada regarding the status of the various applications is merely hearsay, but, in any event, the respondent is not bound by representations of his officials.

In reply, counsel for the appellant emphasized that the testimony of the appellant's witness is that he did send an original of the rebate application in October 1994 once he received the Grills' signatures and that subsection 79.2(3) of the Act merely states that the return, in that case, is deemed to have been filed with the respondent on the day on which the return was mailed and that the date of the postmark is merely evidence of that day. Counsel argued that it is inconceivable that, after all Mr. Tait's trouble to process the rebate application and to obtain the Grills' signatures, he would not have mailed it right away.

The Tribunal would note at the outset that it cannot accept counsel for the appellant's arguments that at issue is the rebate application filed by the appellant in July 1992 (or allegedly submitted originally in December 1991). The respondent clearly issued a notice of determination under section 121 of the Act on September 18, 1992, that rejected the appellant's rebate application. Although the wording of the notice of determination is not as clear as it could have been, it was issued pursuant to section 121 and, as such, constitutes a determination of the respondent which must have been challenged within 90 days of the notice pursuant to section 81.17 in order to be reconsidered. If an unsatisfactory decision of the respondent resulted from its reconsideration of the determination, the appellant could have appealed the determination to either the Tribunal or the Federal Court of Canada pursuant to sections 81.19 or 81.2 respectively. The appellant did not challenge the respondent's determination under section 81.17 and, therefore, forfeited its rights to have the respondent's determination in respect of that particular rebate application reconsidered.

In the Tribunal's view, at issue is the determination in respect of the rebate application that the appellant alleges was sent to Revenue Canada in October 1994. For the most part, the Tribunal agrees with counsel for the respondent's statement with respect to the applicable statutory provisions. Subsection 121(4) of the Act provides that "[a] rebate shall not be paid under this section to a person unless the person has applied to the Minister for the rebate in prescribed form and manner before 1995." Subsection 121(6) further provides that "[p]arts VI and VII [of the Act] apply in respect of an application for a rebate and of a payment of a rebate under this section as if the application and payment were made under section 72."

---

5. In support of this view, counsel for the respondent cited the decisions in *Joseph Granger* v. *Canada Employment and Immigration Commission*, [1986] 3 F.C. 70, affirmed [1989] 1 S.C.R. 141; *Walbern Agri-Systems Ltd.* v. *The Minister of National Revenue*, 1 T.S.T. 1328, Canadian International Trade Tribunal, Appeal No. 3000, December 21, 1989; and *Pelletrex Ltée* v. *The Minister of National Revenue*, 4 T.C.T. 3351, Canadian International Trade Tribunal, Appeal No. AP-89-274, October 15, 1991.

Subsection 72(3) specifies that "[a]n application shall be filed with the Minister in such manner as the Governor in Council may, by regulation, prescribe." In the absence of any prescribed regulations, the Tribunal considers it reasonable to refer to the meaning of the word "file" in subsection 79.2(3) and impute its meaning to subsection 72(3).[6] Subsection 79.2(3) specifies that, "[w]here a person who is required by this section to file a return with the Minister does so by mailing the return, the return shall be deemed to have been filed with the Minister on the day on which the return was mailed and the date of the postmark is evidence of that day."

In this case, the Tribunal finds that Mr. Tait mailed the application to Revenue Canada on or about October 13, 1994. While subsection 79.2(3) of the Act provides that the date of the postmark is evidence of the date of mailing, and no such postmark exists in this case, the Tribunal does not believe that this provision prevents it from making a finding that an application was filed, in the absence of a postmark, on the basis of other compelling evidence. In this particular appeal, the Tribunal is persuaded by Mr. Tait's sworn testimony that the application was indeed filed on or about October 13, 1994, and, therefore, that the appellant's application for rebate was made prior to 1995. In the Tribunal's view, it is unreasonable to suggest that Mr. Tait did not file the rebate application in the manner testified, given the extraordinary lengths to which he went in order to obtain the signatures of the Grills for the purposes of making the application, as well as to keep Revenue Canada informed of his progress. The Tribunal considers it reasonable to conclude that the appellant's application may have been misplaced as a result of the relocation of the unit responsible for processing FST rebate applications to Prince Edward Island.

With respect to Mr. Tait's acknowledgement that the rebate application was not sent by registered mail, the Tribunal does not consider this fact to be significant in view of the history of Revenue Canada's dealings with the appellant, for example, the fact that the application filed by the appellant in 1992 was processed by Revenue Canada without this requirement having been met.

In view of the foregoing, the Tribunal allows the appeal.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

6. Support for this approach is found in *Lakhani Gift Store*.