CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 3, 2002

Appeal Nos. AP-99-039 and AP-99-058

IN THE MATTER OF appeals heard on January 21, 2002, 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 April 21, 1999, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

PROLITH INCORPORATED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Ellen Fry
Ellen Fry
Member

Susanne Grimes
Susanne Grimes
Acting 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

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UNOFFICIAL SUMMARY

Appeal Nos. AP-99-039 and AP-99-058

PROLITH INCORPORATED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

These appeals concern a notice of decision dated April 21, 1999, in which the respondent disallowed the appellant's objection in relation to federal sales tax that it claimed to have paid in error. The appellant argued that the respondent had overestimated the value of its sales of printed matter and, consequently, had overestimated the amount of tax owing.

HELD: The appeals are dismissed. Given the evidentiary record, it was impossible for the Tribunal to establish that the amount owing was other than that determined by the respondent. In the Tribunal's view, the onus was upon the appellant to demonstrate a *prima facie* case for the validity of its claim to the remaining alleged overpayment of tax or some portion of it. The evidence presented by the appellant did not establish a *prima facie* case. Therefore, the appeals are dismissed.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 21, 2002
Date of Decision:	October 3, 2002
Tribunal Members:	James A. Ogilvy, Presiding Member Pierre Gosselin, Member Ellen Fry, Member
Counsel for the Tribunal:	John Dodsworth
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Michael Kaylor, for the appellant Louis Sébastien, for the respondent

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(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-99-039 and AP-99-058

PROLITH INCORPORATED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: JAMES A. OGILVY, Presiding Member
PIERRE GOSSELIN, Member
ELLEN FRY, Member

REASONS FOR DECISION

The appellant was a colour separator operating in Quebec. The appellant filed a refund claim in respect of the entire amount of federal sales tax that it had remitted to the respondent during the periods from April 1, 1988, to March 30, 1990, and from May 1 to July 31, 1990. Subsequent to an audit performed in response to the refund claim, the respondent granted a refund of 74 percent of the amount claimed, which he determined was in relation to imaged articles. The sale of imaged articles is tax exempt under the *Excise Tax Act*.[1] The remaining 26 percent of the appellant's refund claim was denied on the basis that the amount was tax owing in relation to printed matter sold by the appellant. The appellant filed a notice of objection in regard to this determination, which was denied. The appeal is from this decision.

ARGUMENT

The appellant argued that the respondent had overestimated the value of its sales of printed matter and, consequently, had overestimated the amount of tax owing. Therefore, the appellant argued that the respondent had incorrectly denied its refund claim. The appellant argued, in its brief, that it would establish at the hearing the value of its sales of printed matter by way of the oral testimony of the appellant's former general manager. In the absence of an oral hearing, the Tribunal did not hear testimony.

The respondent submitted that the amount of the refund claim that he determined to be in relation to sales of printed matter was established by a review of a sample period of six months taken at various points during the relevant period. The amount was calculated by adding the tax paid by the appellant when it bought printed matter from its suppliers at the cost price. The respondent also presented sales invoices prepared by the appellant that demonstrated that the appellant had sold printed matter to its clients. The respondent also relied on statements to the effect that the appellant did not do its own printing, which were made by the appellant's representatives during the audit.

The respondent argued that the 26 percent figure that he determined to be tax owing by the appellant on sales of printed matter was an exact figure for the sample period and did not constitute an estimate, as argued by the appellant. The 26 percent figure was then used to calculate the tax applicable to the sales of printed matter made over the entire period of the refund claim.

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

DECISION

Preliminary Matters

The parties filed their briefs in accordance with the *Canadian International Trade Tribunal Rules*[2] and a hearing was scheduled for January 21, 2002. On January 15, 2002, the appellant sought an order from the Tribunal allowing it to file an amended brief. The appellant acknowledged that the amended brief raised additional legal arguments, but argued that they were not new to the respondent. The appellant submitted that it had made the same arguments in its notice of objection and that they were considered and denied by the respondent in his notice of decision dated April 21, 1999. The respondent opposed the motion on the grounds that the appellant should have included the additional arguments in its original brief in the appeal, given that they were not new. If the Tribunal granted the motion, however, the respondent requested a postponement of the hearing, as well as an opportunity to file an amended brief in reply.

On January 17, 2002, the Tribunal informed the parties that the appellant's request to file an amended brief had been denied. Rule 34 of the Rules of Procedure requires the appellant to file its brief within 60 days after filing a notice of appeal. Rule 24.1 allows a party to make a written request to the Tribunal for permission to file its brief after the expiry of the applicable time limit. The Tribunal may allow the document to be filed if it determines that to do so is fair and equitable in the circumstances.

In this instance, the Tribunal denied the appellant's request to file an amended brief on the grounds that it would not be fair and equitable to do so. Contrary to the appellant's claim in its letter of January 15, 2002, the Tribunal was not satisfied that the additions, which more than doubled the length of the original submission, did not introduce new arguments. Even if the additional arguments had been considered earlier, they did not constitute a part of the submissions made in this case. Further, the Tribunal notes that the request was made immediately prior to the scheduled hearing, well outside the time limit for filing a brief, as provided in the Rules of Procedure, and over two years after the appeal was initiated.

The hearing of this appeal had already been delayed several times at the appellant's behest.

A postponement requested by the appellant on November 15, 2001, was granted, and the hearing was scheduled for January 21, 2002. The Tribunal notes that this request by the appellant was based on the possibility that the two parties would resolve the matter without the need for a hearing. The Tribunal also notes that, in the same request, the appellant advised the Tribunal that counsel would provide a progress report "no later than December 15, 2001." No such progress report was provided.

The Tribunal further notes that, over the previous two years, there had been other such requests for a delay in proceedings. In requesting the delays, the appellant submitted that the parties were preparing to discuss the issues in detail, with the likely result that a solution would be found and the appeal withdrawn. In earlier correspondence, there was at least one similar failure to fulfill the terms of a promise to advise the Tribunal of developments.

A subsequent request for a postponement by the respondent, dated January 15, 2002, was contingent upon the Tribunal's granting leave to the appellant to file an amended brief. The denial of the appellant's request to file an amended brief effectively nullified the respondent's request for a further postponement.

Absent sufficient indication of extraordinary circumstances or a satisfactory explanation as to why the request to file an amended brief was not made earlier, the Tribunal considers the request to be late. To permit the filing of an amended brief so close to the hearing date would be unfair to the respondent or,

2. S.O.R./91-499 [hereinafter Rules of Procedure].

alternatively, would cause yet another delay in these proceedings in order to allow the respondent sufficient time to respond adequately to the new arguments.[3]

Following the receipt of submissions from the parties, the in-person hearing scheduled for this appeal was cancelled, and a teleconference hearing was scheduled for January 21, 2002. The appellant subsequently informed the Tribunal that it would not be making any further representations to the Tribunal, with the consequence that the teleconference was no longer necessary. The Tribunal, therefore, proceeded to decide the matter on the basis of written submissions.

Decision on the Merits

The Tribunal notes that the respondent had accepted the appellant's original claim in part and had refunded 74 percent of the amount claimed. The appeal, therefore, concerns the remaining 26 percent of the appellant's original claim.

The relationship of much of the appellant's evidence to the subject matter of the appeal was unclear. While connections might have been established through testimony and argument, the appellant's decision to withdraw from the teleconference hearing made it necessary for the Tribunal to determine the matter on the basis of the written material on the record.

Much of the invoice and financial material presented in evidence was virtually unreadable. In this respect, the Tribunal refers to the respondent's Exhibits, Tabs A and B. The invoices presented under Tab C of the respondent's Exhibits were mostly legible and support the respondent's position that there was more than a minimal amount of printing done by the appellant. However, it was impossible for the Tribunal to draw any precise conclusions based on the evidence filed.

It is the Tribunal's view that the onus was on the appellant to demonstrate a *prima facie* case for the validity of its claim to the remaining alleged overpayment of tax or some portion of it. As a whole, the evidence available to the Tribunal did not establish a *prima facie* case for the appellant. The Tribunal found insufficient evidence and no compelling argument in support of the appellant's position that it should be refunded a greater portion of its original claim. Therefore, the appeals are dismissed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Ellen Fry
Ellen Fry
Member

3. *Qureshi* v. *Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 1300 (T.D.). *Lanlehin* v. *Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 207 (T.D.). *Mishak* v. *Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1242 (T.D.).