



Ottawa, Tuesday, May 15, 2001

**Appeal No. AP-99-062**

IN THE MATTER OF an appeal heard on May 3, 2000, 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 July 19, 1999, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

**BETWEEN**

**BARNEY PRINTING LIMITED**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



**UNOFFICIAL SUMMARY**

**Appeal No. AP-99-062**

**BARNEY PRINTING LIMITED**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* from a decision of the Minister of National Revenue, whereby the respondent did not refund the federal sales tax (FST) paid on exempt printed matter. The issue in this appeal is whether an application for refund of FST, which was filed by the appellant and did not mention printed matter, entitles the appellant to a refund with respect to FST paid in error on printed matter.

**HELD:** The appeal is dismissed. The process of determination of the exact amount paid in error is set in motion by the application for refund as indicated by subsections 72(4) and 72(5) of the *Excise Tax Act*. In the Tribunal's view, that application must state the nature of the error committed by the applicant for the limitation period to have any meaning. Where the error relates to payments of FST made on tax-exempt goods, the type of goods must be specified. Otherwise, one would simply have to file a notice of objection claiming that moneys were paid in error, without further information and without even knowing for a fact that any error had been made, in order to protect any amounts paid in error during the two-year period in issue.

In addition, to accept that the nature of the error not be specified in the application for refund would seem to render the phrase "if he applies therefor", found in section 68 of the *Excise Tax Act*, devoid of any substantive obligatory content. This, given the obligation put on the respondent to determine the amount payable to an applicant, would place an unreasonable burden on the respondent. As indicated above, it would also constitute a way around the two-year limitation period. In the Tribunal's view, this could not have been Parliament's intent.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: May 3, 2000  
Date of Decision: May 15, 2001

Tribunal Members: Pierre Gosselin, Presiding Member  
Patricia M. Close, Member  
James A. Ogilvy, Member

Counsel for the Tribunal: Philippe Cellard

Clerk of the Tribunal: Anne Turcotte

Appearances: J.A. Prestage, for the appellant  
Patricia Johnston, for the respondent



Appeal No. AP-99-062

**BARNEY PRINTING LIMITED**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: PIERRE GOSSELIN, Presiding Member  
PATRICIA M. CLOSE, Member  
JAMES A. OGILVY, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> from a decision of the Minister of National Revenue dated July 19, 1999, where the respondent did not refund the federal sales tax (FST) paid on exempt printed matter. The issue in this appeal is whether an application for refund of FST, which was filed by the appellant under section 68 of the Act on May 9, 1990, and did not mention printed matter, entitles the appellant to a refund with respect to FST paid in error on printed matter.

The relevant provisions of the Act are the following:

68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.

72(4) On receipt of an application, the Minister shall, with all due dispatch, consider the application and determine the amount, if any, payable to the applicant.

72(5) In considering an application, the Minister is not bound by any application or information supplied by or on behalf of any person.

**EVIDENCE**

The appellant and the respondent filed an agreed statement of facts. These facts follow. The appellant is a commercial printer in the business, *inter alia*, of producing imaged articles and printed matter. Imaged articles are materials used to produce printed matter (for example, film and proofs). Printed matter is material created from the imaged articles (for example, annual reports, newsletters, brochures and catalogues).

During the appeal period, from May 1, 1988, to December 31, 1989, the appellant remitted FST pursuant to the Act on both imaged articles and printed matter. On May 9, 1990, the appellant filed, on the prescribed form, i.e. *Application for Refund/Deduction of Federal Sales and/or Excise Taxes*, claiming a refund of \$74,708.54 for FST remitted in error on imaged articles. On July 11, 1990, the respondent released a notice of determination that rejected the appellant's application for refund. On December 27, 1990, the

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1. R.S.C. 1985, c. E-15 [hereinafter Act].

appellant served a notice of objection on the respondent in response to the notice of determination. This notice of objection was held in abeyance until early 1999 pending the outcome of similar litigation.

In January 1999, the Department of National Revenue (now Canada Customs and Revenue Agency) commenced an audit of the appellant's records in response to its notice of objection. The auditor requested that the appellant prepare an analysis based on actual work dockets. The resulting analysis revealed that, during the appeal period, the appellant had remitted FST in error on imaged articles in the amount of \$135,660.18 rather than \$74,708.59 as originally claimed. Furthermore, the appellant discovered that it had also remitted FST during the appeal period on allegedly FST-exempt printed matter in the amount of \$64,298.48.

On July 19, 1999, the respondent released a notice of decision with respect to the appellant's application for refund on imaged articles. The decision also considered the allegedly erroneous remittances on printed matter. The notice of decision concluded that the full overpayment of \$135,660.18 regarding imaged articles would be paid. It also concluded that there would be no refund regarding FST paid on printed matter, as these transactions are "statute barred". It is this later decision that is the subject of the present appeal. The parties have agreed that, for the purposes of this appeal, it will be assumed that at least some printed matter was FST exempt, as it falls within an exemption category of the Act.

## ARGUMENT

Relying on *Erin Michaels Mfg. v. MNR*,<sup>2</sup> the appellant submitted that it should be entitled to a refund on FST paid in error on printed matter. In *Erin Michaels*, the Tribunal determined that it was possible for a taxpayer to recover an amount in excess of the amount requested by the taxpayer in its initial application. According to the appellant, it is not relevant to the present case that, in *Erin Michaels*, both the amount specified in the initial application and the amount sought to be recovered related to the same goods. The appellant submitted that the same principle should apply when the amount sought to be recovered, above the amount of the initial application, relates to different goods. To support its position, the appellant relied on subsection 72(5) of the Act, which states that, in considering an application, the respondent is not bound by that application.

The appellant argued that, having filed an application for a refund on the basis that tax had been remitted erroneously on specific tax-exempt goods, then tax remitted in error on all exempt goods is subject to refund as part of that application. The appellant submitted that the policy rationale that justified the Tribunal's decision in *Erin Michaels* was that the respondent should not be entitled to keep more money than the amount to which he is entitled when a timely application has been made. The appellant stated that the same policy rationale supported its position in the present appeal.

The respondent submitted that the present appeal is distinguishable from *Erin Michaels*, which was concerned with only one type of goods. In the present appeal, the amount sought to be recovered over the amount of the initial application relates to goods, printed matter, which differ from those that were listed in the initial application, that is to say imaged articles. The respondent submitted that the amount paid in error with respect to printed matter should not be refunded, given that printed matter was not mentioned on the initial application for refund filed pursuant to section 68 of the Act. No amended or new application for refund with respect to printed matter was filed within the two-year time limit prescribed by section 68.

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2. (10 January 1997), AP-94-330 (CITT) [hereinafter *Erin Michaels*].

The respondent submitted that to grant a refund on tax paid in error on printed matter would be tantamount to permitting an amendment to the original application or to permitting the filing of a new application, both outside of the time limit. The respondent also submitted that to grant this appeal would set the precedent that one could protect one's right to reimbursement of moneys paid in error by the mere filing of a general application for refund that does not specify the nature of the reimbursement sought. According to the respondent, such a precedent would be contrary to the purpose of the Act.

## DECISION

Section 68 of the Act provides in part that, where a person has paid any moneys in error and the moneys have been taken into account as taxes, an amount equal to the amount of those moneys shall be paid to that person if he applies therefor within two years after the payment of the moneys. Subsection 72(4) indicates that, on receipt of an application, the Minister shall, with all due dispatch, consider the application and determine the amount, if any, payable to the applicant. Pursuant to subsection 72(5), in considering an application, the Minister is not bound by any application or information supplied by or on behalf of any person.

In the present appeal, the appellant, when it filed its application for refund with the respondent, indicated that it sought a refund in the amount of \$74,708.54 for FST paid in error on tax-exempt imaged articles. As indicated earlier, after an audit, the appellant realized that the amount of FST paid in error was, in fact, \$135,660.18. This amount was reimbursed by the respondent even though the appellant, in its notice of application, had applied for a lesser amount.

The issue that the Tribunal must decide in the present appeal is whether, having filed an application for refund of FST paid on one type of tax-exempt goods, imaged articles, within the two-year time limitation, the appellant is entitled to a refund for FST paid on another type of tax-exempt goods, printed matter, not mentioned in the application.

Section 68 of the Act provides for a two-year time limit within which an applicant must file an application for refund if it wants to get a refund for moneys that it paid in error. In the Tribunal's view, this implies that an applicant must report the nature of its error within that time limit. To permit a refund for an error discovered after the expiration of the two-year period would seem to defeat the purpose of such a time limit.

In the Tribunal's view, the present appeal is distinguishable from *Erin Michaels*. In *Erin Michaels*, the appellant, when filing the application, claimed a refund of FST paid in error on tax-exempt hair bows. Clearly, the appellant knew at the time that FST had been paid in error on hair bows. The audit later revealed that the amount paid in error was higher than the amount specified in the application for refund. As decided in *Erin Michaels*, the amount in excess of the application was also refundable.

In rendering its decision in *Erin Michaels*, the Tribunal, after having cited subsections 72(4) and 72(5) of the Act, stated:

The Tribunal interprets these provisions to mean that there is an obligation on the Minister to determine the amount payable to an applicant and, in so doing, the Minister is not bound by the information provided by the applicant. The Tribunal is of the view, therefore, that it is not sufficient for the Minister to accept without question, or to limit a refund to, the amount identified in the application as being paid in error. For purposes of determining the amount payable to an applicant,

the Minister must determine the actual amount paid in error. It is this sum that constitutes the amount payable under section 68, subject to the two-year limitation imposed under that section.<sup>3</sup>

It should be noted that, in this passage, the emphasis is put on the determination of the “amount” that was paid in error. The process of determination of the exact amount paid in error is set in motion by the application for refund as indicated by subsections 72(4) and 72(5) of the Act. In the Tribunal’s view, that application must state the nature of the error committed by the applicant for the limitation period to have any meaning. Where the error relates to payments of FST made on tax-exempt goods, the type of goods must be specified. Otherwise, one would simply have to file an application for refund claiming that moneys were paid in error, without further information and without even knowing for a fact that any error had been made, in order to protect any amounts paid in error during the two-year period in issue.

In addition, to accept that the nature of the error not be specified on the application for refund would seem to render the phrase “if he applies therefor”, found in section 68 of the Act, devoid of any substantive obligatory content. This, given the obligation put on the respondent to determine the amount payable to an applicant,<sup>4</sup> would place an unreasonable burden on the respondent. As indicated above, it would also constitute a way around the two-year limitation period. In the Tribunal’s view, this could not have been Parliament’s intent.

Given the foregoing and since the appellant did not apply within the two-year time limit for a refund of FST paid in error on tax-exempt printed matter, the Tribunal concludes that the appellant is not entitled to a refund of the amount of FST that it paid in error on such tax-exempt printed matter. Consequently, the appeal is dismissed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

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3. *Ibid.* at 4.

4. *Ibid.*