Federal Court  Cour fédérale

Date: 20100412

Docket: T-1509-07
T-1510-07
T-1511-07
T-1512-07
T-1513-07

Citation: 2010 FC 381

Ottawa, Ontario, April 12, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

KRUGER PRODUCTS LIMITED

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The plaintiff, Kruger Products Limited, commenced on August 15, 2007, five actions against the defendant, Her Majesty the Queen in Right of Canada, seeking pursuant to section 81.2 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act), the recovery of Federal Sales Tax (FST), plus applicable interest, overpaid by the plaintiff between April 1, 1982 and June 30, 1985 (the relevant period) with respect to the sales of its bathroom tissue products.

[2] The plaintiff, formerly known as Scott Paper Limited (Scott Paper), is a corporation which at all relevant times was engaged in the manufacture and sale of paper products, including facial tissue and bathroom tissue products.

[3] The Canada Revenue Agency (CRA), and ultimately the Minister of National Revenue (the Minister) accepted to refund the plaintiff's overpayment of tax with regard to its sales of facial tissue during the relevant period. The plaintiff was reimbursed $3,023,576, which corresponded to the qualifying sales of the plaintiff's facial tissues that were exempted from FST on the basis of being a "cosmetic" pursuant to subsection 50(5)(g) of the Act. This amount is $2,362,884 less than what plaintiff originally filed for ($5,386,460) and it does not include any amount of FST overpaid with regard to sales of the plaintiff's bathroom tissue products during the relevant period.

[4] The CRA and the Minister disallowed any claim relating to the plaintiff's sale of bathroom tissue products during the relevant period on two grounds. First, the plaintiff's refund claims made on April 1, 1986, failed to identify "bathroom tissues" as a product for which the refund was requested. Second, the plaintiff was not entitled to recover any overpayment of tax with regard to the sales of its bathroom tissue products because it made a request to include its sales of bathroom tissue products within the refund claims late in 1999, outside the expiry of the statutory limitation period provided in section 68 of the Act.

[5] The plaintiff estimates that the total FST paid in error on its sales of bathroom tissue products during the relevant period is $13,081,573. The plaintiff seeks, *inter alia*, an order from this

Court, acknowledging that the plaintiff overpaid tax during the relevant period with regard to its sales of bathroom tissue, and providing that as a result of this overpayment, the plaintiff is entitled to a refund. The defendant opposes the actions.

[6] At the time the plaintiff filed the claims in issue in this proceeding (1986), the Act entitled taxpayers to claim a refund for any tax paid in error within four years from the payment of the tax in issue (here, FST). The limitation period was later shortened by legislative amendment (R.S., c. 7 (2nd Supp.), subsection 23(3)) to two years from the payment of any tax; however, it is not disputed by the parties that the limitation period applicable to the claims in question is the old, four year period.

[7] Section 68 sets out the process by which a taxpayer may be granted a refund for tax paid in error. Until 2007, Section 68 of the Act provided that:

68. Where a person, otherwise than pursuant to an assessment, has paid moneys in error, whether by reasons 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.	**68.** Lorsqu'une personne, sauf à la suite d'une cotisation, a versé des sommes d'argent par erreur de fait ou de droit ou autrement, et qu'il a été tenu compte des sommes d'argent à tire de taxes, de pénalités, d'intérêts ou d'autres sommes en vertu de la présente loi, un montant égal à celui de ces sommes doit, sous réserve des autres dispositions de la présente partie, être payé à cette personne, si elle en fait la demande dans les deux ans suivant le paiement de ces sommes.

[8] In 2007, section 68 was amended with retroactive effect to September 3, 1985. In effect, the Act was amended to comply with current legislative drafting standards. Presently, section 68 reads as follows:

68. (1) If a person, otherwise than pursuant to an assessment, has paid any moneys in error in respect of any goods, 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 the moneys shall, subject to this Part, be paid to the person if the person applies for the payment of the amount within two years after the payment of the moneys.	**68.** (1) Lorsqu'une personne, sauf à la suite d'une cotisation, a payé relativement à des marchandises, par erreur de fait ou de droit ou autrement, des sommes d'argent qui ont été prises en compte à titre de taxes, de pénalités, d'intérêts ou d'autres sommes en vertu de la présente loi, un montant égal à ces sommes d'argent est versé à la personne, sous réserve des autres dispositions de la présente partie, si elle en fait la demande dans les deux ans suivant le paiement de ces sommes.

[My emphasis.]

[9] Section 68 must be read in conjunction with sections 71 and 72 of the Act, which read as follows:

71. Except as provided in this or any other Act of Parliament, no person has a right of action against Her Majesty for the recovery of any moneys paid to Her Majesty that are taken into account by Her Majesty as taxes, penalties, interest or other sums under this Act.	**71**. Sauf cas prévus à la présente loi ou dans toute autre loi fédérale, nul n'a le droit d'intenter une action contre Sa Majesté pour le recouvrement de sommes payées à Sa Majesté, dont elle a tenu compte à titre de taxes, de pénalités, d'intérêts ou d'autres sommes en vertu de la présente loi.

72. (1) In this section, "application" means an application under any of sections 68 to 69.	**72.** (1) Dans le présent article, « demande » s'entend d'une demande faite en vertu des articles 68 à 69.
(2) An application shall be made in the prescribed form and contain the prescribed information.	(2) Une demande doit être faite en la forme prescrite et contenir les renseignements prescrits.
(3) An application shall be filed with the Minister in any manner that the Governor in Council may, by regulation, prescribe.	(3) Une demande doit être présentée au ministre de la manière que le gouverneur en conseil peut déterminer par règlement.
(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.	(4) Le ministre saisi d'une demande doit, avec toute la célérité raisonnable, l'examiner et déterminer le montant éventuel à payer au demandeur.
(5) In considering an application, the Minister is not bound by any application or information supplied by or on behalf of any person.	(5) Lors de l'examen d'une demande, le ministre n'est pas lié par une demande présentée ni par un renseignement fourni par une personne ou au nom de celle-ci.
…	…

[10] According to section 81.28 of the Act, appeals commenced under section 81.2 are deemed to be actions and are to be instituted by way of the method prescribed in section 48 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (*FCA*), which governs the institution of proceedings against the Crown. This means that the appeal is not a judicial review to which a standard of review applies, but rather, an appeal *de novo.* See *Zale Canada Diamond Sourcing Inc. v. Canada*, 2010 FC 202 at paragraph 2 and *Pétroles Dupont Inc. v. Canada*, 2010 FC 72 at paragraph 7.

[11] The joint and common trial of the actions took place before this Court on March 25, 2010. The relevant facts are not in dispute. No witnesses were heard by the Court, the parties having agreed to proceed by way of an agreed statement of facts, which was supported by a joint book of documents.

[12] The appeals are dismissed by the Court.

[13] First, the plaintiff's contention that it has complied with the provisions of subsection 68(1) of the Act for a refund of tax paid in error with respect to its sales of bathroom tissues is not supported by the facts of this case or the law. Indeed, the plaintiff is asking the Court to adopt an interpretation of the law which is contrary to relevant case law and which completely undermines the limitation period provided in section 68 of the Act.

[14] Second, the administrative policy of the CRA can be of no assistance to the plaintiff in the case at bar. While the CRA's policy may provide applicants for a refund under section 68 of the Act with a certain level of flexibility, this policy cannot supersede the law or provide additional benefits or rights not contemplated by the law. Moreover, on the facts presented to this Court, there is nothing in the policy that would entitle the plaintiff to a refund for the overpayment of its FST with regard to its sale of bathroom tissue during the relevant period.

[15] The claims which are currently in issue before the Court concern the same type of goods, i.e. sales of bathroom tissues, as the claim that was dealt with by this Court in *Scott Paper Ltd. v.* Canada, 2005 FC 1354 (*Scott Paper 2005*) and the Federal Court of Appeal in *Scott Paper Limited v. Canada*, 2006 FCA 372 (*Scott Paper 2006*). Leave to appeal to the Supreme Court of Canada was refused January 16, 2007 (*Scott Paper Ltd. v. Canada*, [2007] S.C.C.A. No. 26). These latter cases conclusively disposed of the claim made by Scott Paper with regard to the FST paid it in relation to its sales of bathroom tissue products during the period between April 1, 1990 and December 31, 1990 (the 1990 claim).

[16] In dismissing Scott Paper's appeal, the Federal Court of Appeal stated that the appellant's original claim did not intend to claim a refund with regard to their sales of bathroom tissue products. This was supported by, *inter alia*, the evidence of the appellant's own witnesses and the fact that the quantum claimed was based exclusively on the tax paid in relation to Scott Paper's sales of its facial tissues (see paragraphs 29, 30 and 32). Of importance to the case at bar, the Federal Court of Appeal found that section 68 of the Act, which enables the taxpayer to apply for a refund of overpaid tax and sets out the applicable limitation period, requires the taxpayer to specify which products they are claiming a refund for (see paragraphs 47-49).

[17] The Court is asked to determine a second time, this time on the basis of claims filed by Scott Paper for the period between April 1, 1982 and June 30, 1985 (the 1982-1985 claims), whether the plaintiff is entitled to a refund for any tax it overpaid with regard to the sales of its bathroom tissue products. More particularly, the issue in these appeals is whether the plaintiff is entitled to recover

any overpayment of FST with regard to the sales of its bathroom tissue products during this period, notwithstanding the fact that the refund claims upon which the refund is based do not identify bathroom tissues. Except for the period contemplated by the 1982-1985 claims, the issue currently in dispute between the parties is the same as the one conclusively decided in *Scott Paper 2005* and *Scott Paper 2006*.

[18] The 1982-1985 claims were filed on N-15 refund forms, the prescribed form as required by subsection 72(2). According to these forms, the error which entitled the plaintiff to a refund was that the products for which the FST was paid, were "exempt by virtue of Part VIII or Part XV of Schedule III" of the Act. Part VIII and Part XV of Schedule III of the Act dealt with "health products" and "clothing and footwear products", respectively. The total amount claimed for FST paid in error is $5,386,460. While Scott Paper did not specify on those forms whether the products in question were facial tissue, bathroom tissue, both or neither, the subsequent exchanges between parties clearly suggest that Scott Paper was seeking a reimbursement of FST paid solely with respect to facial tissue products sold during the period covered by the 1982-1985 claims.

[19] The 1982-1985 claims were initially filed to protect its right of refund pending a decision by the Canadian International Trade Tribunal (the tribunal) with regard to an application brought by Canadian International Paper Inc. (CIP). The decision rendered on August 8, 1986, denied CIP's request for a declaration that facial tissues were exempt from FST under the Act, because they are "health products". According to the tribunal, facial tissues were not "health products", but "cosmetics" which were not exempt products under the Act at that time. This decision was later

confirmed by the Federal Court of Appeal. See *CIP Inc. v. Deputy M.N.R.., Customs and Excise*, [1988] F.C.J. No. 582 (F.C.A.) (QL) (*CIP*).

[20] In the case at bar, at the time the parties signed the agreed statement of facts, the plaintiff was unable to ascertain whether the amounts specified on the 1982-1985 claims as tax paid in error were estimated having regard to the sales of any products other than the plaintiff's facial tissue products. At the hearing before this Court, the plaintiff did not deny that these figures correspond exclusively to its sales of facial tissues during the relevant period. This finding is supported by the documentary evidence and exchanges that took place between the parties prior to the CRA actually conducting their audit of the 1982-1985 claims sometime in 2003.

[21] Like the 1982-1985 claims, the 1990 claim was filed by Scott Paper on a protective basis. The 1990 claim also relied on the decision of the Federal Court of Appeal in *CIP*, above. That being said, by notice of determination dated September 21, 1993, the Minister disallowed the 1990 claim on the basis that its sales of facial tissue products were correctly made on a tax-paid basis. On December 9, 1993, the plaintiff filed a notice of objection to the notice of determination, on the basis that, according to the decision of the Federal Court of Appeal in *CIP*, above, facial tissues should be included in the definition of "cosmetics" and should not be subject to FST. On March 14, 1995, the plaintiff agreed to hold its 1990 claim in abeyance pending resolution of a similar claim by one of its major competitors, namely, Kimberley-Clark Canada Inc. (Kimberley-Clark).

[22] In 1994, Kimberley-Clark filed a statement of claim at this Court seeking a declaration as to whether “toilet paper and/or facial tissue are either, or both, a "cosmetic" or a "health good" according to the definition in the [Act]”. On March 12, 1998, the Court found that both bathroom tissue and facial tissue are “cosmetics” under the Act and therefore exempt from FST under certain circumstances. See *Kimberley-Clark Canada Inc. v. Canada* (1998), 145 F.T.R. 265, [1998] F.C.J. No. 353 at paragraphs 1 and 35 (F.C.T. D.) (QL) (*Kimberley-Clark).* This decision was never appealed.

[23] On December 8, 1998, Rosemary J. Anderson, C.A., on behalf of the plaintiff, wrote a letter to Revenue Canada in which she inquired as to the status of Scott Paper’s refund claims “which were … filed … in connection with the payment of Federal Sales Tax on sales of facial tissues” [my emphasis]. As can be seen, the plaintiff had never construed its refund claims to include any overpayment of tax with regard to the sales of its bathroom tissues.

[24] In January 1999, the Minister proceeded with an audit of the plaintiff’s sales of facial tissues covered by the 1990 claim. It is only in late 1999, that the plaintiff, for the first time, advised the CRA that the audit of the 1982-1985 claims and the 1990 claim should include its sales of bathroom tissue in the respective periods. Indeed, the plaintiff requested that the CRA increase the 1982-1985 claims and the 1990 claim amounts by the difference between their original face amounts and the amount of any otherwise uncredited taxes overpaid on sales of bathroom tissue (the further claim amounts). Thus, more than thirteen years after the filing of the 1982-1985 claims (in the case of the 1990 claim, it was more than seven years after its filing), the plaintiff advised the CRA that it

wanted the audit of these claims to consider any overpayment of tax in respect of another product i.e. its sales of bathroom tissues.

[25] *Stare decisis* is a fundamental principle of our system and dictates that a lower court follows the decision of an appellate court on a point of law where the factual situation is the same. In the case at bar, the plaintiff relies on legislative amendments to tell this Court that it is not bound by the judgment rendered by the Federal Court of Appeal in *Scott Paper 2006*, above. The plaintiff further submits that as a result of a policy in place for dealing with refund claims, the Minister is required to investigate into any overpayment of tax within the period specified in the refund claim, regardless of whether the overpayment was initially claimed by the taxpayer or whether the product for which the tax has been paid was specified on the prescribed form (the N-15 form). According to the plaintiff, this policy was not considered by the Federal Court of Appeal in *Scott Paper 2006*, but ought to be by this Court in considering the issue.

[26] For the reasons that follow, the plaintiff's arguments must fail.

Legislative changes

[27] I do not believe that the minor changes to the wording of the statute can be said to modify the interpretation provided by the Federal Court of Appeal in *Scott Paper 2006*, above.

[28] The plaintiff highlights the inclusion of the words “in respect of any goods”; however this only expressly states what was implicit in the previous wording, namely that the refund is payable to persons who have overpaid tax with respect to goods (as opposed to services, which are referred to in sections 68.12 - 68.14 of the Act). The parallel amendment to the French text supports this. Namely, “payé relativement à des marchandises” simply means that the overpayment must have been with respect to goods, generally. There is no support for the plaintiff’s interpretation that the refund may be sought without specifying *for which* goods the overpayment was made.

[29] Similarly, by substituting “therefor” with “for the payment of the amount”, the legislature simply expressly stated what was previously implied. This is all the more certain when one considers that prior to the hearing at the Federal Court of Appeal, Justice Heneghan of this Court found in *Scott Paper 2005*, above, at paragraph 54, that “[t]he word "therefor" refers to any moneys paid in error”. Furthermore, the substitution of the phrase “for the payment of the amount” in place of “therefor” supports the interpretation given by the Federal Court of Appeal in *Scott Paper 2006*, above. The taxpayer must apply for the amount of tax it has overpaid. To know what amount is an overpayment, the taxpayer would need to specify the nature of the error. As the Federal Court of Appeal stated, to specify the nature of the error, the taxpayer would be required to identify the goods with regard to which the error was made.

[30] This conclusion is supported by the fact that the amendments to the French version of the provisions are no more significant than the English amendments, and the explanatory notes relating to the 2007 amendment of section 68 provide that the amendments are “update[s] [to the] wording

in accordance with current legislative drafting standards." Therefore, in addition to the fact that the words themselves do not appear to change the meaning of the provision, there is no indication that the legislature intended to make any substantive change to the law.

[31] In *Scott Paper 2006*, above, at paragraph 44, the Federal Court of Appeal cites with approval the approach to statutory interpretation set down by the Supreme Court in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at paragraph 10. In accordance with the plaintiff's argument, the Court finds that the ordinary meaning of the words of section 68, as it then was, "must … "play a dominant role in the interpretive process"" (see paragraph 47). While the Federal Court of Appeal found that there was only one interpretation open to them on the plain and ordinary meaning of the words of the provision, according to the Court, there was no basis whatsoever for the plaintiff's argument that the nature of the error (or the identity of the goods) giving rise to the refund need not be specified. Emphasizing the words "applies therefor" from the old version of the provision, the Court finds, at paragraph 49, that this phrase meant that the taxpayer must apply for the money paid in error, which according to the Court of Appeal, could not be done without specifying the error which is at the heart of the demand. In specifying the error, the Court notes that it is essential that the taxpayer indicate the goods for which the refund is sought, since without such information, there can be no explanation of the error that entitles the taxpayer to a refund (see paragraph 49).

[32] Furthermore, the plaintiff's argument must fail considering that the jurisprudence is clear that the creation of a limitation period within section 68, which has not been removed by the

legislative amendments, would be rendered meaningless were taxpayers not required to state in their claim the identity of goods and the nature of the error giving rise to their right to refund. See *W. Ralston (Canada) Inc. v. Canada (Minister of National Revenue– M.N.R.)*, 2002 FCT 627 at paragraph 20, which was cited with approval by Justice Heneghan in *Scott Paper 2005*, above, at paragraphs 56-61, who was then affirmed by the Federal Court of Appeal in *Scott Paper 2006*, above, at paragraphs 46 and 47.

[33] Every taxpayer would be entitled to file a broadly worded, or blank, refund claim within the limitation period and then retroactively specify goods for which they are entitled to a refund. Given that a purpose of a limitation period must be to bring certainty and finality to the refund of claims under section 68, it cannot be that Parliament did not intend that taxpayer's specify the nature of the error and/or the identity of the good for which the refund is being claimed. Equally as problematic would be the possibility that the CRA be responsible for conducting a complete audit of every taxpayer that files a refund claim, in order to determine if there exist any goods for which the taxpayer has overpaid tax.

[34] As a final note on the issue of statutory interpretation, the plaintiff's reliance on the Supreme Court's decision in *United Parcel Service Canada Ltd. v. Canada*, 2009 SCC 20 at paragraph 20 (*UPS Canada*) is misplaced. In that case, the Court dealt with the ability of UPS to be refunded the GST it had overpaid. Given that UPS was not the entity that was legally liable to pay the GST, the Minister argued that based on the wording of subsection 261(1), they were not entitled to the refund.

[35] The wording of the provision is as follows:

261. (1) Where a person has paid an amount (a) as or on account of, or (b) that was taken into account as, tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.	**261.** (1) Dans le cas où une personne paie un montant au titre de la taxe, de la taxe nette, des pénalités, des intérêts ou d'une autre obligation selon la présente partie alors qu'elle n'avait pas à le payer ou à le verser, ou paie un tel montant qui est pris en compte à ce titre, le ministre lui rembourse le montant, indépendamment du fait qu'il ait été payé par erreur ou autrement.

[36] At paragraph 17, the Supreme Court disagrees with the Minister's interpretation of the provision, finding that nothing in the wording of the provision requires an inquiry into the liability for the payment of tax. According to the Supreme Court, there is nothing in the ordinary and grammatical meaning of the provision to enable only persons who are liable to pay GST to apply for a refund under subsection 261(1) (paragraph 20).

[37] This is not the case with regard to the Federal Court of Appeal's decision in *Scott Paper 2006*, above, and by necessary implication, the interpretation urged by the defendant. In my humble opinion, contrary to the suggestion made by the plaintiff, the Federal Court of Appeal did not read in any additional requirement to section 68. Indeed, section 68 would not make sense if "appl[ying]

therefor" did not require the applicant to, at minimum, specify what error they allege entitles them to the refund. With regard to section 68 in its present form, the same holds true for the phrase "appl[ying] for the payment of the amount", since, as noted above, the latter is not so different as to render the Federal Court of Appeal's interpretation inapplicable.

[38] It is clear therefore, that the legislative amendments have not changed the Federal Court of Appeal's interpretation that section 68 of the Act requires an applicant for a refund to specify the nature of the error and/or the identity of the goods for which the refund is being claimed.

The Role of the Minister's Policy

[39] In the alternative, the plaintiff argues that once a valid refund claim is filed, the Minister, as a result of the policy in place for dealing with refund claims, is required to investigate into any overpayment of tax within the period specified in the refund claim, regardless of whether the overpayment was initially claimed by the taxpayer. In support of this argument, the plaintiff notes that section 72 of the Act enables the Minister to mandate the process to be complied with by applicants seeking a refund under section 68.

[40] According to the plaintiff, the Minister did in fact prescribe a form (the N-15 form), which requires applicants to specify the period for which the refund is sought, the reason for the refund, and the amount of the refund. However, the plaintiff submits that the Minister has derogated from the requirements specified in the N-15 form through his "prescription" of a policy with regard to

refund claims, which does not require applicants to supply accurate or complete information on the prescribed forms in order to get their refund. According to the plaintiff, so long as the claim is filed within the limitation period, and there exist goods which are properly exempt under the Act, the Minister could not deny any claim.

[41] At the time the plaintiff's refund claims were audited, the parties agree that the CRA had a policy *not* to deny claims solely on the basis that the applicant for a refund failed to identify the goods or provide a reason for the refund, or where the applicant made a mistake with regard to the basis for the refund or the amount to be refunded. Furthermore, the CRA's policy did not require applicants to file supporting documents, but if there was information missing, the policy enabled the CRA: to contact the applicant for further information, to request that documentation be submitted in support of the claim or to conduct a field audit on the premises where supporting documentation is believed to be kept. Finally, the CRA's policy was such that they would refund any applicant, moneys paid in error over and above the amount specified in an applicant's claim, so long as the moneys related to the same period for which the refund was sought and were in relation to the same goods contemplated by the refund claim.

[42] The plaintiff notes that subsection 72(5) of the Act explicitly provides that the Minister is not bound by the information contained in the application when assessing a refund claim. The plaintiff submits that this, in addition to the Minister's policy not to penalize an applicant who has failed to supply certain information, is illustrated in the case at bar by the fact that the Minister refunded a portion of the plaintiff's claim on the ground that the product was a cosmetic, a ground

that the plaintiff itself did not specify in its refund claims. Since the Minister clearly applies his policy in some circumstances, the plaintiff submits that he is required to do so consistently, since he has an obligation to treat similarly situated taxpayers in the same way. See *Johnson & Johnson Inc. v. Ontario (Minister of Finance)* (2003), 63 O.R. (3d) 675, [2003] O.J. No. 676 at paragraph 40.

[43] Again, the plaintiff's arguments must fail.

[44] First, section 72 of the Act actually supports the finding above that section 68 requires some information on which a refund can be assessed. The Federal of Court of Appeal in *Scott Paper 2006*, above, at paragraph 51 made a similar observation. Pursuant to subsection 72(2) all applications must be in prescribed form and contain the prescribed information. It is even noted by the plaintiff that the Minister did in fact prescribe a form (the N-15 refund claim form) and information to be contained on said form. Among other things, the N-15 form requires an applicant for a refund to specify the period for which the refund is sought, the reason for the refund, and the amount of the refund.

[45] The plaintiff's argument that the Minister prescribed the policy to derogate from the requirements of the Act and the N-15 form cannot stand. Unlike the Act and the N-15 form, there is no evidence before the Court that this policy was made public. Furthermore, the plaintiff did not produce any evidence to oppose the defendant's contention that this is simply an internal policy.

[46] Even where any policy is said to have created a legitimate expectation, the law is clear that this cannot create any substantive rights, but at best will guarantee certain procedural safeguards. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 26. That said, even considering the policy as identified by the plaintiff, the refund claim forms submitted by the plaintiff would not even give rise to any additional procedural safeguards.

[47] While the CRA permits a certain level of flexibility with regard to the information provided by applicants for refund under section 68 of the Act, there is nothing in the policy that would entitle the plaintiff, on the facts presented to this Court, to a refund for the overpayment of its FST with regard to its sales of bathroom tissue during the relevant period.

[48] First, the plaintiff did not identify any goods in its refund claims, but simply noted that it was seeking a refund for taxes paid on "products exempt by virtue of Part VIII or Part XV of Schedule III" of the Act. It is clear, based on this Court's decision in *Kimberley-Clark*, above, that while both facial and bathroom tissues are exempt under the Act, it is not because they fit under either Part VIII or Part XV of the Act, but because they are cosmetics as defined in the Act. Therefore, the policy as outlined above *was* applied when the CRA determined that regardless of the plaintiff's error in identifying the basis of its entitlement to a refund, the FST paid by the plaintiff with regard to its sales of its facial tissue was exempt under the Act.

[49] Second, with regard to the CRA's decision not to consider the tax the plaintiff paid with regard to its sales of bathroom tissue during the relevant period, there is nothing in the policy or on

the refund claim forms as filed by the plaintiff, which would have required them to do so. As noted above, there were no products identified on the forms and the plaintiff erred in identifying the basis of their entitlement to a refund. The only information left that could have possibly identified the plaintiff's claim with regard to its bathroom tissue products therefore, are the amounts the plaintiff applied for. With regard to the latter, the plaintiff has all but explicitly conceded that the amounts detailed in the refund claim forms relate solely to their facial tissue products. There is no evidence to suggest otherwise. The only time the plaintiff requested that the CRA consider its bathroom tissue products was sometime after the *Kimberley-Clark* decision was rendered, well beyond the four year limitation period.

[50] Therefore, even if the Court accepted the plaintiff's arguments, there is nothing on the face of their refund claims, in light of the CRA's policy, that would entitle them to a refund on the tax paid with regard to the sales of their bathroom tissue products during the relevant period.

[51] While not integral to the disposition of this case, before concluding the Court will touch on the plaintiff's reference to the tribunal's decision in *Erin Michaels Mfg. Inc. v. The Minister of National Revenue*, Appeal No. AP-94-330, January 10, 1997 (CITT) (*Erin Michaels*). The plaintiff argues that at a minimum the Minister was required to consider an amount of tax overpaid by the plaintiff with regard to its sales of bathroom tissue during the relevant period that would make up the difference between the amount actually refunded and the amount initially claimed by the plaintiff. That said, the plaintiff's primary position is that the Minister, in light of *Erin Michaels*, which is another articulation of the Minister's policy, should have considered the total amount of tax

overpaid by the plaintiff with regard to its sales of bathroom tissue during the relevant period, regardless of the fact that it is an estimated 13 million dollars in excess of what was originally applied for.

[52] In light of the findings above, suffice it to say that the *Erin Michaels* decision stands for the proposition that where a good is properly identified, but the applicant for a refund errs with regard to the amount of refund it is entitled to, the Minister should conduct an audit and refund the applicant the full amount they have overpaid. In other words, where an applicant understates their entitlement on their refund claim form, they will not be prohibited from obtaining a refund for the full amount. Such is not the issue in the case at bar, where the plaintiff did not identify their bathroom tissue products in their application for a refund, and therefore were not entitled to a refund for any tax overpaid.

Conclusion

[53] The actions must be dismissed by the Court.

[54] While there is no dispute that the plaintiff overpaid tax with regard to the sales of its bathroom tissue products during the relevant period, the refund claims filed in April 1986 cannot be said to have included any claim for a refund with regard to the sale of its bathroom tissue products. As a result, and given that the plaintiff did not bring the latter claim to the CRA’s attention until

well beyond the limitation period, this Court concludes that the plaintiff is not entitled to a refund pursuant to section 68 of the Act.

[55] This leaves the issue of costs.

[56] The defendant seeks an order for solicitor-and-client costs, or special costs corresponding at a minimum to the highest end of Column V of Tariff B, as of June 4, 2009, in addition to the regular costs that would normally flow from such proceedings.

[57] The date from which the defendant seeks these special costs corresponds to the date the defendant confronted the plaintiff on the latter's failure to disclose the letter written by Mrs. Rosemary J. Anderson, on behalf of the plaintiff, to Revenue Canada in 1998. In the letter dated June 4, 2009 the defendant notified the plaintiff that as of that date, should the plaintiff insist on proceeding with the case, the defendant would be seeking special costs. The basis of these special costs is, according to the defendant, that the plaintiff's case had little, if any, merit. While the particular claim is not the same as was considered by the Federal Court of Appeal in *Scott Paper 2006*, above, the defendant argues that it is the same plaintiff with the same type of claim seeking the same remedy from the Court after the limitation period provided by the Act has expired. While not argued in the operative part of this case, the defendant essentially claims he is entitled to special costs since the plaintiff's case is an abuse of proceedings. See *Toronto(City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 at paragraph 38. The defendant notes that this is the second time Her Majesty the Queen has had to come to Court to defend the same

provision that was considered by the Federal Court of Appeal and for which leave was refused by the Supreme Court.

[58] Subsection 400(1) of the *Federal Court Rules*, SOR/98-106 (the Rules) provides that the Court has full discretion over the award of costs. According to subsection 400(6), this includes the power to order all or part of the costs on a solicitor-and-client basis. I do not believe that this is an appropriate situation for special costs. The law is clear that solicitor-and-client costs are awarded where one of the parties has engaged in reprehensible, scandalous or outrageous conduct (*Roberts v. Canada.*, [2000] 3 C.N.L.R. 303 at paragraph 142 (F.C.A.)). According to the Supreme Court of Canada, "solicitor-client costs are awarded only on very rare occasions". See *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13 at paragraph 86.

[59] In the case at bar, I cannot find any conduct on the part of the plaintiff that could be described as "reprehensible, scandalous or outrageous", or consequently, an abuse of proceedings. With regard to the plaintiff's failure to disclose Mrs. Anderson's letter, there is no evidence before the Court that this was done with any malicious intent, or for the purpose of deceiving the defendant. Further, in its attempt to distinguish the Federal Court of Appeal judgment in *Scott Paper 2006*, the plaintiff relied on a retroactive legislative amendment to the Act and was able to put into evidence, without any dispute from the defendant, the existence of a ministerial policy at the CRA.

[60] Special costs cannot be awarded simply because the plaintiff's claim had no merit or that the matter is *res judicata* (or subject to the principle of issue estoppel). This is not a case where the

importance and complexity of the issues, the amount of work involved or the public interest in having the proceeding litigated justifies a particular award of costs or an assessment on an increased scale.

[61] In conclusion, considering all relevant factors, costs will be awarded to the defendant on a party-and-party basis, and shall be assessed in accordance with the middle range of Column III of Tariff B.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The appeals in Court Files T-1509-07, T-1510-07, T-1511-07, T-1512-07 and T-1513-07 are dismissed;

2. Costs are awarded in favour of the defendant and shall be assessed in accordance with the middle range of Column III of Tariff B.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1509-07, T-1510-07, T-1511-07, T-1512-07, T-1513-07
STYLE OF CAUSE:	**KRUGER PRODUCTS LIMITED and HER MAJESTY THE QUEEN**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 25, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	April 12, 2010

APPEARANCES:

Mr. Brian Pel Mr. J. Warnock	FOR THE PLAINTIFF
Mr. André LeBlanc	FOR THE DEFENDANT

SOLICITORS OF RECORD:

McCarthy Tétrault Toronto, Ontario	FOR THE PLAINTIFF
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANT