

Ottawa, Thursday, December 21, 1989

Appeal No. 3000

IN THE MATTER OF an application heard May 18, 1989,
pursuant to section 51.19 of the *Excise Tax Act*, R.S.C.
1970, c. E-13, as amended;

AND IN THE MATTER OF a notice of decision of the
Minister of National Revenue dated September 30, 1987,
with respect to a notice of objection filed pursuant to
section 51.17 of the *Excise Tax Act*.

BETWEEN

WALBERN AGRI-SYSTEMS LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal is bound by the law and cannot refuse to apply it, even on the grounds of equity. The *Excise Tax Act* does not give the Tribunal any discretionary powers.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Kathleen Macmillan
Kathleen Macmillan
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 3000

WALBERN AGRI-SYSTEMS LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - Sales tax - Whether the appellant can rely upon the alleged failure of the Department of National Revenue to inform it of changes in legislation which affected its liability to pay sales tax.

***DECISION:** The appeal is dismissed. The Tribunal is bound by the law and cannot refuse to apply it, even on the grounds of equity. The Excise Tax Act does not give the Tribunal any discretionary powers.*

*Place of Hearing: Calgary, Alberta
Date of Hearing: May 18, 1989
Date of Decision: December 21, 1989*

*Panel Members: Robert J. Bertrand, Q.C., Presiding Member
Sidney A. Fraleigh, Member
Kathleen Macmillan, Member*

*Counsel for the Tribunal: Danielle Bouvet
Clerk of the Tribunal: Lillian Pharand*

*Appearances: Walter Regehr, for the appellant
Jean Fitzgerald, for the respondent*

***Cases Cited:** Joseph Granger v. Employment and Immigration Commission (1986), 3 F.C. 70; William A. Gibbon v. The Queen (1978), 1 F.C. 247; Ernest G. Stickel v. Minister of National Revenue (1972), 1 F.C. 672.*

***Statutes Cited:** Excise Tax Act, R.S.C. 1985, c. E-15; An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof, S.C. 1986, c. 9, s. 15.*

Appeal No. 3000

WALBERN AGRI-SYSTEMS LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT J. BERTRAND, Q.C., Presiding Member
SIDNEY A. FRALEIGH, Member
KATHLEEN MACMILLAN, Member

REASONS FOR DECISION

SUMMARY

The appellant appeals its liability for an assessment in the amount of \$80 129.11 representing federal sales tax due on structural steel trusses and studs sold to its customers from June 1, 1983, to November 30, 1986.

Effective July 1, 1985, subsection 26(4) of the *Excise Tax Act* (the Act) was repealed. The effect of that subsection had been to exempt the type of goods manufactured and sold by the appellant from the application of sales tax. With the repeal of subsection 26(4), this exemption was removed and those goods became subject to tax.

The appellant argues that it should be relieved of the payment of the assessed tax because it was misled in respect of its sales tax liability by officials of the Department of National Revenue (the Department) and because it did not receive the issue of Excise News containing information about the changes in the application of sales tax resulting from the amendment to the Act.

The appeal is not allowed. The Act imposes an obligation on the seller of specified goods to pay a tax on the sale price at the time of the transaction. With regard to the appellant's activities, that obligation is stated in very clear terms. In this appeal, the appellant admits its liability for the tax, and the Canadian International Trade Tribunal (the Tribunal) takes note of that admission although it would have reached that same conclusion with respect to the liability for tax.

Whether or not the appellant was misled by officials of the Department and whether or not it received the Excise News is irrelevant to the determination of the liability for tax of a person required to pay it. The Tribunal is not authorized to introduce concepts of equity nor to accept compassionate considerations in dealing with this appeal.

THE LEGISLATION

For the purpose of this appeal, the relevant statutory provisions of the Act are as follows:

26(4) *Where a person*

...

(b) manufactures or produces otherwise than at the site of construction or erection of a building or other structure, structural building sections for incorporation into such building or structure, in competition with persons who construct or erect buildings or other structures that incorporate similar sections not so manufactured or produced,

...

(d) manufactures or produces from steel that has been purchased by or manufactured or produced by that person, and in respect of which any tax under this Part has become payable, fabricated structural steel for buildings,

he shall, for the purposes of this Part, other than subsection 29(1), be deemed not to be, in relation to any such building, structure, building sections, building blocks or fabricated steel so manufactured or produced by him, the manufacturer or producer thereof.

27(1) *There shall be imposed, levied and collected a consumption or sales tax at the rate specified in subsection (1.1) on the sale price of all goods*

(a) produced or manufactured in Canada ...

(b) imported into Canada ...

27(1.4) *Notwithstanding subsection (1), there shall be imposed, levied and collected a consumption or sales tax of five percent on the sale price of the goods enumerated in Schedule V.*

SCHEDULE V

PART I

CONSTRUCTION MATERIALS

21. *Structural metal and fabricated metal for buildings and other structures.*

31. *Buildings or other structures manufactured or produced by a person otherwise than at the site of construction or erection thereof in competition with persons who construct or erect similar buildings or structures not so manufactured or produced.*

32. *Structural building sections, for incorporation into buildings or other structures manufactured or produced by a person otherwise than at the site of construction or erection of the building or other structure in competition with persons who construct or erect buildings or other structures that incorporate similar sections not so manufactured or produced.*

THE FACTS

This is an appeal pursuant to section 51.19 of the Act from a decision of the Minister of National Revenue (the Minister) dated September 30, 1987, confirming assessment number ALB2139. The appellant, Walbern Agri-Systems Ltd. (Walbern), appeals its liability for an assessment in the amount of \$80 129.11 representing federal sales tax due on structural steel trusses and studs sold to its customers from June 1, 1983, to November 30, 1986.

The appellant's business, at the time relevant to this appeal, was the manufacture and sale of custom-engineered, structural steel trusses and studs for use as components in farm and commercial buildings; the manufacture and sale of equipment for the confinement of hogs, such as farrowing crates, gestation stalls and penning material; and the purchase for re-sale (i.e., jobbing) of metal sheeting for use in the roofing and siding of buildings sold by Walbern as complete building packages.

Effective July 1, 1985, subsection 26(4) of the Act was repealed by *An Act to amend the Excise Tax Act and the Excise Act and to amend other Acts in consequence thereof*.¹ The effect of that subsection had been to exempt the type of goods manufactured and sold by the appellant from the application of sales tax. With the repeal of subsection 26(4), the exemption was removed and those goods became subject to tax.

The company was established in 1954 by Mr. Regehr, the current president. He was the sole shareholder of the company until 1972 when he entered into a partnership. In 1975, Mr. Regehr sold most of his shares, keeping only a minority shareholder's interest.

Mr. Regehr told the Tribunal that he decided in 1986 to re-acquire all the shares of the company. Before proceeding with the acquisition, he thought it would be advisable to consult with the Department about the company's practices regarding the treatment of federal sales tax. He therefore gave instructions to an employee of the company, Mr. Loewen, to make the necessary inquiries.

Mr. Loewen testified that, in the course of two telephone conversations with an officer of the Department in Calgary, he was informed that the company's practices were in accordance with the Act. Since 1980, the company had been purchasing the material needed for its manufacturing of trusses and studs on a "tax included" basis and the material required for its manufacturing of hog containment equipment on a "tax excluded" basis.

1. S.C. 1986, c. 9, s. 15.

In November 1986, the Department conducted an audit of the company. On May 12, 1987, following the audit, the Department issued a notice of assessment to the appellant requesting payment of sales tax due for the period between June 1, 1983, and November 30, 1986.

The appellant filed a notice of objection on June 16, 1987, stating that it should not have to pay the amount due because it had been misinformed by an employee of the Department vis-à-vis its liability for sales tax applicable to the transactions that took place during the relevant period.

The Minister disallowed the appellant's objection on the grounds that the Minister had no discretionary power to defer the effective date or to take into consideration specific circumstances of a particular company when the application of tax is altered by announced amendments to the Act. The notice of decision also stated that the Department endeavoured to inform taxpayers of legislative and administrative changes through the Excise News, as was the case when subsection 26(4) of the Act was repealed.

The appellant filed an appeal to the Tariff Board on May 6, 1988, pursuant to section 51.19 of the Act. This appeal has been taken up and continued by the Tribunal in accordance with subsection 54(2) and section 60 of the *Canadian International Trade Tribunal Act*.²

THE ISSUE

The appellant admits its liability for the tax as computed by the Department, and the amount of that tax is not in issue in the present case.

However, the appellant argues that it should be relieved of the payment of the assessed tax because it was misled by officials of the Department and because it did not receive the issue of Excise News containing information about the changes in the application of sales tax resulting from the amendment to the Act. The appellant also states that the payment of such a large amount of tax would have serious adverse financial consequences for it.

The respondent, in reply, states that the legislation governing the tax in question is in public domain. The appellant had an obligation to comply with the legislation and cannot rely upon alleged ignorance of the law or upon any alleged misinformation given to its employees by government officials to escape this obligation. Even if the appellant had been given incorrect advice by a servant of the Crown, the respondent argues that this does not alter the effect of legislation enacted by Parliament, and the advice is therefore void.

The respondent also submits that even if the appellant had received incorrect advice in February 1986, advice that would have entitled him to a tax relief, this would not have pertained to transactions occurring between July 1, 1985, and February 1986, when the advice was given.

2. S.C. 1988, c. 56.

DECISION

The Act imposes an obligation on the seller of specified goods to pay a tax on the sale price at the time of the transaction. With regard to the appellant's activities, that obligation is stated in very clear terms. In this appeal, the appellant admits its liability for the tax, and the Tribunal takes note of that admission although it would have reached that same conclusion with respect to the liability for tax.

Whether or not the appellant was misled by officials of the Department and whether or not it received the Excise News is irrelevant to the determination of the liability for tax of a person required to pay it. It is settled law that misinformation by officials of the Department does not excuse a person from paying nor constitute a reason for avoiding tax liability.

In a 1986 Federal Court of Appeal decision,³ Mr. Justice Pratte concluded that, in such circumstances, the judge is bound by the law and cannot refuse to apply it, even on the grounds of equity. At page 77 of that decision, he states the following:

The applicant's real complaint against the Umpire is not that he infringed the rules of natural justice, simply that he did not apply equity rather than the law. It is beyond question that the Commission and its representatives have no power to amend the law, and that therefore the interpretations which they may give of that law do not themselves have the force of law. It is equally certain that any commitment which the Commission or its representatives may give, whether in good or bad faith, to act in a way other than that prescribed by the law would be absolutely void and contrary to public order. The applicant's argument therefore comes down to this: the Umpire erred because, so as to avoid causing injury to the applicant, he should have refused to apply the law.

Once the applicant's argument is seen in its true light it is clear that it must be dismissed. A judge is bound by the law. He cannot refuse to apply it, even on grounds of equity.

In a Federal Court decision,⁴ Mr. Justice Walsh concluded that the validity of a reassessment could not be disputed on the basis that an incorrect assessment may have induced a taxpayer into a course of conduct which resulted in financial loss. The learned judge expressed himself in the following manner:

The only issue before the Court is whether the reassessments for the 1972 and 1973 taxation years are correct or not and there is not the slightest doubt that they are in accord with the law. If, but for the previous errors, plaintiff might have acted otherwise and claimed certain other deductions which he is now not able to claim, thereby reducing his tax liability for the years in question, this is regrettable but cannot affect the validity of the reassessment. Plaintiff's only action would be against the Crown in tort if he could establish that he had suffered damages as a result of negligence by servants of the Crown, and I am not suggesting that such an action is available to him, but am merely holding that he

3. *Joseph Granger v. Employment and Immigration Commission* (1986), 3 F.C. 70.

4. *William A. Gibbon v. The Queen* (1978), 1 F.C. 247.

certainly cannot dispute the validity of the reassessments before the Court on the basis that he allegedly was induced into a course of conduct causing him a financial loss as the result of the earlier erroneous assessments.

Finally, in the case of *Ernest G. Stickel v. Minister of National Revenue*,⁵ the Federal Court of Canada held that estoppel cannot be raised against the Minister on the basis of representations made in an information bulletin. While the Tribunal believes that the appellant acted in good faith, it is not in a position to grant the appellant the relief sought.

There remains, however, for the Tribunal to decide whether the normal tax burden imposed by the law could possibly be attenuated, alleviated or lessened on the grounds of misinformation, failure to inform or undue financial hardship. In this regard, the Tribunal concludes that the Minister and officials of the Department are bound to apply the law to the particular facts of a case and that the Act does not give them discretionary powers to vary the tax burden on compassionate grounds.

The Tribunal's jurisdiction under section 81.27 of the Act encompasses the power to dismiss an appeal, to allow it, in whole or in part, and to vacate or vary the assessment which is the subject of an appeal. This does not mean that the Tribunal is authorized to introduce concepts of equity nor to accept compassionate considerations in dealing with the appeal.

If the payment of the amount of sales tax were to result in undue hardship, the appellant could make arrangements with the Department for payment by instalments. While the law itself cannot be altered, such a course of action is available to the appellant to mitigate its adverse effects.

CONCLUSION

The Tribunal confirms the original assessment and the decision of the Minister. Accordingly, the appeal is not allowed.

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Kathleen Macmillan

Kathleen Macmillan
Member

5. (1972), 1 F.C. 672.