CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, August 29, 1989

Appeal No. 3074

IN THE MATTER OF an appeal heard on February 14 and 28, 1989, pursuant to section 51.23 of the *Excise Tax Act*, R.S.C. 1970, c. E-13 as amended;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated September 23, 1988, with respect to a claim for refund made pursuant to section 44 of the *Excise Tax Act*.

BETWEEN

ALLAN G. COOK LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed in part. The Tribunal finds that the appellant paid taxes in error and, therefore, is entitled to a refund under section 44 of the *Excise Tax Act* for overpayment of federal sales tax paid during the year 1987 on certain asphalt paving mixtures. The Tribunal refers the matter back to the Minister for reconsideration on the basis that the appellant is entitled to a refund, calculated on the basis of the fair market value method, but only for the sales during 1987 of asphalt paving mixtures on a supply and install basis where the appellant supplied all the materials.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

John C. Coleman
John C. Coleman
Member

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

Robert J. Martin
Robert J. Martin
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. 3074

ALLAN G. COOK LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Sales Tax - Whether sales tax levied on asphalt paving mixtures manufactured by the appellant for its own use or for sale during the year 1987 was paid in error and can be the subject of a refund for overpayment under section 44 of the Excise Tax Act - Whether the appellant can retroactively change its method of accounting for tax - Meaning of consistently.

DECISION: *The appeal is allowed in part. The Tribunal finds that the appellant paid its taxes in error and, therefore, is entitled to a refund under section 44 of the Excise Tax Act. The appellant can retroactively change its method of accounting to the fair market value method, but the change is only applicable to sales in 1987 of asphalt paving mixtures on a supply and install basis where the appellant supplied all the materials.*

Place of Hearing:	*Ottawa, Ontario*
Dates of Hearing:	*February 14 and 28, 1989*
Date of Decision:	*August 29, 1989*
Panel Members:	*Arthur B. Trudeau, Presiding Member* *John C. Coleman, Member* *Robert J. Bertrand, Q.C., Member*
Counsel for the Tribunal:	*Ginette Collin*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Maureen Gregory, for the appellant* *Brian Saunders, for the respondent*
Cases Cited:	*Cairns Construction Limited v. The Government of Saskatchewan, [1960] S.C.R. 619; Jack Herdman Limited v. M.N.R. (1983) 48 N.R. 144 (Fed. C. A.); Hadler Turkey Farms Inc. v. The Queen (1985) 86 D.T.C. 6013; Vanguard Coatings and Chemicals Ltd. v. The Minister of National Revenue 86 D.T.C. 6342 (Fed. T.D.); 88 D.T.C. 6374 (Fed. C. A.).*
Statutes Cited:	*Excise Tax Act, R.S.C. 1970, c. E-13 - s. 26, subss. 27(1) and 28(1), s. 44.*
Excise Tax Memorandum Cited:	*ET 207.*

Excise Communiqués Cited: *110/TI; 110-1/TI; 110-2/TI.*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3074

ALLAN G. COOK LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
JOHN C. COLEMAN, Member
ROBERT J. BERTRAND, Q.C., Member

REASONS FOR DECISION

SUMMARY

The appellant, Allan G. Cook Limited, is a road construction company and is also a manufacturer of asphalt paving mixtures for its own use and for sale. On July 1, 1985, asphalt paving mixtures became subject to sales tax at a rate of six percent. At the time this tax was imposed, Revenue Canada officials informed manufacturers that they had to become licensed for sales tax purposes and would be liable for sales tax. As asphalt paving mixtures are in large part manufactured for a paving company's own use, special provisions were established by Revenue Canada to give taxpayers a choice of methods to calculate their tax liability. However, these administrative guidelines indicated that whichever method the manufacturer elected to use for the calculation of tax liability must be used consistently. Subsequently, consistently was defined to mean not less than one year.

From the time the tax became payable to March 1988, the appellant paid tax using the "determined value method." In March 1988, the appellant decided to change to the "fair market value method," and filed a claim for a refund for the overpayment of tax it argued was paid in error for the year 1987. The claim for a refund of an overpayment was eventually denied by the respondent; hence this appeal.

The appeal is allowed in part. The Tribunal rules that the appellant paid taxes in error and, therefore, is entitled to a refund pursuant to section 44 of the *Excise Tax Act*[1] (the Act). The Tribunal considers that the appellant made an error in early 1987 in that it failed to select the fair market value method over the determined value method, as the use of the former method would have resulted in the least financially burdensome method of tax calculation. The Tribunal considers that the appellant can change its method of accounting to the fair market value method, but the change is only applicable to sales in 1987 of asphalt paving mixtures on a supply and install basis where the appellant supplied all the materials.

1. R.S.C. 1970, c. E-13; *now* R.S.C. 1985, c. E-15.

THE LEGISLATION

The relevant statutory provisions of the Act are as follows:

> *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*
>
> ...
>
> *(iii) payable, in a case where the goods are for use by the producer or manufacturer thereof, by the producer or manufacturer at the time the goods are appropriated for use;*
>
> ...
>
> *28. (1) Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because*
> ...
>
> *(d) such goods are for use by the manufacturer or producer and not for sale,*
>
> *the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.*
>
> *44. 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 ... be paid to that person if he applies therefor within two years after he paid the moneys.*

THE FACTS

This is an appeal pursuant to section 51.23[2] of the Act from the respondent's Notice of Assessment, Number SWO-7530, dated September 23, 1988, rejecting the appellant's claim for refund of overpayment of sales tax on asphalt paving mixtures. The claim for refund in the amount of $113 599.22 was subsequently reduced to $95 452 and related to sales from January 1, 1987, to December 31, 1987.

The appeal was originally commenced before the Tariff Board. However, pursuant to

2. *Now* s. 81.23.

section 60 of the *Canadian International Trade Tribunal Act*,[3] the appeal is taken up and continued by the Canadian International Trade Tribunal.

Because the facts are important in the disposition of the appeal, it will be necessary to review them in some detail.

The appellant, Allan G. Cook Limited, is engaged in road construction, doing municipal and other government work, as well as large parking lots, site preparation and sales of aggregates and asphalt. The appellant manufactures asphalt partly for its own use and partly for sale.

On July 1, 1985, asphalt paving mixtures became subject to sales tax, at a six percent rate, calculated on the sale price, when sold or used by manufacturers or producers, or when imported. On the same date, the appellant became licensed under the Act as a manufacturer of asphalt paving mixtures, the subject goods of this appeal, and became liable to remit sales tax on sales of these products. In the situations relevant to this appeal, the asphalt was manufactured for the purpose of carrying out two types of supply and install contracts. The first type is when the manufacturer or producer supplies all the materials to the customer. The second type is when the customer supplies some of the materials as, for example, the liquid asphalt.

On May 23, 1985, Revenue Canada issued Excise Communiqué 110/TI which authorized manufacturers of asphalt paving mixtures to account for sales tax payable under the Act by any one of several methods. With respect to supply and install contracts, Communiqué 110/TI provided the following methods:

> <u>*Supply and Install Contracts*</u>
> *Where asphalt paving mixtures are manufactured for sale as such, and on a supply and install basis, tax is payable on the asphalt sold on a supply and install basis based on the manufacturer's established uninstalled selling price to independent customers. If the manufacturer is unable to establish an uninstalled price to independent customers, tax is payable on the total contract price, less transportation and installation costs. As an alternative, on supply and install contracts, the manufacturer may elect to account for tax on the basis of the fair market value of the asphalt paving mixtures, as determined in accordance with the provisions of paragraph 3(c) of Memorandum ET 207; however, whichever method the manufacturer elects to use must be used consistently.*

Memorandum ET 207, which has been in effect since July 1, 1977, purports to be a document made in accordance with the power given to the Minister to determine the value for tax under subsection 28(1)[4] of the Act for goods manufactured for own use. Essentially, the fair market value method set out in paragraph 3 (c) of Memorandum ET 207 involves the calculation of value for tax in accordance with a formula. The formula is the aggregate of the following factors:

> *(i) the cost of all materials used,*
> *(ii) the cost of direct labour,*
> *(iii) one hundred and fifty per cent (150 %) of the cost of direct labour, for overhead ...*
> *(iv) fifteen per cent (15 %) of the accumulated total, for administration and profit.*

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3. S.C. 1988, c. 56.
4. *Now* subs. 52(1).

Shortly after becoming a licensed asphalt manufacturer, the appellant sought help from Revenue Canada as to how to remit its federal sales tax. It contacted the local branch of Revenue Canada, Customs and Excise. The first witness on behalf of the appellant was Mr. Thomas Medlyn, the comptroller of the appellant company. Mr. Medlyn, who had just been appointed comptroller of the company in early 1985, prepares the appellant's remittance of federal sales tax on all asphalt it produces. In company with Mr. Woods, the appellant's former comptroller, Mr. Medlyn met with Mr. Hugh Alexander from Revenue Canada's local branch. At the meeting, they discussed the values that the appellant should use for the asphalt and how to make remittances. They also discussed the appellant's use of determined values per tonne (hereinafter referred to as the "determined value method") as the basis of the appellant's remittances. Mr. Medlyn testified that Mr. Alexander did not advise them of any method other than determined values and said that the appellant was not aware at that time of any other method for remitting taxes.

Subsequently, Mr. Alexander sent the appellant a letter, dated July 12, 1985 (tendered as Exhibit A-1) in which he was advised as follows:

> *The Department has established a value for tax of $25.00 per tonne on sales of asphalt paving mixtures on supply and install contracts. This value will apply on all sales where the physical manufacturer supplies all input to the finished product. This value of $25.00 per tonne is also to be used where the Provincial Government supplies aggregate, sand, and/or other exempt material. Where the Provincial Government supplies the liquid asphalt to the physical manufacturer a value of $12.00 per tonne has been established.*

The values referred to in the letter were arrived at subsequent to the issuance of Communiqué 110/TI. The letter, which did not mention any other method for calculating the value for tax, also contained a list of the Excise Memoranda that were enclosed. The letter did not mention Memorandum ET 207. Mr. Medlyn testified that Mr. Alexander did not supply a copy of Memorandum ET 207 during their meeting. Mr. Alexander visited the appellant's offices again in December 1985 to look at its books for tax remittances. By the time of this second visit, the appellant had been remitting taxes for four months using the determined values of $25 and $12.

For the period in issue, namely, November 1, 1985, to February 29, 1988, the appellant accounted for the sales tax payable under the Act on its supply and install contracts using the determined value method.

In April 1987, Revenue Canada issued Excise Communiqué 110-1/TI, effective July 1, 1987, for the purpose of updating and clarifying the instructions concerning values for tax on asphalt paving mixtures as outlined in Excise Communiqué 110/TI. Paragraph 3 of Communiqué 110-1/TI points out that subsequent to the issuance of Communiqué 110/TI, the Department authorized the use of interim values for tax, i.e. $25 per tonne and $12 per tonne, which became effective July 1, 1985, and had been available for use in addition to the values mentioned in Communiqué 110/TI. Paragraph 4 (C) of Communiqué 110-1/TI sets out a number of alternative methods for determining value for tax on supply and install contracts and reiterates that the selected method must be used consistently. It specifies that "consistently" means for a period of not less than one year. Paragraph 4 (C) (iii) of Communiqué 110-1/TI continues the use of the fair market value method in accordance with the provisions of paragraph 3 (c) of

Memorandum ET 207, and paragraph 4 (C) (v) of the communiqué sets out determined values of $30 per tonne, where the manufacturer supplies all materials, and $15 per tonne where the customer supplies materials.

In April 1988, Revenue Canada issued Excise Communiqué 110-2/TI which specified that the use of any of the alternative methods for accounting for tax on supply and install contracts, provided for in paragraph 4 (C) of Excise Communiqué 110-1/TI, is subject to the condition that the manufacturer both supply and install the asphalt paving mixtures. Where a customer supplies some of the materials relative to a supply and install contract, Excise Communiqué ET 110-2/TI provides that a licensed manufacturer of asphalt paving mixtures is not permitted to use the fair market value method provided by Memorandum ET 207.

On April 18, 1988, the appellant filed a claim for refund of tax for the period covering January 1, 1987, to December 1, 1987. The refund claim is based upon a value for tax, determined in accordance with Excise Memorandum ET 207, paragraph 3 (c), i.e. the fair market value method.

Mr. Medlyn told the Tribunal that he became aware of the alternative methods available for calculating the value for tax in July 1987 when the determined values increased from $25 to $30. The witness testified that, in 1987, the actual cost of producing manufactured asphalt decreased because of a decline in the price of liquid asphalt, which accounts for 50 percent of the cost of manufactured asphalt. The witness put into evidence, as Exhibit A-3, a package of invoices from Petro-Canada to the appellant which showed that the price of liquid asphalt decreased from $268.87 per tonne in 1985 to $185.00 per tonne in 1988.

During cross-examination, Mr. Medlyn reiterated that in July 1985 Mr. Alexander did not advise the appellant of other methods of calculating the tax and that, if it had been so advised at that time, the appellant's officials would have gone through the calculations to determine the best method of calculation. He rejected a suggestion that Mr. Alexander had advised the appellant of the fair market value method, but that the appellant had not found it convenient to apply it. Mr. Medlyn testified that the appellant has been using this method since 1988 and that it could have adopted it after the first meeting with Mr. Alexander.

Mr. Medlyn further acknowledged that, when the appellant became aware of its sales tax liability on asphalt paving mixtures, it did not make any representations to Revenue Canada as to whether there should be methods other than sale price to determine the value for tax. He said that he was also aware of the contents of Excise Communiqués 110-1/TI and 110-2/TI before he actually saw them, but neither he nor anyone from the appellant company contacted Revenue Canada to discuss them. Mr. Medlyn agreed that the first indication that the appellant gave to Revenue Canada that it wished to change methods of accounting for sales tax was when it filed a claim for refund in April 1988. He could not remember Mr. Alexander advising the appellant that the method chosen had to be used consistently, and up until 1987, when the appellant learned of the difference between the fair market value and the determined value methods, the appellant had not consulted anybody regarding excise tax.

Mr. Alexander who, prior to his retirement from the public service, had worked for 18 years with the Excise Branch of Revenue Canada as an auditor, testified for the respondent. He said that in July 1985 he had visited the offices of the appellant where he discussed with the appellant's representatives the alternative methods of tax calculation as outlined in Communiqué 110/TI. Mr. Alexander also testified that he provided the appellant's representatives with various documents including Memorandum ET 207.

During cross-examination, Mr. Alexander conceded that the July 12, 1985, letter did not list Memorandum ET 207 as one of the documents left with the representatives. He insisted that he had left a copy of Memorandum ET 207 with the appellant because it was referred to in Communiqué 110/TI and anything mentioned in that communiqué was delivered personally by him. Mr. Alexander also explained that the letter referred only to a discussion about the determined value and not the other methods because the appellant had decided to choose that method in lieu of the others, which were also discussed at the meeting, for the reason that the appellant could not prove its costs at that point.

The appellant's second witness was Mr. Rory Pike, a sales tax specialist, who has been in the sales tax business for about eight years. The company for which he works, D.F. Lunnen Tax Refunds (Canada) Limited, filed the claim for refund of tax on behalf of the appellant. He testified that the claim was prepared on the basis of Excise Memorandum ET 207, paragraph 3 (c). Mr. Pike explained to the Tribunal that he had used the profit and loss statements prepared by the appellant to calculate the refund, and that the amount claimed by the appellant was the difference between what should have been remitted as taxes, using fair market value, and what was actually remitted by the appellant on the basis of determined value.

Another witness called by the appellant was Mr. Robert Bradford, the Executive Secretary of the Ontario Hot Mix Producers' Association. The Association promotes the use of asphalt and represents its members in matters dealing with various levels of government. Mr. Bradford testified that the Association was not consulted by Revenue Canada before it set determined values. He said that there are certain companies in the Association which produce asphalt paving mixtures and which used a method other than the determined value method for the calculation of the tax on asphalt paving mixtures. However, the vast majority of the Association's member companies were using the determined value method because it was the simplest method and the only one they could understand. Mr. Bradford testified that the first direct contact that he had with Revenue Canada on the matter was in November 1988 when a meeting was held between the Association and officials from Revenue Canada. At the meeting, there was no discussion as to the basis on which the determined values were set. As far as he knew, it is impossible for asphalt manufacturers to determine their actual costs during the paving season and, as a result, it is practically impossible for them to change from one method to another in mid-season.

During cross-examination, Mr. Bradford testified that the Association received Excise Tax Communiqués relating to the tax on asphalt and communicated the contents of these communiqués to its members, including the appellant. To his knowledge, the members did not make any representations to Revenue Canada complaining about the tax calculation methods proposed by these communiqués. The Association's representative, however, in July 1985 had a meeting with M. Gray, a Revenue Canada official, where they discussed the changes regarding asphalt. Mr. Bradford acknowledged that at that time the Association was aware of other methods of accounting for tax. Mr. Bradford said that even though Communiqué 110/TI indicated that the fair market value method was available under Memorandum ET 207, paragraph 3 (c), there was no discussion of this method at the meeting.

The respondent's second witness, Mr. William B. Gray, currently the Acting Manager of Operations with the Tax Interpretations Directorate of Revenue Canada, Excise Branch, testified

that after the publication of Communiqué ET 110/TI on May 23, 1985, Revenue Canada received submissions from the industry as to the problems that would be encountered in using the methods outlined in that communiqué to account for tax. As a result of these submissions, most of which asked for some allowance for fixed price contracts, values of $25 and $12 per tonne were struck. He said that these values were slightly less than the figures the Excise Branch had worked out mathematically. He testified that there is no mention of fixed values in Communiqué 110/TI because that had not yet been contemplated by the officials who worked on that document.

Also, after the publication of the commmuniqué, Mr. Gray attended a meeting in July 1985 called by Mr. Bradford from the Ontario Hot Mix Producers' Association. The thrust of the meeting was a discussion of the determined value method as opposed to other methods so as to make it easy for the members of the Association to ascertain their tax liability.

During cross-examination, Mr. Gray told the Tribunal that, in June 1985, he consulted with asphalt manufacturers and the Ministry of Transport, a large buyer of asphalt. He wanted to obtain, through these consultations, the views of both sellers and buyers in the industry. With the manufacturers, his aim was to find out if they had problems in accounting for tax, what method they had been advised of, and what their sale price was. He testified that he did not check into the price of liquid asphalt during consultations. However, he checked into what percentage of the sale price of a tonne of asphalt would be represented by the value of liquid asphalt.

Mr. John Sitka, Acting Assistant Director, Valuation, Tax Interpretations Unit of the Excise Branch, was called as the respondent's third witness. He testified that the Valuation Unit prepared Communiqués 110-1/TI and 110-2/TI which were distributed to all asphalt manufacturers. Communiqué 110/TI, issued on May 23, 1985, did not mention a determined value option. However, in Communiqué 110-1/TI, issued in April 1987, interim fixed values were referred to as a result of representations from the asphalt manufacturing industry. These values were referred to as interim values because they were based upon information that was supplied to the departmental officers, and books and records were not verified.

On the question as to whether these fixed values were a determination of the Minister under section 28 of the Act, Mr. Sitka said that the fixed values were provided as an administrative measure and as an equivalent to sale price because of the difficulties expressed by the manufacturers in following the methods outlined in Communiqué 110/TI. In Mr. Sitka's opinion, the fixed values are not determined by the Minister under section 28 of the Act because section 28 involves appropriation of goods for own use. He added that in the case of asphalt provided in the context of supply and install contracts, there is a sale of goods. Concerning the change in the fixed values in 1987 of $30 and $15 per tonne, he testified that the values were based on 1985 data, but that the Department undertook a survey of asphalt manufacturers across Canada in 1986 and the results of the survey were discussed with the Canadian Construction Association from which the Department obtained some additional data in 1986.

Mr. Sitka told the Tribunal that a manufacturer could choose any of the methods outlined in Communiqué 110/TI, but once a method is chosen, it must be used for not less than a year from the date of the selection. He specified, however, that the fair market value method is available only in those instances where the manufacturer provides all the materials. He cited specifically paragraph 4 of Memorandum ET 207 on page 3 which reads as follows :

> *4. Materials ... must include all materials that are incorporated into and become an integral or component part of the finished product....*

During cross-examination, Mr. Sitka testified that Revenue Canada does not consider that asphalt manufacturers performing supply and install contracts are taking the asphalt for their own use, but rather are selling it. He said that the Department had established fixed values per tonne as an administrative measure to provide an equivalent to sale price. The measures had been taken for the convenience of the taxpayers because of the difficulties they had expressed in their ability to make use of the existing methods. In his opinion, there is no statutory authority for using them. Mr. Sitka conceded that the price of liquid asphalt declined by approximately 30 percent from 1985 to 1988.

On June 10, 1988, the respondent issued Notice of Determination No. SWO-42987, cancelling the appellant's claim. The two reasons given by the respondent for the refusal of the claim for refund were stated as follows in the Department's Notice of Determination of June 10, 1988:

> *Claim has been cancelled--*
> *Communiques 110TI & 110-1TI require that whatever method of accounting for tax on supply and install asphalt contracts is chosen it must be used consistently. Once a method is chosen, retroactive adjustment to another method is not permitted.*
> *Communique 110-2TI states that where a customer supplies some of the material, as is the case with your MTC contracts, the valuation method provided by the Memorandum ET 207 cannot be used.*

In the meantime, on April 29, 1988, the respondent assessed the appellant the sum of $14 415.58 for sales tax, interest and penalty owing for the period from November 1, 1985, to February 29, 1988 (Notice of Assessment No. SWO-2566). This assessment covered errors and omissions in the calculation of the appellant's federal sales tax liability. On June 30, 1988, the respondent reassessed the appellant (Notice of Assessment No. SWO-7491) for the same period. The reassessment varied the taxes, interest and penalty owing by reasons of errors and omissions to $10 904.02 and gave a credit of $58 766.79 to the appellant. The credit represented the difference between the sales tax actually remitted by the appellant using the determined value method on its supply and install contracts, where the appellant had supplied all the materials, and the sales tax payable on those contracts using the fair market value method.

On September 9, 1988, the appellant filed a Notice of Objection against Notice of Assessment No. SWO-7491 because a refund of the sales tax paid on asphalt produced where the customer supplied some of the materials, namely, the liquid asphalt, had not been granted. The amount in dispute was $31 841.01. The refusal of this portion of the claim was on the basis of Communiqué 110-2/TI, which in fact originated in April 1988, about the same time that the claim was submitted.

On September 23, 1988, the respondent reassessed the appellant (Notice of Assessment No. SWO-7530) for the period from November 1, 1985, to February 29, 1988. This assessment cancelled Notice of Assessment No. SWO-7491 dated June 30, 1988, and disallowed the credit that had been given to the appellant. The appellant was reassessed for that portion of the claim which the respondent had agreed to refund previously in Notice of Assessment No. SWO-7491. On October 5, 1988, the appellant filed, under section 51.23 of the Act, a Notice of Appeal from Notice of Assessment No. SWO-7530; hence, this appeal.

THE ISSUES

Essentially, the appellant is asking the Tribunal to determine whether it paid taxes in error and, therefore, is entitled to a refund pursuant to section 44 of the Act[5] to recover the amount of tax which it would not have been required to remit had the calculation of the value for tax been based upon another method. In support of that position, counsel for the appellant submitted a number of arguments which raised related issues.

First, the appellant submitted that it manufactures asphalt for supply and install contracts, and this kind of operation is considered to be manufacturing of goods for own use. In support of that argument, counsel for the appellant relied on the decision of the Supreme Court of Canada in *Cairns Construction Limited v. The Government of Saskatchewan.*[6] In that case, the appellant building contractor purchased materials for use in the construction of houses on its own land for sale to others or on the land of others. The Supreme Court of Canada held that the appellant was a "user" of the materials.

Second, the appellant submitted that because the asphalt paving mixtures are manufactured in circumstances which render it difficult to determine the value thereof, the Minister has authority, under section 28 of the Act, to determine the value for tax. Counsel for the appellant submitted that the fair market value method that has been authorized by Communiqué 110/TI, and which is set out in Memorandum ET 207, is a statutorily authorized method for determining the value for tax under section 28 of the Act, while the determined value method, which did not appear in any departmental documentation until Communiqué 110-1/TI, effective July 1987, is only an administrative convenience that the Department has adopted.

Third, the appellant submitted that it remitted its taxes using the determined value method on the advice of Revenue Canada. In this regard, counsel for the appellant urged the Tribunal to accept the appellant's evidence, despite contrary evidence of the respondent, that Revenue Canada made no effort to advise the appellant of the availability of alternative methods of calculating value for tax.

On becoming aware of alternative methods of determining value for tax, the appellant submitted a claim for refund based on fair market value which the respondent rejected on the grounds that a retroactive adjustment could not be made after the appellant had chosen to remit on a particular basis and secondly, that, based on Communiqué 110-2/TI, the fair market value could not be used on supply and install contracts where a customer supplied some of the materials. Counsel argued that the second ground of rejection is untenable because Communiqué 110-2/TI, which implements that policy, came into effect in April 1988 and should, therefore, not be made applicable to taxes to be remitted during the period covering January 1, 1987, to December 31, 1987. Similarly, since Memorandum ET 207 does not make any distinction between contracts where the manufacturer supplies all the materials and those where it does not, there is no reason why the fair market value method should not apply to both instances.

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5. *Now* s. 68.
6. [1960] S.C.R. 619.

Fourth, concerning the retroactive adjustment argument, the appellant further submitted that, under section 44 of the Act, a taxpayer can go back for a period of two years and claim a refund for taxes paid in error. This, by necessary implication, allows a retroactive adjustment. The appellant, being unaware of alternative methods, remitted taxes on the basis of the determined value method. As a result, counsel for the appellant argued that there was a mistake of law or fact and that the appellant should be able to recover the taxes. For that proposition, counsel cited *Jack Herdman Limited v. M.N.R.*,[7] a case involving the application for refund of tax, in which the Court said:[8]

> *... the tax was paid by the applicant not because of an understanding with the refiners but because the applicant was told by the Department that it was required to do so. The applicant paid the tax under the mistaken belief that it was legally obliged to pay it....*

Counsel submitted that the appellant relied on the advice that it had received and, without any knowledge that there was any other method it could use, remitted tax using the determined values. Counsel submitted that this would clearly be an error within the context of section 44. It would be an error because there existed a method of calculating value for tax other than the determined value method and an error because of the decreased liability for tax which would result from remitting tax using the fair market value method. The errors resulted in the taxpayer paying over $100 000 more than it need have paid using the alternative method.

Fifth, the appellant argued that, for any selection to be binding, it must be an informed selection made with full knowledge of the legal and financial consequences involved. On the facts of this case, the appellant did not make a valid selection since it was not aware of any alternative method and did not know that the values it was using would be unilaterally increased by the government in the middle of the year. This unilateral increase by the respondent in the middle of the taxpayer's busy season of operation violated the respondent's own principle of "consistency." It was submitted that the case of *Hadler Turkey Farms Inc. v. The Queen*,[9] on which the respondent relies to preclude a change of selection, is distinguishable in this case in that it dealt with a change of selection after the expiry of the time for filing an amended return. In the present case, section 44 of the Act contemplates that, as long as one is within the statutorily prescribed period, one can go back and claim for recovery of taxes which have been paid in error. Indeed, counsel for the appellant argued that the respondent, by his ruling 550-022, allowed a taxpayer to go back to use an alternative method to obtain a refund of tax which was paid using a different method from that which he could have used. Since the fair market value method is the only one which is statutorily authorized, the determined value method having been adopted as an administrative procedure, the appellant should be entitled to go back and use the fair market value.

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7. (1983) 48 N.R. 144 (Fed. C. A.).
8. *Supra*, footnote 6, at p. 280.
9. (1985) 86 D.T.C. 6013.

Finally, the appellant submitted, that in establishing the determined values, the Minister was exercising a discretionary power and that such a discretion must not be exercised arbitrarily or capriciously. In support of that proposition, counsel cited the Herdman case.[10] In that decision, the Federal Court of Appeal indicated that a Minister's discretionary power ought not to be exercised in an arbitrary or capricious manner. In addition, counsel referred the Tribunal to the case of *Vanguard Coatings and Chemicals Ltd. v. The Minister of National Revenue.*[11] In that case, the Federal Court of Appeal held that the Minister's determination of values under section 34 had to be fair and reasonable. Counsel submitted that the increases in the Minister's determined values per tonne made effective in July 1987 are clearly unfair. In increasing the determined values in 1987, the respondent acted unfairly and unreasonably in that the new values were based on 1985 costs. Counsel further submitted that the appellant was able to show that, between 1985 and 1988, the price of liquid asphalt decreased drastically and there was also a decrease in the cost of manufactured asphalt. With such a decrease, the determined values would have to be decreased in order to be reasonable.

The respondent also presented a series of arguments. First, he submitted that determination of values pursuant to section 28 of the Act is possible only if the goods on which tax is eligible are for own use and not for sale. In support of that position, counsel for the respondent argued that the Department, in its Communiqué 110/TI of May 23, 1985, regarded asphalt used in supply and install contracts as not for own use but as asphalt which is indeed sold. Consequently, the methods authorized in Communiqué 110/TI and 110-1/TI were administrative methods that were set to establish an equivalency to sale price.

Counsel for the respondent argued that the Department will accept sales tax calculated under one of these administrative methods, so long as the conditions thereunder are met, as being the equivalent of the selling price of asphalt. In the alternative, the taxpayer may remit taxes on the actual selling price calculated in accordance with section 26[12] of the Act. One condition set out in the administrative methods is that the method chosen must be used consistently for a period of at least one year. The other condition is that the taxpayer cannot use the fair market value method in contracts where the customer supplied some of the materials. This is based not on the communiqué of April 1988, but on Memorandum ET 207 which requires the inclusion of the cost of all materials. This element cannot be met in situations where the customer supplied some of the materials. Because it was not understood, a clarification memorandum was issued. In addition, counsel suggested that the Tribunal does not have authority to look at how these communiqués are being applied or interpreted and that the Tribunal can simply apply the law.

It was further submitted on behalf of the respondent that on the issue of the selection, there was conflicting evidence before the Tribunal with the appellant's witness, Mr. Medlyn, testifying that he did not receive Communiqué 110-1/TI issued on May 23, 1985, and the respondent's witness, Mr. Alexander, testifying that he explained different methods to the appellant's representatives. Counsel urged the Tribunal not to reject Mr. Alexander's evidence which was supported by the appellant's witness, Mr. Bradford, that he sent the communiqué to all

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10. *Supra*, footnote 7.
11. 86 D.T.C. 6342 (Fed. T.D.); 88 D.T.C. 6374 (Fed. C. A.).
12. *Now* s. 42.

members of his Association, of which the appellant was a member. Similarly, the respondent urged the Tribunal to accept the evidence of Mr. Sitka who testified that he mailed out the second and third communiqués to licensed asphalt manufacturers, including the appellant. Mr. Medlyn also denied receiving those.

Counsel argued that it was illogical for the appellant to submit that Revenue Canada was not interested in explaining the alternative methods to the appellant. The Department was in contact with the Ontario Hot Mix Producers' Association, which in turn sent out communiqués to its members. Further, the Department sent out a licensing officer to explain the system and, again, it would be illogical for the officer to go without the communiqué establishing these methods. Counsel submitted that the appellant's own witness, Mr. Bradford, testified that most of the Association's members chose the determined value method because it was convenient and easy. That a few members used a method other than the determined value method supports the position that the alternative methods were made known to the industry.

Counsel for the respondent further submitted that the Tribunal should reject the appellant's argument that the determined value method was not formally authorized whereas the fair market value method was. Counsel reiterated that both methods were administratively authorized as a means of establishing an equivalency of selling price.

Finally, counsel argued that the respondent did not act capriciously or arbitrarily in setting the determined values in exercising his discretion under section 28 of the Act. If the Minister exercises his power under section 28, he would have to do so in a reasonable fashion. But, counsel made the point that section 28 was not in issue in this case. Further, counsel submitted that the argument that costs of production decreased was untenable; what is of interest is not the cost of production, but the selling price. Counsel pointed out that Mr. Medlyn, on behalf of the appellant, testified that its list prices stayed the same or went up slightly, though it might have given discounts. As to the criticism of the actual values set by the respondent, counsel argued that it was reasonable, in determining a value, to look to the past to see what had happened as opposed to looking to the future to guess what would happen. The values used by the respondent were furnished by the Ontario Hot Mix Producers' Association. What these values established was that the price of liquid asphalt might have been dropping, but they did not prove that the selling price of manufactured asphalt was also dropping.

DECISION

There are many issues in this appeal which have been enumerated and discussed. The key issue to decide, however, is whether the appellant made an error which would justify corrective measures by this Tribunal pursuant to its jurisdiction under the Act.

After a detailed review of the evidence and arguments presented on behalf of both parties, the Tribunal has come to the conclusion that the appellant has paid taxes in error and, therefore, is entitled to a refund pursuant to section 44 of the Act.

That section allows for a refund, where moneys are paid in error, "whether by reason of mistake of fact or law or otherwise." The word "otherwise" as a qualifier of the word mistake in section 44 is broad enough, in our view, to cover a taxpayer's mistake in the selection of a method of computation of tax on the basis of administrative concessions or practices, where those are available.

The essence of the appellant's position is that an error was made in that it failed to exercise the option to change, beginning in January 1987, the method of calculation of tax liability to the fair market value method as provided for in relevant Excise Communiqués and Memorandum ET 207. The appellant submitted that it was unaware firstly (until about mid-1987) of the existence of a method of calculating the tax, other than the determined value method, and, secondly, of the decreased liability that would have resulted from its remittance of tax using the fair market value method (presumably until calculations were made, in late 1987, using both methods). The appellant submitted that, as a result, there was a mistake of fact or law or otherwise.

The Tribunal heard conflicting evidence on the advice and communiqués provided to the appellant by the respondent's official concerning the availability of alternative methods of accounting for tax. The appellant submitted that it remitted its taxes using the determined value method on the advice of the respondent who made no effort to advise it on the availability of alternative methods of calculating value for tax. The appellant further submitted that it did not become aware of alternative methods before mid-1987, when the determined values increased from $25 to $30. On the other hand, the respondent argued that the Revenue Canada official explained various methods to the appellant's representatives.

The Tribunal believes that the appellant knew or should have known before 1987 that there was a variety of methods available to it for calculating sales tax. The appellant is a member of the Ontario Hot Mix Producers' Association which receives the Excise Communiqués relating to the tax on asphalt and communicates them to its members, including the appellant. The Executive Secretary of the Ontario Hot Mix Producers' Association acknowledged that certain members of the Association used a method other than the determined value method.

However, and more importantly, at the beginning of 1987, the appellant was not aware of the financial implications for it of using one method over the other for the balance of the year. The necessary information for the calculation of tax liability for the year 1987 using one method over another was not available until well into the 1987 paving season. Firstly, the determined values established by the Department, to take effect in July 1987, were not available until April 1987. Secondly, the actual (or even estimated) costs of production to be used in the fair market value calculations were not available until well into the 1987 season. Consequently, the appellant could not make an informed choice, in early 1987, as to the method to be selected for tax calculation. It did not have full knowledge of the financial consequences of that selection. Only after weighing the financial outcomes resulting from the different methods can a choice be made. As the Tribunal understands the scheme provided for in the relevant Excise Communiqués, a taxpayer has the choice of several methods for the calculation of tax liability on liquid asphalt. A method must be used consistently for at least 12 months. There is no indication that the choice once made is irrevocable, at least not within the two-year limit imposed by section 44 for claiming a refund. The only requirement is that it be used consistently for 12 months.

The Tribunal concludes, therefore, that an error was made by the appellant at the beginning of 1987 in that it failed to select the fair market value method over the determined value method as provided for in the relevant Excise Communiqués, as the use of the fair market value method would have resulted in the least financially burdensome method of tax calculation.

Clearly, the statute authorizes a refund where moneys have been paid in error. Where such an error has been made, the Tribunal sees nothing in the Act that prevents a taxpayer from going back, within the time limit provided under section 44, to re-calculate tax liability using a different method which is authorized by the Minister under certain conditions.

In the present case, the appellant filed a claim in April 1988 for refund of tax for the period covering January 1, 1987, to December 31, 1987, only. The refund claim is based upon a value for tax determined in accordance with the fair market value method which was authorized as an alternative in Excise Communiqué 110/TI.

The principal argument that is being advanced by the respondent as grounds for rejecting the appellant's application for refund is the argument that this is a request for a retroactive adjustment of tax. The Tribunal does not agree with that argument. On this point, the Tribunal notes that the respondent changed his position twice.

As the evidence has shown, the respondent was prepared at one point to allow the appellant to re-calculate its sales tax liability using the fair market value method. At a later date, the respondent refused the claim on the grounds that a method, once chosen, must be used "consistently." The respondent has qualified the word "consistently" in Excise Communiqué 110-1/TI issued in April 1987 as meaning "for a period of not less than one year." But, in his grounds for rejecting the refund sought by the appellant, the respondent added that once a method is chosen, retroactive adjustment to another method was not permitted.

The relevant Excise Communiqués, the respondent said, allow the use of various methods of calculating the sales tax liability on the condition that once a method is chosen, it must be used consistently for at least a year. At the end of a 12-month period, a taxpayer can elect at any time to use one of the other methods for at least a year. However, the Tribunal believes that a true interpretation of the word "consistently" should not prevent a taxpayer, who has made an error in selecting the method of calculation, from going back within the statutorily prescribed period of two years and selecting another method for a period of one year, if the new method more properly or accurately reflects the taxpayer's sales tax liability. On the evidence in this case, the accounting for tax on the basis of the fair market value method is justified if all the conditions specified in Memorandum ET 207 are met. The Tribunal believes that section 44, by allowing the taxpayer two years in which to claim a refund, contemplates, by necessary implication, a retroactive adjustment. For these reasons, the Tribunal believes that the respondent erred in ruling that the appellant could not retroactively change the method by which it accounted for the sales tax payable.

The second ground given by the respondent for refusing the claim was that the fair market value method provided by Memorandum ET 207 could not be used where a customer supplies some of the materials, as is the case with some of the appellant's contracts. It has been established in evidence that, in the situations relevant to this appeal, the asphalt was manufactured for the purpose of carrying out two types of supply and install contracts: the first is when the manufacturer supplies all the materials to the customer, and the second is when the customer supplies some of the materials, in this case, the liquid asphalt.

It appears from a careful reading of paragraph 4 of Memorandum ET 207 that the fair market value method is available only in those instances where the manufacturer provides all the materials. Memorandum ET 207 has been in effect since July 1, 1977, and the method in question was available only in those instances since that date. The Tribunal believes that Excise Communiqué 110-2/TI simply reiterates that when a customer supplies some of the materials relative to a supply and install contract, the licensed manufacturer of asphalt paving mixtures is not permitted to use the fair market value method. For this second type of contract, Excise Communiqué 110-2/TI specifies that manufacturers may use any of the remaining methods set out in section 4(C) of Excise Communiqué 110-1/TI. Consequently, the Tribunal concludes that the respondent did not err in ruling that the fair market value method provided by Memorandum ET 207 could not be used where a customer supplied some of the materials.

Therefore, the Tribunal finds that the appellant can retroactively change its method of accounting to the fair market value method, but only with respect to the sales of asphalt paving mixtures on a supply and install basis where the appellant supplied all the materials.

CONCLUSION

For the foregoing reasons, the Tribunal allows the appeal in part and refers the matter back to the Minister for reconsideration on the basis that the appellant is entitled to a refund, calculated on the basis of the fair market value method, but only for the sales during 1987 of asphalt paving mixtures on a supply and install basis where the appellant supplied all the materials.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

John C. Coleman
John C. Coleman
Member

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