CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, September 8, 1992

Appeal No. 3078

IN THE MATTER OF an appeal heard on April 2, 1992, pursuant to section 51.19 of the *Excise Tax Act*, R.S.C., 1970, c. E-13, as amended;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated July 22, 1988, with respect to notices of objection served under section 51.17 of the *Excise Tax Act*.

BETWEEN

ALRICH CUSTOM CABINETS LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member

Michel P. Granger
Michel P. Granger
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. 3078

ALRICH CUSTOM CABINETS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is to determine whether part of the sales tax paid, pursuant to subsection 27(1) of the Excise Tax Act, on kitchen cabinets manufactured and sold by the appellant is refundable under section 44 of the Excise Tax Act, given that the appellant claims to have erred in establishing its tax liability and wishes to retroactively use a determined value allowed by the Department of National Revenue.

***HELD**: The appeal is dismissed.*

Place of Hearing:	*Vancouver, British Columbia*
Date of Hearing:	*April 2, 1992*
Date of Decision:	*September 8, 1992*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *Sidney A. Fraleigh, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Robert Desjardins*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Vincent A. Heitzman, for the appellant* *John B. Edmond, for the respondent*

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. 3078

ALRICH CUSTOM CABINETS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
SIDNEY A. FRALEIGH, Member
W. ROY HINES, Member

REASONS FOR DECISION

On September 30, 1987, the appellant filed refund claims for sales tax paid during the periods from April 1 to December 31, 1985, January 1 to December 31, 1986, and January 1 to February 28, 1987, on the basis that it had overpaid its tax "as a result of using previous basis of calculation." Notices of determination rejecting the refund claims were issued on October 23, 1987. Notices of objection dated January 25, 1988, were served by the appellant. In notices of decision dated July 22, 1988, the respondent confirmed the determinations.

The issue in this appeal is to determine whether part of the sales tax paid, pursuant to subsection 27(1) of the *Excise Tax Act*[1] (the Act), on kitchen cabinets manufactured and sold by the appellant is refundable under section 44 of the Act, given that the appellant claims to have erred in establishing its tax liability and wants to retroactively use a determined value allowed by the Department of National Revenue (Revenue Canada).

The appellant, in business since the 1950s, is a kitchen cabinet manufacturer with sales in the area of $1,000,000 to $1,500,000 a year. As pointed out by counsel for the appellant during the hearing, the appellant manufactures, delivers and installs made-to-order kitchen cabinets. The clients are contractors and home-owners. In April 1987, an officer of Revenue Canada visited the appellant and reviewed its operations. On that occasion, it would appear that the officer also informed the appellant that it could take a further discount in accordance with the determined value established by Revenue Canada for the kitchen cabinet industry. The appellant then implemented this discount and filed the above-mentioned refund claims for overpayment of sales tax. Revenue Canada, in accordance with Excise Memorandum ET 202 (the Memorandum), took the view that the determined value could not be applied retroactively.

Counsel for the appellant argued that, since other cabinet companies have used the determined value during the periods covered by the refund claims, his client, although unaware at that time of the existence of the discount, should be entitled to the same benefit. Counsel argued that it was a question of fairness. He also argued that the case of *Allan G. Cook Limited v. The Minister of National*

1. R.S.C., 1970, c. E-13, as amended.

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Revenue[2] constituted a precedent applicable to the case at hand. In this connection, he argued that the appellant was a manufacturer for its own use. Pursuant to paragraph 28(1)(*d*) of the Act, when goods are manufactured in Canada under circumstances making it difficult to determine their taxable value, because "such goods are for use by the manufacturer or producer and not for sale," the Minister of National Revenue (the Minister) may determine the taxable value, and such transactions are deemed to be sales.

Counsel for the respondent first pointed out that the relevant documents, published by Revenue Canada and bearing upon the existence of a determined value for the kitchen cabinet industry, were publicized and available to the appellant before the latter became aware of the existence of that value. Counsel further added that the *Cook* decision was not applicable to the present case, stating that the determined value in this decision had a statutory basis and that there is no question that the cabinets manufactured by the appellant in the present instance are finished products which are sold and not for its own use. Counsel for the respondent concluded by drawing an exact parallel between the case at hand and three recent unreported decisions made by the Tribunal on March 2, 1992, namely, *Artec Design Inc. v. The Minister of National Revenue* (Appeal No. AP-90-117), *Seine River Cabinets Ltd. v. The Minister of National Revenue* (Appeal No. AP-90-118) and *Imperial Cabinet (1980) Co. Ltd. v. The Minister of National Revenue* (Appeal No. AP-91-045).

Having reviewed the file and considered the arguments, the Tribunal is of the view that the appeal must be dismissed.

The appellant's basic contention is that it is a manufacturer for its own use. In this connection, counsel for the appellant claimed to be supported by the Tribunal's decision in the *Cook* decision. However, the Tribunal does not believe that the case at hand turns upon the issue of whether the appellant is a manufacturer for its own use. In the Tribunal's opinion, the kitchen cabinets manufactured by the appellant, during the period in issue, were not made for its own use. The Tribunal agrees with the respondent's basic position that the appellant sells kitchen cabinets and that there is no question of these cabinets being components of other items that are subsequently sold by the apppellant. There has been no dispute that the kitchen cabinets sold by the appellant were finished goods and sold as such to contractors and home-owners. This situation contrasts with that in the *Cook* case where the asphalt produced by the appellant, a road construction company as well as a producer of asphalt paving mixtures for its own use and for resale, was basically used by the appellant in carrying out contracts for paving roads. The situation would be different if the appellant were a housebuilder, manufacturing kitchen cabinets to be installed in the houses to be sold. In *The Queen v. Saracini et al.*,[3] the Exchequer Court of Canada decided that these kitchen cabinets were not manufactured for sale to other buyers, but were consumed or used by the manufacturer.

In its brief, the appellant specifically referred to Ruling Card 3700/107-1 issued by Revenue Canada. For the appellant, this is evidence that the respondent, in accordance with paragraph 28(1)(*d*) of the Act, established a determined value for the kitchen cabinet industry. As noted above, the Tribunal is of the view that this paragraph has no bearing on the case at bar. Furthermore, it should be underlined that Ruling Card 3700/107-1 is based explicitly on the Memorandum. As already stated in

---

2. Canadian International Trade Tribunal, Appeal No. 3074, August 29, 1989; 2 T.C.T., at 1167.
3. [1959] Ex. C.R., at 63.

the three decisions made on March 2, 1992, mentioned above, the Memorandum, which explicitly disallows the retroactive application of a determined value, has no statutory or regulatory authority. The Tribunal is of the opinion that the determined value set forth in the Memorandum essentially reflects a purely administrative policy adopted by Revenue Canada. Accordingly, the determined value relevant to the present case is without legal foundation, and it would be outside of the Tribunal's jurisdiction to disregard the provisions of the Act in favour of its use.

Section 44 of the Act provides that the Minister refund a taxpayer any moneys paid in error, whether by reason of mistake of fact or law or otherwise, when those moneys have been taken into account as taxes, penalties or interest "under this Act." The Tribunal must establish whether the Minister was correct in his determination that the moneys were not paid in error when they were taken into account as taxes "under this Act," regardless of the method used by the taxpayer to calculate the tax. During the periods covered by the refund claims, the appellant paid the sales tax on the sale price in accordance with the Act. It claims that it paid the tax on a less advantageous basis than was provided by a Revenue Canada administrative concession, of which, it contended, it was unaware at the time that the taxes were remitted. The appellant has appealed to the Tribunal to receive the benefit of this administrative concession. The Tribunal considers that the moneys paid by the appellant were paid in accordance with the relevant provisions of the Act and that they constitute taxes paid "under this Act."

The appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

W. Roy Hines
W. Roy Hines
Member