

Ottawa, Thursday, October 31, 1991

Appeal No. AP-89-012

IN THE MATTER OF an appeal heard on July 16, 1991,  
under section 81.19 of the *Excise Tax Act*, R.S.C., 1985,  
c. E-15;

AND IN THE MATTER OF a notice of decision of the  
Minister of National Revenue dated October 31, 1988, relating  
to a notice of objection served under section 81.15 of the  
*Excise Tax Act*.

**BETWEEN**

**JOHNSON INTERNATIONAL INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed in part and referred back to the Minister of National Revenue for reconsideration as to the appropriate allowance for costs of transportation that should apply on the appellant's sales; penalty and interest to be adjusted accordingly.

W. Roy Hines  
W. Roy Hines  
Presiding Member

Sidney A. Fraleigh  
Sidney A. Fraleigh  
Member

Michèle Blouin  
Michèle Blouin  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-89-012**

**JOHNSON INTERNATIONAL INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act. The appellant asks the Tribunal to apply a cost of transportation/net sales ratio of 12.2 percent established during a six-month reference period preceding the thirteen-month assessment period.*

**HELD:** *The appeal is allowed in part and referred back to the Minister of National Revenue for reconsideration as to the proper ratio for costs of transportation that should apply on the appellant's sales. Penalty and interest to be adjusted accordingly.*

*Place of Hearing: Ottawa, Ontario*  
*Date of Hearing: July 16, 1991*  
*Date of Decision: October 31, 1991*

*Tribunal Members: W. Roy Hines, Presiding Member*  
*Sidney A. Fraleigh, Member*  
*Michèle Blouin, Member*

*Counsel for the Tribunal: Gilles B. Legault*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: F. Johnson, for the appellant*  
*H. Baker, for the respondent*

**Cases Cited:** *Les Presses Lithographiques Inc. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 2997, June 26, 1989; M.H. Riley Enterprises of Florida, Inc. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 3079, July 19, 1991.*

**Appeal No. AP-89-012**

**JOHNSON INTERNATIONAL INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member  
SIDNEY A. FRALEIGH, Member  
MICHÈLE BLOUIN, Member

**REASONS FOR DECISION**

The appellant is a company in the business of producing, bottling and selling soft drinks. On August 12, 1987, it was assessed for the period of July 1, 1985, to July 31, 1986, for a total amount of \$159,519.87, including taxes, penalty and interest. On November 20, 1987, the Department of National Revenue for Customs and Excise (the Department) acknowledged receipt of the appellant's notice of objection. On October 31, 1988, a notice of decision allowed in part the objection, but maintained the assessment for an amount due of \$142,427.16.

At the hearing, the parties agreed that the outstanding issue with respect to the tax assessment concerned the deduction for the cost of transportation pursuant to clause 26(6)(c)(ii)(B) of the *Excise Tax Act* (the Act) and the related penalty and interest imposed on the amount due. More precisely, the issues are:

- whether the deduction for cost of transportation was calculated in accordance with the statute and its regulations; and
- whether interest and penalty can be waived because of alleged promises and oral advice provided to the appellant by the respondent's officials.

At the hearing, Mr. F. Johnson testified for the appellant. The witness explained that, in December 1985, the appellant was co-operating with the Department in a survey and provided the Department with its calculation of transportation and delivery costs per unit it had incurred for the period between January 1, 1985, and June 30, 1985. The amount totalled \$289,417.66 which represented 12.2 percent of the appellant's sales during that period. The witness explained that an auditor for the Department seemed to have calculated the cost of transportation for the 13-month assessment period by simply multiplying the amount of \$289,417.66 by two and calculating the result (\$578,836) as a percentage of sales (\$6,188,106) for the 13-month assessment period that amounted to 9 percent instead of the 12.2 percent obtained during the reference period.

In cross-examination, Mr. Johnson acknowledged that no records of the costs of transportation had been submitted for the audit period. Mr. Bose, a senior litigation officer with the Department, testified that no evidence was submitted to support the appellant's cost of transportation deduction, and he was unable to tell the Tribunal which method the auditor had used in arriving at a 9-percent transportation allowance.

Mr. Johnson argued that the auditor should have used a 12.2-percent figure rather than the 9 percent in calculating the transportation allowance for the assessment period. Counsel for the respondent argued that the deduction for cost of transportation must meet the requirements of the *Sales Tax Transportation Allowance Regulations*<sup>1</sup> (the regulations) as provided by clause 26(6)(ii)(c)(B) of the Act. Since section 3 of the regulations requires that the costs of transportation be determined by reference to records and books, the appellant had not discharged his burden of proof.

The Tribunal cannot agree with counsel for the respondent. The appellant has established in testimony that the departmental auditor had used the data the company provided for the six-month period immediately preceding the assessment period in conducting his audit. The respondent did not refute any of the information provided by the appellant, nor did any witnesses for the respondent explain how the auditor arrived at the 9-percent figure. Moreover, the Tribunal has difficulty in understanding why the numbers establishing the cost of transportation net sales ratio of 12.2 percent during the reference period would now need to be supported by records or other evidence since these numbers were originally accepted by the Department's auditor.

Given the evidence before the Tribunal, two conclusions are apparent. The first concerns the actual transportation allowance authorized for the assessment period. The evidence clearly establishes that this allowance was based on a 12-month period and should be adjusted to reflect sales for a 13-month period. The second is somewhat more complicated and relates to the method used by the Department to calculate tax. The respondent noted in his submission that the departmental auditor determined the transportation costs that could be deducted from the "sale price" by extrapolating the actual transportation costs incurred by the appellant during the six months preceding the relevant period. As noted above, it was this figure calculated on a 12-month basis that was used to establish a ratio in relation to total sales for the assessment period, and this ratio was later used by the auditor to determine the actual amount of the transportation allowance. Accordingly, if a ratio or percentage figure rather than an actual number is the preferred departmental method to be applied, then it would seem logical, since both transportation costs and sales value vary with the actual volume of sales, that the ratio applied in the assessment period reflect the ratio that existed between these two variables during the reference period. The Tribunal, therefore believes that a 12.2-percent ratio should have been applied for the 13-month period of assessment.

On the other hand, the Tribunal notes that it did not receive, at the hearing, any recorded figures showing the exact amount of sales on which the deduction of 12.2 percent should have been applied.

As for the tax and penalty, the Tribunal recalls that it has no authority to waive penalty and interest imposed in accordance with the Act, although it is sympathetic to the appellant's situation whose evidence and argument lead to the conclusion that it was left unaware of its exact rights and obligations under the Act (*Les Presses Lithographiques Inc. v. The Minister of National Revenue*;<sup>2</sup> and *M.H. Riley Enterprises of Florida, Inc. v. The Minister of National Revenue*).<sup>3</sup>

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1. SOR/83-95, January 21, 1983.

2. Canadian International Trade Tribunal, Appeal No. 2997, June 26, 1989.

3. Canadian International Trade Tribunal, Appeal No. 3079, July 19, 1991.

CONCLUSION

The Tribunal allows the appeal in part and refers it back to the Minister of National Revenue for reconsideration as to the appropriate allowance for costs of transportation that should apply on the appellant's sales, penalty and interest to be adjusted accordingly.

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Presiding Member

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