CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, March 10, 1992

**Appeal No. AP-89-013**

IN THE MATTER OF an appeal heard on September 17, 1991, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated November 7, 1988, with respect to a notice of objection dated February 12, 1988, under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**HYALIN INTERNATIONAL (1986) INC.** **Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

## DECISION OF THE TRIBUNAL

The appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
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 AP-89-013**

**HYALIN INTERNATIONAL (1986) INC.** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

*The appeal is filed by Hyalin International (1986) Inc. with respect to a decision rendered on November 7, 1988, by the Minister of National Revenue dismissing the notice of objection by the appellant. The period covered is from March 1, 1983, to December 31, 1985.*

*On April 29, 1987, the appellant filed an application for refund of sales tax under section 68 of the Excise Tax Act (the Act). The amount claimed was $1,053,200. The appellant claims to have erred in determining its tax obligation and wishes to use retroactively a determined value allowed by the Department of National Revenue.*

***HELD**: The appeal is dismissed. The determined value method has no statutory or regulatory authority. During the period identified in the appeal, the appellant paid tax on the sale price in compliance with section 50 of the Act. The appellant is seeking an administrative concession. The Tribunal is of the opinion that the amounts paid by the appellant were paid in accordance with the requirements of the Act and that they are therefore, as set forth in section 68, taxes paid " ... under this Act...."*

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|---|---|
| *Place of Hearing:* | *Ottawa, Ontario* |
| *Date of Hearing:* | *September 17, 1991* |
| *Date of Decision:* | *March 10, 1992* |
| *Tribunal Members:* | *Michèle Blouin, Presiding Member*<br>*W. Roy Hines, Member*<br>*Charles A. Gracey, Member* |
| *Counsel for the Tribunal:* | *Robert Desjardins* |
| *Clerk of the Tribunal:* | *Nicole Pelletier* |
| *Appearances:* | *Réjean Leroux, for the appellant*<br>*Alain Lafontaine, for the respondent* |

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

**Appeal No AP-89-013**

**HYALIN INTERNATIONAL (1986) INC.** **Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE** **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
W. ROY HINES, Member
CHARLES A. GRACEY, Member

## REASONS FOR DECISION

This is an appeal filed under section 81.19 of the *Excise Tax Act*[1] (the Act).

The appellant, Hyalin International (1986) Inc., is primarily engaged in the manufacture of aluminum windows. Before assuming its current corporate identity, this company operated under the name of Groupe Cayouette Superseal Inc. The change in name resulted from the acquisition of the company's shares, in the fall of 1985, by the Groupe Hervé Pomerleau Inc.

On April 29, 1987, under section 68 of the Act, the appellant filed an application for refund of federal sales tax. The period covered by the application was March 1, 1983, to December 31, 1985. The appellant claimed $1,053,200 in sales tax. On January 15, 1988, the Department of National Revenue (Revenue Canada) issued a notice of determination in which it denied the application on the grounds that a determined value could not be applied retroactively. The appellant opposed this decision in a notice of objection dated February 12, 1988. The reasons given by the appellant were that the retroactive use of determined values announced in ruling card 3700.259/8.2, a directive issued by Revenue Canada and dated September 22, 1983, had allegedly been granted to other taxpayers under similar circumstances. On November 7, 1988, the respondent issued a notice of decision that dismissed the notice of objection and upheld the determination.

This appeal is to determine whether part of the sales tax paid with respect to aluminum windows manufactured and sold by the appellant is refundable under section 68 of the Act, given that the appellant claims to have erred in establishing its tax obligation and wishes to use retroactively a determined value allowed by Revenue Canada.

Mr. René Mathieu, witness for the appellant, indicated that Groupe Cayouette Superseal Inc. had remitted the federal tax on its sale price, less a discount and the shipping costs. The application for refund was prepared after an audit of the company, shortly after it had been acquired, and on the

1. R.S.C., 1985, c. E-15, as amended.

recommendation of a well-known accounting firm, which had informed the purchaser of the existence of a determined value for aluminum doors and windows and of the fact that it could be used retroactively. Mr. Mathieu also expressed the opinion that the respondent's refusal to consider the retroactive use of a determined value would appear to contradict a number of Revenue Canada's documents, including the memorandum of March 19, 1980, sent by the Assistant Deputy Minister, Excise, to regional directors of Revenue Canada, which gave authorization to use determined values for aluminum and wooden doors and windows. This memorandum, since rescinded, indicated that the determined values could be applied retroactively to November 17, 1978, or the date on which the manufacturer's licence had been issued. Lastly, Mr. Mathieu added that Revenue Canada had first authorized determined values for aluminum windows in 1974 and that these values were therefore not subject to Memorandum ET 202 which was adopted by Revenue Canada in December 1975.

When questioned by counsel for the respondent on the nature of the error that the appellant had allegedly made, Mr. Mathieu stated that this error consisted in Groupe Cayouette Superseal Inc. forgetting the recommendation to use the determined value. It appears that this recommendation had been made to Groupe Cayouette Superseal Inc. by its external auditor in previous audits. According to Mr. Mathieu, who stated that he had read an audit report by this auditor, "it had been strongly recommended, but given the fact that the company was in a precarious financial situation, they completely forgot about the recommendation. The error occurred in that manner." [Translation]

The key witness for the respondent, Mr. Jean-Paul L'Homme, is a district manager for Excise (Montréal-East District). From 1984 to 1991, he was regional head of audit services and, among other things, responsible for a refund section. After explaining that a determined value is not provided for under the Act and it is merely an administrative concession, he emphasized the fact that "departmental policy has always been that the determined value begins on the date on which the manufacturer uses it for the first time" [Translation] and that it is not retroactive. Mr. L'Homme referred to subsection 3, Part II of Memorandum ET 202, which stipulates that computation of tax on a determined value becomes effective on the date the use of this value is commenced and that a determined value may not be applied retroactively to adjust amounts of tax paid computed on the sale price. According to the witness, Memorandum ET 202 states the general policy of Revenue Canada with respect to taxable values. With respect to the cases raised by the appellant in which retroactivity was allegedly allowed by Revenue Canada, Mr. L'Homme suggested that it might have occurred as a result of some confusion over the memorandum of March 19, 1980, which was rescinded in June 1984. According to this witness, this confusion may have allowed a few companies to benefit from a retroactive determined value.

The appellant's representative argued that, in the March 19, 1980, memorandum, the administrative policy authorized by the Assistant Deputy Minister had a retroactive effect. According to him, cases involving the retroactive approval of a determined value confirm this retroactivity. It was not until 1988 that Revenue Canada opted for non-retroactivity. Counsel for the respondent again pointed out the stipulation of non-retroactivity in Memorandum ET 202. Setting aside the question of retroactivity, he argued that this was not a case where an error had been made when the amount, as in this case, was paid by the taxpayer in accordance with the Act. Determined values are only administrative concessions.

The Tribunal is a creature of statute. As such, its jurisdiction and the powers it may exercise must be found in statutory instruments such as the *Excise Tax Act* and any regulations enacted thereunder. Subsection 59(1) of the Act provides authority for the Minister of Finance or the Minister of National Revenue (the Minister) to make regulations, as he deems necessary, for carrying out the Act. None of the documents cited by the appellant to justify its claim regarding the retroactive application of a determined value - i.e. the memorandum of the Assistant Deputy Minister of March 19, 1980, to the regional directors, ruling card 3700.259/8-2, Memorandum ET 202 which is explicitly the authority for this card, the previous circulars or directives - have statutory or regulatory authority. The Tribunal is of the opinion that these documents reflect an administrative policy adopted by Revenue Canada and for which there is no statutory or regulatory authority. Accordingly, the determined value method is without legal authority, and the Tribunal would be outside its jurisdiction to disregard the provisions of the Act in favour of its use.

Section 68 provides that the Minister must refund a taxpayer any moneys paid in error, whether by reason of mistake of fact or law or other, 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 the Act, regardless of the method used by the taxpayer to calculate the tax. During the period covered by this appeal, the appellant paid the tax on the sale price in accordance with section 50 of the Act. It claims that it erred in paying the tax on a less advantageous basis than was provided by a Revenue Canada administrative concession of which, it claimed, it was unaware at the time that the taxes were remitted. The appellant has appealed to the Tribunal in order to receive the benefit of this administrative concession. The Tribunal is of the opinion that the amounts paid by the appellant were paid in accordance with the provisions of the Act and that they constitute taxes paid " ... under this Act...."

The appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member