CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, June 11, 1992

Appeal No. AP-89-132

IN THE MATTER OF an appeal heard on October 25, 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 notice of decision by the Minister of National Revenue dated January 31, 1989, relating to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

A.S. 4 STEEL INDUSTRIES LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

W. Roy Hines
W. Roy Hines
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-89-132

A.S. 4 STEEL INDUSTRIES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

At the hearing held on October 25, 1991, counsel representing the parties requested an adjournment and submitted an agreed statement accepting certain conditions with respect to the adjournment. The Tribunal allowed the postponement and requested that the appellant file its brief within 90 days. Nothwitstanding the Tribunal's order, counsel for the appellant filed his brief after the time limit set forth in the order. The Tribunal therefore proceeded on the basis of the written documents before it as of January 23, 1992, pursuant to rules 5, 25 and 29 of the Tribunal's Rules as stated in the order.

HELD: *The appeal is dismissed. The Tribunal notes that all the arguments raised by the appellant in its notice of objection are linked to questions of fact, which facts need to be proven. It is well established in Canadian tax law, since the decision of the Supreme Court of Canada in Roderick W.S. Johnston v. Minister of National Revenue, that mere allegations are not sufficient to contradict facts on which an assessment is based.*

Place of Hearing:	*Calgary, Alberta*
Date of Hearing:	*October 25, 1991*
Date of Decision:	*June 11, 1992*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Arthur B. Trudeau, Member* *W. Roy Hines, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Gertrude Caisse on behalf of Keith Ibach, for the appellant* *Howard A. Baker, for the respondent*

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Appeal No. AP-89-132

A.S. 4 STEEL INDUSTRIES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ARTHUR B. TRUDEAU, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from an assessment made by the Minister of National Revenue (the Minister).

On May 12, 1987, the appellant was assessed for a total amount of $46, 687.77 including tax, interest and penalty. On December 17, 1987, the appellant served an objection to the assessment. On January 31, 1989, the Minister partially allowed the objection with respect to sales tax paid on the inventory on hand as of July 1, 1985. However, the amount payable was increased to $57,094.93 due to the interest and penalty accrued as of the date of the Minister's decision dated January 31, 1989. The notice of decision makes it clear that the rest of the objection was disallowed either because of an absence of conclusive documentation or because of a failure to prove that the calculation and method applied to assess the appellant were wrong or not based on the Act and the relevant regulations. That decision was appealed on April 17, 1989.

At the hearing held on October 25, 1991, counsel representing the parties requested an adjournment and submitted an agreed statement accepting certain conditions with respect to the adjournment. These conditions were accepted by the Tribunal which, on December 2, 1991, issued an order as follows:

> *At the outset of the hearing, counsel representing both parties requested an adjournment and agreed to respect certain conditions. The Tribunal allowed the adjournment on October 25, 1991, and sets out its conditions as follows:*
>
> *1. Any further oral hearing in this matter must be continued in Ottawa.*
> *2. The appellant must file a brief within 90 days after the October 25, 1991, hearing.*

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

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3. *If the appellant fails to submit its brief within that period, in accordance with rule 34 of the Canadian International Trade Tribunal Rules,*[2] *the Tribunal will dispose of the matter on the basis of the written documents before it, pursuant to rules 5, 25 and 29.*
4. *Finally, if the appellant files its brief, the respondent must file his supplementary response within 60 days after the service of the appellant's brief.*

Nothwitstanding the above order, counsel for the appellant filed his brief after the time limit set forth in the order, that is, after January 23, 1992. Counsel for the appellant has not offered any reasons to the Tribunal explaining this delay, although he was informed that the Tribunal was going to proceed on the basis of the written documents before it as of January 23, 1992, pursuant to rules 5, 25 and 29 of its Rules as stated in the order.

In this context, the sole argument raised by counsel for the respondent is that the appellant, by not filing a brief, has not substantiated its objection. Therefore, counsel submitted, the appeal must be dismissed as the appellant has not discharged its onus. The case law relied upon by counsel is the decision of the Supreme Court of Canada in *Roderick W.S. Johnston v. Minister of National Revenue*.[3]

The Tribunal does not fully agree with the submission of counsel for the respondent. That which was agreed at the hearing and further ordered by the Tribunal was to proceed on the basis of the documents before the Tribunal if the appellant failed to file its brief within the delay. Therefore, the appellant's failure to submit its brief is not *per se* fatal to its appeal.

Dealing now with the merits of this case, the Tribunal first notes that, pursuant to section 81.19 of the Act, it is the assesment and not the Minister's decision itself that is being appealed to the Tribunal:

> *81.19 Any person who has served a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, may, within ninety days after the day on which the notice of decision on the objection is sent to him, appeal the assessment or determination to the Tribunal.*
>
> (emphasis added)

It is also noteworthy that subsection 81.15 (1) requires the objection to an assessment to set out the reasons for the objection and all relevant facts on which the assessed person relies. Furthermore, section 81.25 of the Act requires the Deputy Minister of National Revenue to send to the Tribunal copies of all notices that are relevant to the appeal. As reflected by these provisions, the Tribunal had, therefore, on hand all the relevant information required by the Act to dispose of this case, and it was up to the appellant to produce evidence in support of its arguments.

In the *Johnston* case, the Supreme Court had to deal with an appeal under the *Income War Tax Act,*[4] a procedure very similar to the appeal procedure governing this case. In

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2. SOR/91-499, Canada Gazette Part II, Vol. 125, No. 18, p. 2912, August 14, 1991.
3. [1948] S.C.R. 486.
4. R.S.C., 1927, c. 97.

determining whether the appellant had the onus to demonstrate that the facts on which the assessment was based were wrong, the Court stated:

> *Notwithstanding that it is spoken of in section 63 (2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.*
>
> (emphasis added)

The Tribunal notes that all the arguments raised by the appellant in its notice of objection are linked to questions of facts, which facts need to be proven as stated in the *Johnston* decision. It is is well established in Canadian tax law, since the *Johnston* decision, that mere allegations are not sufficient to contradict facts on which an assessment is based.

Given that the appellant had the opportunity to present its case, but did not provide any evidence supporting its arguments, the Tribunal has no other alternative but to dismiss the appeal.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

W. Roy Hines
W. Roy Hines
Member