CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, July 22, 1991

Appeal No. AP-89-225

IN THE MATTER OF an appeal heard on March 7, 1991, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated August 18, 1989, to which a notice of objection was served under section 81.15 of the *Excise Tax Act*.

BETWEEN

PENISTON INTERIORS (1980) INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

John C. Coleman
John C. Coleman
Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Michel P. Granger
Michel P. Granger
Acting Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-89-225

PENISTON INTERIORS (1980) INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act by Peniston Interiors (1980) Inc. from a decision of the Minister of National Revenue (the Minister) disallowing an objection and confirming an assessment. By Notice of Assessment dated October 9, 1987, the appellant was assessed for the period commencing October 1, 1984, and ending June 30, 1987, resulting in an amount owing, including interest and penalty, of $10,848.95. The appellant objected to the assessment on the grounds that the respondent had revoked its manufacturer's licence, it had carried on the same type of business since that time and the respondent had not, prior to October 1986, informed the appellant that it would require a licence if and when its annual sales of taxable goods exceeded $50,000. By Notice of Decision dated August 18, 1989, the Minister disallowed the objection on the basis that there was no evidence that the appellant was misinformed about its responsibility to apply for a licence when its sales of taxable goods exceeds $50,000 in a calendar year.

HELD*: The appeal is dismissed (Member Gracey dissenting).*

Place of Hearing: *Ottawa, Ontario*
Date of Hearing: *March 7, 1991*
Date of Decision: *July 22, 1991*

Tribunal Members: *Charles A. Gracey, Presiding Member*
John C. Coleman, Member
Kathleen E. Macmillan, Member

Counsel for the Tribunal: *David M. Attwater*

Clerk of the Tribunal: *Nicole Pelletier*

Appearances: *Bernard Goodman, for the appellant*
Joseph de Pencier, for the respondent

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***Cases Cited**:*

Re Flamboro Downs Holdings Ltd. and Teamsters Local 879 (1979), 24 O.R. (2d) 400 (Div. Ct.) and (1980), 99 D.L.R. (3d) 165 at 168; Granger v. Canadian Employment and Immigration Commission, [1986] 3 F.C. 70 (C.A.) and [1989] 1 S.C.R. 141; Sturdy Truck Body (1972) Limited v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 2979, June 23, 1989; Walbern Agri-Systems Ltd. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 3000, December 21, 1989; A.G. Green Co. Limited v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. AP-89-134, August 9, 1990; Mentuk v. The Queen, [1986] 3 F.C. 249; Re Smith & Municipality of Vanier (1973), 30 D.L.R. (3d) 386 (Ont. High Ct.).

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-89-225

PENISTON INTERIORS (1980) INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
JOHN C. COLEMAN, Member
KATHLEEN E. MACMILLAN, Member

REASONS FOR DECISION

ISSUE AND LEGISLATION

The issue in this appeal is whether Peniston Interiors (1980) Inc. (Peniston), the appellant, may be relieved of its statutory liability for sales tax pursuant to subsection 27(1) of the *Excise Tax Act*[1] (the Act) based upon an earlier determination by the taxing authority that the appellant had "ceased manufacturing" and the resulting decision of the taxing authority to cancel the appellant's licence.

The relevant provisions of the Act to this appeal are:

> 2.(1) ...
>
> *"manufacturer or producer" includes*
>
> ...
>
> *(f) any person who, by himself or through another person acting for him, prepares goods for sale by assembling, blending, mixing, cutting to size, diluting, bottling, packaging or repackaging the goods or by applying coatings or finishes to the goods, other than a person who so prepares goods in a retail store for sale in that store exclusively and directly to consumers,*
> [Emphasis added]
>
> ...
>
> *27.(1)[2] There shall be imposed, levied and collected a consumption or sales tax of nine per cent on the sale price of all goods*
> *a) produced or manufactured in Canada*

1. R.S.C., 1970, c. E-13, now R.S.C., 1985, c. E-15, as amended.
2. Now subsection 50(1).

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(i) payable, ... by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,

...

31.(2)[3] *... the Governor in Council ... may make regulations exempting any class of small manufacturer or producer from payment of consumption or sales tax on goods manufactured or produced by persons who are members of the class and persons so exempted are not required to apply for a licence.*

51.1(1)[4] *The Minister may, in respect of any matter, assess a person for any tax, penalty, interest or other sum payable by that person under this Act and may, notwithstanding any previous assessment covering, in whole or in part, the same matter, make such additional assessments as the circumstances require.*

51.11(2)[5] *Subject to subsections (3) to (5), no assessment shall be made for any tax, penalty, interest or other sum more than four years after the tax, penalty, interest or sum became payable under this Act.*

The specific regulation providing the exemption is the *Small Manufacturers or Producers Exemption Regulations*,[6] the relevant provisions of which are:

2.(1) The following classes of small manufacturers and producers are exempt from payment of consumption or sales tax on goods manufactured or produced by them in the operations referred to in this section:

(a) manufacturers, other than those who elect to operate under a licence, who sell goods of their own manufacture that are otherwise subject to consumption or sales tax ... if the value of such goods sold or manufactured for their own use does not exceed $50,000 per calendar year;

...

(2) When the value of the sales of a manufacturer or producer who is exempt from obtaining a licence under paragraph (1)(a) exceeds $50,000 during any calendar year, the exemption granted by subsection (1) ceases to apply.

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3. Now subsection 54(2).
4. Now subsection 81.1(1).
5. Now subsection 81.11(2).
6. SOR/82-498, 13 May, 1982.

FACTS AND EVIDENCE

This is an appeal under section 81.19 of the Act by Peniston from a decision of the Minister of National Revenue (the Minister) disallowing an objection and confirming an assessment. By Notice of Assessment dated October 9, 1987, the appellant was assessed for the period commencing October 1, 1984, and ending June 30, 1987, resulting in an amount owing, including interest and penalty, of $10,848.95. The appellant objected to the assessment on the grounds that the respondent had revoked its manufacturer's licence and had directed the appellant not to use the said licence again for any purpose whatsoever. The appellant further submits that it has carried on the same type of business since that time and that the respondent had not, prior to October 1986, informed the appellant that it would require a licence if and when its annual sales of taxable goods exceeded $50,000.

By Notice of Decision dated August 18, 1989, the Minister disallowed the objection on the basis that there was no evidence that the appellant was misinformed about its responsibility to apply for a licence when its sales of taxable goods exceeded $50,000 in a calendar year. By letter dated September 27, 1989, Peniston appealed that decision to this Tribunal.

Peniston Interiors (1980) Inc. was incorporated and purchased the assets and assumed the liabilities of Peniston Building Supplies (Ontario) Limited on March 1, 1980. The earlier corporation was occupied with kitchen design and sales, and this activity has been continued by the new corporation.

The appellant's witness, Mr. Ben Westlaken, who is presently the President of the appellant company, was a Director and General Manager of the former corporation. He testified that the former company operated under a manufacturer's licence. Further, he acknowledged that he was fully aware of the company's legal obligation to pay tax on the goods it manufactured and that he acted to ensure that the necessary remittances were made. The witness testified that the former company had annual sales of goods around the $50,000 range and, though it may have qualified as a small manufacturer, it opted to operate under a licence.

When Peniston was incorporated, it applied for a federal sales tax licence, which was granted. Some time prior to September 22, 1980, an official of the Barrie Excise Office visited the appellant's operation and, in a letter dated September 22, 1980, Mr. H. Alexander of that office informed the appellant:

> ...
>
> *This will confirm an audit of your books and records for Federal Sales Tax purposes has been conducted covering the period March 1, 1980 to July 31, 1980. As a result of this audit no arrears or credits were established.*
>
> *Cancellation of your licence # 1342492 is confirmed effective July 31, 1980 as you have ceased manufacturing. This licence must not be used for any purpose whatsoever after the above date.*
>
> ...

Mr. Westlaken testified that he understood the letter to mean that Peniston was deemed not to

be a manufacturer. As a result, the appellant therefore ceased using the licence and thereafter paid federal sales tax on all taxable articles and materials purchased for use in its manufacturing or production at the source and no longer collected or remitted tax on the sale of its finished goods.

The appellant's first indication that Revenue Canada (the Department) might consider it to be a manufacturer came in a letter dated October 16, 1986, after a visit by a Mr. Obelacker of the Barrie Excise Office. The letter stated that the appellant was engaged in the manufacture of kitchen and bathroom counter tops for which sales to date in 1986 were approximately $35,000. The letter continued by describing "small manufacturers" and the benefits they receive under the Act. It stated that if the total sales value of taxable goods exceeded $50,000 annually, the appellant would no longer be exempt as a small manufacturer and would have to apply for a manufacturer's sales tax licence. It concluded by stating that the Barrie Office would review the appellant's sales again in 1987. In testimony, Mr Westlaken stated that he provided the $35,000 figure quoted in the letter based on a rough estimate of total sales and an estimate of the percentage of that total that counter tops comprised.

Mr. Westlaken testified that he was aware of the licensing requirements of manufacturers. He indicated that he did not have a licence because he believed he was considered not to be a manufacturer based on the letter of September 22, 1980. He indicated that the letter of October 16, 1986, was the first indication that the Department was now deeming Peniston to be a small manufacturer. He indicated that he did not apply for a licence at that time because Peniston's sales figures were not certain. Since the Department would review the figures again in 1987, he decided to wait until the 1986 sales figures were available before determining whether it was necessary to apply for a licence. The witness stated that after the audit in 1987, Peniston applied for, received and has continued to operate with a manufacturer's licence. The audit, which covered the period October 1, 1984, to June 30, 1987, revealed that Peniston's annual sales of the subject goods had exceeded $50,000 by October 1, 1984. Evidence was not provided as to any year since 1984 in which sales may have again exceeded $50,000 or by how much. However, it was put into evidence that the total amount involved was not in dispute.

ARGUMENTS

The amount claimed by the Department represents the difference between the tax the appellant paid at the source for its materials and the tax it would have charged on the selling price of its manufactured goods had it been licensed, plus interest and penalty.

Mr. B. Goodman, counsel for the appellant, argued that his client has always followed the instructions of the Department. The preceding company had a licence, the new company, Peniston, applied for and received a licence that was revoked by the Department and, when advised to again apply for a licence, it did so. He argued that its Director and General Manager, Mr. Westlaken, has always acted in accordance with the requirements of the Department. As such, he submitted that the re-assessment was very unfair in that it classified the appellant as a manufacturer during the period prior to being notified that it was again deemed a manufacturer.

Mr. Goodman argued that there are only minor advantages to carrying on business without a licence. He acknowledged that it was somewhat simpler for the appellant to be unlicensed. However, there was little dollar difference for Peniston between paying tax on its raw material purchases and not remitting on its sales as it did when operating without a licence, compared to receiving materials tax free, but charging on its sales as a licensed manufacturer. In any event, the taxes were borne by the customer, whether the appellant was licensed or not.

Counsel argued that it was unfair to levy a penalty for negligence as Mr. Westlaken was not negligent. In addition, he objected to Peniston paying interest on the alleged tax owing because it was never asked to collect the tax.

As a preliminary matter, counsel for the respondent, Mr. J. de Pencier, sought an adjournment of the hearing. He claimed that counsel for both parties discussed, on January 21, 1991, withdrawal of the appeal in return for settlement of the assessment on certain terms. Working on the assumption that the appellant was prepared to settle on certain terms, Mr. de Pencier agreed to discuss the settlement with his client.

The hearing, originally scheduled for February 5, 1991, was rescheduled to March 7, 1991, at the consent of the parties. Mr. Goodman stated that he received a letter dated January 22, 1991, from the Tribunal, which sought his consent to a rescheduling of the hearing. Mr. de Pencier sought the rescheduling because his workload would not permit him to be prepared for the hearing. Mr. Goodman consented to the rescheduling.

On February 28, 1991, Mr. de Pencier sent a letter by FAX to the appellant's counsel seeking written confirmation of the appellant's settlement proposal. No confirmation was sent by the appellant.

It was not until March 4, 1991, three days before the hearing, that the respondent instructed his counsel to accept the alleged settlement proposal. On March 5, both counsel discussed the appeal, at which time Mr. Goodman indicated that the appellant was not prepared to settle. There is conflicting evidence on this point. Mr. Goodman indicated that on January 22, 1991, the same day as the initial settlement discussions occurred, he contacted Mr. de Pencier, indicating that the appellant was not prepared to settle on the proposed terms. Mr. de Pencier indicated that he had no such recollection.

Working on the assumption that there would be a settlement, Mr. de Pencier did not fully prepare for the hearing. Consequently, the respondent's brief was not available until the afternoon before the hearing and Mr. de Pencier was unable to secure the witnesses he otherwise might have presented to the Tribunal.

Mr. de Pencier argued that there were four evidentiary matters that he would have addressed but for his inability to secure the desired witnesses. He argued that failure to grant the adjournment would deny the respondent effective participation in the appeal and result in a breach of fairness and natural justice. Counsel also presented the Tribunal with jurisprudence supporting the respondent's position.

With regard to the merits of the case, counsel for the respondent argued that the appellant was liable under section 27 of the Act to pay federal sales tax unless exempted by virtue of the *Small Manufacturers or Producers Exemption Regulations*. An audit of Peniston determined that during the period in question, it exceeded the $50,000 threshold, at which time its exemption ceased to apply. Therefore, the appellant's legal liability for taxes assessed is clear.

Mr. de Pencier argued that the Act has created a self-assessment system. Nowhere in the Act is there an obligation on the Minister or the Department or any other government agency to seek out those who should or should not pay taxes. Counsel further argued that the appellant's business, at all material times, brought it within the application of the Act as a "manufacturer or producer,"

notwithstanding the letter of September 22, 1980, from Mr. Alexander and the Department's cancellation of Peniston's manufacturer's sales tax licence.

Furthermore, counsel argued that section 51.1 of the Act empowers the Minister to re-assess at any time and subsection 51.11(2) provides for a four-year "backward" limitation on the application of section 51.1.

It was argued that any error or misinformation provided by an official of the Crown does not relieve the appellant of its obligations under the Act. There is no estoppel that would prevent the Minister from assessing the appellant as long as there is authority in the Act to make such assessments. Mr. de Pencier argued that it is a well established principle that estoppel cannot be applied against the respondent on the basis of representations or statements of officials of the Department. Furthermore, he argued that the Tribunal has no equitable jurisdiction or the jurisdiction to cancel penalties or interest.

Finally, counsel argued that the onus is on the appellant to prove its case and that it has not satisfied the onus of establishing that it is entitled to rely on the mistake or misinformation to avoid its obligations under the Act. Accordingly, counsel for the respondent submitted that the appeal should be dismissed.

FINDING OF THE TRIBUNAL

With regard to the preliminary matter, the Tribunal did not grant the adjournment. After reviewing the parties' briefs, it was the Tribunal's opinion that there was no substantial disagreement on the facts going to the merits of the case. Furthermore, the hearing had once before been rescheduled and the appellant strongly opposed the adjournment.

The Tribunal considered the jurisprudence presented by the respondent in support of his argument for adjournment, but found little similarity between the cases cited and the circumstances of this case. The jurisprudence concerned situations in which parties to a case-counsel, intervenors or complainants - were not present at the hearing or had not been given notice of the issue under consideration by the administrative body. In the Tribunal's view, this is entirely different from the situation in this instance, where counsel were given generous notice of the hearing dates and were well aware of the points in dispute. Further, the Tribunal notes that the jurisprudence cited by the respondent clearly recognizes that administrative tribunals are entitled to determine their own procedures and practices, subject to the rules of natural justice. This point is expressed in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879*,[7] which states the following:

> *... As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.*

The Tribunal does not think it was reasonable for counsel for the respondent to assume that a settlement could be reached before the hearing, given the difficulties that had been encountered in discussions between the parties. The Tribunal expects that when hearings are scheduled, parties will prepare themselves to appear even while they may be negotiating a settlement.

Underlying the issue in this case are two questions: First, did the Department, in its 1980 letter,

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7. (1979), 24 O.R. (2d) 400 (Div. Ct.) and (1980), 99 D.L.R. (3d) 165 at 168.

misinform or misdirect the appellant concerning its sales tax obligations? Secondly, if the appellant was misinformed or misdirected, was it entitled to pay sales tax on the basis provided for in that letter until the Department gave the appellant new advice or direction on its sales tax obligations?

In addressing these questions, the Tribunal first considered carefully the advice that the appellant received from the Department in the September 1980 letter. It states plainly, as the appellant maintains, that Peniston had "ceased manufacturing." Evidence provided at the hearing indicated that at the time of the 1980 audit, the company was cutting counter tops to size, thereby bringing it within the definition of manufacturer contained in the Act.

Based on the evidence available to the Tribunal, there is no doubt that the Department wrongly depicted the appellant's operations in its letter of 1980 when it stated that the company had ceased manufacturing. The Tribunal finds that the Department's letter did misinform and misdirect the appellant by depriving it of a taxpaying option that it had in law, based on its business circumstances at the time of the letter.

The second question facing the Tribunal is whether the appellant was entitled to rely indefinitely on the Department's letter as a basis for meeting its sales tax responsibilities.

As noted above, the letter incorrectly characterized the appellant's operations. The appellant claimed to rely solely on the letter for guidance as to its tax responsibilities. However, the Tribunal finds it difficult to accept that the appellant would not have sought confirmation of the Department's position at the time of the audit that preceded the letter, particularly since the company was a sizeable operation and the letter suggested to the appellant a different course of action from that followed by the predecessor corporation. Indeed, the appellant's President acknowledged in testimony that he found the Department's letter odd since, prior to receiving the letter, he considered the company to be "manufacturing" counter tops.

Indeed, the appellant's continued reliance on the 1980 letter became less credible as time passed. The Tribunal finds it difficult to accept that in the six-year interval between the 1980 and 1986 audit, the appellant's only guidance as to its tax liability under the Act was the Department's 1980 letter. Even when the Department explained the "small manufacturers" provisions to the appellant in the letter of October 16, 1986, the appellant decided not to review its tax status; it waited until the tax audit of 1987 showed clearly that its manufacturing sales during the previous three-year assessment period had exceeded $50,000 in a calendar year. Only then did it apply for a licence.

The Tribunal observes that even if the Department's advice or direction was wrong, Canadian case law makes it clear that the argument of "estoppel" does not apply against the Crown when the representations are inconsistent with the statute. That is to say that a taxpayer's responsibility to pay tax as required by the law must stand, even if the taxpayer received wrong information or direction from government officials. In *Granger v. Canadian Employment and Immigration Commission*,[8] which was affirmed by the Supreme Court of Canada,[9] Mr. Justice Lacombe stated at page 86:

> *In Canadian tax law, the courts have consistently held that the Crown is not bound by the representations made and interpretations given to taxpayers by*

8. [1986] 3 F.C. 70 (C.A.).
9. [1989] 1 S.C.R. 141.

> *authorized representatives of the Department, if such representations and interpretations are contrary to clear and peremptory provisions of the law: ...*

The Tribunal finds that the appellant cannot escape its responsibilities under the Act by relying on the Department's letter. Fundamental to our tax system is the idea that taxpayers have a duty to inform themselves of their tax obligations. While the Tribunal is sympathetic to the appellant's situation, it cannot escape the conclusion that the appellant, as time passed and its sales of finished counter tops increased, neglected to properly exercise its sales tax responsibilities.

In conclusion, the Tribunal can understand how the appellant could have been misled by the Department's letter of 1980. However, the Tribunal finds that, in relying only on the Department's letter, the appellant did not meet its obligations to properly inform itself of its responsibilities under the law. Finally, the Tribunal concludes that even if the appellant had been clearly misdirected by the Department, the Tribunal has no "equitable jurisdiction" and is bound by the case law, which clearly states that estoppel does not apply against the Crown.

In closing, the Tribunal must state that it has reached its conclusion with considerable regret. The Tribunal has no reason to believe that the appellant was anything but honest, although somewhat naive and neglectful, in its dealings on sales tax matters. It appears that the appellant truly believed that manufacturing was a rather unimportant part of the company's business. It was prepared to accept the Department's judgment, until further notice, that it had ceased manufacturing. Once the appellant was informed by the Department in 1987 that it had to charge sales tax on its finished counter tops, it faithfully and honestly met its obligations.

Despite its sympathy for the appellant's predicament, as the Tribunal has explained in a number of its recent appeal decisions,[10] it has no "equitable jurisdiction." It must decide the case on the basis of the law rather than on its sympathy for a party that might have been wronged by the Department. In this case, there was no dispute that the appellant, during the assessment period, met the definition of manufacturer under the Act, that its annual sales had exceeded $50,000 and, therefore, was required to remit sales tax under the law.

Although the respondent's position must win on legal grounds, the Tribunal, if it had "equitable" jurisdiction, would have exercised it in this case.

The Tribunal wishes to observe, however, that a negotiated settlement would have saved a lot of time and money for the parties and the Tribunal. The Department, in its "Notice of Decision" referred to by our colleague, Mr. Gracey, implied that the assessment might have been varied if there were evidence the appellant was misinformed in this case. The Tribunal hopes that in cases such as this, where the taxpayer has reasonable evidence to show that it was misinformed by a Revenue Canada official, the Department will proceed quickly to settle the matter. This would be particularly desirable in cases such as this, where relatively small sums are involved, where the taxpayer has acted in good faith and where no real questions of precedent and principle are at stake.

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10. Canadian International Trade Tribunal, *Sturdy Truck Body (1972) Limited v. The Minister of National Revenue*, Appeal No. 2979, June 23, 1989; *Walbern Agri-Systems Ltd. v. The Minister of National Revenue*, Appeal No. 3000, December 21, 1989; and *A.G. Green Co. Limited v. The Minister of National Revenue*, Appeal No. AP-89-134, August 9, 1990.

CONCLUSION

The appeal is dismissed.

John C. Coleman
John C. Coleman
Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

DISSENTING VIEWS OF MEMBER GRACEY

I respectfully dissent from the majority decision. My dissent arises primarily from my conviction that the majority decision extends too far the argument that no estoppel can rest against the Crown and much further than any of the precedent cases cited by counsel for the respondent.

The facts of the case are not in dispute and this discussion will therefore be limited to those observations necessary to explain my dissent.

I acknowledge the fact that the tax system is a self-assessing system and that there is no obligation upon the Minister or his agent to determine who should and who should not pay tax. But such a defence loses much of its force when, despite being under no obligation to do so, an official of the Department, following an audit, summarily cancelled the appellant's licence with an admonishment not to use it again "for any purpose whatsoever." In doing so, the official substituted his will for the demonstrated correct judgment of the taxpayer and, in my view, cannot now claim the defense that no estoppel can rest against the Crown to escape responsibility for that act. Prior to this direct intervention, it is clear to me that the appellant was acting entirely properly within the requirements of a self-assessing tax system. The Department, by its direct intervention to cancel a licence, diverted the appellant from a correct to an incorrect course of action. This action goes far beyond misinformation, bad advice or faulty interpretation that characterizes the precedent cases cited by counsel for the respondent.

It can be argued that having acted correctly in the past, the appellant should have realized that it was being misdirected. The appellant's testimony that it was aware of the law, but accepted the licence cancellation as an indication that its activities were not deemed to be manufacturing is credible. Indeed, the appellant's testimony that it believed that the Department did not consider its activities to constitute manufacturing is further supported by the fact that this would be the most apparent reason for cancelling the licence. We must recall that small manufacturers have an option to operate with or without a licence. This being the case, the authorities had no reason to cancel its licence, however small or limited the appellant's manufacturing activities. But the reason given for the cancellation was that the appellant had "ceased manufacturing" and, whereas the appellant testified that it had not changed the nature of its activities, there is ample reason to believe that the appellant accepted the apparent view of the

Department that what it was doing did not constitute manufacturing.

Accordingly, I find that the appellant acted reasonably and must therefore consider the second question, that being whether the appellant is taxable notwithstanding the fact that its difficulties arose out of the action taken by the Department to cancel its licence.

In such circumstances, it is common that the Crown resort to the principles of estoppel as the respondent did in this case. The respondent argues that there can be no estoppel arising that would prevent a re-assessment and cites several authorities to that effect.

The present case can be distinguished from all of the precedent cases cited by the fact that the respondent took direct action to cancel the appellant's licence and, in so doing, placed the appellant in jeopardy. In the several cases cited by the respondent, the appellant or applicant was the recipient of false information or bad advice, but was never the victim of a direct intrusive act taken by the taxing authority.

To support my conviction that this act of cancelling a licence goes too far to permit invocation of the defense that no estoppel can rest against the Crown, I wish to cite two precedents, namely *Mentuk v. The Queen*[11] and *Re Smith & Municipality of Vanier*.[12]

In the *Mentuk* case, a Treaty Indian family, the plaintiff, farming on a reserve was encouraged by Government officials to expand operations. In so doing, its activities attracted harassment and the plaintiff was offered compensation if it would abandon the project and leave the reserve. The plaintiff did so relying upon those assurances, but the Minister subsequently determined that there was no basis for compensation and sued for breach of contract or trust. In his judgment in favor of the plaintiff, McNair, J., stated in part at page 269:

> *... Expectation and reliance, buttressed by estoppel, all come down to the same thing: the defendant gave promises or assurances to the plaintiff on which the latter could reasonably be expected to rely and did in fact rely to his detriment and it would be unjust and inequitable in the circumstances to allow the defendant to afterwards go back on those promises and assurances.*

In the *Smith* case, the applicant had been declined a licence to run a public hall on the grounds that unsatisfactory safety precautions had been arranged and lack of evidence of adequate insurance. When the applicant eliminated these defects, the municipality then passed a resolution not to approve the licence in the public interest. The municipality was directed to reconsider the application and in his reasons at page 392, Pennell, J., stated in part;

> *Would not a reasonable man be entitled to assume from the posture of the Municipal Council on return of the first motion that approval would be forthcoming if he remedied the deficiencies? In the present case the applicant ordered his affairs accordingly. Then, after completing the deficiencies with the financial consequences which that entailed he finds that the Council refused to issue the licence. Under such circumstances I believe a Court is entitled to look*

11. [1986] 3 F.C. 249.
12. (1973), 30 D.L.R.(3d) 386 (Ont. High Ct.).

> *beyond the resolution to refuse the licence. I am of opinion that there was a want of good faith in law and accordingly an order of mandamus may issue.*

The obvious parallel with the present case is that the appellant relied upon the action of the taxing authority that cancelled its licence and ordered its affairs accordingly, just as did the appellant in the above cited case.

I side also with Hugessen, J., the dissenter in *Granger v. Employment and Immigration Canada*,[13] the case cited by my colleagues as a precedent in this case. Hugessen stated in part, in commenting upon the majority decision:

> *In my view this attitude is not acceptable. There may have been a time when the courts could close their eyes to reality and say that, however unfair the results might be, Parliament intended that the statute should always be applied. The individual relied at his peril on the interpretation of the legislation given by the authorities.*

In the present case, the authority went much further than merely giving a false interpretation. The authority actually cancelled the appellant's licence and, in so doing, set the appellant on the wrong course of action.

Finally, in dealing with the matter of estoppel, I consider it appropriate to quote McDonald, P., in *Contradictory Government Action: Estoppel of Statutory Authorities*,[14] who stated in part:

> *A public authority cannot be estopped from exercising its powers. But once the authority has decided that a particular exercise of power is appropriate, it must act accordingly, at least where there has been reliance on that decision.... When the authority by its conduct leads the individual to believe that a decision has been made, it is to be treated as having made the decision. And having made it, the authority must act accordingly.*

There is yet another line of reasoning that compels me to favor the appellant in this case. When the appellant received the "Notice of Decision" on its earlier "Objection to Assessment," the letter included the following statement.

> *As there is no evidence that you were misinformed or that your responsibility to apply for a licence at the appropriate time was not clear, there are no grounds on which to vary or vacate the assessment.*

If that statement was written without awareness of the earlier letter of September 22, 1980, one could accept the very strong implication that had there been evidence to the effect that the appellant had been misinformed, there might have been a different decision. As it turned out, the appellant produced such evidence at the hearing in the form of the aforementioned letter and it strikes me as hypocritical that the respondent continues to argue that no estoppel can rest against the Crown when the above-quoted letter strongly implied the opposite.

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13. *Supra*, footnote 8, at 82.
14. (1979), 17 Osgoode Hall Law Journal, at 180-81.

My opinion in strong support of the appellant, however, extends only to the time in late 1986 when it received another visit from the Department and was not only made aware that it was considered a manufacturer, but was advised that whenever its annual sales exceeded $50,000, it would require a licence. It is apparent from the testimony and the evidence that the appellant was well aware of this provision, but had, until 1986, accepted the Department's view that it was not manufacturing. Upon being advised, this time correctly, the appellant had no credible reason not to obtain a licence in late 1986 if, in fact, its annual sales exceeded $50,000 in fiscal 1986. Therefore, I would have found the appellant liable for that portion of tax and prorated interest and penalty that accrued on or after October 16, 1986, that being the date on which the appellant received the letter from the Department.

Charles A. Gracey
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Presiding Member