CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, December 12, 1991

**Appeal No. AP-89-032**

IN THE MATTER OF an appeal heard on October 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 September 13, 1988, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**SUNSET LAMP MANUFACTURING COMPANY LTD.** **Appellant**

**AND**

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

## DECISION OF THE TRIBUNAL

The appeal is allowed with respect to the issue of sale price on which tax is payable. The Tribunal refers back to the Minister of National Revenue for reconsideration the matter of freight allowances within the two years prior to the date of the assessment.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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*UNOFFICIAL SUMMARY*

**Appeal No. AP-89-032**

**SUNSET LAMP MANUFACTURING COMPANY LTD. Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE Respondent**

*The appellant manufactures lamps and sells them to retail stores.*

*During the assessment period, the appellant "overbilled" one of its customers on certain lamps. The appellant negotiated a sale price for the lamps and was instructed by the customer to add an additional sum to the invoice price. It was agreed that the overbilled amount would be returned to the customer in the form of a credit. The debit note received from the customer referred to "advertising." In order for the appellant's credit note to coincide, the same terminology was adopted, namely, "advertising rebate-credit." When the deal was consummated, there was no discussion about advertising nor did the appellant provide its customer with a credit because it was advertising the appellant's products. It was always understood between the parties that the overbilled amount would be returned and that it did not form part of the sale price of the lamps.*

*The respondent claims that the appellant credited its customers with rebates to defray the cost of advertising. He argued that the sale price on which tax is payable is that price which includes the overbilled amount.*

***HELD:*** *The appeal is allowed with respect to the issue of sale price on which tax is payable. The Tribunal refers back to the Minister of National Revenue for reconsideration the matter of freight allowances within the two years prior to the date of the assessment.*

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| *Place of Hearing:* | *Ottawa ,Ontario* |
| *Date of Hearing:* | *October 7, 1991* |
| *Date of Decision:* | *December 12, 1991* |
| *Tribunal Members:* | *Sidney A. Fraleigh, Presiding Member*<br>*Arthur B. Trudeau, Member*<br>*Charles A. Gracey, Member* |
| *Counsel for the Tribunal:* | *David M. Attwater* |
| *Clerk of the Tribunal:* | *Janet Rumball* |
| *Appearances:* | *Anthony A. Greenwood, for the appellant*<br>*Linda Wall, for the respondent* |

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

**Appeal No. AP-89-032**

**SUNSET LAMP MANUFACTURING COMPANY LTD.** **Appellant**

**and**

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

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, Member

## REASONS FOR DECISION

The appellant manufactures lamps and sells them to retail stores.

On September 25, 1987, Revenue Canada issued a notice of assessment in respect of sales by the appellant between April 1, 1984, and July 31, 1987. During this period, the appellant "overbilled" one of its customers, Woodward Stores Ltd. (Woodward), on certain lamps. Mr. Sam Nussbaum, founder of Sunset Lamp Manufacturing Company Ltd. (Sunset Lamp), testified that the appellant negotiated a sale price for certain lamps and was instructed by Woodward to add a sum to this price and invoice it accordingly. It was agreed that the overbilled amount would be returned in the form of a credit. The debit note received from Woodward referred to "advertising." The witness testified that in order for the credit note to coincide with the debit note, the same terminology was adopted, namely, "advertising rebate-credit." He stated that when the deal was consummated there was no discussion about advertising nor did the appellant provide Woodward with a credit because it was advertising the appellant's products. He claimed that it was always understood that the overbilled amount would be returned and that it did not form part of the sale price of the lamps.

The respondent claims that the appellant credited its customers with rebates to defray the cost of advertising. He argued that the sale price on which tax is payable is that price which includes the overbilled amount.

The appellant claimed that it incurred additional eligible transportation costs in the sale of its manufactured goods which it was entitled to deduct in the calculation of its tax liability.

There are two issues in this appeal:

1. whether the amount overbilled by the appellant on certain lamps is included in its sale price for purposes of sales tax liability; and

2. whether the respondent correctly calculated and credited the appellant for transportation and

freight costs incurred during the assessment period, thus correctly reducing the sale price that the appellant would be liable to pay sales tax on.

As a manufacturer of lamps, the appellant is liable to pay sales tax on the sale price of its manufactured goods. For purposes of this appeal, to determine the applicable consumption or sales tax, section 42 of the of the *Excise Tax Act*[1] (the Act) states that it shall include the aggregate of:

...

*(i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,*

*(ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price, whether payable at the same or any other time, including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter ...*

In an earlier decision, *Dure Foods v. The Minister of National Revenue*,[2] the Tribunal recognized that sale price is to include "any amount that the purchaser is liable to pay to the vendor." In making this statement, the Tribunal acknowledged that liability for tax is imposed on the total value realized by the vendor by reason of, or in respect to, the sale of its goods. This is often greater than the "amount charged as price." Similarly, the Tribunal is cognizant that certain exclusions and deductions from selling price are, at times, proper and necessary for the calculation of sale price on which tax is payable. In effect, the vendor is asked to pay tax on the net realized value it received for, or in respect to, the sale of its goods.

The appellant provided undisputed evidence that the overbilled sum did not form part of the negotiated price of the goods; that during such negotiations this sum was in no way associated with advertising; that any association was purely nominal; and that it was the intention of the parties that this sum would be credited back to Woodward. The Tribunal concludes, therefore, that the overbilled amounts did not form part of the total value realized by the appellant for, or in respect to, the sale of its goods. As such, the overbilled sum does not form part of the sale price of the goods on which tax is payable.

Inasmuch as the clear intent of the legislation is to charge a tax on the sale price, and inasmuch as the appellant negotiated such a price and was instructed by its client to overbill in order to generate a rebate, it cannot be construed that such overbilling constitutes any part of the sale price. The provisions of paragraph (ii) of the Act, that indicate that the sale price should include any amount that the purchaser is liable to pay to the vendor because of charges, including, amongst other things, advertising, is of no assistance to the respondent. In this case, there is no payment by the purchaser to the vendor for advertising. If anything, it is the other way around. There are "rebates or credits" provided to the purchaser by the vendor, which is a much different proposition than that contemplated by paragraph (ii) of the Act.

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1. R.S.C., 1985, c. E-15, as amended.
2. Canadian International Trade Tribunal, Appeal No. AP-89-158, November 21, 1991.

With regard to the second issue, counsel for the respondent argued that it was outside the jurisdiction of the Tribunal to consider the freight credits. Counsel noted that the notice of objection to the assessment did not address such credits; and that the appellant has previously applied for a refund of such monies, however, two years late, which was not appealed, and it is now attempting to graft its claim for a freight rebate onto the present appeal. Counsel further argued that the relevant provisions of the Act provide the Minister of National Revenue (the Minister) with a discretion to determine if there are refunds or credits available to the appellant and that it is not within the jurisdiction of the Tribunal to force the Minister to exercise that discretion by making such a determination.

The Tribunal recognizes that subsections 81.1(5) and (7) of the Act have provided the Minister with the discretion to determine whether amounts are payable or credits are to be allowed to a party being assessed. Similarly, it recognizes that it is not within its jurisdiction to force the Minister to exercise that discretion. However, it is the Tribunal's opinion that it is within its jurisdiction to ensure that the Minister has properly determined whether an amount is payable or a credit may be allowed if the Minister has chosen to exercise that discretion.

The notice of assessment dated September 25, 1987, indicates that the Minister has exercised his discretion under subsection 81.1(5) of the Act to allow for monies payable. There was some evidence presented at the hearing to suggest that the Minister may have overlooked certain freight allowances that would have been payable to the appellant in the two years prior to the date of the assessment if the appellant had made an application for such. Accordingly, the Tribunal is referring this matter back to the Minister for reconsideration.

With regard to credits allowed, the notice of assessment indicates "Nil." Based on this, the Tribunal cannot interpret it to mean that the Minister has exercised his discretion under subsection 81.1(7).

Accordingly, the appeal is allowed with regard to the issue of sale price on which tax is payable. Also, the Tribunal refers back to the Minister for reconsideration the matter of freight allowances within the two years prior to the date of the assessment.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member