CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, August 21, 1991

Appeal No. AP-90-122

IN THE MATTER OF an application heard on May 14, 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 August 16, 1990, with respect to a notice of objection filed pursuant to section 81.15 of the *Excise Tax Act*.

BETWEEN

BOUTIQUE DU STORE DÉCORATIF INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. The appellant was not able to establish that the *Excise Tax Act* gave it authority to make the deduction it made and did not prove that the assessment in dispute was contrary to the *Excise Tax Act*.

Michèle Blouin
Michèle Blouin
Presiding Member

John C. Coleman
John C. Coleman
Member

Arthur B. Trudeau
Arthur B. Trudeau
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-90-122

BOUTIQUE DU STORE DÉCORATIF INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Whether the appellant was entitled to deduct from its monthly returns an amount equal to the sales tax paid by it to the supplier, who sold to it, on a non tax-exempt basis, partly manufactured goods.

This is an appeal from the decision of the Minister of National Revenue disallowing the appellant's objection to the Notice of Assessment dated November 30, 1988. The appellant was assessed for not filing any monthly returns for the months of September, October and November 1987 because it had deducted from its monthly sales tax remittances the amount of said tax charged on certain purchases made from one of its suppliers, who had refused to sell to the appellant prefabricated goods on a tax-exempt basis.

HELD: *The appeal is dismissed. The appellant was not able to establish that the Excise Tax Act gave it authority to make the deductions from its monthly remittances, nor that the assessment in dispute was contrary to the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 14, 1991*
Date of Decision:	*August 21, 1991*
Members of the Tribunal:	*Michèle Blouin, Presiding Member* *John C. Coleman, Member* *Arthur B. Trudeau, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Nathalie Aubin, for the appellant* *Rosemarie Millar, for the respondent*
Cases Cited:	*Geocrude Energy Inc. v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 2937, August 21, 1989 (decision appealed); Price (Nfld.) Pulp and Paper Limited v. The Queen, [1974] 2 F.C. 436; Her Majesty The Queen v. M. Geller Incorporated, [1963] S.C.R. 629.*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-90-122

BOUTIQUE DU STORE DÉCORATIF INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
JOHN C. COLEMAN, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

This is an appeal pursuant to section 81.19 of the *Excise Tax Act*[1] (the Act) from a decision of the Minister of National Revenue (the Minister) rejecting the appellant's objection to the Notice of Assessment dated November 30, 1988.

ISSUE AND APPLICABLE LEGISLATION

The issue on which the Tribunal must decide is whether the appellant had the right to deduct from its monthly remittances an amount equal to the sales tax it paid to a supplier who had sold it partially manufactured goods without exempting it from said tax.

The provisions of the Act relevant to this appeal are:

> *50.(1) There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sale price or on the volume sold of all goods*
>
> *(a) produced or manufactured in Canada*
>
> *(i) payable, in any case other than a case mentioned in subparagraph (ii) or (iii), 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,*
>
> ...
>
> *50.(5) Notwithstanding anything in subsection (1), the consumption or sales tax shall not be payable on goods*
>
> *(a) sold by a licensed manufacturer to another licensed manufacturer if the goods are partly manufactured goods:*
>
> ...

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

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42. ...

"partly manufactured goods" means

...

(b) goods that are to be prepared for sale as goods subject to the consumption or sales tax 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 goods that are so prepared in a retail store for sale in that store exclusively and directly to consumers,

and the Minister is the sole judge as to whether or not goods are partly manufactured goods;

...

73.(1) Any person authorized pursuant to subsection (4) who files a return under section 20, 21.32 or 78 and to whom an amount would be payable under any of sections 68 to 68.153 or 68.17 to 69 if that person duly applied therefor on the day on which he files the return, in lieu of applying for that amount, may in that return report that amount and deduct it or any part thereof from the amount of any payment or remittance of tax, penalty, interest or other sum that is reported in that return.

FACTS

The appellant, in accordance with the Act, is a licensed manufacturer and, in this capacity, is deemed to be a manufacturer of vertical blinds. The facts show that during the assessment period from January 1, 1985, to July 31, 1988, the appellant was part of a purchasing group. Through this group, referred to as Cantrex, the appellant purchased certain partly manufactured goods. It seems that one of the group's suppliers, Vertican Inc., refused to accept the appellant's license number and, therefore, required that the appellant pay the sales tax on the goods purchased.

On December 22, 1987, the appellant informed the respondent that it had not provided monthly returns for the months of September, October and November because it had deducted from its monthly sales tax remittances the amount of sales tax paid on the above-mentioned goods.

On November 30, 1988, the Deputy Minister of National Revenue for Customs and Excise assessed the appellant in the amount of $4,754.48, of which $3,378.95 was for unauthorized deductions and $1,375.53 for errors and omissions. Interest amounting to $443.14 and a fine of $308.81 were also imposed.

On January 16, 1989, a notice of objection was filed contesting the part of the assessment relating to the $3,378.95 for unauthorized deductions. However, on August 16, 1990, the

respondent upheld the assessment. It is this decision that Boutique du Store Décoratif Inc. is appealing to this Tribunal.

ARGUMENTS

In its brief to the Tribunal, the appellant claimed that it had already paid the sales tax to its supplier, that other suppliers had agreed to credit it the sales tax already paid, that the Government had provided no direction or assistance as regards the application of the Act and that the Government had never sent it any documentation clarifying the sales tax credit.

At the hearing, Mrs. Nathalie Aubin, the appellant's representative, testified in support of the latter's claims. The witness explained that the appellant joined the Cantrex purchasing group in August or September, but that it did not receive the first bills for purchases made from Vertican Inc. until December. At that time, the witness noted that the sales tax was included in the sale price. She therefore took action both with the Cantrex purchasing group and with Vertican Inc., as well as with the Government.

According to Mrs. Aubin, Vertican Inc. refused to credit the sales tax to the appellant because the supplier had allegedly been advised by the Government that this was what it should do. As for the Cantrex purchasing group, it advised her that the appellant would probably not receive the credit requested. Lastly, a clerk of the respondent informed it that an auditor would have to come to the appellant's premises. The witness stated that no auditor ever came in spite of the fact that Mrs. Aubin called the same clerk again concerning this matter. Acting on behalf of the appellant, the witness therefore decided to deduct what, according to her, had already been paid as sales tax.

In the second part of her testimony, answering questions from the members of the Tribunal, the witness explained that the appellant was a retailer and not a manufacturer. The appellant receives at its retail store PVC slats, which it places in boxes along with a rod. The kit is then sold directly to consumers based on the specific measurements required. During these explanations, the witness also stated that she did not think that the appellant was carrying out an assembling activity.

Mrs. Aubin also presented the oral argument on behalf of the appellant. She reconfirmed that the money at issue in the appeal was in fact a payment of sales tax and was not simply an integral part of the purchase price of the goods acquired from Vertican Inc., as the respondent claims. She also stated that the respondent could not claim that the transactions which gave rise to the dispute concerned only the parties involved since the matter in dispute is the payment of the federal tax.

Counsel for the respondent objected to the appellant's claims, particularly as regards the payment of what the appellant referred to as the sales tax. Counsel suggested that the mechanism that the appellant wished to use to claim the deduction is found in section 73 of the Act. However, the deduction allowed under that provision relates to section 68. In the opinion of the respondent, only an amount subject to reimbursement under section 68 can be deducted under section 73. Counsel claimed that the appellant had not paid sales tax, but a price agreed upon between itself and the supplier and that, consequently, no reimbursement could be claimed under section 68 of the Act. Counsel cited, in support of her claims, decisions of this Tribunal, the Federal Court and the

Supreme Court,[2] which confirm that a payment such as that made by the appellant does not constitute the payment of a tax.

The respondent also argued that the agreement made between Vertican Inc. and the appellant regarding the payment of the sales tax involves only the parties themselves and does not affect the respondent's right to claim the sales tax from the appellant in accordance with the Act. Lastly, the respondent claimed that it is the appellant's responsibility to act in accordance with the provisions of the Act.

REASONS

Although the situation is unfortunate for the appellant, the Tribunal cannot support its claims and rather subscribes to the arguments presented by the respondent. The Act does not provide for taxpayers to take matters into their own hands. There is nothing in the Act that authorizes the appellant to deduct from its monthly returns and remittances an amount corresponding to the sum paid to its supplier as sales tax. Whether the latter refused to accept the appellant's manufacturer's license and whether the sale price included the cost of the sales tax are not issues involving the respondent.

Moreover, section 73 does not apply in this instance, even if it were to be considered that the payment made by the appellant was the payment of tax, which the Tribunal doubts given the jurisprudence cited by the respondent.

The Tribunal points out that, as it has read since March 4, 1986,[3] section 73, and specifically subsection (4), sets forth strict conditions with respect to the deductions from tax remittances that a taxpayer has the authority to make on the return to be filed. It does not appear from the evidence that any of these conditions were met. Since section 73 does not apply, the Tribunal does not have to rule on the issue of whether the payment made by the appellant met the conditions prescribed by section 68 of the Act or whether, to use the words of the respondent, it represented the payment of a tax.

Lastly, the Tribunal notes that although the appellant holds a licence, the terms of the exemption prescribed in subsection 50(5) and the definition of the expression "partly manufactured goods" in section 42 of the Act are far from sufficient to qualify the appellant for the exemption to which it claims to be entitled. The facts and explanations provided by its own witness reveal, in fact, that the appellant is not a manufacturer and does not assemble or cut to measure the blinds that it sells. The appellant does package the goods in question, but it does so within its retail store for sale directly and exclusively to the consumer. For these reasons, although it is licensed as a manufacturer under the Act, the evidence is to the effect that the appellant did not fulfil the first condition set out in the exempting subsection 50(5), in that it is not a manufacturer, nor the second

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2. *Geocrude Energy Inc. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. 2937, August 21, 1989 (decision appealed); *Price (Nfld.) Pulp and Paper Limited v. The Queen*, [1974] 2 F.C. 436; *Her Majesty The Queen v. M. Geller Incorporated*, [1963] S.C.R. 629.

3. *An Act to amend the Excise Tax Act and the Excise Act and to amend certain other Acts in consequence thereof*, R.S.C., 1985, c. 7 (2nd Supp.), s. 34.

condition, which relates to the definition of "partly manufactured goods," since it operates out of a retail store and sells exclusively and directly to consumers.

The appellant was unable to show before the Tribunal that the Act gave it the authority to make the deduction that it made or that the assessment in question was contrary to the Act. The Tribunal has no choice but to dismiss the appeal.

CONCLUSION

The appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

John C. Coleman
John C. Coleman
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member