CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, January 28, 1991

Appeal No. AP-90-063

IN THE MATTER OF an appeal heard on December 11, 1990, under section 81.19 of the *Excise Tax Act*, R.S.C., 1985, c. E-15 ;

AND IN THE MATTER OF a notice of decision by the Minister of National Revenue dated June 15, 1990, with respect to a notice of objection filed under section 81.15 of the *Excise Tax Act*.

BETWEEN

CUISINES A.C. INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION

The appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-063

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CUISINES A.C. INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Refund of sales tax paid in error - Deduction for installation costs under subparagraph 46(c)(ii) of the Excise Tax Act - Choice of calculation methods.

This is an appeal under section 81.19 of the Excise Tax Act (the Act) from a notice of decision of the Minister of National Revenue denying a refund of federal sales tax paid on custom kitchen cabinets. According to clause 46(c)(ii)(A) of the Act, the appellant is entitled to exclude in the calculation of the sale price of goods manufactured in Canada an amount representing the cost of installation of these goods where they are sold at a price that includes installation. Between August 1, 1984, and June 1988, the appellant deducted a factor of 10 percent for installation as permitted by section 6 of the Erection or Installation Costs Regulations (the Regulations) made under subparagraph 46(c)(ii) of the Act.

In June 1988, the appellant discovered that the actual costs of installation were significantly greater than the 10-percent factor that it had been using. It filed a refund claim under section 68 of the Act on September 23, 1988, for the federal sales tax paid in error by failing to deduct the actual installation costs incurred as permitted by section 5 of the Regulations. The amount claimed represents the difference between the actual costs of installation and the amount of installation deducted by the appellant through the use of the 10-percent factor.

The question in issue is whether the appellant is entitled, under section 68 of the Act, to recalculate retroactively its sales tax liability using the actual costs of installation under section 5 of the Regulations, and obtain a refund for tax paid in error.

HELD: *The appeal is dismissed. The use of another method is, as set out in subsection 9(2) of the Regulations, conditional upon compliance with all the requirements in that section, including the notification in writing to the Deputy Minister of National Revenue for Customs and Excise before using the new method. Also, there is no evidence to suggest that the election made by the appellant was made in error. Consequently, the Tribunal cannot allow the appellant to recalculate retroactively its sales tax liability using the actual costs of installation under section 5 of the Regulations and obtain a refund for sales tax paid in error.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*December 11, 1990*
Date of Decision:	*January 28, 1991*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *Arthur B. Trudeau, Member* *Robert J. Bertrand, Q.C., Member*

Clerk of the Tribunal:	*Joseph LaRose*
Appearances:	*Michael Kaylor, for the appellant* *Rosemarie Millar, for the respondent*
Cases Cited:	*Allan G. Cook Limited v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. 3074, August 29, 1989; Jack Herdman Limited v. The Minister of National Revenue, [1983] C.T.C. 272 (F.C.A.); Tambrands Canada Inc. v. The Minister of National Revenue, 10 C.E.R. 24 (F.C.A.); Amoco Canada Petroleum v. The Minister of National Revenue, [1985] 1 C.T.C. 240 (F.C.A.).*
Statute and Regulations Cited:	*Excise Tax Act, R.S.C., 1985, c. E-15, ss. 50 and 68 and subparagraph 46(c)(ii); Erection or Installation Costs Regulations, SOR/83-136, 1983, Canada Gazette Part II, p. 625, ss. 5, 6 and 9.*
Memorandum Cited:	*Excise Memorandum, ET 205, June 1, 1985.*

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-90-063

CUISINES A.C. INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
ARTHUR B. TRUDEAU, Member
ROBERT J. BERTRAND, Q.C., Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) by Cuisines A.C. Inc. (the appellant) from a notice of decision of the Minister of National Revenue (the Minister) dated June 15, 1990. The appellant seeks a declaration from the Canadian International Trade Tribunal (the Tribunal) that it is entitled, under section 68 of the Act, to a refund of moneys paid in error for $98,436.41.

FACTS

The facts in this case are not in dispute. The appellant has been a licensed manufacturer of custom kitchen cabinets since November 21, 1973. The appellant installs most of its own cabinets. Between August 1, 1984, and June 1988, the appellant deducted, in calculating the sale price of those goods, a factor of 10 percent for installation of the goods as permitted by section 6 of the *Erection or Installation Costs Regulations* (the Regulations)[2] made under subparagraph 46(*c*)(ii) of the Act.

In June 1988, the appellant discovered that the actual costs of installation of those goods were significantly greater than the 10 percent factor that it had been using. On September 23, 1988, under section 68 of the Act, the appellant filed Refund Claim No. 3232 for the federal sales tax it claimed it had paid in error by failing to deduct the actual costs of installation as permitted by section 5 of the Regulations. The amount claimed in the refund represents the difference between the actual costs of installation as incurred by the appellant and the amount of installation deducted by the appellant through the use of the 10-percent factor under section 6 of the Regulations.

The refund was denied in Notice of Determination No. QUE 37267, dated November 22, 1988, on the basis that the Regulations and Memorandum ET 205 (June 1, 1985) provide that a manufacturer who has elected to use an authorized method cannot apply retroactively another method to make adjustments.

1. R.S.C., 1985, c. E-15, as amended.
2. SOR/83-136, 1983 Canada Gazette Part II, p. 625.

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On February 16, 1989, the appellant filed a notice of objection to the determination. By notice of decision dated June 15, 1990, the Minister disallowed the objection and confirmed the determination. On September 13, 1990, the appellant appealed the decision to the Tribunal.

ISSUE AND APPLICABLE LEGISLATION

The issue in this appeal is whether the appellant is entitled, under section 68 of the Act, to recalculate retroactively its sales tax liability using the actual costs of installation under section 5 of the Regulations and obtain a refund for tax paid in error.

The statutory provisions relevant to this appeal are as follows:

Excise Tax Act

> *46. For the purpose of determining the consumption or sales tax payable under this Part,*
> *...*
> *(c) in calculating the sale price of goods manufactured or produced in Canada, there*
> *may be excluded*
> *...*
> *(ii) under such circumstances as the Governor in Council may, by regulation, prescribe, an amount representing*
> *(A) the cost of erection or installation of the goods incurred by the manufacturer or producer where the goods are sold at a price that includes erection or installation, or*
> *...*
> *determined in such manner as the Governor in Council may, by regulation, prescribe.*

> *68. Where a person, otherwise than under an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interests or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.*

Erection or Installation Costs Regulations

> *Conditions*
> *...*
>
> *9.(1) Where a manufacturer or producer elects to determine the cost of installation of the goods manufactured or produced by him in accordance with one of the methods referred to in section 5, 6 or 7, he shall use that method consistently for not less than one year from the date of the election, before electing to use one of the other methods.*

> *(2) Where a manufacturer or producer elects to change from one method referred to in subsection (1) to another, he shall meet the requirements of this section and notify the Deputy Minister of National Revenue for Customs and Excise in writing prior to using the new method.*

ARGUMENTS

Counsel for the appellant submitted that the appellant is entitled to a refund of taxes it has overpaid as a result of not taking advantage of the installation cost factor set out in the Regulations. According to counsel, section 68 of the Act entitles the appellant to a refund whether the overpayment is due to an error of law, an error of fact or an error that might fall within the expression "otherwise."

In counsel's submission, section 9 of the Regulations requires that a new method, once selected, be used consistently for one year before another method can be adopted. In this case, the appellant adopted a new method, the actual costs of installation, on September 23, 1988. That one-year period commences on that date. However, in his submission, there is nothing in the Regulations that would impede the appellant from availing itself of the refund rights accorded under section 68 of the Act within the statutory period.

Counsel further argued that the position of the appellant is parallel with that of the applicant in the case of *Allan G. Cook Limited v. The Minister of National Revenue*[3] and drew attention to that portion of the decision where the Tribunal interpreted the word "otherwise" as follows:

> *... The word "otherwise" as a qualifier of the word mistake in section 44 [now section 68] is broad enough, in our view, to cover a taxpayer's mistake in the selection of a method of computation of tax on the basis of administrative concessions or practices, where those are available.*

Counsel pointed out that, in this case, it is really an error in the application of the law rather than an administrative practice that the appellant seeks to benefit from. The appellant chose to account for sales tax on the basis of the actual cost of installation, which was more favourable to it and, in counsel's submission, that does not preclude it from going back within the statutory period and claiming a refund of the excess taxes that it has paid.

These contentions were opposed by the respondent's counsel who submitted, in support of the Minister's decision, that the tax was not paid in error within the meaning of section 68 of the Act. In support of that submission, the respondent referred to cases that provide examples of what the Minister considers to be an error. These are cases where the applicant was told by the Department that he had to pay the tax and, in fact, paid the tax under the mistaken belief that he was legally obliged to pay[4] or cases where the applicant paid taxes on goods that were tax exempt.[5]

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3. Canadian International Trade Tribunal, Appeal No. 3074, August 29, 1989, p. 12.
4. *Jack Herdman Limited v. The Minister of National Revenue*, [1983] C.T.C. 272 (F.C.A.).
5. *Tambrands Canada Inc. v. The Minister of National Revenue*, 10 C.E.R. 24 (F.C.A.); *Amoco Canada Petroleum Company Ltd. v. The Minister of National Revenue*, [1985] 1 C.T.C. 240 (F.C.A.).

The respondent also argued that the facts in the *Cook* case cited by the appellant are different from the facts in the present matter. Contrary to the *Cook* case where the applicant was not aware of other methods of calculation of the sales tax liability, all the methods were, in this case, permitted and mentioned in the Regulations, and the appellant chose to use the 10-percent factor.

The respondent concluded that, under the Regulations made under the authority of subparagraph 46(*c*)(ii) of the Act, in choosing to use an authorized method, the appellant could not apply another method to readjust the amount paid and be reimbursed.

FINDING OF THE TRIBUNAL

Paragraph 50(1)(*a*) of the Act imposes a consumption or general sales tax on the sale price of goods produced or manufactured in Canada. Under clause 46(*c*)(ii)(A) of the Act, the manufacturer can exclude, in the calculation of the sale price of goods manufactured in Canada, an amount representing the cost of installation of these goods when they are sold at a price that includes installation. The amount representing the cost of installation is determined in accordance with the Regulations adopted by the Governor in Council in 1983.

In this case, the appellant elected to use the 10-percent deduction mentioned in section 6 of the Regulations. Subsection 9(2) of the Regulations provides that where a manufacturer elects to change from one method to another, he or she shall notify the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) in writing before using the new method.

In the Tribunal's view, this requirement limits the taxpayer's ability to overturn previous elections. The use of another method is, as stated in subsection 9(2) of the Regulations, conditional upon compliance with all the requirements in that section, including the notification to the Deputy Minister before using the new method. This being said, that does not mean that a taxpayer is deprived of his or her refund rights under section 68 of the Act when he or she commits an error within the meaning of the Act.

However, in the present case, there is no evidence to suggest to the Tribunal that the election made by the appellant was made in error. The appellant did not make an error, but elected to apply one of the authorized methods of calculation of the costs of installation as set out in the Regulations, being aware of other methods. The election was not based on incomplete or inaccurate information. The appellant knew or should have known that, under the Regulations, it had to notify the Deputy Minister before using another method. The Deputy Minister, while rejecting the refund claim submitted by the appellant on September 23, 1988, rightfully recognized the refund claim as a notice of change of method as of that date.

The Tribunal recognizes that section 68 of the Act is broadly worded. It is clear to the Tribunal that Parliament's intention was that the taxpayer be entitled to a refund in case of error. However, the Tribunal's interpretation of the Regulations in issue is that Parliament did not intend that the taxpayer should be able to change his or her mind retroactively on the calculation method chosen simply because, on hindsight, another method would provide a more favourable tax position.

Furthermore, the Tribunal believes, as the respondent suggested, that the facts in this case are distinguishable from the facts in the *Cook* case on which the appellant relies in support of its position.

In the *Cook* case, the necessary information for the calculation of the tax liability for the year 1987 using one method (the fair market value method) over another (the determined value method) was not available until well into 1987. More particularly, the determined values established by the Department, to take effect in July 1987, were not available until April 1987. Consequently, the Tribunal felt that the appellant in that case was unable to make an informed choice in early 1987 about the method to be selected for tax calculation because it did not have full knowledge of the financial consequences of that selection. The Tribunal concluded that an error was made by the appellant at the beginning of 1987 in that it failed to select one method over another as provided in the relevant Excise Communiqués, as the use of the second method would have resulted in the least financially burdensome method of tax calculation. Another distinguishable fact in the *Cook* case is that the methods of calculation of the sales tax liability in issue were administrative concessions provided in Excise Communiqués. In addition, certain amendments were made to the Communiqués in question during the period at issue.

In the present case, however, the methods are not administrative concessions or practices; they are provided in the Regulations made under the authority of subparagraph 46(*c*)(ii) of the Act. The validity of these Regulations is not in issue. The Regulations purport to prescribe the circumstances under which the costs of installation may be excluded and the manner under which these costs may be determined. Their object is not to restrict the right of the taxpayer to claim a refund. However, it is clear under these Regulations that it is only after notification in writing to the Deputy Minister that a taxpayer may change its method of calculating the costs of installation to be deducted from the sale price of goods.

CONCLUSION

The Tribunal must interpret the law as it stands. The appellant was not entitled to change its method of calculation of the costs of installation before notifying the Deputy Minister and has not demonstrated that it has paid moneys in error within the meaning of the Act. Consequently, the Tribunal cannot allow the appellant to recalculate retroactively its sales tax liability using the actual costs of installation under section 5 of the Regulations and obtain a refund for sales tax paid in error. Accordingly, the appeal should be dismissed.

Kathleen E. Macmillan
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Presiding Member

Arthur B. Trudeau
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