CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, January 18, 1991

Appeal No. AP-90-076

IN THE MATTER OF an appeal heard on November 1, 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 of the Minister of National Revenue dated July 26, 1990, with respect to a notice of objection filed pursuant to section 81.15 of the *Excise Tax Act*.

BETWEEN

KLIEWER'S CABINETS LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. The appellant has not demonstrated that it has made a mistake and paid moneys in error, and, therefore, is not entitled to a refund of the sales tax it was obligated to pay as a licensed manufacturer under the *Excise Tax Act*.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michèle Blouin
Michèle Blouin
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-90-076

KLIEWER'S CABINETS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

Excise Tax Act - Whether, after having paid tax on sales value in accordance with the Excise Tax Act (the Act), the appellant is entitled to recalculate retroactively its sales tax liability using the "determined value" method set out in Memorandum ET 202 and obtain a refund for tax paid in error.

This is an appeal pursuant to section 81.19 of the Act from a decision of the Minister of National Revenue denying a refund of federal sales tax paid on the appellant's sales of kitchen furniture, counters and cabinets.

The appellant, Kliewer's Cabinets Ltd., recalculated its sales tax liability using the determined value method provided in Memorandum ET 202, "Values for Tax," and claimed a refund of moneys paid in error. It had previously paid tax on the basis of the sale price pursuant to section 50 of the Act.

The appellant seeks a declaration from the Tribunal that it is entitled to a refund of moneys paid in error in the amount of $56,712.90 under section 68 of the Act.

***Held**: The appeal is dismissed. The appellant has not demonstrated that it paid taxes in error.*

Place of Hearing:	*Winnipeg, Manitoba*
Date of Hearing:	*November 1, 1990*
Date of Decision:	*January 18, 1991*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Sidney A. Fraleigh, Member* *Michèle Blouin, Member*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*E. R. (Ted) Reid, for the appellant* *Geoffrey S. Lester, for the respondent*
Statute Cited:	*Excise Tax Act, R.S.C., 1985 (as amended), c. E-15, subsection 50(1) and section 68.*
Other Reference Cited:	*Memorandum ET 202.*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-90-076

KLIEWER'S CABINETS LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
SIDNEY A. FRALEIGH, Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from a decision of the Minister of National Revenue (the Minister) denying a refund of federal sales tax paid on the appellant's sales of kitchen furniture, counters and cabinets. The appellant, Kliewer's Cabinets Ltd. (Kliewer's), seeks a declaration from the Tribunal that it is entitled, under section 68 of the Act, to a refund of moneys paid in error in the amount of $56,712.90.

Subsection 50(1) of the Act requires that sales tax be imposed on the sale price or on the volume sold of all goods. It reads in part as follows:

> 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,*

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

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Section 68 of the Act provides that, under certain circumstances, a person may recover moneys paid in error. The section reads as follows:

> *68. Where a person, otherwise than pursuant to 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, interest 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.*

The issue in this appeal is whether a taxpayer, who has initially remitted federal sales tax based on the sales price of an article in accordance with the requirements of subsection 50(1) of the Act, is entitled to recalculate retroactively its tax liability using a determined value set out in Memorandum ET 202 and obtain a refund for the difference in tax liability as moneys paid in error.

In Memorandum ET 202, "Values for Tax", the Department of National Revenue (the Department) acknowledges that the Act does not distinguish between sales to different classes of customers such as wholesalers, retailers and users. In order to reduce these differences, the Memorandum authorizes the use of two methods of tax computation that are the established value and the determined value method. These methods of calculation allow certain deductions to determine the sales value upon which the tax rate is calculated and specify certain requirements that taxpayers must satisfy for their use.

FACTS

The appellant is a licensed manufacturer engaged in the manufacture of kitchen furniture, counters and cabinets. During the taxation period starting April 30, 1986, and ending February 18, 1990, the appellant calculated and paid federal sales tax on the basis of its sales price.

On April 3, 1990, the appellant submitted a refund application in the amount of $56,712.90. On May 7, 1990, the Department issued a notice of determination disallowing the application in total. By a notice of objection signed June 7, 1990, the appellant objected to that determination. On July 26, 1990, the Minister issued a notice of decision disallowing the objection and confirming the determination of the Department. It is that decision that is the subject of this appeal.

ARGUMENTS

The appellant was represented at the hearing by Mr. E. R. Reid, a tax consultant. No witness was called by the appellant to explain the basis of the alleged error. The appellant's representative, however, filed several documents that were recorded as Exhibits A-1 to A-51. These exhibits consist mainly of Interpretation Bulletins, Excise Tax (ET) Memoranda and correspondence with officials of the Department.

The appellant's representative argued that the policy outlined by the Department in Memorandum ET 202 overrides the statute and added that the appellant's refund claim is reasonable, just and logical.

According to Mr. Reid, there are several sections of the Act that, from time to time, have authorized the Governor in Council, the Minister or designated officers to adopt or take administrative measures for the determination of sales price under certain circumstances where it is difficult to arrive at a just and fair selling price upon which tax is to be calculated.

The appellant's representative also referred to several Memoranda that, he argued, were adopted pursuant to the Act or its regulations. He submitted that the authority for the use of the values provided in Memorandum ET 202 is derived from the Act as it read before 1988. From this, he concluded that the values set out in Memorandum ET 202 are not simply administrative concessions, but statutorily prescribed methods.

In his main argument, counsel for the respondent submitted that the appeal should be dismissed on lack of evidence and that there was no error to be remedied under section 68 of the Act. No witness was called to explain the nature of the mistake nor was there any evidence to sustain a conclusion that tax was paid in error.

Counsel added that the appellant had not demonstrated in the first place, on the balance of probabilities, its entitlement to rely upon the policy described in Memorandum ET 202 and that there was no mistake. Finally, counsel argued that an error in the sense of section 68 must result from a mistaken belief in the existence of a given state of facts and that is not the case here.

FINDING OF THE TRIBUNAL

The appellant seeks to obtain a refund for moneys paid in error pursuant to section 68 of the Act. Although section 68 uses broad language to define the kind of error that can be made by stating " ... whether by reason of mistake of fact or law or otherwise ... ," the Tribunal, nevertheless, is of the view that the taxpayer has the burden of proof that an error was made to justify or obtain a refund of moneys paid in error. The mere allegation, as is the case here, that a mistake was made is not sufficient for an appeal to succeed and to justify a refund.

In this case, the facts indicate that the appellant paid sales tax during the relevant period in accordance with the requirements of subsection 50(1) of the Act on the basis of the sales price. However, subsequently the appellant requested a refund on the basis that it was entitled to calculate a lesser sales tax liability using the determined value method set out in Memorandum ET 202. Such a method may or may not apply to the appellant's operation. The appellant's representative chose not to call any witness to explain the nature of the appellant's operation and the basis of the alleged mistake or indeed how its operation qualified for the use of the methods described in Memorandum ET 202. No facts or evidence were led to determine that issue.

The Tribunal is of the view that the appellant has not demonstrated that, at any time, it has made a mistake and paid moneys in error.

The Tribunal notes that the Department's policies set out in Memorandum ET 202 have been characterized as administrative concessions and are not regulations derived from the statute. Furthermore, it is clear that Memorandum ET 202 does not provide an inherent right to the appellant to recalculate retroactively its tax liability at will. First and foremost, the appellant must qualify and satisfy certain conditions for the use of the administrative concessions.

In sum, the mere fact that a taxpayer wishes to recalculate retroactively its sales tax liability according to values set out in a Memorandum that is not derived from the statute cannot by itself prove that a mistake was made and that moneys were paid in error, especially when moneys have been paid in accordance with the full requirements of the Act and constitute taxes.

CONCLUSION

The appeal is dismissed. The appellant has not demonstrated that it made a mistake and paid moneys in error.

Arthur B. Trudeau
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Presiding Member

Sidney A. Fraleigh
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