CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, March 2, 1992

Appeal No. AP-90-117

IN THE MATTER OF an appeal heard November 4 to 6, 1991, under section 81.22 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, as amended, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

ARTEC DESIGN INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed. Since the appellant paid tax on the basis of sale price, there were no moneys paid in error. Whether the appellant was qualified to pay tax according to the determined value method is a question that falls outside the jurisdiction of this Tribunal.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-90-117

ARTEC DESIGN INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The basis of this appeal is the appellant's allegation that it paid moneys in error when it calculated its tax liability on the basis of sale price, as provided in the Excise Tax Act. It claims to have made the decision to calculate its tax liability on this basis without knowledge or advice that it could have used the "determined value" method provided in Excise Tax Memorandum ET 202. It claims that its tax liability would have been less if it had used the determined value method. On this basis, it applied to the Minister of National Revenue, under section 68 of the Excise Tax Act, for a refund of moneys paid in error.

***HELD**: The appeal is dismissed. Since the appellant paid tax on the basis of sale price, there were no moneys paid in error. Whether the appellant was qualified to pay tax according to the determined value method is a question that falls outside the jurisdiction of this Tribunal.*

Place of Hearing:	*Winnipeg, Manitoba*
Dates of Hearing:	*November 4 to 6, 1991*
Date of Decision:	*March 2, 1992*
Counsel:	*David M. Attwater*
Clerk:	*Janet Rumball*
Appearances:	*Roger D. Gripp, for the appellant* *Meg Kinnear, for the respondent*

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Appeal No. AP-90-117

ARTEC DESIGN INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
MICHÈLE BLOUIN, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

The basis of this appeal is the appellant's allegation that it paid moneys in error when it calculated its tax liability on the basis of sale price, as provided in the *Excise Tax Act*[1] (the Act). It claims to have made the decision to calculate its tax liability on this basis without knowledge or advice that it could have used the "determined value" method provided in Excise Tax Memorandum ET 202 (the Memorandum). It claims that its tax liability would have been less if it had used the determined value method. On this basis, it applied to the Minister of National Revenue (the Minister), under section 68 of the Act, for a refund of moneys paid in error.

Section 68 states:

> *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.*

Mr. Hubert Baldes, President of Artec Design Inc. (Artec), testified that he calculated Artec's tax liability based on the sale price because that was the only method of which he was aware. The witness indicated that he was not informed of the determined value method as provided in the Memorandum. Counsel for the appellant indicated that a mistake was committed in that Artec did not know or could not know that there was an alternative method of determining its tax liability. Counsel also argued that the history of ruling card 3700/107, which identifies the specific conditions of eligibility for use of the determined value of the Memorandum by the kitchen cabinet industry, demonstrates why the appellant was incapable of knowing of the availability of the determined value and how a mistake was made.

Ruling card 3700/107, dated January 9, 1985, was the first determined value authorized for use by the kitchen cabinet industry. However, it was amended before it was announced in the bulletin of the Department of National Revenue, Customs and Excise (Revenue Canada), entitled Excise News. On April 23, 1985, ruling card 3700/107-1 was issued, which replaced 3700/107.

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

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Mr. Edward R. Reid, who worked as an interpretation officer for Revenue Canada, out of Winnipeg, Manitoba, served as a witness for the appellant. He testified that the two ruling cards were never approved in Manitoba. He added that he was instructed not to inform the Manitoba kitchen cabinet industry of the ruling card until the completion of an internal investigation used to confirm the validity of the card. Evidence was presented that neither Mr. Reid nor any other officer from the Revenue Canada offices at Winnipeg informed the kitchen cabinet industry of ruling card 3700/107-1 and the availability of the use of determined values.

On June 6, 1986, Mr. Reid, upon instructions from his supervisors, wrote a letter to Excise headquarters in Ottawa questioning the validity of ruling card 3700/107-1. In response, Mr. John Sitka, Assistant Director of Valuations for the Tax Interpretations Branch of Excise, wrote, on October 15, 1986, indicating that the authorized determined value discount of 33 1/3 percent was based on a single case study, and not on an industry survey. As a result, ruling card 3700/107-1 was withdrawn, effective that day, and transferred to "passive."

Mr. Sitka testified that on November 5, 1986, he sent a message to the regional directors in the Excise Branch by "iNet," which is an electronic message system used within Revenue Canada. He informed them that ruling card 3700/107-1 would remain in the "active" state pending the outcome of a national survey which, he anticipated, would be completed soon. However, the ruling card was never removed from the passive state and transferred to active. As such, any reference to the ruling card, through Revenue Canada or any reporting service, would indicate that it was passive and not available for use by the industry. Mr. Sitka testified that if a copy of the ruling card were requested from Revenue Canada, it would inform the person that ruling card 3700/107-1 was available to the kitchen cabinet industry.

On March 16, 1989, ruling card 3700/107-2 was issued, based on a national survey of the kitchen cabinet industry. It was not until October of 1989 that it was publically announced in the Excise News.

The evidence before the Tribunal clearly establishes that the kitchen cabinet industry throughout Canada was entitled, under departmental policy, to calculate its sales tax liability in accordance with ruling card 3700/107-1 between April 23, 1985, and March 16, 1989. Thereafter, ruling card 3700/107-2 became effective, although this was not announced until October of 1989. As indicated above, this information was not made available to the industry served by the Winnipeg district office. Indeed, the evidence of witnesses for the appellant suggests that the active status of this ruling card was not known to the officers directly involved in the Winnipeg office, even though it was being used by the industry in other parts of the country. Obviously, Revenue Canada's internal "iNet" message system was ineffective as far as the Winnipeg region was concerned. Moreover, because Revenue Canada did not alter the status of the ruling card from passive to active nor take the appropriate steps to inform tax reporting services of this change, confusion resulted in both the industry and within Revenue Canada itself. As such, the alleged error in this instance can, in the view of this Tribunal, be directly attributable to Revenue Canada. The result would appear to have been an inequitable and unjustifiable application of departmental policy to the industry in one region of the country.

Counsel for the appellant identified the issues as:

> (1) did the appellant qualify to use the "determined value" method pursuant to the Memorandum and the relevant ruling cards; and,
>
> (2) if the answer to (1) is yes, did the appellant pay any moneys in error, whether by reason of mistake of fact or law or otherwise, and were those moneys taken into account as taxes under the Act, thereby entitling the appellant to a refund, when the appellant calculated its sales tax liability using the "sale price" method without the knowledge or advice that it could have used the "determined value" method?

The Tribunal is a creature of statute and any regulations flowing therefrom. As such, its jurisdiction and the powers it may exercise must be found in statutory instruments such as the *Excise Tax Act* and regulations enacted thereunder. Despite the evidence that firms like the appellant firm, located in other regions of Canada, had been allowed to use the determined value method, this Tribunal regretfully notes that it lacks the jurisdiction to determine whether the appellant firm would itself have been qualified to use it. The necessary conditions for eligibility are included in the Memorandum, and since its provisions are not based on the Act or a regulation made pursuant to the Act, it falls outside the jurisdiction of the Tribunal to assert that the appellant was qualified to use it.

Subsection 59(1) of the Act provides authority for the Minister of Finance or the Minister of National Revenue to make regulations, as he deems necessary or advisable, for carrying out the provisions of the Act. However, the Memorandum is not a regulation made pursuant to the Act.[2] It can be characterized as a departmental policy for which there is no statutory or regulatory authority. Accordingly, the determined value method is without legal authority and it is outside the jurisdiction or power of the Tribunal to disregard the Act in favour of its use.

Section 68 of the Act provides that the Minister must refund a taxpayer any moneys paid in error, "whether by reason of mistake of fact or law or otherwise," when those moneys "have been taken into account as taxes ... under [the] Act." Therefore, the Tribunal must establish whether the Minister was correct in his determination that moneys were not paid in error when they were taken into account as taxes under the Act, regardless of the method used to calculate that tax.

The appellant paid tax on the basis of sale price as explicitly provided in the Act. There were no claims of errors of calculation, unrecognized tax deductions or exempt sales, etc. The appellant has claimed that it made an error when it paid taxes on a less advantageous basis than it otherwise might have done. It claimed to be entitled to use the determined value method, as provided in the Memorandum, for determining its tax liability. It appealed to the Tribunal to assert the right it claims to that use. However, it is not within the power of the Tribunal to disregard the statutorily prescribed basis on which tax is to be paid in favour of a method inconsistent with the Act for which there is no statutory or regulatory authority.

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2. In order to qualify as a regulation, the requirements provided in the *Statutory Instruments Act*, R.S.C., 1985, c. S-22, must be met. The Memorandum does not meet those requirements.

Accordingly, the appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Michèle Blouin
Michèle Blouin
Member

Charles A. Gracey
Charles A. Gracey
Member