CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, July 6, 1992

Appeal No. AP-91-078

IN THE MATTER OF an appeal heard on April 28, 1992, 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 March 20, 1991, relating to a notice of objection served under sections 81.15 and 81.17 of the *Excise Tax Act*.

BETWEEN

BRIGHAM PIPES LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Robert J. Martin
Robert J. Martin
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-91-078

BRIGHAM PIPES LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is the largest Canadian manufacturer of smoking pipes and has been in business since 1906. Its appeal to the Tribunal concerns two issues. The first relates to the value on which tax is to be assessed. The second issue is whether the appellant was eligible to take a deduction from taxes payable to the Department of National Revenue for moneys paid in error.

HELD: *The appeal is dismissed. The Tribunal has no option but to uphold the decision of the Minister of National Revenue that the assessment of tax be based on sale price, pursuant to subsection 50(1) of the Excise Tax Act. With regard to the second issue, the Tribunal finds that the appellant was statutorily barred from taking a deduction from taxes payable to the Department of National Revenue for moneys paid in error.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*April 28, 1992*
Date of Decision:	*July 6, 1992*
Tribunal Members:	*Kathleen E. Macmillan, Presiding Member* *W. Roy Hines, Member* *Robert C. Coates, Q.C., Member*
Legal Services:	*France Deshaies*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*M. H. Brigham, for the appellant* *Gilles Villeneuve, for the respondent*

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-078

BRIGHAM PIPES LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: KATHLEEN E. MACMILLAN, Presiding Member
W. ROY HINES, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

This is an appeal pursuant to section 81.19 of the *Excise Tax Act*[1] (the Act) from a notice of decision by the respondent dated March 20, 1991, confirming a notice of assessment for the period from January 1, 1987, to December 31, 1989, under which the appellant is liable for $57,512.56, including taxes, penalties and interest.

The appellant is the largest Canadian manufacturer of smoking pipes and has been in business since 1906. Its appeal to the Tribunal involves two issues. The appellant had been calculating its federal sales tax liability on the basis of the established price to wholesalers of its pipes. Such calculations were made pursuant to Excise Memorandum ET 202 (ET 202). However, as a representative of the appellant acknowledged, it did not qualify to use ET 202. The first issue is whether, under the circumstances, the appellant should be allowed to continue to use the established value method for determining its tax liability. The second issue is whether the appellant was eligible to take a deduction from taxes payable to the Department of National Revenue (Revenue Canada) for moneys paid in error.

For many years the appellant took advantage of the provisions set out in ET 202 for determining the value of its goods for tax purposes. Under ET 202, a manufacturer is permitted to remit tax on the "established price to wholesalers" rather than on the basis of the sale price of its goods, provided it sells to two or more independent wholesalers and its sales to wholesalers account for at least 15 percent of its domestic sales.

According to Mr. Michael Brigham, President of Brigham Pipes Limited, who appeared as a witness at the hearing, the appellant's major wholesaler went out of business in 1985. Since 1987, the appellant has only dealt with one wholesaler, and its sales to this wholesaler amounted to less than 15 percent of its total sales volume.

While Mr. Brigham conceded that the appellant did not meet the requirements of ET 202, he argued that it should be entitled to pay tax, as it always had, on the basis of the lower

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

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

established value. He pointed out that a strict application of subsection 50(1)[2] of the Act further increases the already considerable disparity between the taxes paid by importers and those paid by Canadian manufacturers. Mr. Brigham also maintained that the roughly tenfold increase in federal and provincial taxes on the tobacco industry in the past eight years was largely responsible for the appellant's inability to meet the requirements of ET 202. Because of the tax increases, wholesalers were unwilling to carry tobacco items. It is unfair, argued Mr. Brigham, to increase the company's tax burden even further by requiring it to pay tax on the basis of sale price.

On the question of value for tax, counsel for the respondent argued that the Tribunal's jurisdiction does not extent to the application of administrative concessions such as ET 202 nor to matters of equity and fairness. In counsel's view, the appellant's requirement to pay tax on the basis of sale price is clearly stated under subsection 50(1) of the Act.

While the Tribunal sympathizes with the appellant's difficulties on the first issue in this appeal, it cannot provide assistance. The Tribunal's jurisdiction does not allow it to grant equitable relief. It cannot refuse to apply the law, even on grounds of equity.[3] The Act imposes sales tax on the basis of sale price or volume sold of all goods produced or manufactured in Canada. The established value method of calculating tax liability as provided in ET 202 is not consistent with the Act. As stated in an earlier decision of the Tribunal," ... 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."[4]

The second issue raised by counsel for the appellant is whether the appellant was eligible to take a deduction from taxes payable to Revenue Canada for moneys paid in error.

Mr. Brigham explained that on February 10, 1986, the appellant imported a shipment of bulk-packed pipes. Revenue Canada typically regarded these pipes as "partly manufactured goods" that were not subject to tax upon importation, according to subsection 50(5)[5] of the Act. However, the appellant paid tax on these goods at the time of importation.

---

2. 50(1) *There shall be imposed, levied and collected a consumption of sales tax ... on the sale price or on the volume sold of all goods ...*

(a) produced or manufactured in Canada

(i) payable ... 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,

...

(b) imported into Canada ...

3. See *Joseph Granger v. Employment and Immigration Commission,* [1986] 3 F.C. 70, at 77, affirmed [1989] 1 S.C.R. 141.

4. *Artec Design Inc. v. The Minister of National Revenue,* Canadian International Trade Tribunal, Appeal No. AP-90-117, March 2, 1992, at p. 3.

5. *50(5)Notwithstanding anything in subsection (1), the consumption or sales tax shall not be payable on goods*

...

(b) imported by a licensed manufacturer if the goods are partly manufactured goods;

...

It also paid tax on the same goods when they were sold between May and December of 1986. Having paid tax twice on the same goods, the appellant realized its mistake and took deductions from its tax payments to Revenue Canada for the months of June to September 1988, totalling what it had paid in error. It did not formally request a refund of taxes paid. On April 11, 1990, the appellant received a notice of assessment for this amount.

The appellant argued that it erred in paying the tax at the time of sale, from May 1986 onwards, and not at the time of importation in February 1986. Therefore, it falls within the two-year time limit imposed by the Act. The respondent, on the other hand, submitted that the appellant's error occurred in February 1986, when it paid tax on the importation of partly manufactured goods contrary to subsection 50(5) of the Act.

In examining this issue, the Tribunal notes that there is no dispute between the parties that tax on the goods was, in fact, paid twice. The Tribunal believes, however, that the error was made when tax was paid on the importation of the pipes when an exemption to such taxation was available.

In lieu of making a refund claim pursuant to section 68 of the Act for moneys paid in error, the appellant deducted these moneys from its payment of taxes to Revenue Canada for the period from June to September 1988. The Tribunal notes that the authority for taking a deduction in lieu of applying for a refund is provided in section 73 or 74 of the Act, though no evidence was presented on this point. To be eligible to utilize either of these provisions, the appellant must have been authorized by the Minister of National Revenue and have been eligible, pursuant to section 68 of the Act, for a refund of the moneys it paid in error. However, the appellant was not eligible for a refund pursuant to section 68 as it had not acted within two years of paying those moneys in error. Accordingly, as it was statutorily barred from receiving a refund of the moneys paid in error pursuant to section 68, it was also barred from taking a deduction for the moneys paid in error pursuant to either section 73 or 74. Accordingly, the appellant's claim on this point must fail.

Accordingly, the appeal is dismissed. The Tribunal lacks the jurisdiction to displace the determination of the Minister of National Revenue that tax be payable on the basis of the sale price of the goods in issue. With regard to the second issue, the Tribunal finds that the appellant was statutorily barred from taking a deduction from taxes payable to Revenue Canada for moneys paid in error.

Kathleen E. Macmillan
Kathleen E. Macmillan
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member