CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 9, 1993

Appeal No. AP-91-187

IN THE MATTER OF an appeal heard on March 22, 1993, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated October 4, 1991, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

ESSELTE PENDAFLEX CANADA INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Michèle Blouin
Michèle Blouin
Member

Nicole Pelletier
Nicole Pelletier
Acting Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-91-187

ESSELTE PENDAFLEX CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The Tribunal entertained a preliminary matter in respect of an appeal initiated under section 81.19 of the Excise Tax Act. The preliminary issue was whether the Tribunal had jurisdiction to grant the relief sought by the appellant. The appellant calculated its tax liability on the basis of sale price as provided in the Excise Tax Act. It subsequently recalculated it on the basis of the "established value" method as provided in Excise Memorandum ET 202. As its liability was lowered, the appellant took a deduction from its tax return to the Department of National Revenue in lieu of applying for a refund of moneys paid in error. The respondent assessed the appellant for these moneys indicating that the established value method could not be used retroactively. At the hearing, counsel for the respondent argued that established values were an administrative concession and that the Tribunal lacked jurisdiction over the subject matter.

***HELD**: The appeal is dismissed. Excise Memorandum ET 202 has been characterized as a departmental policy for which there is no statutory or regulatory authority. In fact, the policy is inconsistent with the Excise Tax Act in that it creates a scheme for determining tax liability on a basis other than sale price or volume as provided in the Excise Tax Act. The Tribunal concluded that it was not within its power to disregard the statutorily prescribed basis on which tax is to be paid in favour of a method inconsistent with the Excise Tax Act for which there is no statutory or regulatory authority. Accordingly, the Tribunal lacks jurisdiction to grant the relief sought by the appellant.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*March 22, 1993*
Date of Decision:	*August 9, 1993*
Tribunal Members:	*Lise Bergeron, Presiding Member* *Kathleen E. Macmillan, Member* *Michèle Blouin, Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Rick H. Kesler, for the appellant* *Meg Kinnear, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-91-187

ESSELTE PENDAFLEX CANADA INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member
KATHLEEN E. MACMILLAN, Member
MICHÈLE BLOUIN, Member

REASONS FOR DECISION

This represents the decision of the Tribunal on a preliminary matter made in respect of an appeal initiated under section 81.19 of the *Excise Tax Act*[1] (the Act). The preliminary issue was whether the Tribunal had jurisdiction to grant the relief sought by the appellant. These proceedings were initiated after the appellant had been assessed for unpaid taxes, interest and penalty in the amount of $357,866.72 for the period from March 30, 1985, to February 27, 1988.

The appellant is a licensed manufacturer of stationery products, which it sells to wholesalers, retailers and end users. Identical goods bore different amounts of federal sales tax (FST) due to the different prices charged to the various trade levels. In October 1986, the appellant was advised that, to remedy the problem, it could use "established values," as provided in Excise Memorandum ET 202 (Memorandum ET 202) entitled Values for Tax,[2] for calculating its sales tax liability. The appellant recalculated its tax liability for the period from January to October 1986, and, in November 1986, it took a deduction from its tax return to the Department of National Revenue (Revenue Canada) in lieu of applying for a refund of moneys paid in error under section 68 of the Act.

Because of the complexity of implementing the new scheme, it was not until November 1987 that a computer program was in place to automatically calculate the appellant's tax liability using established values. In the interim period, from October 1986 to October 1987, the appellant's monthly tax liability was first calculated based on actual sale price and periodically reduced, making a deduction from its tax return in lieu of applying for a refund of moneys paid in error.

On January 11, 1989, the appellant was assessed for $133,258.62 for unpaid taxes, interest and penalty on the basis of the lump sum tax adjustment taken in November 1986. Revenue Canada cited paragraph 5 of Memorandum ET 202 indicating that established values become effective only from the date that use of the values is commenced and that they cannot be used retroactively. The appellant paid this amount.

However, three months later, the appellant was reassessed for $357,866.72 including unpaid taxes, interest and penalty, and credited $133,258.62 against this debt. Apparently, Revenue Canada determined that the appellant was not entitled to use established values until

1. R.S.C. 1985, c. E-15.
2. Department of National Revenue, Excise, December 1, 1975.

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November 1987 and further assessed the appellant for the deductions taken from its returns during the period from October 1986 to October 1987.

Counsel for the respondent argued that the Tribunal does not have jurisdiction to consider the merits of the appeal, as the case deals entirely with the appellant's entitlement to use established values as provided in Memorandum ET 202 to calculate its tax liability. Counsel argued that the Tribunal is a creature of statute with no inherent jurisdiction. The only jurisdiction that it may exercise is that conferred upon it by a statutory instrument such as the Act. In matters governing the payment of FST, section 50 of the Act requires taxpayers to calculate tax on the basis of sale price. The Tribunal has jurisdiction to rule on assessments under section 50 of the Act and to determine whether a taxpayer has paid tax based on sale price.

By contrast, Memorandum ET 202 is not a statutory instrument. It is not part of the Act or of the *Canadian International Trade Tribunal Act*,[3] nor is it a regulation made under either act. It is no more than an administrative policy of Revenue Canada. The appellant has admitted that Memorandum ET 202 does not have the force of law and is merely an administrative, rather than legislative, provision. As Memorandum ET 202 falls beyond the jurisdiction of the Tribunal to assert that a taxpayer is entitled to use established values, it is outside the jurisdiction of the Tribunal to disregard the statutorily prescribed basis for tax liability found in section 50 of the Act in favour of an administrative scheme or policy not provided for by statute or regulation.[4]

For the Tribunal to hold that tax was paid in error by the appellant, it would have to hold that the appellant was entitled to use established values for all or part of the period in question. Such a determination is beyond the jurisdiction of the Tribunal. It must, therefore, dismiss the appeal for want of jurisdiction.

In his brief and submissions, counsel for the appellant rephrased the issue, submitting that the appeal does not relate exclusively to the appellant's eligibility to use the "established value" method of determining its tax liability, as its eligibility has been confirmed and approved by Revenue Canada. Rather, the issue is whether the deduction that the appellant took from its tax return to Revenue Canada in lieu of making a refund claim was calculated correctly.

In argument, counsel for the appellant submitted that for almost 20 years Revenue Canada has been applying Memorandum ET 202 for purposes of assessments and refund claims. It is inconsistent, therefore, for counsel for the respondent to argue that the Memorandum ET 202 cannot be the subject of an appeal. Counsel for the appellant cited three cases[5] in support of the proposition that Revenue Canada cannot publish bulletins on which taxpayers govern their affairs and then come before the Tribunal and argue that those bulletins have no legal status and cannot be the subject of an appeal.

Counsel for the appellant referred to a recent decision of the Tribunal, *Brandon Forest*

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3. R.S.C. 1985, c. 47 (4th Supp.).
4. See, for example, *Artec Design Inc. v. The Minister of National Revenue*, Appeal No. AP-90-117, March 2, 1992; *Seine River Cabinets Ltd. v. The Minister of National Revenue*, Appeal No. AP-90-118, March 2, 1992; *Imperial Cabinet (1980) Co. Ltd. v. The Minister of National Revenue*, Appeal No. AP-91-045, March 2, 1992.
5. *George Lenn Bowen v. The Minister of National Revenue* (February 3, 1972), 72 D.T.C. 1161 (Tax Court of Canada); *Jack Steckel v. The Minister of National Revenue* (February 14, 1992), 92 D.T.C. 1904 (Tax Court of Canada); *J. Camille Harel v. The Deputy Minister of Revenue of the Province of Quebec*, [1978] 1 S.C.R. 851.

Products Ltd. v. The Minister of National Revenue,[6] where the Tribunal distinguished the cases[7] referred to by opposing counsel in determining that it had jurisdiction to hear an appeal concerning the appellant's eligibility to use the notional values provided in Memorandum ET 202. It was argued that the *Brandon* case established the principle that the Tribunal has jurisdiction to hear such an appeal where the taxpayer was assessed under the Act as opposed to filing a refund claim and that the taxpayer actually paid tax based on Memorandum ET 202. Counsel argued that, based on the *Brandon* case, the Tribunal has jurisdiction to hear the merits of this appeal.

Contrary to the assertions of counsel for the appellant, the Tribunal is of the view that it lacks jurisdiction to grant the relief sought by the appellant. The appellant was calculating its tax liability on the basis of sale price as provided in the Act and retroactively redetermined its liability on the basis of an established value provided in Memorandum ET 202. As its tax liability was reduced with the use of an established value, it took various deductions from its tax returns to Revenue Canada in lieu of applying for a refund of those moneys. As paragraph 5 of Memorandum ET 202 provides that "[a]n established value may not be applied retroactively to adjust amounts of tax paid computed on the sale price," the respondent did not accept the appellant's use of the established value and assessed it for the moneys that it deducted from its return. To this, the appellant claimed that it was eligible to use the established value as it met the conditions of eligibility therefor.

As stated in the *Artec* case, Memorandum ET 202 "can be characterized as a departmental policy for which there is no statutory or regulatory authority." In fact, the policy is inconsistent with the Act in that it creates a scheme for determining tax liability on a basis other than sale price or volume as provided in the Act. In that case, the Tribunal concluded that "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." The Tribunal is in complete agreement with this statement and concludes, therefore, that it lacks jurisdiction to grant the relief sought by the appellant.

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6. Appeal No. AP-91-256, December 1, 1992.
7. *Supra*, note 4.

With regard to the cases cited by counsel for the appellant, the Tribunal notes that in the *Harel* case, the Supreme Court of Canada stated that an administrative policy "could not be taken into consideration if it were contrary to the provisions of the Act.[8]"

Accordingly, the appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Michèle Blouin
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8. *Supra*, note 5 at 858.