CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, May 4, 1993

Appeal No. AP-92-042

IN THE MATTER OF an appeal heard on February 4, 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 March 20, 1992, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

ELECTRA SUPPLY INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-042

ELECTRA SUPPLY INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

There are two issues in this appeal. The first issue is whether the Tribunal has jurisdiction to hear matters arising from the application of an administrative concession, in this case, the so-called blanket discount method set forth in Excise Memorandum ET 201, which allows wholesalers to compute and account for sales tax by using a reconstructed trading statement covering their business for each of the two preceding fiscal years. The second issue, assuming that the Tribunal has the above jurisdiction, is whether the assessment is incorrect.

HELD: *The appeal is dismissed. In an appeal from an assessment under the Excise Tax Act, the Tribunal lacks jurisdiction to examine a taxpayer's practice of changing the applicable standard set forth by the Department of National Revenue in an administrative concession. As to the appellant's allegations that the assessment was incorrectly based upon a value not provided for in the Excise Tax Act, there are simply no facts or proof to sustain those allegations.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*February 4, 1993*
Date of Decision:	*May 4, 1993*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Charles A. Gracey, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*David Fulton, for the appellant* *Linda J. Wall, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-042

ELECTRA SUPPLY INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
CHARLES A. GRACEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from an assessment that was confirmed by the Minister of National Revenue (the Minister).

On May 23, 1991, the appellant was assessed for a total amount of $64,194.26, including unpaid tax, interest and penalty. On June 12, 1991, the appellant served a notice of objection with respect to the assessment, in which it argued that the method of calculating sales tax liability for wholesalers in Excise Memorandum ET 201[2] (Memorandum ET 201) created a bias in favour of the Department of National Revenue (Revenue Canada) and that, under the method,-an amount greater than required by the Act was actually remitted to Revenue Canada. On March 20, 1992, the Minister confirmed the assessment.

There are two issues in this appeal. The first issue is whether the Tribunal has jurisdiction to hear matters arising from the application of an administrative concession, in this case, the so-called blanket discount method set forth in Memorandum ET 201, which allows wholesalers to compute and account for sales tax by using a reconstructed trading statement covering their business for each of the two preceding fiscal years. The second issue, assuming that the Tribunal has the above jurisdiction, is whether the assessment is incorrectly based upon a value not provided for in the Act.

In its brief, the appellant claimed that the method outlined in Memorandum ET 201 did not produce an accurate statement of cost or duty-paid value and argued that, as Memorandum ET 201 was not regulatory, it was entitled to follow guidelines acceptable to Revenue Canada in calculating its sales tax liability. At the hearing, the representative of the appellant, Mr. David Fulton, also explained that the blanket discount method resulted in an assessment of sales tax that was higher than that levied by using the direct costing method, that is, the method actually provided for in the Act. He also argued that the assessment was incorrect, as it used a value established in accordance with a non-regulatory memorandum instead of being based upon the language of the Act.

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1. R.S.C. 1985, c. E-15.
2. Licensed Wholesalers, Department of National Revenue, Customs and Excise, December 1, 1975 (revised on September 29, 1989).

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The respondent argued that, according to the Tribunal's decision in *Artec Design Inc. v. The Minister of National Revenue*,[3] the application of an administrative policy or concession, such as the blanket discount method, is a matter outside the jurisdiction of the Tribunal. Moreover, if the Tribunal were of the view that it had jurisdiction, the respondent argued that the appellant has failed to prove that it should have been exempted from the imposition of tax in accordance with the statute.

As it was necessary to deal with the jurisdiction issue first, the Tribunal examined the *Artec Design* decision, as well as three other decisions that were rendered by the Tribunal at relatively the same time.[4] In the Tribunal's view, those four cases were concerned with situations where a person had paid sales tax based on a value provided for in the Act, and, accordingly, that person could not obtain a refund of sales tax paid in error since the Tribunal lacks jurisdiction to authorize the use of another value that, otherwise, might have been available to the appellant through a departmental administrative concession.

More recently, in *Brandon Forest Products Ltd. v. The Minister of National Revenue*,[5] the Tribunal had to deal again with that question of jurisdiction with respect to a departmental administrative concession. That case involved a situation where a taxpayer, which was assessed, claimed the benefit of a value set forth in a non-regulatory memorandum, such as the one in issue. In its reasons for decision, the Tribunal distinguished the *Artec Design* case, as well as other cases to the same effect, as follows:

> *There are significant differences between the above-mentioned appeals and the case before us. The first distinction is that this is an appeal from an assessment, while the other appeals dealt with sales tax refund claims based on section 68 of the Act. Furthermore, in those appeals, the Tribunal had to deal with the notion of tax paid in error, where the appellants, having paid tax on the statutory basis, relied upon the non-statutory measures of the Memorandum [Excise Memorandum ET 202] to obtain a refund of sales tax.*[6]

The Tribunal notes that, in distinguishing the *Artec Design* case on the basis that the appellant was assessed, the Tribunal also relied upon the fact that the assessment, the notice of objection and the notice of decision referred to the value set forth in Excise Memorandum ET 202[7] and that it was stated that the assessment could be appealed to the Tribunal. The Tribunal then concluded that, being properly seized of an appeal from an assessment, it had jurisdiction to hear the case on its merits. To this end, the Tribunal stated:

> *[I]f a taxpayer argues that it falls squarely within the terms and conditions of the concessions made in a memorandum that is used by the Department ... to levy sales tax under the Act, there is no reason why the Tribunal should refuse to hear the appeal and, if it agrees with the appellant, why the Tribunal could not refer the matter back to the Minister for reconsideration pursuant to paragraph 81.27(1)(b) of the Act.*[8]

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3. Appeal No. AP-90-117, March 2, 1992.
4. *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; and *Hyalin International (1986) Inc. v. The Minister of National Revenue*, Appeal No. AP-89-013, March 10, 1992.
5. Canadian International Trade Tribunal, Appeal No. AP-91-256, December 1, 1992.
6. *Ibid.* at 2.
7. Values for Tax, Department of National Revenue, Excise, April 1, 1973.
8. *Supra*, note 5 at 3.

The Tribunal, nevertheless, recognized the limit of its jurisdiction when dealing with such issues. The Tribunal hence concluded that the situation that it had at hand was

> *different from a case where the appellant would request the Tribunal to change the applicable standard enunciated in such policy which, obviously, the Tribunal would not have jurisdiction to undertake [See Brigham Pipes Limited v. The Minister of National Revenue, Canadian International Trade Tribunal, Appeal No. AP-91-078, July 6, 1992].*[9]

The Tribunal finds that the appellant's case falls within this last category of appeals, as the appellant has asked the Tribunal to change the applicable standard enunciated in the policy. The appellant, indeed, admitted that it had found that the method set forth in Memorandum ET 201 had not produced an accurate statement of cost or duty-paid value and, hence, felt that, as Memorandum ET 201 was not regulatory, it was entitled to follow guidelines acceptable to Revenue Canada. There is no doubt that, as stated in the Tribunal's decisions in *Brandon Forest* and *Brigham Pipes*, in an appeal from an assessment under the Act, the Tribunal lacks jurisdiction to examine a taxpayer's practice of changing the applicable method of calculation set forth by Revenue Canada in an Excise memorandum that grants an administrative concession or that makes it easier for the taxpayer to calculate its sales tax liability.

That being said, the appellant also alleged that the assessment was incorrect, arguing that it was based on the value set forth in Memorandum ET 201 rather than on the language of the Act. It is clear that an assessment must be based on the Act, as provided in subsection 81.1(1) which reads as follows:

> *The Minister may, in respect of any matter, assess a person for any tax, penalty, interest or other sum payable by that person under this Act and may, notwithstanding any previous assessment covering, in whole or in part, the same matter, make such additional assessments as the circumstances require.*
>
> (Emphasis added)

In this case, however, the appellant failed to prove the facts that could have supported its allegations. In *A.S. 4 Steel Industries Ltd. v. The Minister of National Revenue*,[10] the Tribunal referred to the Supreme Court of Canada decision in *Roderick W. S. Johnston v. The Minister of National Revenue*[11] in order to explain the need for an appellant to prove the facts on which it intends to rely:

> *In the Johnston case, the Supreme Court had to deal with an appeal under the Income War Tax Act [R.S.C., 1927, c. 97], a procedure very similar to the appeal procedure governing this case. In determining whether the appellant had the onus to demonstrate that the facts on which the assessment was based were wrong, the Court stated:*
>
> > *Notwithstanding that it is spoken of in section 63 (2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged.*

9. *Supra*, note 5 at 3.
10. Canadian International Trade Tribunal, Appeal No. AP-89-132, June 11, 1992.
11. [1948] S.C.R. 486.

> *Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.*
>
> *(Emphasis added)*[12]

The onus, thus, was on the appellant to demonstrate that the assessment was incorrectly based upon a value not provided for in the Act. In this case, however, mere allegations are insufficient to contradict an assessment that must be deemed to have been based upon the legislation until evidence to the contrary is presented to the Tribunal.

In light of the foregoing, the appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member

12. *Supra*, note 10 at 2-3.