CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 19, 1993

Appeal No. AP-91-270

IN THE MATTER OF an appeal heard on October 22, 1992, 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 December 23, 1991, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

EMPIRE HOMES LTD. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-91-270

EMPIRE HOMES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act from a decision of the Minister of National Revenue dated December 23, 1991. The issue is whether the respondent's assessment of the appellant for outstanding taxes in the amount of $20,472.96, inclusive of interest and penalty, for the period from March 1, 1987, to August 31, 1990, was correct. If any or all of the assessment is found to be correct, it must be further determined whether the Tribunal has jurisdiction to relieve the appellant from payment of any and all outstanding taxes, interest and penalty accrued as a result of alleged misinformation provided to the appellant by representatives of the Department of National Revenue.

HELD: *The appeal is dismissed. The appellant did not satisfy its burden of proving that the assessment was incorrect, having regard to the Excise Tax Act, and cannot be relieved of its federal sales tax liability by reason of misinformation from representatives of the Department of National Revenue.*

Place of Hearing:	*Edmonton, Alberta*
Date of Hearing:	*October 22, 1992*
Date of Decision:	*March 19, 1993*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Sidney A. Fraleigh, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Dwight Kuhn, 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-91-270

EMPIRE HOMES LTD. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
SIDNEY A. FRALEIGH, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

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) dated December 23, 1991. The issue is whether the respondent's assessment of the appellant for outstanding taxes in the amount of $20,472.96, inclusive of interest and penalty, for the period from March 1, 1987, to August 31, 1990, was correct. If any or all of the assessment is found to be correct, it must be further determined whether the Tribunal has jurisdiction to relieve the appellant from payment of any and all outstanding taxes, interest and penalty accrued as a result of alleged misinformation provided to the appellant by representatives of the Department of National Revenue (Revenue Canada).

The appellant is a licensed manufacturer of modular homes and, as such, was entitled to purchase goods on a federal sales tax (FST) excluded basis. However, several of the appellant's suppliers refused to sell to it on an FST-excluded basis. As a result, the appellant purchased goods from those suppliers on an FST-included basis and recovered the FST paid by taking internal deductions at the time that it made its own FST returns, based on its alleged entitlement to a refund of the FST paid.

Mr. Dwight Kuhn, who appeared on behalf of the appellant, submitted that, on December 11, 1985, prior to the audit which gave rise to this appeal, he met with Mr. S. Virani, an auditor with Revenue Canada, to review the appellant's situation. Mr. Virani was aware that the appellant was not able to purchase all supplies on a FST-excluded basis and assisted Mr. Kuhn in calculating the appellant's FST liability, which involved the calculation of the internal deduction taken by the appellant. The internal deduction was calculated based upon the wholesale purchase price less 25 percent, the result of which was then multiplied by the applicable tax factor. Mr. Kuhn referred to the appellant's reply to the respondent's brief and, more particularly, to the attached copy of Excise Memorandum ET 313[2] (Memorandum ET 313) and to the adding machine tape, which both had Mr. Virani's printing on it, as evidence that Mr. Virani provided the appellant with, and approved, its method for calculating the internal deduction.

During the period from 1985 to 1990, the appellant continued to purchase goods on an FST-included basis and to take internal deductions by discounting the wholesale purchase price by 25 percent and multiplying the amount by the applicable tax factor.

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1. R.S.C. 1985, c. E-15.
2. Refunds, Department of National Revenue, Customs and Excise, December 1, 1975, amended November 18, 1988.

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Mr. Hanif Amlani, who conducted the audit which gave rise to this appeal, appeared and gave evidence on behalf of the respondent. He referred to paragraph 17 of Excise Memorandum ET 105[3] (Memorandum ET 105) which provides that a licensed manufacturer that may purchase goods on an FST-exempt basis is not permitted to take internal deductions for FST paid to suppliers. On that basis, he determined that, although the appellant had been taking internal deductions, it was not entitled to do so since it was a licensed manufacturer exempt from the payment of FST. However, since the suppliers that were the eligible refund claimants had not filed any refund claims, and in order to eliminate the paper burden and the necessity of the appellant going back to its suppliers for a refund, he decided to allow the appellant to take internal deductions, but not as calculated previously.

Mr. Amlani put the appellant in the same position as that of its suppliers, if they had claimed a refund, and allowed it to deduct the amount that the suppliers would have been allowed to deduct in lieu of claiming a refund. Since he did not know the purchase price paid by the suppliers, he determined that he could not apply the formula previously used, which is based upon the purchase price. He therefore calculated the internal deductions based upon the suppliers' selling price in accordance with the formula under paragraph 11 of Memorandum ET 313,[4] which is the selling price less 50 percent, the result of which is multiplied by the applicable tax factor. Mr. Amlani stated that the alternative would have been to disallow the internal deductions completely.

The appellant argued that the use of the selling price formula by Mr. Amlani was incorrect. Since it had purchased the supplies from wholesalers and jobbers, it should only have had to deduct 25 percent before applying the tax factor to determine the amount available for internal deductions. In support of this argument, the appellant relied on the fact that Mr. Virani showed it how to complete the July 1986 return and allowed an internal deduction by using the wholesale purchase price less 25 percent, as provided for under the previous paragraph 8[5] of Memorandum ET 313. Further, the appellant argued that the wholesale purchase price formula under paragraph 8 of Memorandum ET 313 was applicable because it bought its supplies from wholesalers, not retailers. The appellant contended that it had always been allowed to take internal deductions.

The respondent argued that the onus was on the appellant to prove that the respondent's assessment was incorrect, that the appellant was to establish clearly that it was entitled to a different tax treatment than that proposed in the assessment and, finally, that the appellant could not rely on alleged misinformation given by the respondent's servants or agents to avoid its tax liability. It was the respondent's position that the appellant did not discharge this onus and did not present the requisite information to support its claim that the assessment was incorrect.

The burden of proof that an assessment under the Act is incorrect rests with the taxpayer, as was established in the Supreme Court decision, *Roderick W. S. Johnston v. The Minister of National Revenue*.[6] Therefore, unless the appellant is able to establish, through its

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3. Deductions, Department of National Revenue, Customs and Excise, November 29, 1988. Previously paragraph 13 in Memorandum ET 105 dated August 1, 1978.
4. Paragraph 11 became paragraph 31 in Memorandum ET 313 dated November 18, 1988.
5. Paragraph 8 became paragraph 28 in Memorandum ET 313 dated November 18, 1988.
6. [1948] S.C.R. 486.

evidence, that the allegations of errors in the assessment have substance in the Act, the Tribunal has no grounds for allowing this appeal.

Having examined all the evidence and considered the arguments of both parties, the Tribunal concludes that the appeal must be dismissed because the appellant provided neither evidence nor argument that would allow the Tribunal to conclude that the assessment was incorrect and, as a result, the appellant did not meet the burden of proof as required under the law.

The Tribunal observes that, even if Mr. Virani's advice or direction to the appellant was wrong, Canadian jurisprudence makes it clear that the argument of "estoppel" does not apply against the Crown when the representations are inconsistent with statutory provisions. In *Joseph Granger v. Employment and Immigration Commission*,[7] Lacombe J. stated:

> *In Canadian tax law, the courts have consistently held that the Crown is not bound by the representations made and interpretations given to taxpayers by authorized representatives of the Department, if such representations and interpretations are contrary to clear and peremptory provisions of the law.*[8]

While the Tribunal has considerable sympathy for the appellant under the circumstances in this case, it is bound to apply the law. It was the appellant's responsibility to conduct its business in compliance with the provisions of the Act, regardless of the fact that it may have received misleading or incorrect information or direction from Mr. Virani. The Tribunal further observes that the representations of Mr. Virani were made in respect of a period of time not taken into account in the assessment which gave rise to this appeal.

Accordingly, the Tribunal confirms the original assessment and the decision of the Minister, and dismisses the appeal.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Desmond Hallissey
Desmond Hallissey
Member

7. [1986] 3 F.C. 70 (F.C.A.); affirmed [1989] 1 S.C.R. 141.
8. *Ibid*. at 86.