CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, June 11, 1993

Appeal No. AP-92-077

IN THE MATTER OF an appeal heard on January 8, 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 June 30, 1992, relating to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

GLENAN (WHOLESALE) DISTRIBUTORS LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

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

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-077

GLENAN (WHOLESALE) DISTRIBUTORS LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The sole issue before the Tribunal is whether the appellant was authorized to apply a tax factor of 6.29 percent, having used the blanket discount method provided in Excise Memorandum ET 201 to calculate its sales tax liability as a wholesaler under the Excise Tax Act.

HELD: *The appeal is dismissed. Not only did the appellant change the formula that it used to determine the appropriate tax factor to be applied, but it also used an erroneous tax rate. In this regard, the Tribunal agrees with counsel for the respondent that the appellant should have ensured that its formula was derived from departmental guidelines or that it should have used the direct costing method provided in the Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*January 8, 1993*
Date of Decision:	*June 11, 1993*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *W. Roy Hines, Member* *Charles A. Gracey, Member*
Counsel for the Tribunal:	*Gilles B. Legault*
Clerk of the Tribunal:	*Dyna Côté*
Appearances:	*Jack A. Fraser, for the appellant* *Wayne D. Garnons-Williams, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-077

GLENAN (WHOLESALE) DISTRIBUTORS LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
W. ROY HINES, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal from an assessment under section 81.19 of the *Excise Tax Act*[1] (the Act).

On July 3, 1991, the appellant was assessed in the amount of $41,884.16. On September 24, 1991, the appellant filed a notice of objection which was allowed in part. On June 30, 1992, in order to reflect the date on which the company, Glenan Distributors Ltd., changed ownership, the respondent issued a decision that varied the assessment with respect to the period of assessment.

The sole issue before the Tribunal is whether the appellant was authorized to apply a tax factor of 6.29 percent, having used the blanket discount method provided in Excise Memorandum ET 201[2] (Memorandum ET 201) to calculate its sales tax liability as a wholesaler under the Act.

At the hearing, Mr. Jack Anthony Fraser appeared as a witness for the appellant. Mr. Fraser informed the Tribunal that he had purchased Glenan Distributors Ltd. on May 31, 1989. He then called the Department of National Revenue (Revenue Canada) to get information as to the need to obtain a new licence because of the change of ownership. At the same time, he was informed that, in June, an auditor would visit his premises to audit and close the books of the previous owner. However, according to Mr. Fraser, he did not receive any information from Revenue Canada on how to deal with the federal sales tax. According to the situation described by Mr. Fraser, the appellant had to build its own tax factor for calculating its sales tax liability under the Act.

Mr. A.K. Sirivar, who audited the appellant's business, appeared as a witness for the respondent. Mr. Sirivar explained that Memorandum ET 201 is an administrative arrangement that allows the use of a discount factor for purposes of helping wholesalers that would otherwise find it impractical to determine their tax liability on the cost of the goods that they resell. The tax factor allows a taxpayer to determine the cost of a particular product and to remit sales tax based on the total sales for the appropriate month. Two methods of remitting

1. R.S.C. 1985, c. E-15.
2. Licensed Wholesalers, Department of National Revenue, Customs and Excise, December 1, 1975, revised April 19, 1985.

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sales tax are provided: the direct costing method and the blanket discount method. The direct costing method refers to the actual cost of the product that has been resold. The blanket discount method, which is at issue, allows the use of a discount factor that will be applied either to the sales, so as to provide a value for tax, or to the tax rate, so as to constitute a discounted tax rate. The Tribunal notes, for ease of understanding, that, in order to use the blanket discount method, Memorandum ET 201 requires the appellant to prepare a reconstructed trading statement covering its entire wholesale business for each of the two preceding fiscal years. The reconstructed trading statement provides a cost value that removes the gross margin on the goods sold.

That being said, the crux of Mr. Sirivar's testimony with respect to the facts of this case is that the appellant misconstrued and, therefore, miscalculated the tax factor that it applied to its sales. The witness, indeed, explained that the formula used by the appellant tends to determine the sale price, while the blanket discount method is designed to determine the cost of the goods sold by a wholesaler. Mr. Sirivar also confirmed that the appellant did not use the tax rate of 13.5 percent that was in force at that time; rather, it used a tax rate of 12 percent.

Mr. Fraser, who represented the appellant at the hearing, stated that he was not aware of the proper method to use for purposes of calculating the appellant's sales tax liability under the Act. Mr. Fraser argued that, until the appellant received a copy of Memorandum ET 201 from the auditor, he had not obtained assistance nor understanding from Revenue Canada officials.

Counsel for the respondent is of the view that the appellant should have ensured that its formula was in compliance with Memorandum ET 201. In his brief, counsel for the respondent stated that, as a result of the appellant's failure to comply with the method set forth in Memorandum ET 201 "[t]he auditor applied the method in ET 201 to establish a blanket discount formula which he applied to the Appellant's taxable sales and found that the Appellant had not remitted all the sales taxes for which it was liable in the period covered." Counsel also argued that the Tribunal cannot grant equitable relief and is bound to apply the law. Moreover, the Crown is not bound by representations made by its officers.

As stated in *Electra Supply*,[3] the Tribunal lacks jurisdiction to examine a taxpayer's practice to modify the standard applicable in an administrative policy such as Memorandum ET 201. Indeed, in *Electra Supply*, the Tribunal reviewed its latest decisions outlining the scope of its jurisdiction with respect to matters arising from the application of administrative policies, and then concluded that:

> *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.*[4]

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3. *Electra Supply Inc. v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-92-042, May 4, 1993.
4. *Ibid.* at 3.

In the present case, not only did the appellant change the formula used to determine the appropriate tax factor to be applied, but it also used an erroneous tax rate. In this regard, the Tribunal agrees with counsel for the respondent who, at paragraph 18 of his brief, states that the appellant "should have ensured that its formula was derived according to Departmental guidelines, failing which it should have used the direct costing method."

For the foregoing reasons, the appeal is dismissed.

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

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member