

Ottawa, Wednesday, October 6, 1993

Appeal No. AP-92-187

IN THE MATTER OF an appeal heard on March 23, 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 September 2, 1992, with respect to
a notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

**395266 ONTARIO LIMITED
O/A FOCUS PHOTOGRAPHIC SERVICES**

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

W. Roy Hines

W. Roy Hines
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-187

**395266 ONTARIO LIMITED
O/A FOCUS PHOTOGRAPHIC SERVICES**

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in this appeal is whether the appellant was properly assessed.

***HELD:** The appeal is dismissed. The appellant has failed to discharge its burden of proof. Claims that there were errors or shortcomings in an audit are not sufficient. The essential step is to detail those errors or shortcomings.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: March 23, 1993

Date of Decision: October 6, 1993

*Tribunal Members: Charles A. Gracey, Presiding Member
Kathleen E. Macmillan, Member
W. Roy Hines, Member*

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Janet Rumball

*Appearances: Don Burley, for the appellant
Linda J. Wall, for the respondent*

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**395266 ONTARIO LIMITED
O/A FOCUS PHOTOGRAPHIC SERVICES**

Appellant

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TRIBUNAL: CHARLES A. GRACEY, Presiding Member
KATHLEEN E. MACMILLAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

This is an appeal from an assessment under section 81.19 of the *Excise Tax Act*¹ (the Act). The appellant was assessed a net amount of \$32,091.66 for unpaid federal sales tax (FST), interest and penalty. The period covered by the assessment is from October 1, 1987, to December 31, 1990.

Licensed as a photofinisher since 1985, the appellant is a corporation carrying on the business of photofinishing, commercial photography, portrait and related activities. It operates a studio and a retail store in which it sells film and photographic equipment. In April 1991, an audit was conducted by the Department of National Revenue (Revenue Canada) on the appellant's premises. The appellant's president was then informed that FST should have been remitted on commercial photography. The notice of assessment was issued on September 25, 1991.

The issue in this appeal is whether the appellant was properly assessed.

Mr. Peter Wyslouzil, who as President of the appellant company oversees its day-to-day operations, served as the appellant's witness. During his testimony, Mr. Wyslouzil gave some details about the appellant's photographic operations and details concerning the audit that led to the assessment. He also acknowledged that he had not known that he had to pay the FST in relation to commercial photography. He indicated that most of the medium and large commercial photography format done by the appellant was processed, on a tax-paid basis, by outside laboratories and that all materials and equipment used in the commercial photographic operations were bought FST-included. Finally, Mr. Wyslouzil indicated to the Tribunal that he manufactured various items falling under the exemption provided by section 4 of Part XIII of Schedule III to the Act.

Mr. William Anderson, an auditor with Revenue Canada, appeared as a witness for the respondent. Mr. Anderson testified that, during his first visit to the appellant's premises in April 1991, he ascertained that the appellant had commercial photography operations. On a second visit, he tried to segregate the sales in order to remove non-taxable sales, such as

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

portrait photography. Mr. Anderson also indicated to the Tribunal that he had left it to the licensee to show him whether there was anything else in his sales breakdown that would not be taxable. Told that such information would be forthcoming, Mr. Anderson postponed the finalization of the audit until the end of September 1991. However, he received no further information either from the appellant's counsel at that time or from Mr. Wyslouzil. Mr. Anderson told the Tribunal that his objective was to make as fair an assessment as possible, i.e. to give the appellant any credits that might possibly have been overlooked. For instance, Mr. Anderson reduced the amount of sales treated as commercial photography to provide an allowance for any materials bought on an FST-paid basis.

In essence, the appellant's representative argued that the various credits and allowances provided by the auditor were too small. In this connection, he said that insufficient allowance had been made for the unconditionally tax-exempt sales. He also contended that goods on which the appellant was assessed fell within the *Small Manufacturers or Producers Exemption Regulations*² (the Regulations). Having underlined that the FST is a single incidence tax, he pointed out the work done by outside laboratories. He added that the Act should have been changed when section 47 of that Act was enacted in order to make clear that commercial photography is subject to the FST.

On the last point, counsel for the respondent stated that section 47 was inserted in the Act to provide greater certainty that photofinishing amounts to manufacturing. She submitted that commercial photography, i.e. the taking, developing and making of the prints, is clearly manufacturing or production. In this respect, she drew the Tribunal's attention to the Regulations, notably the specific exemption provided for portrait photographers. She contended that, if such photography had not been considered the manufacture or production of goods, it would not have been necessary for Parliament to specifically exempt portrait photographers from payment of the FST.

Counsel for the respondent further contended that the burden was on the appellant to establish that the assessment was incorrect or that it was entitled to an exemption. In her view, the appellant had several opportunities to provide this evidence and, yet, it failed to do so. Indeed, she noted that the appellant did not seize the opportunity to bring to the hearing some evidence that the assessment was wrong.

Having reviewed the evidence and having carefully considered the arguments, the Tribunal is of the view that this appeal should be dismissed. The burden is on the appellant to show, through evidence, that the assessment is incorrect. Claims that there were errors or shortcomings in an audit are not sufficient. The essential step is to detail those errors or shortcomings. In the present case, the appellant has failed to discharge its burden of proof. The Tribunal agrees with counsel for the respondent that no specifics were provided by the appellant to substantiate the impropriety of the assessment. The appellant could have brought information to the hearing or adduced evidence relating to Mr. Anderson's examination of the invoices, but did not do so.

2. SOR/88-637, December 7, 1988, Canada Gazette Part II, Vol. 122, No. 26 at 5564.

Accordingly, the appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

W. Roy Hines
W. Roy Hines
Member