



Ottawa, Monday, April 18, 1994

Appeal No. AP-92-363

IN THE MATTER OF an appeal heard on  
December 10, 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 December 11, 1992, with respect to a  
notice of objection served under section 81.15 of the *Excise  
Tax Act*.

**BETWEEN**

**ÉBÉNISTERIE DURAMEN INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Arthur B. Trudeau  
Arthur B. Trudeau  
Presiding Member

W. Roy Hines  
W. Roy Hines  
Member

Desmond Hallissey  
Desmond Hallissey  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-363**

**ÉBÉNISTERIE DURAMEN INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act of an assessment of the Minister of National Revenue in which the appellant, Ébénisterie Duramen Inc., was required to pay federal sales tax for the period from 1985 to 1990. The issue in this appeal is whether the assessment is founded in fact and in law and, more specifically, whether the sample of invoices used by the respondent's official during the audit was representative of the appellant's activities.*

**HELD:** *The appeal is allowed. After having examined the evidence and carefully considered the arguments, the Tribunal finds that the appeal should be allowed. The appellant had the onus to prove, through evidence, that the assessment was incorrect. The Tribunal is of the opinion that the appellant discharged its burden of proof. It very clearly showed, by doing the calculations itself from the company's actual sales, that the assessment, as prepared by the Department of National Revenue, did not represent its actual activities during the years from 1987 to 1990. The matter is referred back to the Minister of National Revenue for reconsideration in order to calculate the amount of federal sales tax owing on the basis of the appellant's actual sales.*

*Place of Hearing: Ottawa, Ontario  
Date of Hearing: December 10, 1993  
Date of Decision: April 18, 1994*

*Tribunal Members: Arthur B. Trudeau, Presiding Member  
W. Roy Hines, Member  
Desmond Hallissey, Member*

*Counsel for the Tribunal: Joël J. Robichaud*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Jean-Paul Auger, for the appellant  
Stéphane Lilkoff, for the respondent*

Appeal No. AP-92-363

**ÉBÉNISTERIE DURAMEN INC.**

**Appellant**

and

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member  
W. ROY HINES, Member  
DESMOND HALLISSEY, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of an assessment of the Minister of National Revenue (the Minister) in which the appellant, Ébénisterie Duramen Inc., was required to pay federal sales tax (FST) for the period from 1985 to 1990. The appellant objected to the assessment. In a decision dated December 11, 1992, the respondent rejected the appellant's objection. The issue in this appeal is whether the assessment is founded in fact and in law and, more specifically, whether the sample of invoices used by the respondent's official during the audit was representative of the appellant's activities.

The appellant is a company specializing in architectural carpentry and in the manufacture of commercial furniture. Mr. Jean-Paul Auger, a certified general accountant and Director, Administration and Finance, for Ébénisterie Duramen Inc., represented the appellant and testified on its behalf. Mr. Auger explained that the number of invoices used by the representative of the Department of National Revenue (Revenue Canada) as a sample for calculating the amount of FST to be paid represented only 2/10 of 1 percent of the number of invoices issued annually by the company. He submitted, as evidence, a summary of the appellant's actual sales for the years from 1987 to 1990 inclusive, which he himself had prepared. From these amounts, he deducted 10 percent for installation costs and 6.5 percent for transportation costs in accordance with the Act. From these figures, he calculated the amount of FST owing. By comparing these amounts to those which the appellant had in fact paid to Revenue Canada, he concluded that the appellant owed an amount that was less than that being requested by the respondent. Mr. Auger explained that he did not take into consideration the years 1985 and 1986 because the amount of FST owing for this period was minimal, and he did not, therefore, take the time to redo the calculations.

Counsel for the respondent called as a witness Mr. Ghislain Bourbeau, a certified general accountant, Appeals Service, Quebec District, Revenue Canada. Mr. Bourbeau was responsible for preparing the notice of decision. He described the method used to calculate the amount of FST owing. He explained that the amount was calculated using a sample of invoices provided by the appellant. From this sample, the Revenue Canada auditor made a random selection of invoices. From the amount of the invoices, he deducted 10 percent for installation costs and 6.5 percent for transportation costs, as Mr. Auger had done and in accordance with the Act. For 1990, the auditor deducted the actual installation costs rather than an amount representing 10 percent. Mr. Bourbeau explained that, by doing a mathematical operation, the auditor determined the amount of FST to be paid for that year. In Mr. Bourbeau's opinion, the sample of invoices was indeed representative of the appellant's activities during the period at issue.

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

The invoices were selected at random, and they represented all of the appellant's activities. He explained that calculating the FST owing on the basis of the company's actual sales was difficult for Revenue Canada employees, which was why the respondent chose a method of calculation using a sample of invoices.

Mr. Auger argued that the assessment prepared by Revenue Canada on the basis of a sample of invoices was not representative of the appellant's activities. Having determined, by using the company's actual sales, that the FST owing was significantly less than the amount calculated by Revenue Canada and given that, for 1990, the appellant had only deducted 10 percent for installation costs rather than the actual costs, which would have been more advantageous for it, Mr. Auger requested that the file be closed and that the Tribunal find that the appellant is not liable for FST for the years from 1987 to 1990 inclusive.

Counsel for the respondent argued that the assessment was founded in fact and in law since the amount of FST owing was calculated by the Revenue Canada auditor in accordance with generally accepted accounting principles. He commented that the sample of invoices had been provided by the appellant. Therefore, he argued that the sample was representative of all of the appellant's activities. Referring to the decision in *Roderick W.S. Johnston v. The Minister of National Revenue*,<sup>2</sup> counsel for the respondent claimed that the appellant was required to discharge the burden of proof, which it had not done. He argued that the appellant had not provided any evidence to refute the facts on which the calculation of FST had been based.

The only issue in this appeal is whether the assessment is founded in fact and in law. After having examined the evidence and carefully considered the arguments, the Tribunal finds that the appeal should be allowed. The appellant had the onus to prove, through evidence, that the assessment was incorrect. The Tribunal is of the opinion that the appellant discharged its burden of proof. It very clearly showed, by doing the calculations itself from the company's actual sales, that the assessment, as prepared by Revenue Canada, did not represent its actual activities during the years from 1987 to 1990.

Therefore, the appeal is allowed. The matter is referred back to the Minister for reconsideration in order to calculate the amount of FST owing on the basis of the appellant's actual sales.

Arthur B. Trudeau

Arthur B. Trudeau  
Presiding Member

W. Roy Hines

W. Roy Hines  
Member

Desmond Hallissey

Desmond Hallissey  
Member

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2. [1948] S.C.R. 486.