



Ottawa, Thursday, January 13, 1994

Appeal No. AP-92-353

IN THE MATTER of an appeal heard on August 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 February 5, 1993, with respect to a  
notice of objection served under section 81.15 of the  
*Excise Tax Act*.

**BETWEEN**

**LES INDUSTRIES FERMCO LTÉE**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Lise Bergeron

Lise Bergeron  
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan  
Member

Desmond Hallissey

Desmond Hallissey  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-353**

**LES INDUSTRIES FERMCO LTÉE**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The appellant sold framing, used in the construction of houses, to several Indian bands. The leaders of these bands and a number of government officials told the appellant that, under the Indian Act, Indians were not required to pay federal taxes under the Excise Tax Act. The appellant, therefore, did not include the amount of federal sales tax (FST) in its sale price to the Indians. The issue in this appeal is whether the appellant must remit the amount of FST, including interest, to the respondent. The Tribunal must decide whether the sales made by the appellant to the Indians are FST-exempt.*

**HELD:** *The appeal is dismissed. The Tribunal finds that, under section 50 of the Excise Tax Act, the manufacturer must pay FST on the sales to the Indians. Because this is an indirect tax, the Indians are not the real taxpayers and are not, therefore, exempt from the payment of FST.*

*Place of Hearing:* Ottawa, Ontario

*Date of Hearing:* August 10, 1993

*Date of Decision:* January 13, 1994

*Tribunal Members:* Lise Bergeron, Presiding Member  
Kathleen E. Macmillan, Member  
Desmond Hallissey, Member

*Counsel for the Tribunal:* Joël J. Robichaud

*Clerk of the Tribunal:* Anne Jamieson

*Appearances:* Jocelyn Trépanier, for the appellant  
Stéphane Lilkoff, for the respondent

**Appeal No. AP-92-353**

**LES INDUSTRIES FERMCO LTÉE**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member  
KATHLEEN E. MACMILLAN, 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 requiring the appellant, Les Industries Fermco Ltée, to pay federal sales tax (FST) on certain sales to Indians. The respondent informed the appellant that it was required to pay FST, plus interest. The appellant objected to the respondent's assessment. In a decision dated February 5, 1993, the respondent disallowed the appellant's objection. Les Industries Fermco Ltée appealed from this decision. The issue in this appeal is whether the appellant must remit the amount of FST, including interest, to the respondent. To this end, the Tribunal must determine whether the sales made by the appellant to the Indians are FST-exempt.

The appellant was represented by its President, Mr. Jocelyn Trépanier. Mrs. Céline Trépanier, Vice-President of Marketing, testified on behalf of the appellant. The appellant's representative, in particular, explained his company's objectives, the manner in which its business is conducted and the nature of its relations with the Indians.

The appellant is a manufacturer of components for the commercial and home-building trades, as well as for prefabricated buildings. Between 1988 and 1990, it supplied framing used in the construction of houses to the following band councils: the Band Councils of the Attikamek Nation of Manawan, Obedjewan and Neymontachie, and the Band Council of the Wendat Huron Nation of the Village of Wendake Hurons. Their leaders explained to the appellant that they were not required to pay federal or provincial taxes under the provisions of the *Indian Act*.<sup>2</sup>

Mrs. Trépanier verified this information with the Minister of Indian Affairs and Northern Development and the Minister of National Revenue. These sources confirmed that sales to Indians were indeed FST-exempt. The appellant, therefore, did not include the amount of FST in the sale price of the goods sold to the Indians.

The appellant's representative claimed that he had acted in good faith by taking all reasonable action, that is, all action that a normal business person would take under similar circumstances. He argued that he relied on section 87 of the *Indian Act* that provides that

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

2. R.S.C. 1985, c. I-5.

Indians do not pay the tax. Consequently, he added that the amount of FST should not be included in the sale price of the goods sold to the Indians and that the appellant should not be held liable, under any circumstances, for remitting the amount of tax to the respondent.

Counsel for the respondent did not present any evidence. He pointed out that he was not challenging the good faith of the appellant or its officers. He stated that the appellant was required to pay FST under section 50 of the Act. He explained that, under this section, the manufacturer, and not the purchaser, is deemed to be the legal payer of the tax. Relying on two recent decisions of the Supreme Court of Canada, *Williams v. Canada*<sup>3</sup> and *Mitchell v. Peguis Indian Band*,<sup>4</sup> counsel argued that the Indians were only exempt from paying taxes on personal property located on the reserve and that, by acquiring goods outside the reserve, they were subject to the same conditions as all other Canadians. He also referred the Tribunal to *Saugeen Indian Band v. Canada (C.A.)*.<sup>5</sup>

Relying on a recent decision of the Tribunal, *J.S. Bal v. The Minister of National Revenue*,<sup>6</sup> counsel for the respondent stated that the respondent could not be held responsible for false representations made to the appellant by the Indians, the appellant's auditor or officials of the Department of Indian Affairs and Northern Development or the Department of National Revenue and that this argument is not founded in law. He argued that the Tribunal is required to make its rulings based on the law and not on principles of equity.

The Tribunal finds that the FST must be paid by the manufacturer under section 50 of the Act.

The burden or incidence of the tax is normally passed on to the consumer by the manufacturer by including the amount of the tax in the sale price.<sup>7</sup> The consumer, under such circumstances, is not the real taxpayer. The consumer is subject to the payment of an indirect tax. The appellant's representative suggested that, in this instance, it was not required to include the amount of FST in the sale price of the goods sold to the Indians because they are exempt from paying the tax or any other tax under section 87 of the *Indian Act*.

In the *Saugeen Indian Band* case, the issue was whether section 87 of the *Indian Act* should be interpreted so as to allow the appellant to claim a refund of FST paid on certain goods purchased. The Federal Court ruled that the appellant was not entitled to the refund. During his analysis, MacGuigan J. referred to the decision of Reed J. of the Trial Division.<sup>8</sup> Reed J. concluded that "the words of section 87 stating that no Indian band 'is subject to taxation in respect of ...', must be read as meaning that such bands are not to be taxed as taxpayers," and that "[h]ad it been intended that the Indians and Indian bands were to be exempt from all incidence or burden of indirect taxes, as well as from direct liability for taxes, surely section 87 would have been more specifically worded to so provide."<sup>9</sup>

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3. [1992] 1 S.C.R. 877.

4. [1990] 2 S.C.R. 85.

5. [1990] 1 F.C. 403.

6. Appeal No. AP-91-171, September 23, 1992.

7. *Supra*, note 5 at 409.

8. [1989] 3 F.C. 186 at 203.

9. *Supra*, note 5 at 407.

MacGuigan J. reached conclusions similar to those of Reed J.<sup>10</sup> Since the Indians are not the real taxpayers in this instance, they are not exempt from the payment of FST under section 87 of the *Indian Act*. Consequently, the appellant is not relieved of its obligation to remit the amount of FST to the respondent.

This interpretation of section 87 of the *Indian Act* is in keeping with that given in the two recent decisions of the Supreme Court of Canada mentioned earlier. In the *Mitchell* case, La Forest J. stated that "Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians."<sup>11</sup>

This opinion was confirmed by Gonthier J. in the *Williams* case.<sup>12</sup> In that case, the Indians acquired goods from outside the lands reserved for their use. They were, therefore, subject to the same conditions as all other Canadians.

In the *J.S. Bal* case, the Tribunal stated that the "errors made by Revenue Canada officials do not excuse an individual from his tax liability" and that the "Tribunal sympathizes with the appellant's frustration over having to repay money which was mistakenly given to him. However, the Tribunal does not have the authority to refuse to apply the law."<sup>13</sup>

As in the *J.S. Bal* case, the Tribunal sympathizes with the frustration of the appellant that took all reasonable precautions, in its opinion, to try to comply with the Act. However, the Tribunal has no jurisdiction to refuse to apply the law. The appellant is, therefore, required to remit the amount of FST, including interest, to the respondent.

Accordingly, the appeal is dismissed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Desmond Hallissey  
Desmond Hallissey  
Member

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10. *Supra*, note 5 at 413.

11. *Supra*, note 4 at 131.

12. *Supra*, note 3 at 886.

13. *Supra*, note 6 at 3, in which the Tribunal referred to its decision in *Walbern Agri-Systems Ltd. v. The Minister of National Revenue*, Appeal No. 3000, December 21, 1989.