

Ottawa, Friday, March 11, 1994

Appeal No. AP-93-239

IN THE MATTER OF an appeal heard on February 16, 1994,
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 August 12, 1993, with respect to a
notice of objection served under section 81.15 of the
Excise Tax Act.

BETWEEN

LES ATELIERS YVES BÉRUBÉ INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Michèle Blouin

Michèle Blouin
Presiding Member

Desmond Hallissey

Desmond Hallissey
Member

Lise Bergeron

Lise Bergeron
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-239

LES ATELIERS YVES BÉRUBÉ INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant is a manufacturer of home furnishings and kitchen cabinets. It was assessed for sales made to three companies which the Minister of National Revenue deemed to be commercial users to which the established value, as provided in Circular ET 81, does not apply. There are three issues in this appeal. The Tribunal must first determine whether it has jurisdiction to rule on the applicability of Circular ET 81. If so, the Tribunal must determine whether companies which purchase goods to carry out construction and renovation contracts can be considered users within the meaning of subsection 9(4) of Circular ET 81. And lastly, if the appellant is liable for payment of the tax for which it was assessed, the Tribunal must determine whether it can grant the appellant relief from its fiscal obligation.

HELD: *Circular ET 81 lacks statutory or regulatory authority, as does Excise Memorandum ET 202, and, consequently, the Tribunal does not have jurisdiction to grant the relief being sought. Furthermore, the Tribunal does not have the authority to vacate the assessment for unpaid taxes, penalty and interest unless the appellant shows that the assessment was not founded in fact or in law. Lastly, it would be fruitless and misleading to hear the testimony of a witness for the appellant on matters on which the Tribunal does not have jurisdiction to rule. It would give the appellant the impression that it had a chance for success when the Tribunal is, in fact, unable to even rule on the relief being sought.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: February 16, 1994
Date of Decision: March 11, 1994

Tribunal Members: Michèle Blouin, Presiding Member
Desmond Hallissey, Member
Lise Bergeron, Member

Counsel for the Tribunal: Gilles B. Legault

Clerk of the Tribunal: Anne Jamieson

Appearances: Serge Mercier, for the appellant
Anick Pelletier, for the respondent

Appeal No. AP-93-239

LES ATELIERS YVES BÉRUBÉ INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
DESMOND HALLISSEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of an assessment of the Minister of National Revenue (the Minister) which was confirmed in a notice of decision dated August 12, 1993.

The appellant is a manufacturer of home furnishings and kitchen cabinets. It is a licensed manufacturer under the Act. On May 9, 1990, the appellant was assessed in the amount of \$13,866.46 for the period from October 1, 1986, to January 31, 1989. The amount includes unpaid taxes totalling \$10,055.54, due to the appellant incorrectly using the established value as provided in Excise Memorandum ET 202² (Memorandum ET 202) and, more specifically, in Circular ET 81³ which relates to the sale of furniture.

The evidence reveals that the assessment was based on the appellant's sales to three companies. The Minister considers these companies to be commercial users to which the established value provided in Circular ET 81 does not apply.

There are three issues in this appeal. The Tribunal must first determine whether it has jurisdiction to rule on the applicability of Circular ET 81. If so, the Tribunal must determine whether companies which purchase goods for the purpose of carrying out construction and renovation contracts can be considered users within the meaning of subsection 9(4) of Circular ET 81. And lastly, if the appellant is liable for payment of the tax for which it was assessed, the Tribunal must determine whether it can grant the appellant relief from its fiscal obligation on the grounds that its sales covered by the assessment were made to companies which have since declared bankruptcy and that the appellant would be unable to recover the amounts owing in tax.

At the outset of the hearing, the Tribunal asked counsel to deal with the issues of jurisdiction. Counsel for the appellant argued that Memorandum ET 202 and Circular ET 81 represent an administrative interpretation of the provisions of the Act and that, in *J. Camille Harel*

1. R.S.C. 1985, c. E-15.
2. Values for Tax, Department of National Revenue, Customs and Excise, December 1, 1975.
3. Furniture — Household, Office, Church, Lodgeroom, School and Theatre, Bases for Tax Computation, Department of National Revenue, Excise, June 17, 1964.

v. The Deputy Minister of Revenue of the Province of Quebec,⁴ the Supreme Court of Canada recognized the validity of such an interpretation. Moreover, counsel argued that the appellant was entitled to be heard on the facts before the Tribunal ruled on the merits of the case. Counsel for the respondent relied, for her part, on certain Tribunal decisions,⁵ in which, based on *Artec Design Inc. v. The Minister of National Revenue*,⁶ it was found that the Tribunal did not have jurisdiction to determine the applicability of Memorandum ET 202, which has no statutory or regulatory authority. She further argued that, as the Tribunal noted in *Esselte Pendaflex*, the Supreme Court of Canada ruled in the *Harel* case that the "policy could not be taken into consideration if it were contrary to the provisions of the Act."⁷

While it can hear an appeal of an assessment under the Act, the Tribunal agrees with the arguments of counsel for the respondent that it does not have jurisdiction to consider the applicability of Memorandum ET 202 and Circular ET 81. In *Esselte Pendaflex*, *Brigham Pipes* and *Artec*, to name just a few, the Tribunal found that it did not have the authority to have a method that is inconsistent with the Act or that has no statutory or regulatory authority take precedence over the statutorily prescribed basis on which tax is to be paid. In the present case, the appellant is asking the Tribunal to rule on the applicability of Circular ET 81, which lacks statutory or regulatory authority, as does Memorandum ET 202, and, consequently, the Tribunal does not have jurisdiction to grant the relief being sought.

It is also evident from the decision rendered by deGrandpré J. in the *Harel* case that an administrative interpretation should not be contrary to a clear legislative provision and, conversely, that such an interpretation is not necessary unless the provision is ambiguous. In this appeal, the administrative policy which makes provision for discounting the sale price under certain circumstances is contrary to subsection 50(1) of the Act which stipulates that tax is imposed on the sale price. In fact, the administrative policy is not an administrative interpretation, but an administrative concession that is inconsistent with the Act. As a result, the administrative concession cannot, in any way, be used to interpret the Act and, specifically, section 50 of the Act which the Tribunal must apply.

Given the Tribunal's decision on the first issue, there is not need to address the second issue. As for the third issue, which also involves the question of jurisdiction, the Tribunal, contrary to the arguments of counsel for the appellant, finds that it does not have the discretionary authority to vacate an assessment on the grounds cited by the appellant nor the authority to recommend to the Minister that the assessment be vacated on the grounds of equity. If the appellant feels that it has been given incorrect direction by the respondent and is now unable to collect the unpaid tax for which it is liable under the Act, there may be some recourse, but in another forum and not before the Tribunal. The Tribunal's only jurisdiction under the Act is to determine whether the assessment is properly founded in fact or in law. The Tribunal does not have jurisdiction to apply principles of equity, to force the Minister to apply discretionary guidelines nor to impose the payment of damages. Moreover, the Tribunal does not have the authority to vacate the payment of penalty and interest.

4. [1978] 1 S.C.R. 851.

5. *Esselte Pendaflex Canada Inc. v. The Minister of National Revenue*, Appeal No. AP-91-187, August 9, 1993, and *Brigham Pipes Limited v. The Minister of National Revenue*, Appeal No. AP-91-078, July 6, 1992.

6. Appeal No. AP-90-117, March 2, 1992.

7. *Supra*, note 4 at 858.

Finally, as for the argument of counsel for the appellant with respect to the appellant's right to be heard on the facts, and specifically the testimony of the appellant's secretary-treasurer on the application of Memorandum ET 202, as well as on the bankruptcy of the companies at issue, the Tribunal points out that, since it does not have jurisdiction to rule on these matters, it would be fruitless and misleading to hear testimony relating to them. It would give the appellant the impression that it had a chance for success when the Tribunal is, in fact, unable to even rule on the relief being sought.

For these reasons, the appeal is dismissed.

Michèle Blouin
Michèle Blouin
Presiding Member

Desmond Hallissey
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Member

Lise Bergeron
Lise Bergeron
Member