CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, August 10, 1994

Appeal No. AP-93-285

IN THE MATTER OF an appeal heard on April 12, 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 23, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

COLOR YOUR WORLD CORP. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

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

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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UNOFFICIAL SUMMARY

Appeal No. AP-93-285

COLOR YOUR WORLD CORP. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue dated March 12, 1992, which rejected an application for refund in the amount of $173,545 filed under section 68 of the Excise Tax Act. The appellant, a manufacturer of paint and related products, computed its federal sales tax liability for the sales at issue using the determined value method in accordance with Circular ET 135. Using this method, the appellant was authorized to remit federal sales tax on the basis of a confidential price list to retailers minus an all-inclusive discount of 30 percent, with federal sales tax calculated at the rate of 13.5 percent on the remainder. The appellant's representative claimed that the appellant paid federal sales tax in error since the sale price on which the discount of 30 percent was applied included the cost of transportation of the goods, although, under clause 46(c)(ii)(B) of the Excise Tax Act, the cost of transportation may be deducted from the sale price. Counsel for the respondent contended that the Tribunal has no jurisdiction to change an administrative policy of the Department of National Revenue nor to assess the appropriateness or fairness of that policy. The issue in this appeal is whether the Minister of National Revenue correctly determined that the appellant was not entitled to the refund for which it applied.

HELD: *The appeal is dismissed. In the Tribunal's view, the amount at issue was not paid in error since the appellant chose to use the determined value method authorized by the Department of National Revenue instead of calculating its federal sales tax liability in accordance with the method set out in the Excise Tax Act. The Tribunal does not have the jurisdiction to make a decision as to the appropriateness of the determined value method itself, which has been established by the Department of National Revenue as an administrative concession and as an alternative to paying federal sales tax in accordance with the provisions of the Excise Tax Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*April 12, 1994*
Date of Decision:	*August 10, 1994*
Tribunal Members:	*W. Roy Hines, Presiding Member* *Robert C. Coates, Q.C., Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Janet Rumball*
Parties:	*K.J. Bowden, for the appellant* *Anne M. Turley, for the respondent*

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-285

COLOR YOUR WORLD CORP. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: W. ROY HINES, Presiding Member
ROBERT C. COATES, Q.C., Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of a determination of the Minister of National Revenue (the Minister) dated March 12, 1992, which rejected an application for refund in the amount of $173,545 filed under section 68 of the Act. The issue in this appeal is whether the Minister correctly determined that the appellant was not entitled to the refund for which it applied.

The appeal proceeded by way of written submissions, under rule 25 of the *Canadian International Trade Tribunal Rules*,[2] on the basis of the Tribunal's record as supplemented by an agreed statement of facts and briefs submitted by the parties.

The agreed statement of facts states that the appellant is a manufacturer of paint and related products which sells virtually all of its products to its own retail stores or franchisees at the retail level. The appellant computed its federal sales tax (FST) liability for the sales at issue using the determined value method in accordance with Circular ET 135.[3] Using this method, the appellant was authorized to remit FST on the basis of a confidential price list to retailers minus an all-inclusive discount of 30 percent, with FST calculated at the rate of 13.5 percent on the remainder.

The appellant applied for a refund of FST allegedly paid in error during the period from October 15, 1989, to December 31, 1990. The appellant's representative submitted that the appellant paid FST in error since the sale price on which the discount of 30 percent was applied included the cost of delivery of the goods to the customer. The representative relied on the provisions of clause 46(*c*)(ii)(B) of the Act which provides that a taxpayer may exclude the cost of transportation when calculating the sale price of goods for the purpose of determining the FST payable under the Act. The representative submitted that the respondent should have taken into account the provisions of clause 46(*c*)(ii)(B) of the Act and, more particularly, the deduction of the transportation cost in applying the determined value method.

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1. R.S.C. 1985, c. E-15.
2. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.
3. Paint — Tax Computation, Department of National Revenue, Excise, June 14, 1968.

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The appellant's representative pointed out that the determined value method in Circular ET 135 was established prior to the coming into force of clause 46(*c*)(ii)(B) of the Act and, as a result, the determined value method does not take into account the transportation factor. However, the representative submitted that the transportation factor should be taken into account. The representative stated that, in *Kamloops School Board (District No. 24) (Re)*,[4] the Federal Court of Appeal found that the Minister should have taken into account a change in law when fixing a percentage discount for refund purposes. The representative argued that the facts of this appeal are identical to those of the *Kamloops* case, since the applicable law changed after the determined value discount in Circular ET 135 was fixed.

Counsel for the respondent made four points in her written submission. First, she submitted that, if the respondent is willing to accept a lesser amount in full settlement of the appellant's FST liability as a matter of administrative concession, the Tribunal has no jurisdiction to change the applicable standard or conditions in an administrative policy of the Department of National Revenue (Revenue Canada) nor to assess the appropriateness or fairness of that policy.

Second, counsel for the respondent referred to section 68 of the Act which authorizes a refund where moneys are paid in error, whether by reason of mistake of fact or law or otherwise. Counsel submitted that the onus is on the appellant to show that it had a mistaken belief when it remitted the moneys in order to prove that it paid the moneys in error. Counsel relied on the decision of the Federal Court of Canada in *Jack Herdman Limited. v. The Minister of National Revenue*[5] as providing that the type of error required to invoke section 68 of the Act is an error in calculation or an error resulting from a taxpayer unlawfully being required to pay taxes that he did not owe or for which he was not liable. In counsel's view, the appellant consciously elected to use the determined value method to calculate its FST liability, and the moneys paid by way of this method cannot, therefore, be said to have been paid in error under section 68 of the Act.

Third, counsel for the respondent submitted that the appellant could have chosen to calculate its FST liability in accordance with section 50 of the Act, after taking into account the deductions available to it under section 46 of the Act. Instead, the appellant chose to calculate its FST liability in accordance with the provisions in Circular ET 135. Counsel submitted that it is clear from the wording of Circular ET 135 that the all-inclusive discount covers the transportation cost.

Finally, counsel for the respondent submitted that the circumstances in the *Kamloops* decision are not identical to those in this appeal. Counsel stated that, in the *Kamloops* case, the Minister failed to take into account a factor, namely, the classification of the goods, which he was obliged to take into account when calculating the amount of the refund under the *Formula Refunds Regulations*[6] enacted under section 48 of the Act. The Federal Court of Appeal found that the Minister did not meet his obligation under the law when he failed to consider the effect of the revocation of a tariff classification set out in an administrative policy which had since been revoked. By failing to modify the policy to reflect the change, the Minister had not taken into account the class of the goods in accordance with the law. Counsel submitted that the

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4. 87 D.T.C. 5199, Federal Court of Appeal, File No. A-838-85, March 31, 1987.
5. (1983), 5 C.E.R. 405, Court File No. A-682-81, May 25, 1983.
6. C.R.C. 1978, c. 591.

present appeal is distinguishable from the *Kamloops* case since there is no statutorily prescribed obligation on the Minister to take into account the transportation cost.

The issue in this appeal is whether the Minister correctly determined that the moneys for which the appellant is claiming a refund were not paid in error when they were taken into account as taxes under the Act. In the Tribunal's view, the amount at issue was not paid in error. In calculating its FST liability, the appellant had two choices with respect to the method to use; it could have calculated its FST liability on the basis of the sale price of the goods in accordance with section 50 of the Act, or it could have used the determined value method and calculated its FST liability in accordance with the conditions established for that method in Circular ET 135. The agreed statement of facts clearly states that the appellant chose to use the determined value method set out in Circular ET 135 rather than the method set out in section 50 of the Act.

The appellant's representative asked the Tribunal to find that the Minister, in applying the determined value method, incorrectly failed to take into account clause 46(*c*)(ii)(B) of the Act which allows a taxpayer to exclude the cost of transportation of the goods from the sale price. However, the Tribunal does not have the jurisdiction to make a decision as to the appropriateness of the determined value method itself, which has been established by Revenue Canada as an administrative concession and as an alternative to paying FST in accordance with the provisions of the Act.[7] To deduct the cost of transportation of the goods from the sale price under clause 46(*c*)(ii)(B) of the Act, the appellant would have been required to determine its tax liability in accordance with section 50 of the Act.

Accordingly, the appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

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

Lise Bergeron
Lise Bergeron
Member

7. Canadian International Trade Tribunal, *B.E.A. Per Capita Consulting Corporation v. The Minister of National Revenue,* Appeal No. 3094, September 18, 1990.