

Ottawa, Monday, July 17, 1995

Appeal No. AP-93-384

IN THE MATTER OF an appeal heard on January 9, 1995, 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 17, 1993, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

**BETWEEN**

**LES ENTREPRISES RÉAL LUSSIER INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Raynald Guay  
Raynald Guay  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-93-384**

**LES ENTREPRISES RÉAL LUSSIER 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 made with respect to the appellant in the amount of \$216,753.86 for federal sales tax (FST), interest and penalty. Furthermore, the total amount claimed included \$32,263.00 for FST paid in error to the appellant further to a determination dated June 29, 1991.*

*The issue in this appeal is whether the assessment is sound in fact and in law. More precisely, the Tribunal must determine whether the method used by the appellant to calculate the amount of FST payable is consistent with the Excise Tax Act and whether the appellant is entitled to deductions other than those made by the respondent in calculating the sale price. The Tribunal must also determine whether the appellant is entitled to a refund of an FST overpayment under section 68 of the Excise Tax Act.*

**HELD:** *The appeal is dismissed. The appellant did not appear at the hearing and did not file a brief. The Tribunal, therefore, considered the testimony of Ms. Gertrude Toupin and the brief and arguments of counsel for the respondent. The appellant had the burden of proving that the assessment was incorrect, and the Tribunal is of the view that the appellant did not discharge the burden of proof. As the method used by the appellant to calculate the amount of FST payable is not consistent with the Excise Tax Act, the appellant is not entitled to deductions other than those made by the respondent in calculating the sale price. Finally, the appellant is not entitled to a refund of the FST overpayment under section 68 of the Excise Tax Act, since the goods relating to the refund were purchased tax-exempt. Consequently, the Tribunal concludes that the assessment is sound in fact and in law.*

*Place of Hearing: Ottawa, Ontario*

*Date of Hearing: January 9, 1995*

*Date of Decision: July 17, 1995*

*Tribunal Members: Lise Bergeron, Presiding Member*

*Arthur B. Trudeau, Member*

*Raynald Guay, Member*

*Counsel for the Tribunal: Joël J. Robichaud*

*Clerk of the Tribunal: Anne Jamieson*

*Appearance: Rosemarie Millar, for the respondent*

**Appeal No. AP-93-384**

**LES ENTREPRISES RÉAL LUSSIER INC.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member  
ARTHUR B. TRUDEAU, Member  
RAYNALD GUAY, 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 made with respect to the appellant in the amount of \$216,753.86 for federal sales tax (FST), interest and penalty. Furthermore, the total amount claimed included \$32,263.00 for FST paid in error to the appellant further to a determination dated June 29, 1991. The appellant objected to the respondent's assessment. In a decision dated December 17, 1993, the respondent disallowed the appellant's objection.

The appellant manufactures and sells, with or without installation, standard metal structural shapes for use as an exterior building finish, metal closers and other small metal parts. The goods in issue are manufactured using raw materials purchased FST-exempt. Sales of the goods in issue are subject to FST, and the respondent's audit showed that such sales constituted nearly 92 percent of the appellant's total sales. At that time, the respondent noted that the amount of FST payable by the appellant had been calculated using a method based on the purchase price. The respondent thus recalculated the amount of FST payable by the appellant on the basis of the sale price. Before calculating the amount of FST payable, the respondent deducted from the appellant's total sales figure the costs of transporting and installing the goods in issue, provincial sales tax and the cost of goods resold in the same condition. Costs for supervision and coordination were included in the installation costs.

The issue in this appeal is whether the assessment is sound in fact and in law. More precisely, the Tribunal must determine whether the method used by the appellant to calculate the amount of FST payable is consistent with the Act and whether the appellant is entitled to deductions other than those made by the respondent in calculating the sale price. The Tribunal must also determine whether the appellant is entitled to a refund of an FST overpayment under section 68 of the Act.

Subsection 50(1) and paragraph 46(c) of the Act provide, in part, as follows:

*50.(1) There shall be imposed, levied and collected a consumption or sales tax at the rate prescribed in subsection (1.1) on the sale price or on the volume sold of all goods  
(a) produced or manufactured in Canada.*

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

46. For the purpose of determining the consumption or sales tax payable under this Part,

c) in calculating the sale price of goods manufactured or produced in Canada, there may be excluded

(ii) under such circumstances as the Governor in Council may, by regulation, prescribe, an amount representing

(A) the cost of erection or installation of the goods incurred by the manufacturer or producer where the goods are sold at a price that includes erection or installation, or

(B) the cost of transportation of the goods incurred by the manufacturer or producer in transporting the goods between premises of the manufacturer or producer in Canada, or in delivering the goods from the premises of the manufacturer or producer in Canada to the purchaser, where the goods are sold at a price that includes those costs of transportation,

determined in such manner as the Governor in Council may, by regulation, prescribe.

Counsel for the respondent called one witness, Ms. Gertrude Toupin, an auditor of the Goods and Services Tax and Quebec Sales Tax for the Quebec Ministry of Revenue. Ms. Toupin had worked as an auditor for the Department of National Revenue for four years and had prepared the assessment at issue. She explained that the appellant had calculated the amount of FST payable using a method based on the purchase price instead of the sale price, as required under the Act.

In her brief, counsel for the respondent maintained that the assessment is sound in fact and in law. Counsel felt that the method used by the appellant to calculate the amount of FST payable is not consistent with subsection 50(1) of the Act. The amount of FST payable must be calculated using the sale price, not the purchase price, and must be consistent with section 46 of the Act. Furthermore, the appellant is not entitled to deductions other than those made by the respondent in calculating the sale price. Finally, counsel maintained that the appellant is not entitled to a refund of the FST paid in error on June 29, 1991, since the goods relating to the refund were purchased tax-exempt.

The appellant did not appear at the hearing and did not file a brief. The Tribunal, therefore, considered the testimony of Ms. Toupin and the brief and arguments of counsel for the respondent. The appellant had the burden of proving that the assessment was incorrect,<sup>2</sup> and the Tribunal is of the view that the appellant did not discharge the burden of proof. The method used by the appellant to calculate the amount of FST payable is not consistent with the Act. The amount of FST payable must be calculated on the basis of the sale price, not the purchase price. Moreover, the appellant is not entitled to deductions other than those made by the respondent in calculating the sale price. Finally, the appellant is not entitled to a refund of the FST overpayment under section 68 of the Act, since the goods relating to the refund were purchased tax-exempt. Consequently, the Tribunal concludes that the assessment is sound in fact and in law.

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2. *Roderick W.S. Johnston v. The Minister of National Revenue*, [1948] S.C.R. 486.

For the foregoing reasons, the appeal is dismissed.

Lise Bergeron  
Lise Bergeron  
Presiding Member

Arthur B. Trudeau  
Arthur B. Trudeau  
Member

Raynald Guay  
Raynald Guay  
Member