CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 19, 2002

Appeal No. AP-93-315

IN THE MATTER OF an appeal heard on December 12, 2001, 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 18, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

LES PIGNONS L.V.M. DU QUÉBEC INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-315

LES PIGNONS L.V.M. DU QUÉBEC INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* from a decision of the Minister of National Revenue dated December 18, 1992. The appellant submitted that it purchased finished goods from a related company, Sofab (1984) Ltée, and that these goods were subsequently resold to its customers. The appellant submitted that the remittance of the federal sales tax was made in error and that it is, consequently, entitled to a refund pursuant to section 68 of the *Excise Tax Act*. On the other hand, it was the respondent's position that the appellant had breached the requirements of section 98 of the *Excise Tax Act* by failing to retain its books and records. The respondent argued that the appeal should be dismissed, as the appellant did not meet its burden of proof.

HELD: The appeal is dismissed. The Tribunal is of the view that there is insufficient documentary evidence to support the appellant's claim and that, therefore, it has not satisfied its burden of proof in the matter at hand.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 12, 2001
Date of Decision:	August 19, 2002
Tribunal Members:	Richard Lafontaine, Presiding Member James A. Ogilvy, Member Ellen Fry, Member
Counsel for the Tribunal:	John Dodsworth Dominique Laporte
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Michael Kaylor, for the appellant Jean-Robert Noiseux, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-315

LES PIGNONS L.V.M. DU QUÉBEC INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member
JAMES A. OGILVY, Member
ELLEN FRY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] from a decision of the Minister of National Revenue dated December 18, 1992. A hearing in this matter started on September 26, 1994, but the Tribunal, at the appellant's request, subsequently granted an adjournment and several requests for postponement. The issue in this appeal is whether the appellant is entitled to a refund of federal sales tax (FST) that it remitted on its sales of goods, which it purchased from Sofab (1984) Ltée (Sofab).

PRELIMINARY MATTERS

Standing of the Appellant Before the Tribunal

On April 5, 2001, the appellant filed a supplementary brief in which it indicated that it was inactive. In addition, on September 20, 2001, the office of counsel for the appellant advised the Tribunal, by telephone, that the appellant no longer existed. By letter dated September 26, 2001, the Tribunal requested confirmation from counsel for the appellant regarding the appellant's legal status and confirmation that he had authority to represent the appellant. On September 28, 2001, counsel for the appellant confirmed that the appellant was still in legal existence and that he was authorized to act on the appellant's behalf.

In response to questions from the Tribunal at the hearing, counsel for the appellant indicated some uncertainty as to whether he was validly authorized to act on the appellant's behalf. Consequently, the Tribunal requested counsel for the appellant to provide additional documentation that would satisfy the Tribunal that he was authorized to act on the appellant's behalf. Counsel for the appellant subsequently provided additional documentation. Further, his authorization to act on the appellant's behalf was not disputed by the respondent. On this basis, the Tribunal accepts counsel for the appellant as properly authorized to act on the appellant's behalf.

Alleged Abandonment of the Appeal

Prior to the scheduled hearing, the respondent submitted that the appellant had abandoned its appeal and that the appeal should, therefore, not proceed. For an appreciation of the arguments with respect to the issue of abandonment, it is necessary to review the history of the proceedings.

1. R.S.C. 1985, c. E-15 [hereinafter Act].

The appellant filed its refund claim with the Department of National Revenue (Revenue Canada)[2] on November 12, 1987. A notice of determination allowing a partial refund was issued on February 19, 1988. The appellant subsequently filed a notice of objection dated May 9, 1988. In a letter dated December 1, 1992, Mr. G. Arduini, who identified himself as "*Directeur*"[3], informed Revenue Canada that the appellant wanted to withdraw its notice of objection. On December 2, 1992, the respondent sent a letter to the three persons listed as "directors" of the appellant in the Government's files, informing them of the withdrawal of the notice of objection by Mr. Arduini and requesting them to confirm their approval of this withdrawal. The letter also stated that, if no answer were received before December 15, 1992, the respondent would make his decision on the basis of the information contained in the file.

By notice of decision dated December 18, 1992, the appellant's objection was disallowed, and the determination was confirmed. The decision stated: "This decision gives effect to the letter of December 1, 1992, from Mr. Arduini, your representative, in which you serve notice of your intention to withdraw this objection" [translation]. The notice also informed the appellant that it could appeal the decision to the Tribunal within 90 days.[4] Despite the fact that this time had expired, on September 8, 1993, Mr. Jack Schryver, of Comtax Commodity Tax Consultants Inc. (Comtax), on the appellant's behalf, requested an extension of time to appeal pursuant to section 81.32 of the Act.[5] On October 5, 1993, the Tribunal acknowledged receipt of the appellant's request for a time extension and invited representations from the respondent. The letter also stated that, if no answer were received from the respondent, the Tribunal's decision would be based on the appellant's letter of application for a time extension. On November 19, 1993, having received no representations from the respondent, the Tribunal issued an order extending the time to appeal the foregoing notice of decision. On January 10, 1994, an appeal of the notice of decision dated December 18, 1992, was filed with the Tribunal.

On April 24, 1995, the Tribunal agreed to hold the appeal in abeyance while the parties made efforts to resolve the issue. Although the appellant indicated, on February 24, 1998, that it intended to pursue the appeal, no further action was taken at the time. On January 30, 2001, the Tribunal wrote to the appellant to determine its intentions with respect to the appeal. Both the appellant and the respondent subsequently filed supplementary briefs in April and June 2001 respectively. On June 18, 2001, further to the respondent's supplementary brief, the appellant filed a motion requesting that the Tribunal decide, as a preliminary matter, whether the appellant had effectively abandoned the appeal. Further to the appellant's motion, the Tribunal ordered parties to file written submissions on the abandonment issue. The parties filed submissions on this matter, but the Tribunal decided to reserve its decision on the issue and to proceed with a hearing on the merits of the appeal.

In addition to its written submission that the appellant had abandoned its appeal, the respondent argued at the hearing that the Tribunal did not have jurisdiction to hear the appeal, as the appellant had abandoned it. In the respondent's view, as the notice of objection had been withdrawn, the appellant no longer met the conditions required under section 81.19 of the Act to appeal the decision of the respondent. On the other hand, the appellant submitted that the Tribunal had jurisdiction to hear this matter, arguing that

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2. Now the Canada Customs and Revenue Agency.
3. This would normally be translated into English as "manager" or "director". The English term "director" may be translated into French as either "*directeur*" or "*administrateur*". The French term "*directeur*" is not normally used to convey the meaning of "member of the board of directors", as can be the case for the English term "director".
4. In this regard, the text of the notice of decision reads as follows: "Pursuant to sections 81.19 and 81.2 of the *Excise Tax Act*, you may appeal the determination to the Canadian International Trade Tribunal or to the Federal Court -- Trial Division within 90 days after the date of the notice of decision."[Translation]
5. Exhibit B-1, tab 8.

Mr. Arduini had not had the authority to withdraw the objection on the appellant's behalf and that the Act does not recognize the possibility of withdrawing a notice of objection.

The Tribunal notes that the respondent did not object to the appellant's request for an extension to appeal within the time frame stipulated by the Tribunal in 1993. Nor did the respondent thereafter ask for an extension of time to object. More than eight years later, the respondent is now, for the first time, challenging the Tribunal's decision and its jurisdiction to hear this appeal. The Tribunal notes that the facts of this case are very similar to the ones in issue in Appeal No. AP-91-184[6] in which the respondent argued that the appellant's withdrawal of its notice of objection retroactively annulled the notice of objection. The Tribunal stated the following:

> The Tribunal notes that, pursuant to subsection 81.15(4) of the Act, on receipt of a notice of objection the Minister shall reconsider the assessment and vacate, vary or confirm the assessment or make a reassessment. The Tribunal notes that there is no mechanism in the Act allowing the Minister to deal with withdrawals of objections. It would appear therefore that, strictly speaking, a taxpayer cannot withdraw an objection once it has been served on the Minister.
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> The Tribunal notes that, in recognition of this, the Minister issued a notice of decision on February 13, 1991. In that decision, the Minister stated that he considered the information and reasons set forth in Volkswagen's notice of objection, but disallowed that objection. However, the Minister also acknowledged the appellant's withdrawal.
>
> In response to the argument by counsel for the respondent that the attempted withdrawal of the objection "retroactively annul[led]" the notice of objection, the Tribunal feels that, if this were so, the Minister would not have gone to the trouble of issuing a notice of decision. Of greater significance to the Tribunal, and fatal to counsel's arguments, the Tribunal notes that the notice of decision informed the appellant that it could appeal the assessment to the Tribunal within 90 days from the date of the decision.
>
> The Tribunal concluded, therefore, that the appellant had not lost its right to appeal. Also, as Volkswagen did serve a notice of objection under section 81.15 of the Act, the Tribunal had the jurisdiction to proceed to the merits of the appeal.[7]

With respect to the present appeal, the Tribunal adopts this reasoning in its entirety. The Tribunal is of the opinion that the very act of confirming the determination, as stated in the notice of decision, implies that the respondent reconsidered the determination. In addition, the notice of decision clearly indicated that the appellant had a right of appeal to the Tribunal. That right of appeal is in regard to the respondent's determination, as reconsidered by the respondent in this matter. Furthermore, had the letter purportedly withdrawing the appellant's objection truly ended the matter under the Act, the respondent need not have issued a notice of decision. Since it did, the Tribunal is of the view that the appellant's right to appeal survived the purported withdrawal of its objection.

Moreover, although section 16.2 of the *Income Tax Act*,[8] the *Tax Court Rules*[9] and the *Canadian International Trade Tribunal Rules*[10] provide for notices of discontinuance, there are no such provisions in the Act. Indeed, the Rules of Procedure provide only for notices of discontinuance relating to appeals before the Tribunal (and not before the respondent, as was the case in this matter). Therefore, in the Tribunal's

6. *Volkswagen Canada* v. *MNR* (10 August 1992) (CITT).
7. *Ibid.* at 5.
8. R.S.C. 1985 (5th Supp.), c. 1.
9. R.S.C. 1985 (4th Supp.), c. 51.
10. S.O.R./91-499 [hereinafter Rules of Procedure].

view, the cases cited by the respondent in support of its position are of no help, as they relate to the *Income Tax Act* and the *Tax Court Rules*.

EVIDENCE

Mr. Guy Tremblay, chartered accountant, testified on behalf of the appellant at the hearing. He stated that, during the period for which the refund is claimed, he was the comptroller for the appellant,[11] Sofab and Les Poutrelles du Québec Inc. (Les Poutrelles).

Mr. Tremblay explained that the appellant, as well as Sofab, made roof trusses whereas Les Poutrelles manufactured floor joists. He indicated that each of the companies conducted its manufacturing operations separately and had its own employees. Mr. Tremblay also indicated that each of these three companies purchased its own raw material products for its operations and used separate bank accounts. He explained that the appellant purchased roof trusses from Sofab and floor joists from Les Poutrelles. Given the appellant's limited production capacity, together with the high demand in the construction industry from 1985 to 1988, it was necessary to place orders with Sofab, which could make up the demand.

Mr. Tremblay testified that the appellant remitted the FST to Revenue Canada on all invoices issued to customers of roof trusses, including the roof trusses manufactured by the appellant and those purchased from Sofab. He confirmed that the same held true for the floor joists that the appellant purchased from Les Poutrelles. Mr. Tremblay indicated that, with each purchase of roof trusses manufactured by Sofab or of joists from Les Poutrelles, the appellant issued purchase orders and was invoiced by Sofab or Les Poutrelles. Mr. Tremblay then explained that the invoices were not paid separately, but rather accumulated in accounts receivable and that payments were made at regular intervals. He indicated, however, that he did not know whether the total amount had been paid in the end.

Mr. Tremblay also explained that, according to the notes to the financial statements, Sofab's sales amount did not tally with the appellant's purchases because of the amount of the appellant's purchases from Les Poutrelles. Referring to Exhibit A-3, Mr. Tremblay stated that, for 1985, since Sofab had not sold any roof trusses to Les Poutrelles, all Sofab sales to affiliated companies, that is, $497,181, were made to the appellant. For 1986, Mr. Tremblay explained that Sofab's financial statements show sales of $992,317 to its affiliated companies and that, based on the external auditors' notes, one may conclude that these sales were made to the appellant. He indicated that the appellant's financial statements that show purchases of $1,221,553 from its affiliated companies corroborate the data contained in the external auditors' notes. For 1987, Mr. Tremblay explained that the financial statements of Sofab show sales of $1,696,998 to the affiliated companies and that those of the appellant show purchases of $1,981,076 from its affiliated companies, including $284,078 from Les Poutrelles. Mr. Tremblay went on to say that the same reconciliation exercise between financial statements could be done for 1988. Mr. Tremblay said that Sofab sold approximately 70 percent of its production to its own customers and 30 percent to the appellant.

During cross-examination, Mr. Tremblay also confirmed that he had consulted only the information contained in the financial statements, and indicated that he had seen the appellant's sales books only at the

11. On August 26, 1987, the appellant's corporate name was changed from "Les Pignons L.V.M. du Québec Inc." to "Les Pignons du Québec Inc."

time that he was working for the appellant. He indicated that Mr. Arduini's role in the appellant company was only that of shareholder.[12]

Mr. Tremblay went on to explain that Sofab charged the appellant the same prices as the appellant billed its customers and that a credit note was issued at year end to establish a fair selling price between the companies. He noted that Sofab did not pay tax and that the appellant remitted the tax on the total of the amounts billed its customers. He also confirmed that all the goods were resold by the appellant "as is" and did not undergo any additional work. Mr. Tremblay stated that a credit note had been issued in 1986 and another in 1987 and that these notes were reflected in the financial statements. When asked by counsel for the respondent to determine whether the tax paid in error corresponded to the tax on an amount equivalent to the profit margin generated by the appellant, Mr. Tremblay maintained that the appellant had made an overpayment on its total tax remittances and Sofab had failed to remit a portion thereof.

In response to questions from the Tribunal, Mr. Tremblay confirmed, among other things, that the financial statements had been prepared by external auditors.

Mr. Schryver appeared on the appellant's behalf. He stated that Comtax had a mandate to represent the appellant and confirmed that he was the one who initially filed the FST refund claim in 1987. He explained in detail how the refund had been calculated, referring to a worksheet that was filed with the refund claim. He testified that the total sales figures were taken directly from the appellant's B93 monthly tax remittance forms, while the figures pertinent to sales between Sofab and the appellant were taken from the appellant's sales journal. Mr. Schryver testified that he had gone through the figures, month by month, and stated that he had verified the sales invoices against the sales journal to ensure that there were no discrepancies. He also stated that the FST, listed as paid in 1987, had been remitted and that this was confirmed by the respondent's own accounting records. Mr. Schryver further explained that the refund claim had been made for the period of September 1985 to September 1987.[13] He indicated that, for the year ended April 30, 1987, the total value of the appellant's sales of Sofab goods was $1,748,440 and that, except for a discrepancy explained by year-end adjusting entries, this figure was corroborated by the financial statements. However, Mr. Schryver noted that, despite the fact that he had the financial statements for the other years, he was unable to do the same calculations for the other periods, as he did not have the B93 forms in his possession.

During cross-examination, Mr. Schryver confirmed that the appellant's books and records in support of its refund claim had never been in his possession, as he did the work at the appellant's offices. In response to questions from the Tribunal, he stated that Revenue Canada's representative had looked at his figures and noted that they were used as a basis for the cash discount claim and transport claim, but that the portion of the claim relating to the jobbed goods (i.e. the goods produced by Sofab) was denied. Mr. Schryver indicated that Revenue Canada's representative had conducted an audit of the appellant, looking, among other things, at sales invoices and sales journals.[14]

Ms. Nancy Gélinas, certified management accountant, appeared on behalf of the respondent. She stated that she worked for Revenue Canada as an objections officer from May 1990 until spring 1994. She testified that she had contacted Mr. Serge Duhamel, whose name appeared at the time as director in the appellant's records. She said that he had then referred her to Mr. Arduini, who informed her that he wanted

12. In light of other evidence on the record, Mr. Arduini's position within the company was not entirely clear. See, in particular, *supra* note 2.
13. However, Mr. Schryver indicated that he did not file the claim until November 12, 1987.
14. *Transcript of Public Hearing*, 12 December 2001, at 191-92.

to withdraw his notice of objection since he was no longer interested in the amounts claimed. According to Ms. Gélinas, he sent her a letter withdrawing his notice of objection. She explained that, as a precaution, she had sent a letter to the appellant's three directors, informing them of Mr. Arduini's withdrawal of the notice of objection, advising them to comment if they had a different view, otherwise a decision would be made on the basis of the information contained in the file. She maintained that she had received no reply and that a notice of decision had then been prepared accordingly. She explained that she had sent a copy of the decision to Mr. Schryver, since he held a power of attorney from Mr. Arduini.

Mr. René Pétrin, an accountant employed with the Canada Customs and Revenue Agency as an auditor since 1988, also appeared on behalf of the respondent. He said that he had been an excise tax auditor. According to Mr. Pétrin, he had at that time been asked his opinion on the merits of the appellant's request. He said that he had then concluded, based on the documents provided to him, that it was impossible to know, with any degree of assurance, that the goods presumed to have been resold were the same as those that had been purchased. He said that he had noticed that there were no general ledger or invoices, the documents received being limited to the appellant's financial statements and the worksheets prepared by Comtax. Mr. Pétrin maintained that he had requested other documents from the appellant, to no avail, since, according to the appellant, the documents were not available.

Mr. Pétrin then explained that the documents provided to him were not sufficient. While the appellant's financial statements showed that intercompany transactions had taken place, he maintained that he was unable to verify whether the goods for which the refund is requested were indeed goods for resale (i.e. purchased and resold in the same condition). Based on his written report, Mr. Pétrin testified that the information about the goods for resale had never been audited by Mr. Dubreuil, the senior auditor of record, since the latter believed that the said goods did not qualify as such. He then maintained that, assuming that the appellant had paid the tax, the tax would have been included in the purchase price paid to Sofab and the tax actually paid would therefore be equal to the appellant's profit margin, which would be about 6 or 7 percent.

ARGUMENT

The appellant submitted that this case could be summarized as follows: it purchased finished goods from a related company, Sofab, and these goods were resold, without changing them in any way, to the appellant's customers. It did the same with goods purchased from Les Poutrelles. The appellant submitted that the FST remitted by it on the finished goods, either from Sofab or from both Sofab and Les Poutrelles, was made in error and that it is entitled to a full refund pursuant to section 68 of the Act. The appellant further argued that, contrary to the respondent's position, there was no legal basis for any adjustment to a refund that would effectively only grant to the appellant a refund of the tax on its markup of the resold goods.

The appellant argued that the evidence, which is supported by the testimony of Mr. Schryver and Mr. Tremblay, clearly shows that it had paid FST not only on those goods that it did manufacture but also on all the roof trusses purchased from Sofab and the jobbed floor joists purchased from Les Poutrelles. The appellant referred to Mr. Schryver's testimony that the refund claim was calculated based on the information contained in its sales journal and that he also looked at the invoices from which the sales journal figures were derived. According to Mr. Schryver, the amount of FST paid in error was then calculated by multiplying the sales of the finished goods, as purchased by the appellant, by the rate of tax in effect at the relevant time.

The appellant further submitted that, for the 1986 fiscal year, the total amount of sales of finished goods, as purchased by Sofab, corresponds with a very small margin of error to the information contained in the financial statements. Accordingly, the information given by Mr. Schryver in support of the refund claim is reliable and can be accepted by the Tribunal in the absence of the actual invoices, and this, for the entire period covered by that refund claim.

The appellant, relying on the decision of the Federal Court of Appeal in *Saugeen Indian Band* v. *R*,[15] argued that only Sofab and Les Poutrelles were responsible for the payment of FST on the finished goods sold to it.

The appellant referred to the decision of the Supreme Court of Canada in *Hickman Motors* v. *R*,[16] in order to show that the initial burden on the taxpayer is only to demolish the assumptions made by the respondent. This initial onus is met where the appellant makes out at least a *prima facie* case, and the burden then shifts to the respondent who has to rebut the case made by the appellant and to prove the assumptions. Where the burden has shifted to the respondent, and the respondent adduces no evidence whatsoever, the taxpayer is entitled to succeed. The appellant also relied on another passage of *Hickman Motors* indicating that, in *Docherty* v. *MNR*,[17] the court, in the absence of entries in the financial statements reflecting a transaction, accepted the working papers and the testimony of the corporation's accountant as evidence that the transaction had occurred.

In addition, the appellant relied on the decision of the Tax Court of Canada in *E.F. Anthony Merchant* v. *R*,[18] in which it found that the failure to keep records, as contemplated under subsection 230(2.1) of the *Income Tax Act*, carries its own sanctions, but does not result in the non-deductibility of expenses if they can be otherwise proven. It is the appellant's position that a parallel can be drawn between *Merchant* and the case at bar.

It is, therefore, the appellant's contention that it has discharged its burden on the balance of probabilities, this in light of *Hickman Motors* and *Merchant*. Finally, relying on *Erin Michaels* v. *MNR*,[19] the appellant argued that it should also be granted a refund of the FST paid on its sales of finished goods purchased from Les Poutrelles.

In this last respect, the respondent indicated at the hearing that he was not aware of the appellant's intention to amend its claim and that he was taken by surprise.

With respect to the subject matter of this appeal, the respondent submitted that the appellant did not discharge its burden of proof and, furthermore, it did not comply with the provisions of section 98 of the Act requiring that the appellant retain supporting documents for audit purposes.

The respondent referred to the Tribunal's decision in *Michelin Tires (Canada) Ltd.* v. *MNR*,[20] which, in his view, summarizes the relevant jurisprudence with respect to evidence and states that the burden, when disputing a notice of assessment of the respondent, rests with the taxpayer, who is aware of the facts required to refute the allegations.

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15. [1990] 1 F.C. 403 (F.C.A.).
16. [1997] 2 S.C.R. 336 (S.C.) [hereinafter *Hickman Motors*].
17. 91 D.T.C. 537.
18. 98 D.T.C. 1734 [hereinafter *Merchant*].
19. (10 January 1997), AP-94-330 (CITT) [hereinafter *Erin Michaels*].
20. (22 March 1995), AP-93-333 (CITT).

In response to the appellant's position concerning *Hickman*, the respondent argued that oral evidence is sufficient only when the *Income Tax Act* does not require supporting documentation. The respondent explained that subsection 98(2.1) of the Act specifically required that the appellant keep its books and records so that it could perform the usual audits. Regarding *Merchant*, the respondent maintained that several other decisions contradict it and that it is isolated.

The respondent then referred to the decision in *Zalzalah* v. *Canada,*[21] a case where the appellant did not keep its records and where the Court found that the obligation to keep documents and vouchers pursuant to section 230 of the *Income Tax Act* had been breached and therefore confirmed the respondent's decision to disallow the deduction of the amounts claimed.

Finally, the respondent argued that, in any event, the amount of tax paid in error corresponded to the tax on the appellant's profit margin.

DECISION

Amendment of the Appellant's Brief

At the hearing, the Tribunal reserved its decision on the issue of whether the appellant could amend its brief on the day of the hearing in order to extend its ground of appeal to its sale of the goods it purchased from Les Poutrelles.

Pursuant to rule 34 of the Rules of Procedure, the appellant must file its brief within 60 days after filing a notice of appeal. Pursuant to rule 24.1, if a party fails to file a brief within the applicable time limit, the party may make a written request to the Tribunal for permission to file that document. Under this rule, the Tribunal may allow the document to be filed if it determines that to do so is fair and equitable in the circumstances. In its correspondence of February 25, 1994, to counsel for the appellant the Tribunal reminded the appellant of the 60-day time limit. On May 20, 1994, the Tribunal granted the appellant an extension of time to file its brief. The appellant finally filed its brief on October 14, 1994, and filed a supplementary brief on April 5, 2001.

The Tribunal first notes that, if it were to allow parties to amend their briefs at the last minute and allow them to file new evidence and arguments on an issue that the opposite parties do not expect to be raised, this would thwart the proper conduct of the Tribunal's hearing and proceeding, and would, at the same time, seriously affect the rights of the opposite parties under the rules of natural justice.

In light of the above, the Tribunal is of the view that, pursuant to the Rules of Procedure, the appellant had ample opportunity to seek leave to amend its brief prior to the hearing. Furthermore, the Tribunal is of the view that it would not be fair and equitable in the circumstances to allow the appellant to amend its brief at the hearing. Accordingly, the Tribunal will not accept the new arguments with respect to the refund claim for the goods purchased by the appellant from Les Poutrelles.

Nevertheless, even had this new argument been properly introduced, the Tribunal is convinced that the decision in *Erin Michaels* is not helpful to the appellant in this case. In *Erin Michaels*, the appellant, at the time of the filing of its application, claimed a refund of FST paid in error on tax-exempt hair bows. The audit later revealed that the amount paid in error was higher than the amount specified in the application for refund. As decided in *Erin Michaels*, the amount in excess of the application was also refundable.

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21. [1995] 2 C.T.C. 368D, 99 F.T.R. 277, 95 D.T.C. 5498 [hereinafter *Zalzalah*].

In rendering its decision in *Erin Michaels*, the Tribunal, after having cited subsections 72(4) and 72(5) of the Act, stated:

> The Tribunal interprets these provisions to mean that there is an obligation on the Minister to determine the amount payable to an applicant and, in so doing, the Minister is not bound by the information provided by the applicant. The Tribunal is of the view, therefore, that it is not sufficient for the Minister to accept without question, or to limit a refund to, the amount identified in the application as being paid in error. For purposes of determining the amount payable to an applicant, the Minister must determine the actual amount paid in error. It is this sum that constitutes the amount payable under section 68, subject to the two-year limitation imposed under that section.[22]

In the case at bar, it was clear at the time of the filing of the refund claim that the object of the refund was limited to the tax paid in error on the goods purchased by the appellant from Sofab. This is supported by the worksheets joined to the refund claim. In *Barney Printing* v. *MNR*,[23] the issue that the Tribunal had to decide was whether, having filed an application for refund of FST paid on one type of tax-exempt goods, imaged articles, within the two-year time limitation, the appellant was entitled to a refund of FST paid on another type of tax-exempt goods, printed matter, not mentioned in the application. The Tribunal stated the following:

> It should be noted that, in this passage [of section 68 of the Act], the emphasis is put on the determination of the "amount" that was paid in error. The process of determination of the exact amount paid in error is set in motion by the application for refund as indicated by subsections 72(4) and 72(5) of the Act. In the Tribunal's view, that application must state the nature of the error committed by the applicant for the limitation period to have any meaning. Where the error relates to payments of FST made on tax-exempt goods, the type of goods must be specified. Otherwise, one would simply have to file an application for refund claiming that moneys were paid in error, without further information and without even knowing for a fact that any error had been made, in order to protect any amounts paid in error during the two-year period in issue.
>
> In addition, to accept that the nature of the error not be specified on the application for refund would seem to render the phrase "if he applies therefor", found in section 68 of the Act, devoid of any substantive obligatory content. This, given the obligation put on the respondent to determine the amount payable to an applicant, . . .would place an unreasonable burden on the respondent. As indicated above, it would also constitute a way around the two-year limitation period. In the Tribunal's view, this could not have been Parliament's intent. [Emphasis added]

The Tribunal finds the particulars of *Barney Printing* to be almost identical to the ones in issue, since the appellant is trying to expand its refund claim, which initially covered tax paid in error on roof trusses purchased from Sofab, to totally different goods, floor joists, purchased from another company, Les Poutrelles. The Tribunal fully adopts the analysis of *Barney Printing* and is of the view that, even if the claim relating to Les Poutrelles had been properly introduced, the reasoning of *Erin Michaels* would not assist the appellant in the present case.

MERITS OF THE CASE

The relevant provisions of the Act[24] are the following:

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22. *Supra* note 20 at 4.
23. (15 May 2001), AP-99-0062 (CITT) [hereinafter *Barney Printing*].
24. On March 4, 1986, sections 44 and 57 of the Act, R.S.C. 1970, c. E-13, were repealed and replaced by sections 68 and 98. The modifications to these sections were of no consequence with respect to the issue in this matter and, therefore, reference is made throughout these reasons to sections 68 and 98 only.

> 68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys.
>
> 98.(1) Every person who
>
> (*a*) is required, by or pursuant to this Act, to pay or collect taxes or other sums or to affix or cancel stamps, or
>
> (*b*) makes an application under any of sections 68 to 70,
>
> shall keep records and books of account in English or French at that person's place of business in Canada in such form and containing such information as will enable the amount of taxes or other sums that should have been paid or collected, the amount of stamps that should have been affixed or cancelled or the amount, if any, of any drawback, payment or deduction that has been made or that may be made to or by that person, to be determined.
>
> (2.1) Notwithstanding subsection (2), where a person required by subsection (1) to keep records and books of account serves a notice of objection under section 81.15 or 81.17 or is a party to an appeal under this Part, he shall retain those records and books of account and every account and voucher necessary to verify the information therein until the objection or appeal has been finally disposed of by appeal or otherwise.

Before disposing of the merits of the case, the Tribunal will address, first, the issue of the onus of proof. At the hearing, the appellant relied strongly on the Supreme Court of Canada's decision in *Hickman Motors* in order to argue that the initial onus on the taxpayer is only to "demolish" the respondent's assumptions and, where the appellant has made a *prima facie* case, the onus then shifts to the respondent. In addition, reference was made to *Merchant* to make the point that the failure to keep records, as contemplated under subsection 230(2.1) of the *Income Tax Act*, carries its own sanctions, but does not result in the non-deductibility of expenses if they can be otherwise proven.

The Tribunal first notes that, in *Hickman Motors*, as stated by L'Heureux-Dubé J., "the appellant adduced clear, uncontradicted evidence, while the respondent did not adduce any evidence whatsoever."[25] She found that, "[w]here the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed."[26] In the present case, it can certainly not be said that the Tribunal was faced with clear and uncontradicted evidence, and that no evidence was adduced by the respondent.

The appellant also relies on the decision in *Hickman Motors* as support for the proposition that, in the absence of entries in the appellant's financial statements reflecting a transaction, a court can accept working papers and testimony of the company's accountant as evidence that the transaction occurred. However, it is noteworthy that, in *Hickman Motors*, while accepting that credible oral evidence from a taxpayer is sufficient notwithstanding the absence of records, the Supreme Court of Canada found that to be the case "where the [*Income Tax Act*] does not require supporting documentation".[27] A clear distinction can be drawn here, since the Tribunal is not dealing with a situation where a statute does not require supporting documentation. In this respect, section 98 of the Act requires the taxpayer to keep records and books of account and every account and voucher necessary to verify the information contained therein for six years.

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25. *Supra* note 17 at 378.
26. *Ibid*. at 379
27. *Ibid*. at 376.

These books and records must also be retained until any proceeding under the Act has been disposed of by appeal or otherwise.

Although it was stated in *Merchant* that the failure to keep records, as contemplated under subsection 230(2.1) of the *Income Tax Act*, carries its own sanctions, but does not result in the non-deductibility of expenses if they can be otherwise proved, the Tribunal, given the abundant jurisprudence in support of the opposing position, agrees with the respondent's argument.

The scope of section 230[28] of the *Income Tax Act* is very similar to that of section 98 of the Act. In *Zalzalah*, the Federal Court of Appeal, dealing with a case where the taxpayer had failed to keep books and records as provided under section 230 of the *Income Tax Act*, stated the following:

> The plaintiff frankly acknowledged that he did not keep any books or records during the taxation years here under review. This matter was also raised in the proceedings before the Tax Court of Canada where Lamarre Proulx TCJ stated
>
> > The Minister cannot and should not allow business deductions that cannot be proven by documentary evidence. That would bring the administration of the *Income Tax Act* in the sphere of arbitrariness.
>
> I agree with that view of the matter. Likewise, in the case of *Holotnak* v. *M.N.R.*,[29] . . .Cullen J. considered the requirements of section 230 and stated as follows:
>
> > Section 230 of the Act requires taxpayers to keep adequate books and records. "Adequate" is not defined but it would seem that these records should support whatever the taxpayer is claiming for tax purposes.
> >
> > The onus of proof that the expenses were incurred for the purpose of earning income is on the taxpayer (*Wellington Hotel Holdings Ltd.* v. *M.N.R.*, . . . 73 D.T.C. 5391). . . . Specifically, with regard to assessments, the onus is on the taxpayer to prove that the Minister's assumptions and assessments are wrong (Strayer, J. in *Schwarz v. The Queen*, [87 D.T.C. 5274] . . . quoting from *Johnston v. Minister of National Revenue*., [1948] S.C.R. 486 . . .). The *Schwarz* case (*supra*) also involved a situation where the plaintiff's purchases were not supported by vouchers. As Strayer, J. points out, the onus is on the taxpayer to prove wrong the M.N.R.'s reassessment as the taxpayer is in a better position to prove what actually happened.

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28. Subsections 230(1), 230(2.1) and 230(6) of the *Income Tax Act* read as follows:

> 230.(1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.
>
> (2.1) For greater certainty, the records and books of account required by subsection 230(1) to be kept by a person carrying on business as a lawyer (within the meaning assigned by subsection 232(1)) whether by means of a partnership or otherwise, include all accounting records of the lawyer, including supporting vouchers and cheques.
>
> (6) Where a person required by this section to keep records and books of account serves a notice of objection or where that person is a party to an appeal to the Tax Court of Canada under this Act, that person shall retain every record, book of account, account and voucher necessary for dealing with the objection or appeal until, in the case of the serving of a notice of objection, the time provided by section 169 to appeal has elapsed or, in the case of an appeal, until the appeal is disposed of and any further appeal in respect thereof is disposed of or the time for filing any such further appeal has expired.

29. 87 D.T.C. 5443 (F.C.T.D.).

> Unfortunately for this plaintiff, he has not filed documentation which supports the expenses claimed. This is a clear breach of subsection 230(1), *supra*, which leaves the Minister with no alternative but to disallow the amounts claimed. [Emphasis added]

The decision in *Zalzalah* was followed in several other rulings of the Tax Court of Canada.[30] In the Tribunal's view, the provisions of section 98 of the Act clearly indicate that Parliament requires that claims under the Act be substantiated by documentary evidence. The Tribunal is not convinced that the provisions under the Act relating to fines for not keeping books and records diminishes in any way the requirement to keep books and records to verify claims made under the Act. The Tribunal is of the view that these provisions are not mutually exclusive.

In this regard, the Tribunal is of the view that there is insufficient documentary evidence to support the appellant's claim and that, therefore, it has not satisfied its burden of proof in the matter at hand. In fact, the appellant's books of account and records, including invoices and sales journals, are unavailable. The appellant relied instead on its audited financial statements and those of one of its affiliated companies, Sofab, which are on the record.

In this case, the Tribunal recognizes that there is some evidence that the appellant remitted FST on sales of manufactured goods during the relevant period, as evidenced by the respondent's records obtained through access to information.[31] The Tribunal also recognizes that the appellant purchased some goods from its affiliated companies, Sofab and Les Poutrelles, during the relevant period, as evidenced by the audited financial statements on the record. Moreover, there is evidence that the appellant also purchased goods from an independent company, Nepean Roof Truss, during the same period.[32]

The Tribunal also notes that there is testimony to the effect that the goods purchased by the appellant from Sofab were finished goods for resale to independent customers. According to Mr. Tremblay, the goods were ordered once the sale had been made by the appellant and not ordered in advance for delivery to the appellant's yard. The evidence indicates that the appellant sold the goods to independent customers at the same price as it purchased them from Sofab[33] and that the latter issued credit notes in respect of these purchases once yearly to allow for reasonable profit on the appellant's sales. The Tribunal also notes Mr. Dubreuil's written comment that the appellant's finished manufactured goods and those that it purchased from Sofab were not accounted for separately.[34]

Counsel for the appellant submitted that the Tribunal should accept Mr. Schryver's notes, coupled with the financial statements filed in evidence and its witnesses' *viva voce* evidence, as discharging the appellant's burden of proof in this case. The Tribunal has carefully reviewed the testimony and evidence provided by Mr. Schryver, and particularly the handwritten figures of transactions, which he claimed to have transcribed from the appellant's sales journal and verified against a number of invoices. The Tribunal has also carefully reviewed the documentation on the record, including Mr. Dubreuil's written notes. In this

30. See, for example, *Morrison* v. *R*, [2001] 1 C.T.C. 2679, 2001 D.T.C. 121; *Semerikov* v. *R*, [1999] 4 C.T.C. 2080; *Gee* v. *R*, [1997] 2 C.T.C. 2168.
31. *Appellant's Book of Evidence*, tab 1 at 394.
32. *Ibid.* at 402.
33. In this regard, Messrs. Dubreuil's and Pétrin's written notes and comments corroborated Mr. Tremblay's testimony.
34. *Appellant's Book of Evidence*, tab 1 at 390.

connection, the Tribunal notes that Mr. Dubreuil's verification program included a review of the appellant's sales journal for the period covering January 1985 to the end of November 1987.[35]

The Tribunal is not satisfied that the financial statements sufficiently confirm the accuracy of Sofab's sales recorded by Mr. Schryver. There is, in the Tribunal's view, a significant discrepancy in 1987, which was not satisfactorily accounted for by Mr. Schryver's testimony.[36] Furthermore, there is no supporting evidence in the financial statements for financial years ending in 1986 and 1988,[37] both of which cover part of the period for which the claim is made.

Also, there is an inconsistency between Mr. Schryver's evidence and the notes of Revenue Canada auditors that the appellant itself filed as evidence. Mr. Schryver said that, in looking at the appellant's books, he could distinguish Sofab's sales from the others. However, the Revenue Canada auditor, who also looked at all the books, indicated that the appellant was not able to distinguish Sofab's sales from the others.[38]

Furthermore, since the appellant's sales journal and invoices are not available for comparison, it is impossible to confirm that there were no errors made by Mr. Schryver in copying down the figures or that there were no errors in the sales journal itself, for that matter.

The Tribunal is of the view that additional documentary evidence would have been required in this case to properly verify the appellant's sales of goods purchased from Sofab during the relevant period. Although the audited financial statements show that there were indeed sales of goods to the appellant by its affiliated companies, the statements do not document the volume and timing of re-sales of these goods by the appellant to independent customers. Furthermore, they do not establish whether these were finished goods that were resold to independent customers in the same condition. Therefore, in the Tribunal's view, the appellant falls short of satisfying the burden of proof that it must meet.

For all the above reasons, the appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

35. *Ibid*. at 399.
36. The notes to the appellant's financial statement for the fiscal year ending April 30, 1987, indicate an amount of $1,696,998 for transactions between affiliated companies – sales, while the figures allegedly derived from the sales journal by Mr. Schryver show an amount of $1,748,440 for the sales by the appellant of jobbed goods. (See *Appellant's Book of Evidence*, tab 2 at 122 and exhibit B-1, tab 1 at 5.)
37. *Transcript of Public Hearing*, 12 December 2001, at 177.
38. *Appellant's Book of Evidence*, tab 2 at 35.