CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, January 10, 1997

Appeal No. AP-94-330

IN THE MATTER OF an appeal heard on October 18, 1996, under section 81.22 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

ERIN MICHAELS MFG. INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-94-330

ERIN MICHAELS MFG. INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issues in this appeal are: (a) whether the appellant has the right to appeal from a reconsideration of a determination made under section 81.38 of the *Excise Tax Act*; and (b) whether the appellant's refund under section 68 of the *Excise Tax Act* is limited to the amount for which it applied or all moneys paid in error within two years of its application, regardless of the amount for which it applied.

HELD: The appeal is allowed. The Tribunal finds that an appellant can appeal from a reconsideration of a determination made under section 81.38 of the *Excise Tax Act*. Furthermore, the appellant is entitled to all moneys paid in error within two years prior to its application under section 68 of the *Excise Tax Act*, regardless of the amount for which it applied.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 18, 1996
Date of Decision:	January 10, 1997
Tribunal Members:	Lyle M. Russell, Presiding Member Raynald Guay, Member Charles A. Gracey, Member
Counsel for the Tribunal:	David M. Attwater
Clerk of the Tribunal:	Anne Jamieson
Parties:	Don W. Phillips, for the appellant Anne M. Turley, for the respondent

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-330

ERIN MICHAELS MFG. INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

This is an appeal under section 81.22 of the *Excise Tax Act*[1] (the Act) of a determination[2] (the second determination) of the Minister of National Revenue (the Minister). The Minister's second determination was based on the reconsideration of an earlier determination[3] (the first determination) pursuant to subsection 81.38(1) of the Act.[4] The appeal proceeded by way of an agreed statement of facts and written submissions and without a public hearing.

In the summer of 1988, the appellant applied for a refund of $15,914.99 pursuant to section 68, claiming that the moneys were paid in error as federal sales tax (FST) on hair bows during the period from September 2, 1986, to December 20, 1987.[5] In the first determination, the Minister rejected the application on the grounds that the hair bows were subject to FST. The appellant served a notice of objection[6] (the first objection) and the Minister, by notice of decision, subsequently confirmed the determination. The appellant then appealed the first determination to the Tribunal.

On March 10, 1992, the Tribunal allowed the appellant's appeal, finding that the hair bows were exempt from FST.[7] Over 18 months later, an auditor from the Department of National Revenue (Revenue Canada) visited the appellant's premises and determined that the appellant had, in fact, paid $34,527.62 in error as FST on the hair bows during the period from September 2, 1986, to December 20, 1987. The Minister subsequently issued the second determination, vacating the first determination and approving payment of $15,914.99, as originally claimed by the appellant, plus interest.

On January 14, 1994, the appellant served what is called a notice of objection to the Minister's second determination, claiming that it was entitled to a further $18,612.63, being the difference between the amount of FST actually paid in error, as established by the Revenue Canada audit, and the amount refunded pursuant to the second determination. By letter dated August 3, 1994, the so-called notice of objection was

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1. R.S.C. 1985, c. E-15.
2. Notice of Determination No. ALB 08741 dated October 12, 1993.
3. Notice of Determination No. CAL 32023 dated September 13, 1988.
4. All references to legislative provisions are to the *Excise Tax Act*.
5. Refund Claim No. 2470 dated July 13, 1988.
6. Dated November 9, 1988.
7. *Erin Michaels Mfg. Inc.* v. *The Minister of National Revenue*, Appeal No. AP-89-233, March 10, 1992.

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returned to the appellant. It was stated, on behalf of the Appeals Directorate of Revenue Canada, that the second determination was a reconsideration of the first determination under section 81.38 and not a determination issued pursuant to subsection 72(6). In declining to reconsider the second determination, it was stated that "the Minister can only reconsider determinations issued under subsection 72.(6) of the Excise Tax Act." The appellant responded by filing a notice of appeal with the Tribunal.

The single issue addressed by counsel for the respondent was whether the appellant can appeal the Minister's second determination. In arguing that the appellant had no right of appeal, it was submitted that such right only exists where a determination is issued pursuant to an application for refund under section 68 or 69. Counsel argued that there is no right of appeal from a reconsideration of a determination pursuant to section 81.38. Counsel also claimed that it was in accordance with the Tribunal's decision that the Minister remitted the amount of $15,914.99, plus interest, to the appellant. Therefore, the subject of the Tribunal's decision is *res judicata* and cannot be revisited by the Tribunal.[8] Furthermore, as a refund claim must be made within two years after payment of the moneys, the appellant's claim is statute barred.

In determining whether the appellant has the right to appeal the Minister's second determination, the Tribunal commences with a consideration of subsection 81.38(3). This provision states that, where the Minister makes a reconsideration of a determination under subsection 81.38(1), subsections 81.17(5) and (6) apply with such modifications as the circumstances require. The provision also specifies certain modifications to the definition of "amount payable" in subsection 81.17(6).[9] The Tribunal does not believe that subsections 81.17(5) and (6) apply only to the extent of modifying and making applicable the definition of "amount payable" to a reconsideration under subsection 81.38(1).

Subsection 81.17(5),[10] as modified, required the Minister to send a notice of decision to the appellant after reconsidering the first determination under subsection 81.38(1). Of critical importance to the Tribunal's finding that the appellant has a right to appeal the second determination is paragraph 81.17(5)(*d*). This provision states that, in the notice of decision, the Minister is to set out "the period within which an appeal may be taken under section 81.19 or 81.2." The inference to be drawn from paragraph 81.17(5)(*d*) is

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8. In support of this proposition, counsel for the respondent referred to *Hoystead* v. *Commissioner of Taxation*, [1926] A.C. 155 (Privy Council).

9. Subsection 81.38(3) states:

> (3) Subsections 81.17(5) and (6) apply, with such modifications as the circumstances require, to the reconsideration of a determination under subsection (1) as if
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> (*a*) the reference in paragraph (*b*) of the definition "amount payable" in subsection 81.17(6) to "subsection 72(6)" were a reference to "subsections 72(6), 81.18(1) and 81.38(1)"; and
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> (*b*) the reference in that paragraph to "subsection 74(1)" were a reference to "subsections 74(1) and 81.18(2)".

10. Subsection 81.17(5) states:

> (5) After reconsidering a determination, the Minister shall send to the person objecting a notice of decision in the prescribed form setting out
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> (*a*) the date of the decision;
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> (*b*) the amount payable, if any, to the person objecting;
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> (*c*) a brief explanation of the decision, where the Minister rejects the objection in whole or in part; and
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> (*d*) the period within which an appeal may be taken under section 81.19 or 81.2.

that, after reconsidering a determination under subsection 81.38(1), the Minister is to issue a notice of decision and the appellant has the right to appeal from that decision.

Aside from the law, the Tribunal considers it good policy for a taxpayer to have the right to appeal to the Tribunal from a reconsideration of a determination made under subsection 81.38(1). There has been occasion where, on an appeal, the Tribunal makes certain findings in principle and refers the matter back to the Minister for reconsideration.[11] In such a situation, the Tribunal relies on the Minister to "do the math." In the present case, the Minister's determination under section 72 was based on an interpretation of the Act found to be erroneous, and the amount claimed on the application for refund was subjected to audit verification after the appeal to the Tribunal. In both of these situations, the appellant is denied an opportunity during its appeal before the Tribunal to address the issue of the actual amount of moneys paid in error, or payable as taxes under the Act, etc. The Tribunal believes that, if there is disagreement between the parties in a subsequent determination made under subsection 81.38(1), an appellant should have some recourse before the Tribunal.

In this case, the Minister issued a notice of determination and not a notice of decision on reconsideration of the first determination. In the supplementary brief filed by the appellant, it is noted that the Minister used the prescribed form for that purpose. On the back side of the notice, the appellant was advised as follows:

> If you are unable to resolve any issue concerning this Notice of Determination, you are entitled to make a formal objection. This may be done by filing with the Minister of National Revenue, a "Notice of Objection" respecting this determination. This may be done within 90 days from the date of this Notice of Determination. A Notice of Objection form may be obtained from your local Excise office.

Ninety days following the date of the notice of determination, the appellant served on the Minister a notice of objection. Appended to the form was a submission indicating that the appellant intended to "hereby appeal" the determination for several reasons. When the Minister declined to consider the objection, the appellant subsequently appealed to the Tribunal. Under the circumstances, the Tribunal accepts the appellant's actions as sufficient under the Act to preserve its right of appeal. The appellant apparently acted on the instructions of the Minister and, when these proved insufficient, it took the further step of appealing directly to the Tribunal to preserve its right.

Counsel for the respondent argued that the Tribunal's decision is now *res judicata* and cannot be revisited. To this, the Tribunal notes that the first determination was silent as to the quantum of moneys paid in error, except to the extent that the amount claimed by the appellant was adjusted down to zero. Instead, the first determination simply dismissed the appellant's application on the grounds that the hair bows manufactured by the appellant were subject to FST. Similarly, the Tribunal's decision overturning that determination did not consider the quantum of moneys paid in error or the "amount payable" to the appellant. Rather, the single issue was whether the hair bows were exempt from FST. As such, the Tribunal does not consider itself estopped from considering the issue of the quantum of moneys paid in error and the amount payable to the appellant.

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11. For instance, the Tribunal may find that an appellant was entitled to deduct certain transportation costs in calculating the sale price of goods manufactured in Canada under clause 46(*c*)(ii)(B) of the Act.

Pursuant to subsection 81.17(6),[12] as modified by subsection 81.38(3),[13] the "amount payable" to the appellant on the second determination is equal to the sum by which the amount payable pursuant to section 68 exceeds the amount paid to the appellant pursuant to its application under section 72 (the first determination), plus any additional moneys paid to the appellant pursuant to the reconsideration of the first determination on the appellant's first objection. Nothing was paid to the appellant in either instance. As such, the amount payable to the appellant on the second determination was equal to the amount payable pursuant to section 68. The Minister is of the view that $15,914.99 was payable to the appellant, as that is the amount for which the appellant applied. In contrast, the appellant believes that all moneys paid in error within two years prior to its application under section 68 were payable, regardless of the amount for which it applied.

The second issue addressed by the Tribunal concerns the amount payable to the appellant under section 68, which states:

> 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.

Critical to the resolution of this issue is the meaning of the passage "an amount equal to the [moneys paid in error] shall ... be paid to [the appellant] if [it] applies therefor within two years after the payment of the moneys." There is no dispute as to the actual amount of moneys paid in error that were taken into account as taxes under the Act or that the appellant's application under section 68 was filed within two years after payment of the moneys in error. Therefore, the only issue to be resolved is whether the appellant's entitlement to a refund is limited to the amount for which it applied.

An application for a refund of moneys pursuant to section 68 must be made in accordance with section 72. Subsection 72(4) indicates that, "[o]n receipt of an application, the Minister shall, with all due dispatch, consider the application and determine the amount, if any, payable to the applicant." Furthermore, subsection 72(5) states that, "[i]n considering an application, the Minister is not bound by any application or information supplied by or on behalf of any person." 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.

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12. Subsection 81.17(6) states:

> (6) For the purposes of this section and section 81.18, "amount payable", in respect of a person objecting, means the amount by which
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> (*a*) the aggregate of all amounts payable to that person pursuant to sections 68 to 69
>
> exceeds
>
> (*b*) the amount paid to that person pursuant to subsection 72(6) or authorized to be deducted by that person pursuant to subsection 74(1).

13. *Supra* note 9.

The Tribunal's interpretation of the Act is fortified by the reasoning of the Federal Court of Appeal in *AMOCO Canada Petroleum Company Ltd.* v. *The Minister of National Revenue*.[14] In that case, Revenue Canada sought to avoid paying the whole amount of a refund otherwise wholly owing to a taxpayer on the basis of a claimed one-year limitation period which it inferred from the language of the Act. To this, MacGuigan J. acknowledged that, "[f]or a Court so to limit a taxpayer's right to what would otherwise be his own money would necessitate a clear statutory directive indeed.[15]" He added that "[i]t cannot be lightly presumed that Parliament does not intend the Government to pay its debts. A Court must therefore carefully scrutinize the statute in question.[16]" On careful scrutiny, the Tribunal cannot infer from the language of the Act an intention to limit an applicant to the amount for which it applied when the Minister has ascertained that a greater amount was paid in error to which the applicant is otherwise entitled.

The Minister first determined that the appellant paid no moneys in error, as the hair bows of its manufacture were considered taxable. However, subsequent to the appellant's successful appeal to the Tribunal, a Revenue Canada auditor determined that the appellant had, in fact, paid $34,527.62 in error. It is this sum that the Tribunal finds payable under section 68 of the Act. As such, it was this sum that constituted the "amount payable" to the appellant on the second determination.

Accordingly, the appeal is allowed.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

14. 85 D.T.C. 5169, Court File No. A-1013-84, March 15, 1985.
15. *Ibid.* at 5169.
16. *Ibid.* at 5170.