CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, September 30, 1997

Appeal No. AP-96-084

IN THE MATTER OF an appeal heard on April 21, 1997, 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 June 26, 1996, concerning a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

VITRERIE VERTECH INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Dr. Patricia M. Close
Dr. Patricia M. Close
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-96-084

VITRERIE VERTECH INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the *Excise Tax Act* from an assessment of the Minister of National Revenue for the period from October 31, 1986, to March 31, 1990. At the hearing, a preliminary issue was raised, that is, whether the Tribunal had jurisdiction to grant the relief sought by the appellant. Counsel for the respondent argued that the Tribunal lacked jurisdiction to rule on the applicability of administrative policies developed by the respondent. Counsel for the appellant submitted that it is absurd that the appellant could not contest the method used by the respondent to calculate the amount of outstanding taxes. Should the Tribunal accept the respondent's position, counsel for the appellant argued that the Tribunal has nonetheless jurisdiction to hear this appeal in order to determine whether the respondent acted diligently in reconsidering the assessment.

HELD: The appeal is dismissed. Although the appeal from an assessment has been correctly filed with the Tribunal pursuant to the *Excise Tax Act*, the Tribunal accepts the arguments raised by counsel for the respondent to the effect that the Tribunal lacks jurisdiction to rule on the applicability of Excise Memorandum ET 202. It is not within the Tribunal's power to rule on the application of conditions set out in a departmental policy for which there is no statutory or regulatory authority, such as the one outlined in Excise Memorandum ET 202. In fact, this policy establishes a method for determining tax liability on a basis other than sale price or volume, as provided in the *Excise Tax Act*. The Tribunal concludes, therefore, that it lacks jurisdiction to grant the relief sought by the appellant, for want of proof that the allegations of errors in making the assessment were based on the provisions of the *Excise Tax Act*.

With regard to the argument put forward by counsel for the appellant to the effect that the Tribunal can determine whether the respondent acted diligently in letting almost six years elapse between the notice of objection and the notice of decision, the Tribunal finds that the relief sought by the appellant is an equity issue. It is well established that the Tribunal has no authority to apply principles of equity or grant equitable relief in determining appeals.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 21, 1997
Date of Decision:	September 30, 1997
Tribunal Members:	Arthur B. Trudeau, Presiding Member Dr. Patricia M. Close, Member Lyle M. Russell, Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Charles Tibshirani, for the appellant Guy Blouin, for the respondent

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-96-084

VITRERIE VERTECH INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
DR. PATRICIA M. CLOSE, Member
LYLE M. RUSSELL, Member

REASONS OF DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) from an assessment of the Minister of National Revenue dated August 15, 1990, for the period from October 31, 1986, to March 31, 1990. The assessment, in the amount of $44,234.72, including interest and penalty, was for outstanding taxes on aluminum windows. The appellant served a notice of objection dated November 14, 1990. In a notice of decision dated June 26, 1996, the respondent disallowed the objection and confirmed the assessment.

Since 1986, the appellant has been operating a company specialized in the sale, service and installation of aluminum windows. During the above-mentioned period, the appellant held a manufacturer's licence and manufactured aluminum doors and casements sold exclusively to individuals or to individuals and commercial customers. In November 1986, the Department of National Revenue (Revenue Canada) informed the appellant that it could calculate federal sales tax (FST) on the basis of a determined value, that is, for the aluminum doors and casements including installation, on the basis of the sale price less the deduction for installation in accordance with the guidelines set out in Excise Memorandum ET 205[2] (Memorandum ET 205) and less an all-inclusive discount of 35 percent to be deducted from the balance.

In April 1990, Revenue Canada audited the appellant for the period from October 31, 1986, to March 31, 1990, namely, the period relevant to this appeal. At that time, the auditor informed the appellant that the method used to calculate FST was consistent with Revenue Canada's administrative practice. In a subsequent visit, the auditor informed the appellant that the method of calculating FST had been changed and that, pursuant to these changes, the appellant would lose its entitlement to the all-inclusive discount of 35 percent. The auditor, therefore, had to redo the calculation and assessed the amount of outstanding taxes owed by the appellant. The appellant states that it never received any letter or was never otherwise informed of the change.

At the hearing, a preliminary issue was raised, that is, whether the Tribunal had jurisdiction to grant the relief sought by the appellant. Counsel for the respondent argued that the Tribunal lacked jurisdiction to rule on the applicability of administrative policies developed by the respondent. He submitted that the Tribunal's decisions in

1. R.S.C. 1985, c. E-15.
2. *Goods Erected or Installed*, Department of National Revenue, Customs and Excise, March 29, 1989.

Empire Homes Ltd. v. *The Minister of National Revenue*,[3] *Esselte Pendaflex Canada Inc.* v. *The Minister of National revenue*[4] and *Les Ateliers Yves Bérubé Inc.* v. *The Minister of National Revenue*[5] had a direct bearing on this appeal.

Counsel for the appellant argued that the three decisions on which counsel for the respondent relied differ from the current appeal, in that they all deal with Excise Memorandum ET 202[6] (Memorandum ET 202). According to counsel for the appellant, Memorandum ET 205, not Memorandum ET 202, applies in this case. He argued that the Tribunal should limit the reasoning adopted in the three above-mentioned decisions to the memorandum at issue in those cases and not apply it in all cases where the method of calculating the value for tax is contested between a taxpayer and Revenue Canada. Should the Tribunal accept the respondent's position, counsel for the appellant argued that the Tribunal has nonetheless jurisdiction to hear this appeal in order to determine if the respondent acted diligently in reconsidering the assessment. According to counsel for the appellant, the fact that almost six years elapsed between the notice of objection and the notice of decision indicates that the respondent did not act with "all due dispatch" in reconsidering the assessment, pursuant to subsection 81.15(4) of the Act.

In response, counsel for the respondent argued that Memorandum ET 202 helps the taxpayer calculate the determined value for tax, whereas Memorandum ET 205 provides the method of calculating the deduction for installation costs. Memorandum ET 202, therefore, applies to this case, contrary to the arguments of counsel for the appellant. Counsel for the respondent also argued that the Tribunal lacks jurisdiction to apply principles of equity and to determine if the respondent acted diligently in the exercise of his duties. He added that the appellant could, in any event, have appealed the assessment directly to the Tribunal or the Federal Court of Canada without waiting for the outcome of the administrative process.

After hearing the submissions of counsel for the respondent and counsel for the appellant, the Tribunal adjourned briefly, then decided to hear the testimony of the appellant's witness and informed the parties that it would make its decision on the jurisdiction issue in due course. Mr. Luc P. Labossière, Comptroller for Vitrerie Vertech Inc., testified on behalf of the appellant. In his testimony, Mr. Labossière more or less repeated the facts set out in the appellant's brief, as summarized above. In addition, he explained how, in his view, the auditor calculated the amount of outstanding tax and why the appellant was entitled to the all-inclusive discount of 35 percent, even after the 1988 changes.

Counsel for the appellant concluded by stating that it was absurd for the appellant to be unable to contest the method used by the respondent to calculate the amount of outstanding taxes. He then argued, based on Mr. Labossière's evidence, that the appellant met the conditions set out in Memorandum ET 202, even after the 1988 changes, and that it was entitled to the all-inclusive discount of 35 percent for all sales made during the period from October 31, 1986, to March 31, 1990. With regard to the issue of diligence, counsel for the appellant added that the respondent should not shirk his own obligations pursuant to subsection 81.15(4) of the Act by arguing section 81.22 of the Act and putting the obligation to act on the appellant. In relying on the jurisprudence cited in his brief, he asked the Tribunal to dismiss the assessment because the respondent did not act with all due dispatch. Counsel for the respondent more or less repeated the arguments that he had presented at the start of the hearing.

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3. Appeal No. AP-91-270, March 19, 1993.
4. Appeal No. AP-91-187, August 9, 1993.
5. Appeal No. AP-93-239, March 11, 1994.
6. *Values for Tax*, Department of National Revenue, Customs and Excise, December 1, 1975.

Although the appeal from an assessment has been correctly filed with the Tribunal pursuant to the Act, the Tribunal accepts the arguments raised by counsel for the respondent to the effect that the Tribunal lacks jurisdiction to rule on the applicability of Memorandum ET 202. In *Empire Homes*, *Esselte Pendaflex* and *Les Ateliers Yves Bérubé*, just to name those three cases, the Tribunal concluded that it was not within its power to rule on the application of conditions set out in a departmental policy for which there is no statutory or regulatory authority, such as the one outlined in Memorandum ET 202. The Tribunal also concluded that, in fact, this policy establishes a method for determining tax liability on a basis other than sale price or volume, as provided in the Act. The Tribunal returns to its decisions in the above-mentioned cases and concludes, therefore, that it lacks jurisdiction to grant the relief sought by the appellant. In fact, unless the appellant had been able to prove that the allegations of errors in making the assessment were based on the provisions of the Act, the Tribunal could not have allowed the appeal.

With regard to the argument put forward by counsel for the appellant to the effect that the Tribunal can determine whether the respondent acted diligently in letting almost six years elapse between the notice of objection and the notice of decision, the Tribunal finds that the relief sought by the appellant is an equity issue. It is well established that the Tribunal has no authority to apply principles of equity or grant equitable relief in determining appeals.[7] In any event, the Tribunal notes that subsection 81.22(1) of the Act provides that, where a person has served a notice of objection and the Minister of National Revenue has not sent a notice of decision to that person within 180 days after the notice of objection was served, that person may appeal the assessment to the Tribunal or the Federal Court—Trial Division. The appellant, therefore, could have appealed the respondent's assessment much earlier than it did.

Accordingly, the appeal is dismissed.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Dr. Patricia M. Close
Dr. Patricia M. Close
Member

Lyle M. Russell
Lyle M. Russell
Member

7. See, for example, *Joseph Granger* v. *Canada Employment and Immigration Commission*, [1986] 3 F.C. 70, affirmed [1989] 1 S.C.R. 141; and *Jim's Motor Repairs (Calgary) Ltd.* v. *The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-93-068, February 28, 1994.