

Ottawa, Monday, June 26, 1989

Appeal No. 2997

IN THE MATTER OF an appeal heard on February 7, 1989, pursuant to section 51.19 of the *Excise Tax Act*, R.S.C. 1970, C. E-13, as amended (the Act);

AND IN THE MATTER OF a decision of the Minister of National Revenue dated March 10, 1988, with respect to a Notice of objection filed pursuant to section 51.15 of the Act.

BETWEEN

LES PRESSES LITHOGRAPHIQUES INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed. The Tribunal declares that the federal sales tax is to be imposed on the sale price of the printed matter "Auto Québec" and "Directement du propriétaire" sold between September 1, 1983, and January 31, 1987, as it is indicated in the Assessment No. QUE-0444 of March 20, 1987, and confirmed by the Minister of National Revenue in his Notice of decision dated March 10, 1988. Furthermore, the Tribunal declares it does not have jurisdiction to cancel the penalty assessed by the respondent under subsection 50(4) of the Act. R.S.C. 1970, c. E-13 as amended.

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.

Presiding Member

John C. Coleman

John C. Coleman

Member

Arthur B. Trudeau

Arthur B. Trudeau

Member

Robert J. Martin

Robert J. Martin

Secretary

UNOFFICIAL SUMMARY

Appeal No. 2997

LES PRESSES LITHOGRAHIQUES INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Excise Tax Act - Is the method used to determine the amount of tax due appropriate - Is the penalty for default applicable given the appellant's good faith.

DECISION: *The appeal is dismissed. As a manufacturer, the appellant is responsible for the payment of the sales tax calculated on the sale price of the goods. In light of the evidence, the sale price corresponds to the amount charged to the clients. As for the penalty, the Tribunal does not have jurisdiction to cancel it.*

Place of hearing: Ottawa, Ontario
Date of hearing: February 7, 1989
Date of decision: June 26, 1989

Panel Members: Robert J. Bertrand, Q.C., Presiding Member
John C. Coleman, Member
Arthur B. Trudeau, Member

Counsel for the Tribunal: Lyne Letarte

Clerk of the Tribunal: Janet Rumball

Appearances: Michel Roy, for the Appellant
Michèle Joubert, for the Respondent

Cases Cited: *The King v. Imperial Tobacco Company of Canada Limited, (1939) S.C.R. 322;*
The Queen v. Continental Air Photo Limited, 1962 R.C.E. 461.

Statutes Cited: *Excise Tax Act, R.S.C. 1970, c. E-13, subss. 26(1), 27(1), 29(1) and 50(4), s. 51.19 and par. 3(1)(b) of Schedule III, Part III;*
Canadian International Trade Tribunal Act, S.C. 1988, c. 56, s. 60.

Appeal No. 2997

LES PRESSES LITHOGRAPHIQUES INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT J. BERTRAND, Q.C., Presiding Member
JOHN C. COLEMAN, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

SUMMARY

The appellant received a sales tax assessment for printed matter. The appellant considered the printed matter in question to be newspapers and therefore exempt. The appellant was also assessed a penalty because the tax was not paid within the time prescribed. Revenue Canada re-examined the file and decided that one of the publications in question met the criteria set forth in Schedule III, Part III of the Act, specifically, that because it contained less than 90 per cent advertising, it was a newspaper. Revenue Canada therefore reimbursed the sales tax paid and the penalty charged for this publication. Before the Tribunal, the appellant admitted that the sales tax was applicable to the two other publications and claimed that the sales tax was included in the sale price of the goods and should be calculated on that sale price less the tax, rather than on the sale price alone. The appellant also asked the Tribunal to cancel the fine assessed by the respondent because the former had acted in good faith.

The appeal is not allowed. The sales tax was not included in the sale price and had, therefore, been correctly calculated by the respondent. The Tribunal does not have jurisdiction to cancel the penalty assessed by the respondent, only the Minister has that authority.

THE LEGISLATION

The relevant provisions of the Act¹ are as follows:

26.(1) In this Part,

...

"sale price", for the purpose of determining the consumption or sales tax, means

1. R.S.C. 1970, c. E-13; now R.S.C. 1985, c. E-15.

- (a) *except in the case of wines, the aggregate of*
 - (i) *the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,*
 - (ii) *any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price (whether payable at the same or some other time) including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and*

...

"producer or manufacturer" includes any printer, publisher, lithographer, engraver or commercial artist, but does not include, for the purposes of this Part and the Schedules, any restaurateur, caterer or other person engaged in the business of preparing in a restaurant, centralized kitchen or similar establishment food or drink, whether or not such food or drink is for consumption on the premises;

...

27.(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 of all ... goods

- (a) *produced or manufactured in Canada,*
 - (i) *payable, in any case other than a case mentioned in subparagraph (ii) or (iii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,*

...

29.(1) The tax imposed by section 27 does not apply to the sale or importation of the goods mentioned in Schedule III, other than those goods mentioned in Part XIII of Schedule III that are sold to or imported by persons exempt from consumption or sales tax under subsection 31(2).

...

50.(4) *Subject to subsection (5) to (7), on default in payment of any tax payable under Parts II.1, III, IV or V within the time prescribed by subsection (3), the person liable to pay the tax shall pay, in addition to the amount of the default, a penalty of one-half of one per cent and interest at the prescribed rate, in respect of each month or fraction of a month between the expiry of that time and the day on which the total tax, penalty and interest outstanding is paid, calculated on the total tax, penalty and interest outstanding in that month.*

SCHEDULE III

PART III

EDUCATIONAL, TECHNICAL, CULTURAL, RELIGIOUS AND LITERARY

3.(1) *The following printed matter, articles and materials:*

...

(b) *magazines and parts thereof; newspapers and parts thereof; articles and materials for use exclusively in the manufacture or production of the foregoing; all the foregoing other than:*

...

(iii) *any single issue of a magazine if*

(A) *the printed space therein devoted to advertising is more than ninety per cent of the total space therein, or*

(B) *the aggregate of the printed space devoted to advertising in the four issues of the magazine immediately preceding that issue is more than seventy percent of the aggregate of the total printed space in those four issues ...*

THE FACTS

This is an appeal that was filed with the Tariff Board on April 26, 1988, pursuant to section 51.19 of the Act,² as amended, against an assessment numbered No. QUE-0444, dated March 20, 1987, and upheld, in part, by the respondent's decision of March 10, 1988. Under the assessment, the appellant was required to pay federal sales tax, as well as a penalty and interest on the printed matter sold between September 1, 1983, and January 31, 1987, inclusive. The

2. Ibid.

appellant acknowledges that these sales are subject to tax, but claims that the tax was incorrectly calculated and that the penalty should not be payable because the appellant had acted in good faith.

Since the appeal is a continuation of proceedings instituted before the commencement of the *Canadian International Trade Tribunal Act*,³ it is concluded by the Canadian International Trade Tribunal (the Tribunal) under section 60 of that Act.

The appellant company is the printer of the three publications in dispute: "Auto Québec," "Directement du propriétaire" and "Le Clap." The newspapers in question are printed from photocompositions supplied by the clients' publishers. A Notice of Assessment is issued to the appellant on March 20, 1987, in which the respondent requests the sales tax on all sales erroneously exempted from tax between September 1, 1983, and January 31, 1987, as well as the applicable penalty and interest.

The appellant objects to the assessment by filing a Notice of Objection on June 19, 1987. On March 10, 1988, the Minister of National Revenue renders a decision in favour of the appellant as regards the publication "Le Clap" since it met the criteria set forth in Schedule III, Part III, paragraph 3(1)(b) of the Act and is therefore exempted from federal sales tax. On the other hand, the assessment was upheld in part since the other two publications are not subject to any exemption. Following this decision, the appellant files an appeal with the Tariff Board on April 26, 1988.

On May 6, 1988, the respondent cancels part of the penalty assessed, that part covering the period following the date of the Notice of Objection, but continues to require payment of the penalty for the preceding period. The appellant would like all penalties cancelled because it had acted in good faith.

In the brief submitted to the Tribunal and amended at the hearing, the appellant admits that it is a manufacturer within the meaning of section 27 of the Act, and that the sales of the publications "Auto Québec" and "Directement du propriétaire" are subject to federal sales tax. The appellant is not contesting the amounts billed to clients, the deductions allowed for shipping costs or the rate of the tax applicable on the amount of each of these transactions, as determined by the respondent in its assessment of March 20, 1987, and subsequently amended by its decision of March 10, 1988. The appellant also formally acknowledges the partial reduction of the penalty, but emphasizes that a balance remains.

At the hearing, the appellant admits, through its President's testimony, the General Manager at the time of the transactions in dispute, that no federal sales tax has been collected on the sale of the printed matter in question.

THE ISSUES

The main issue is not whether certain transactions are subject to tax, but is essentially the method used to calculate the tax for remittance. The appellant claims that the sales were made for a fixed and definite price which, although it was not specifically mentioned in the documents submitted, includes the sales tax. The appellant questions the method used to

3. S.C. 1988, c. 56.

calculate the amount of tax due. Since it claims that the sales tax is included in the sale price, the appropriate equation must therefore reflect this fact by allowing the appellant to not pay tax on the tax already imposed.

Relying on the Supreme Court decision in *The King v. Imperial Tobacco Company of Canada Limited*⁴ (Imperial Tobacco), the appellant claims that the amount of tax to be remitted equals the amount billed to the client, minus shipping costs, multiplied by the fraction represented by the tax rate at the time of the transaction, divided by the tax rate increased by one. For example, if the rate is 12 per cent, the tax is equal to the net amount multiplied by 12/112.

The appellant's representative tries to show, based on the conditions of sale printed on the back of his client's invoices, that the amount billed includes the sales tax. The text in question reads as follows:

SALES TAX: Government sales tax applies to all orders, at the current rates, unless the client provides written proof of exemption. [translation]

Since the appellant received no proofs of exemption, the orders include tax.

The respondent, for his part, relying on the appellant's admissions, that is, the company is the manufacturer of the publications in question, the sales of printed matter are subject to sales tax and the federal sales tax was not collected on the sale of these goods, claims that the tax was not calculated nor remitted by the appellant. Consequently the amount of the sales tax corresponds to the product of the rate of tax times the amount billed to the client, minus the shipping costs as calculated by the respondent.

The second issue concerns the payability of the penalties when the tax has not been paid, pursuant to subsection 50(4) of the Act. The appellant does not contest the amount of the penalty, but pleads the company's good faith. Since the company was unaware that the printed matter in question did not meet the criteria for exemption under the Act, it asks the Tribunal to cancel the amount of the penalty.

The respondent, citing the decision of the Exchequer Court in 1962, *The Queen v. Continental Air Photo Limited*,⁵ (Continental Air Photo), informs the Tribunal that only the Minister has the discretion to delay or cancel penalties. The Tribunal does not have jurisdiction to review this decision and put itself in place of the Minister to grant to the appellant what it requests with respect to the penalties.

DECISION

As for the first issue, namely the appropriate method of calculating the sales tax, the federal sales tax must be collected by the appellant on the sale price of the printed matter produced by the latter at the time the goods are delivered or the property of the goods passes, pursuant to subsection 27(1) of the Act.

The appellant acknowledges that it is the manufacturer of the printed matter subject to the sales tax and it claims that the sale price indicated on the invoices includes the tax.

4. (1939) S.C.R. 322.

5. 1962, R.C.E. 461.

Counsel for the appellant relies upon one of the clauses on the back of the invoice to explain to the Tribunal that the tax is included in the sale price of the printed matter.

The wording of this clause would not in itself be sufficient to resolve the issue in the appellant's favour. Indeed, the text merely represents a rewording of the relevant provisions of the Act: sales are subject to tax unless they meet duly certified conditions for exemption. Since the orders in question were not covered by proof of exemption, as acknowledged by the appellant's witness at the time of the relevant transactions, the sale of the publications should have, under this clause, been subject to the sales tax, as the appellant has admitted. Based on the existence of this clause and the lack of any explicit mention of a specific amount for the sales tax on the invoices for the publications concerned, it cannot be concluded, as the appellant claims, that the invoiced amount includes the sales tax.

Other elements must therefore be relied upon to resolve the problem of determining the invoiced price. Based on the written and oral evidence submitted, both parties tried to show that the business practice used by the appellant supports their respective claims. Some of the invoices submitted by the appellant explicitly mention amounts for federal sales tax, calculated on the sale price of the publications or goods and added to the latter to form, with the applicable provincial sales tax, the total amount payable by the client. It appears that the appellant used this practice when it felt that the transactions are subject to the tax. When it thinks that the goods are tax exempt, the invoice makes no mention of the tax whatsoever or of the exemption status. In the case of the publications in question, the appellant's witness admits that he had not charged the tax. In view of the ambiguity of the provisions, or rather the difficulties associated with applying them by ensuring that all the conditions for exemption are satisfied, the company handles the printing of newspapers, including the publications in question, as sales subject to a tax exemption. The witness stated that, if such sales were ever recognized as taxable, he would suffer the consequences without any recourse against his clients.

A more detailed examination of the terms of the sales, written on the back of the appellant's invoices, reveals an escalator clause that covers the sale price in the event of increased wages or material costs. This escalator clause does not mention possible change in tax rates. If the appellant feels it advisable to ensure that possible increases in his direct production costs could be passed on to clients, without being concerned about tax increases, it can be concluded that the prices submitted do not include the taxes and that these are added on at the time of billing.

After examining the written and oral evidence submitted and the appellant's business practices, the Tribunal can only conclude that the invoiced price for the publications in question does not include the sales tax.

The case cited by the appellant, that the Imperial Tobacco case,⁶ does not apply to this appeal. The method of calculating the amount of the tax to be remitted to the public treasury, accepted by the Supreme Court in that decision, can be used only when the invoiced price includes the tax. The sale price list published by the Imperial Tobacco Company of Canada Limited at that time explicitly mentioned that the prices included the sales tax. Its clients' bills were done accordingly, without mention of the tax. In this appeal, the Tribunal has concluded that the invoiced price does not include the sales tax, either implicitly or explicitly, which answers the first issue in dispute. The appellant is responsible for paying and remitting the sales tax calculated on the sale price indicated on the invoices.

6. *Supra*, note 4.

The second issue concerns the levying of penalties under subsection 50(4) of the Act when the tax has not been remitted.

The Tribunal accepts that the appellant had no intention of defrauding or depriving the public treasury of the sales tax payable. The question of good faith, however, does not apply in this case. The penalty automatically becomes payable when the person liable for payment of the tax fails to remit it within the time prescribed by the Act. Only the Minister of National Revenue has the power to extend the payment time and thereby make the penalty payable upon expiration of this extension. It is not within the Tribunal's jurisdiction to fulfil the appellant's request to cancel or reduce the penalty. The Exchequer Court stressed on page 473 of the *Continental Air Photo*,⁷ that the penalty provided for in an act for the non-payment of a tax is mandatory. Justice Noël explained as follows:

... The penalties provided in s. 48(4) are mandatory in the event of non payment within the time provided for in s. 48(4) and there is no power in this Court to waive such penalties.

CONCLUSION

For these reasons, the Tribunal dismisses the appeal and declares that the appellant is liable for payment of the sales tax on the publications "Auto Québec" and "Directement du propriétaire" sold between September 1, 1983, and January 31, 1987, inclusive, calculated on the sale price of these goods. The Tribunal also finds that it does not have the jurisdiction to cancel the penalty imposed.

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Presiding Member

John C. Coleman
John C. Coleman
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

7. *Supra*, note 5.