



Ottawa, Thursday, May 22, 2003

**Appeal No. AP-2001-004**

IN THE MATTER OF an appeal heard on February 4, 2002,  
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 February 20, 2001, with respect to a  
notice of objection served under section 81.17 of the *Excise  
Tax Act*.

**BETWEEN**

**STAZ COMMUNICATIONS INC.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Richard Lafontaine  
Richard Lafontaine  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2001-004

STAZ COMMUNICATIONS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the *Excise Tax Act* (the *Act*) from a decision of the Minister of National Revenue (the Minister), in which a refund of “self-assessed” federal sales tax (FST) on imaged articles used exclusively in the production of printed matter was denied. The issues in this appeal are whether a sale of imaged articles occurs when printed matter produced using those imaged articles is sold and, if so, what portion of the FST remitted should be attributed to the alleged sale of the imaged articles and be refunded.

Staz Communications Inc. (Staz), a licensed manufacturer of printed matter, manufactured imaged articles to produce the printed matter that was sold to its customers and remitted FST on these transactions.

Staz applied for a refund of the FST paid in error, alleging that the imaged articles were sold to its customers and that, since part of the FST remitted should be attributed to the sale of the imaged articles, which are exempt transactions pursuant to the *Act*, the FST should be refunded.

The Minister denied Staz’s refund claim on the basis that Staz failed to provide evidence that FST was remitted on the imaged articles.

**HELD:** The appeal is dismissed. In order to be entitled to a refund of FST pursuant to section 68 of the *Act*, the imaged articles had to be sold to Staz’s customers and FST had to be remitted on these transactions. The Tribunal is of the view that there was insufficient evidence to indicate that Staz sold the imaged articles to its customers. Accordingly, Staz is not entitled to a refund pursuant to section 68.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: February 4, 2002  
Date of Decision: May 22, 2003

Tribunal Members: Pierre Gosselin, Presiding Member  
Richard Lafontaine, Member  
James A. Ogilvy, Member

Counsel for the Tribunal: Marie-France Dagenais

Clerk of the Tribunal: Anne Turcotte

Appearances: Michael Kaylor, for the appellant  
Patricia Johnston, for the respondent



Appeal No. AP-2001-004

STAZ COMMUNICATIONS INC.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PIERRE GOSSELIN, Presiding Member  
RICHARD LAFONTAINE, Member  
JAMES A. OGILVY, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> from a decision of the Minister of National Revenue (the Minister), in which a refund of “self-assessed” federal sales tax (FST) on imaged articles used exclusively in the production of printed matter was denied. The issues in this appeal are whether a sale of imaged articles occurs when printed matter produced using those imaged articles is sold and, if so, what portion of the FST remitted should be attributed to the alleged sale of the imaged articles and be refunded.

**EVIDENCE**

Mr. Barry Staz, Vice-President of Staz Communications Inc. (Staz), testified on Staz’s behalf. He testified that Staz is a full-service printer, which provides a customer with a finished product. He explained that the three major steps in creating a printed item are the creation of the artwork, the preparation of the film and the production of plate-ready film. Once the image is created, it has to be examined by the customer, and any necessary changes can be made. When the artwork is approved, a film is prepared; a proof of the film is then approved; a plate is produced; and then printing can be done.

Mr. Staz testified that, when a customer requests printed matter, Staz first does an estimate, which shows the cost based on the various operations, beginning with the artwork stage. Pre-press activity includes operations from the artwork stage to the film stage to the plate stage. Each of these operations would carry a cost for both labour and materials. He further testified that the estimate includes the cost of completing the project for the customer.

Mr. Staz described the invoicing procedure. He testified that an estimator prepares an estimate and that a salesperson presents it to the customer. Mr. Staz explained that, when the customer places an order, a job docket and a cost sheet are prepared, recording the hours of labour required and, if necessary, the material costs for that particular project. He further explained that, when the job is done, the invoice is prepared according to the estimate, using the cost sheet and the matching job docket. Mr. Staz testified that each salesperson is responsible for billing and that, as a result, different descriptions appear on the invoices. He noted, however, that most invoices tended to be brief and did not break out the cost of the various stages of the work.

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

Mr. Staz went through some of the sample invoices that were filed as evidence and explained that there are essentially three types of invoices. The first is prepared when the customer does not proceed beyond the imaging (design and film) stage and is billed for the work done, and the imaged article is transferred to the customer. The second is prepared when the customer proceeds beyond the imaging stage to the production of the printed matter; in this category, the invoices provide some details on the cost elements relating to imaging, as well as other phases of the process, and present a total price for the printed matter. The third shows no breakdown of the costs and has only a final price for the printed matter.

Mr. Staz testified that, while the imaged article (the film and the plate) is usually kept for about six to eight months in a storage room on Staz's premises at no cost, in case the customer wants to reprint that particular project, it remains the property of the customer. He further stated that the pre-press articles ordered by customers are their exclusive property and are never used for different customers and that Staz always advises customers when it needs to dispose of their imaged articles to free up storage space.

In cross-examination, Mr. Staz testified that his selling price of printed matter includes the price of the imaged article, plus materials, labour and overhead costs, as well as a profit calculated on a percentage basis. He further testified that the FST is calculated on the total price of the printed matter.

In answering questions from the Tribunal, Mr. Staz acknowledged that the majority of invoices do not break out the cost of the imaged article from the cost of the entire printing job, even if the artwork is described separately. He further stated that a customer does not pay for the imaged article if it decides not to proceed further with the printing job. Ms. Peggy Mooney, Senior Consultant/Partner, Iwasan Consulting (Iwasan), also testified on behalf of Staz. Ms. Mooney examined the document<sup>2</sup> filed by the Minister that was sent by Iwasan to the then Department of National Revenue (Revenue Canada) requesting a written ruling with respect to claims filed for the refund of FST overpaid on imaged articles. She explained that this request was made without consulting Staz and was based on the wrong assumption that Staz owned the imaged articles.

Ms. Mooney further testified that, when Revenue Canada audited the claim, it treated the three types of invoices in exactly the same way and even denied any refund made with respect to invoices that presented the sale of an imaged article only.

In cross-examination, Ms. Mooney acknowledged that no follow-up letter was sent to correct the erroneous statement made in the memorandum that the property in the imaged articles was kept by Staz.

## **ARGUMENT**

Staz submitted that the primary issue in this appeal is whether it sold the imaged articles.

Staz argued that it is clear that each printing job, even if this is not always reflected in the commercial invoice, consists of two separate components: the imaged article and the printed matter, which are sold separately to the customer and to each of which there is a distinct application of FST.

Staz made reference to the three types of invoices filed as exhibits and argued that, notwithstanding the lack of uniformity, the commercial reality of the relationship with its customers is that the legal title to the imaged articles passes from Staz to its customers. It argued that, regardless of how the actual invoices read, the underlying nature of the contract with the customer is essentially the same. It further argued that

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2. Respondent's Book of Documents, Tab 2.

the sold imaged article belongs to the customer and can only be used for the purposes of manufacturing printed matter for that particular customer.

Staz submitted that, pursuant to subparagraph 50(1)(a)(i) of the *Act*, FST became payable at the time at which title to the goods, manufactured in Canada, passed to the customer or when the goods were delivered to the customer, whichever was the earlier. It argued that the evidence shows that, in this case, the imaged articles were not physically delivered to the customers, but that, in every case, the imaged articles were sold and title to the imaged articles did in fact pass to the customers when the printed matter was sold.

Staz submitted that the word “sale”, under the Ontario *Sale of Goods Act*,<sup>3</sup> means the transfer of the property in the goods for a money consideration. Staz argued that a sale does not require a physical transfer of the property from the vendor to the purchaser, but that it is sufficient that there be an intention to transfer to the customer the title to the imaged article. Staz further argued that the evidence indicates that there is a transfer of the property in the imaged article to the customer.

Staz made reference to the Supreme Court of Canada’s decision in *Hickman Motors v. Canada*<sup>4</sup> and several other decisions<sup>5</sup> in support of its argument that the Tribunal must look beyond what appears in writing on an invoice and consider the commercial reality of a transaction, which underlies any commercial invoice, to determine the true nature of the arrangement between the vendor and the purchaser. Staz also referred to this jurisprudence to support the argument that, in order to confirm the substantive nature of the relationship between Staz and its customers, the Tribunal can look at the credible and uncontradicted oral evidence given by its witness, Mr. Staz, to the effect that there is a sale of both printed matter and imaged articles.

On the issue of burden of proof, Staz argued that it only has the onus to rebut Revenue Canada’s assumption that there was no sale of imaged articles by adducing satisfactory evidence to the contrary. Staz argued that it shifted the burden of proof to the Minister by presenting invoices that indicate a price attributable solely to the imaged articles, as well as uncontradicted and credible evidence as to the commercial reality of the transactions at issue, in the form of Mr. Staz’s testimony.

Staz also argued that, when there are two distinct components, the Tribunal should consider whether it would be possible to purchase each element separately and still end up with a useful article. In this case, while the imaged article is necessary to produce the printed matter, the imaged article is still a tangible product on its own and very distinct. Staz argued that, if the goods can be purchased separately, there are two separate sale prices.

Finally, Staz submitted that the wording of the applicable legislative provision exempting imaged articles, section 4 of Part XIII of Schedule III to the *Act*, is different from all the other exempting provisions under Part XIII, in that it also exempts imaged articles made by the manufacturer or producer. Accordingly, Staz submitted, in the present case, since Staz itself made the imaged articles, they were obviously for use in the manufacture of printed matter and, as such, clearly fall within the scope of the exempting provision.

The Minister agreed with Staz that the primary issue to be decided in this case is whether a sale of imaged articles occurred and submitted that the determination of this matter is a question of fact.

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3. R.S.O. 1990, c. S. 1.

4. [1997] 2 S.C.R. 336.

5. *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298; *Mountwest Steel Ltd. v. The Queen*, [1994] G.S.T.C. 71 (T.C.C.); *Gaetan Brodeur v. M.N.R.*, 87 D.T.C. 351 (T.C.C.); *Harkishan Sandhu v. Her Majesty the Queen*, 80 D.T.C. 6097 (F.C.T.D.).

The Minister also agreed that Staz manufactures imaged articles and that imaged articles are tax exempt. However, he submitted that there is no evidence to suggest that a sale occurred pursuant to section 50 of the *Act*, which provides that FST is payable by the manufacturer when the goods are passed to the purchaser.

The Minister argued that, to the contrary, the evidence suggests that there was no sale of the imaged articles. First, he made reference to the letter dated May 28, 1998, sent by Iwasan, a consulting company acting on behalf of Staz, in which it is stated that “[t]he taxpayers were printers licensed as [manufacturers] under the Excise Tax Act” and that “title or property in the imaged articles never passed from them.” He submitted that the evidence shows that Iwasan, a company knowledgeable in the field of taxing statutes, should have been acting in its client’s best interest and should have known that the passing of the title to the imaged articles was critical to a finding of whether they were tax exempt. He further submitted that there was never a follow-up letter to suggest that the May 28, 1998, letter was incorrect or that the circumstances set out in the letter no longer applied. Accordingly, the Minister argued, the Tribunal must operate under the assumption that the May 28, 1998, letter is correct and true. He further argued that this evidence puts in question the credibility of Staz’s witnesses when they suggest, contrary to the uncontradicted letter, that the title to the imaged articles passes and that there is a sale.

Second, the Minister submitted that there is no sale of imaged articles because Staz, as a printer, is in the business of selling printed matter and that printers do not sell their production equipment. He argued that the evidence shows that Staz made a practice of not disclosing the price of the imaged articles to its customers. Indeed, only in those instances where the customer decided not to proceed to the printed matter stage, but wanted to gain possession of the imaged articles, did Staz charge for the imaged articles. The Minister further argued that, according to the evidence, the cost of producing the imaged articles is incorporated into the final selling price and that there is no deemed sale of the imaged articles.

Third, the Minister submitted that the invoices and documentation filed as exhibits do not reflect that there are two distinct sales. He argued that the documents do not suggest that Staz’s intention was to sell the imaged articles to its customers. He further argued that the invoices do not show a separate breakout of the FST charged, but only one lump sum, which suggests that the only FST remitted was in respect of the printed matter itself.

Finally, the Minister submitted that the evidence regarding the storage of the imaged articles on Staz’s own premises at no cost to the customers suggests that there is no sale of imaged articles.

With respect to the issue of onus, the Minister argued that a shifting of the burden assumes that the evidence is credible, but, in this case, it has been demonstrated that the testimony of Staz’s witnesses may be questionable. According to the Minister, Staz still has the burden to prove that there was in fact a sale of imaged articles and, on a balance of probabilities, it has not discharged its onus.

## **DECISION**

The primary issue in this appeal is whether a sale of imaged articles occurs when printed matter produced using those imaged articles is sold.

Section 50 of the *Act* reads, in part, as follows:

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

(a) produced or manufactured in Canada

(i) payable . . . 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.

Pursuant to subsection 51(1) of the *Act*, the tax imposed by section 50 does not apply to the sale of goods mentioned in Schedule III. Section 4 of Part XIII of Schedule III covers metal plates, film and art work, when impressed with or displaying or carrying an image for reproduction by printing, made or imported by or sold to a manufacturer or producer for use exclusively in the manufacture or production of printed matter.

Accordingly, pursuant to section 68 of the *Act*, the producer of imaged articles can claim a refund of FST paid in error when the imaged articles are sold to the customers and FST was in fact remitted on the imaged articles.

Both parties agreed that the goods in issue are imaged articles, that they were made by a manufacturer, i.e. a printer, and are for use exclusively in the manufacture of printed matter. Both parties also agreed that there must be a sale of the imaged articles in order for a manufacturer to be entitled to claim a refund.

There is no definition of the word “sale” in the *Act*. Staz referred to the meaning of the word “sale” as set out in the Ontario *Sale of Goods Act*, that is, the transfer of the property in the goods for a money consideration. It also submitted that a sale does not require a physical transfer of the property from the vendor to the purchaser, but that it is sufficient that there be an intention to transfer to the customer the title to the imaged article. The Minister submitted that FST is payable by the manufacturer when the goods are passed to the purchaser and that the transfer of property is a factual determination that must be made by considering the evidence.

In the Tribunal’s view, there is no evidence that clearly demonstrates that there is in fact a sale of imaged articles when the printer sells the printed matter. The Tribunal examined the documentary evidence, which includes a number of invoices filed by Staz as a representation of different types of transactions. These invoices seemingly represent the commercial transactions between Staz and its customers and are the expression of both parties’ intention. However, none of the invoices expressly acknowledges a sale of the imaged articles. That is to say, the invoices show the purchase of printed matter only. The only exception is where the customer decided not to purchase the printed matter, but wanted to gain possession of the imaged article.

The Tribunal also looked at Mr. Staz’s testimony. The Tribunal notes that his testimony shows that, when a customer purchases the printed matter, there is no discussion between the parties as to whether the customer is also purchasing the imaged article. There might have been discussions between the parties as to how the imaged article should look, but there is no evidence to indicate that the parties intended to have a sale of the imaged article when they entered into the agreement. In the Tribunal’s view, there is also no evidence to show that the parties assigned a value or even a component of the overall purchase price to the imaged article. There is no evidence to persuade the Tribunal that Staz contemplated the sale of the imaged article when the transaction occurred and that there was a money consideration given for the purchase of the imaged article.

Mr. Staz’s testimony also indicates that Staz, at no cost to the customers, stores the imaged articles used to create the printed matter. The evidence shows that Staz keeps possession of the imaged articles. There is no evidence to suggest that the customers who purchased printed matter were ever given possession of the imaged articles. To the contrary, the evidence indicates that all pre-print materials relating to the sale of the printed matter stayed with Staz.

While there is some evidence to suggest that, following the sale of the printed matter, the customer could ask Staz to give it possession and exclusive use of the imaged article, the Tribunal is not persuaded that this confirms the sale of the imaged article.

Having considered the evidence, the Tribunal is not persuaded that a sale of imaged articles occurs when printed matter produced using the imaged articles is sold. Consequently, the appeal is dismissed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Richard Lafontaine  
Richard Lafontaine  
Member

James A. Ogilvy  
James A. Ogilvy  
Member