



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal Nos. AP-2002-034 to
AP-2002-037

Pierre Roy et Associés Inc. for
Lithochrome (1974) Inc. (in
Bankruptcy), Le Groupe
Lithochrome Inc. (in Bankruptcy),
Filmographie P.F. Inc. (in
Bankruptcy) and Opticouleur Inc.
(in Bankruptcy)

v.

Minister of National Revenue

*Decision and reasons issued
Thursday, March 31, 2005*

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IN THE MATTER OF appeals heard on March 11, 2005, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National Revenue dated June 6, 2002, with respect to notices of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

PIERRE ROY ET ASSOCIÉS INC. FOR LITHOCHROME (1974) INC. (IN BANKRUPTCY), LE GROUPE LITHOCHROME INC. (IN BANKRUPTCY), FILMOGRAPHIE P.F. INC. (IN BANKRUPTCY) AND OPTICOULEUR INC. (IN BANKRUPTCY)

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Patricia M. Close
Patricia M. Close
Member

James A. Ogilvy
James A. Ogilvy
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 11, 2005

Tribunal Members: Richard Lafontaine, Presiding Member
Patricia M. Close, Member
James A. Ogilvy, Member

Counsel for the Tribunal: Eric Wildhaber

Clerk of the Tribunal: Margaret Fisher

Counsel: Michael Kaylor, for the appellant
Jean-Robert Noiseux, for the respondent

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STATEMENT OF REASONS

BACKGROUND

1. These appeals, made pursuant to section 81.19 of the *Excise Tax Act*,¹ are from decisions of the Minister of National Revenue (the Minister), denying Pierre Roy et Associés Inc. (Pierre Roy), acting for the companies in bankruptcy named in the style of cause, refund applications for allegedly overpaid federal sales tax on imaged articles under section 68 of the *Act*. The Minister denied Pierre Roy's objections to the determinations in these matters on the ground that the various refund claims at issue were not supported with the necessary records and books of account, as required under the provisions of subsections 98(1), (2) and (2.1) of the *Act*.

HISTORY OF THE PROCEEDINGS

2. The decisions under appeal were made by the Minister on June 6, 2002.

3. Pierre Roy filed appeals of those decisions with the Canadian International Trade Tribunal (Tribunal) on September 4, 2002. Pierre Roy filed a brief on April 1, 2003. The Minister filed a brief on May 30, 2003.

4. On June 2, 2003, Pierre Roy, with the Minister's consent, requested that the Tribunal postpone the hearing into these appeals that was scheduled for July 15, 2003. On June 5, 2003, the Tribunal granted that request, and the hearing was rescheduled for October 30, 2003.

5. On October 16, 2003, Pierre Roy requested that the hearing scheduled for October 30, 2003, be postponed and that these appeals be held in abeyance pending decisions by the Federal Court in one of five other cases that purportedly raised the same issue as that raised in these appeals. On October 20, 2003, the Minister opposed Pierre Roy's request, arguing that the issue in the present appeals was resolved by the Tribunal in *Les Pignons L.V.M. du Québec Inc. v. M.N.R.*² The same day, Pierre Roy indicated to the Tribunal that the five cases pending before the Federal Court allowed the opportunity to raise a new argument relative to the interpretation of subsection 98(1) of the *Act* that was not at issue in *Les Pignons* and that it had not included in its brief to the Tribunal in these appeals. Pierre Roy further indicated that it welcomed the opportunity to present that new argument to the Tribunal, but that to do so would require permission from the Tribunal to amend its brief.

6. On October 24, 2003, the Tribunal postponed *sine die* the hearing that had been scheduled for October 30, 2003, and directed the parties to these appeals to file amended briefs addressing Pierre Roy's new argument with respect to the interpretation of subsection 98(1) of the *Act*.

7. On October 27, 2003, Pierre Roy filed an amended brief and requested that the Tribunal decide as a preliminary matter the validity of the legal argument that it made in its amended brief relative to its interpretation of subsection 98(1) of the *Act* before hearing the merits of these appeals. On November 21, 2003, the Minister filed an amended brief with the Tribunal.

8. On January 29, 2004, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,³ the Tribunal decided to treat as a preliminary matter the legal argument raised by Pierre Roy in its amended brief. Pierre Roy had argued that its obligations to keep records, etc. pursuant to section 98 of the *Act*, were

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

2. (19 August 2002), AP-93-315 (CITT) [*Les Pignons*].

3. S.O.R./91-499 [*Rules*].

extinguished. Having determined that there was sufficient information on the record to deal with that issue, the Tribunal rendered a decision on the basis of the written record. The Tribunal rejected Pierre Roy's argument. The full text of the Tribunal's decision and statement of reasons on this preliminary matter appears on the Tribunal's Web site.⁴

9. On February 18, 2004, Pierre Roy filed with the Federal Court of Appeal (the Court) an application for judicial review of the Tribunal's decision of January 29, 2004. As a consequence, on February 26, 2004, the Tribunal gave notice to the parties to these appeals that it would not schedule a hearing in these matters until the Court had rendered its decision.

10. On November 4, 2004, Pierre Roy filed a notice of discontinuance of the proceeding that it had commenced before the Court on February 18, 2004.

11. On November 16, 2004, the parties asked the Tribunal that these appeals be decided on the basis of the existing record. Pierre Roy indicated that it did not intend to produce any further evidence, either written or oral. The parties requested that these appeals be dismissed. Pierre Roy gave notice that it intended, upon their dismissal, to appeal these matters to the Federal Court pursuant to section 81.24 of the *Act*.

12. In the February 12, 2005, edition of the *Canada Gazette*, the Tribunal gave notice that it had decided, at the request of the parties to these appeals, and pursuant to rule 36.1 of the *Rules*, to hold a hearing into these matters by way of written submissions, based on the written documentation currently before it, and that this hearing would take place on March 11, 2005.⁵ A hearing took place on that day.

ARGUMENT⁶

13. In written submissions to the Tribunal, Pierre Roy argued that each of the companies named in the style of cause was involved exclusively in the manufacture of various types of imaged articles and that its sales of such articles included the federal sales tax, which was remitted to the Minister. Pierre Roy submitted that, in accordance with the Court's decision in *Canada v. Tom Baird and Associates*,⁷ and pursuant to section 68 of the *Act*, it was entitled to a refund of all federal sales tax remitted with respect to such sales of imaged articles.

14. In written submissions to the Tribunal, the Minister argued that Pierre Roy had failed to discharge its onus of proving that it is entitled to the requested tax refund because it had failed to substantiate its claims with documentary evidence, as required by section 98 of the *Act*.

DECISION

15. The relevant provisions of the *Act* are the following:

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.

4. On-line at www.citt-tcce.gc.ca/appeals/orders/ap2c34a_e.asp.

5. C. Gaz. 2005.I.400.

6. This section outlines the submissions of the parties. It is not intended as an exhaustive recital of the arguments submitted by the parties in their briefs or amended briefs.

7. [1997] F.C.J. No. 1579 (QL).

81.19 Any person who has served a notice of objection under section 81.15 or 81.17, other than a notice in respect of Part I, may, within ninety days after the day on which the notice of decision on the objection is sent to him, appeal the assessment or determination to the Tribunal.

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) Every person required by subsection (1) to keep records and books of account shall retain those records and books of account and every account and voucher necessary to verify the information contained therein until the expiration of six years from the end of the calendar year in respect of which those records and books of account are kept or until written permission for their prior disposal is given by the Minister.

(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.

16. The Tribunal recalls its decision dated January 29, 2004, whereby it rejected the argument advanced by Pierre Roy that its obligation to keep records, etc., pursuant to section 98 of the *Act*, was extinguished.⁸

17. The Tribunal agrees with the following reasons given by the Minister in the notices of decision that are at issue:⁹

Your basic argument is that the work done for your clients is exclusively for the manufacture or production of print materials, and is exempt from the federal sales tax pursuant to section 4 of Part XIII of the appendix of the Act.

In the decision issued on November 18, 1997, in the Tom Baird & Associates Limited case, the Federal Court of Appeal ruled that the federal sales tax exemption applies to production equipment, packaging materials and plans for use exclusively in the production of print materials.

Pursuant to section 98 of the Act, the person who requests a refund must keep records and books of account, as well as the supporting vouchers. Moreover, pursuant to subsection 98(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

The analysis of your file shows that the records and vouchers necessary to evaluate your claim are not available.

8. *Supra* note 4.

9. Respondent's Brief, Appendices C, F, I and L.

In the circumstances, there is no provision of the Act under which your request for a refund can be granted.

[Translation]

18. The Tribunal notes that the Minister refused the claim for a refund of the federal sales tax because Pierre Roy had not provided the “records and books of account and every account and voucher necessary to verify the information therein”, as required by subsection 98(2.1) of the *Act*. That subsection also requires the taxpayer to keep supporting documentation for six years or until the final disposition of every pertinent objection or appeal, which, in the Tribunal’s view, would include the appeals now before it.

19. In the Tribunal’s view, the provisions of section 98 of the *Act* require that claims under the *Act* be substantiated by documentary evidence.¹⁰ The material on the record included the refund applications submitted by Pierre Roy. Although these materials asserted the grounds for the claims, Pierre Roy did not provide documentation to substantiate its assertions, such as invoices that indicated the dollar value of imaged articles. The Tribunal is of the view that the documentary evidence that was submitted is insufficient to support the claims.¹¹ Accordingly, the Tribunal finds that Pierre Roy did not discharge the onus to demonstrate the validity of its claims for the tax allegedly paid in error.

20. For the foregoing reasons, the appeals are dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Patricia M. Close
Patricia M. Close
Member

James A. Ogilvy
James A. Ogilvy
Member

10. See *Les Pignons L.V.M. du Québec Inc. v. M.N.R.* (19 August 2002), AP-93-315 (CITT).

11. The Tribunal refers to its decisions in the following matters: *Prolith Incorporated v. M.N.R.* (3 October 2002), AP-99-039 and AP-99-058 (CITT); *P.L.B. Graphique Inc. v. M.N.R.* (10 April 2003), AP-2002-005 (CITT); *Gray O'Rourke Sussman Advertizing Inc. v. M.N.R.* (1 April 2003), AP-2002-006 (CITT); *King West Communications Inc. v. M.N.R.* (1 April 2003), AP-2002-007 (CITT); *The Russo Group Inc. v. M.N.R.* (1 April 2003), AP-2002-008 (CITT); *Corlab Inc. v. M.N.R.* (1 April 2003), AP-2002-010 (CITT).