

Ottawa, Tuesday, September 8, 1992

Appeal No. AP-90-043

IN THE MATTER OF an appeal heard on March 31, 1992,
under section 81.19 of the *Excise Tax Act*, R.S.C., 1985,
c. E-15, as amended;

AND IN THE MATTER OF decisions of the Minister of
National Revenue dated March 27 and 28, 1990, with
respect to notices of objection served under section 81.17 of
the *Excise Tax Act*.

BETWEEN

TOTAL GRAPHICS

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Sidney A. Fraleigh

Sidney A. Fraleigh
Presiding Member

Kathleen E. Macmillan

Kathleen E. Macmillan
Member

W. Roy Hines

W. Roy Hines
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-043

TOTAL GRAPHICS

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant provides graphic arts services to its customers. The issue in the present appeal is whether the articles made by the appellant are exempt from federal sales tax under subsection 51(1) of the Excise Tax Act and section 4, Part XIII, Schedule III to the Excise Tax Act.

HELD: *The appeal is allowed.*

Place of Hearing: Vancouver, British Columbia

Date of Hearing: March 31, 1992

Date of Decision: September 8, 1992

*Tribunal Members: Sidney A. Fraleigh, Presiding Member
Kathleen E. Macmillan, Member
W. Roy Hines, Member*

Counsel for the Tribunal: Robert Desjardins

Clerk of the Tribunal: Janet Rumball

*Appearances: Michael Kaylor, for the appellant
John B. Edmond, for the respondent*

Appeal No. AP-90-043

TOTAL GRAPHICS

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
KATHLEEN E. MACMILLAN, Member
W. ROY HINES, Member

REASONS FOR DECISION

On October 14, 1988, the appellant filed refund claims for sales tax paid with respect to the sale of imaged articles to its customers. By notices of determination dated October 28 and December 19, 1988, the respondent rejected the claims. Notices of objection were served by the appellant on January 13, 1989. By notices of decision dated March 27 and 28, 1990, the respondent confirmed the determinations.

The issue in the present appeal is whether the articles made by the appellant are exempt from federal sales tax under subsection 51(1) of the *Excise Tax Act*¹ (the Act) and section 4, Part XIII, Schedule III to the Act. The goods covered by this exemption are "Typesetting and composition, metal plates, cylinders, matrices, film, art work, designs, photographs, rubber material, plastic material and paper material, 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."

The appellant provides graphic arts services to its customers. Mr. Greg Franklin, general manager of the appellant company, appeared as a witness on its behalf and described its activities. He explained that the appellant, a licensed manufacturer, is considered in the trade as a "pre-press house" or a "film house." Working from a provided manuscript, the appellant's designers paste up or mechanically assemble various graphic images onto art board. In addition, the appellant does illustrations and photo-retouching, as well as produces final film and colour separations for use in printing operations. It does not itself print the film, but provides film in print-ready form to printers. Mr. Franklin explained that while the business is comprised of several different stages of operations, not all are required for each project that the appellant completes.

The witness referred to a number of invoices filed as exhibits which he said were representative of the work done by the appellant. For instance, discussing Exhibit A-10 (an invoice dated September 15, 1987, to Great Escape Vacations Limited), Mr. Franklin testified that the lay-out, the typesetting, the paste-ups and the printer's final film fall within the definition of the goods described in section 4, Part XIII, Schedule III to the Act, as they carry an image for reproduction by printing. He also testified that the appellant charged sales tax on this invoice.

1. R.S.C., 1985, c. E-15, as amended.

Counsel for the appellant rejected any argument that the benefit of the exemption at issue be limited to manufacturers that, themselves, use imaged articles in their own printing. The heart of the appellant's submission is that no such restriction exists on either the plain meaning and interpretation of the words as found in section 4 or by virtue of the normal rules of statutory interpretation. He argued that the manufacturer or producer that purchases the goods may sell them to another manufacturer or producer and still avail itself of the exemption under section 4, as long as the goods themselves are for use in the manufacture or production of printed matter. In support of his argument, counsel pointed to the fact that the Act is full of provisions in which Parliament limited the scope of exemptions by using the words "for use by that manufacturer and not for resale." He contended that the absence of any such words of limitation in section 4 reflects the deliberate intention of Parliament not to limit the application of the section 4 exemption. When the words are clear and not susceptible of some secondary meaning, then the Tribunal must read the words as they stand, unless there is a compelling reason to do otherwise. Counsel referred to the decision in *Lor-Wes Contracting Ltd. v. The Queen*² in which MacGuigan J. held that it was impossible to read the words "by him" into the relevant provision of the *Income Tax Act* because it would be inappropriate for the Federal Court to take on a legislative role in this way.

Counsel for the appellant also argued that the inclusion of the words "by him or by them" would render the words "made by" meaningless. Subsection 52(1) of the Act provides for a deemed sale when the goods in question are produced by the manufacturer for his or her own use. He argued that if the words "made by" meant "made by for use by" (by virtue of subsection 52(1)), one would have a situation where the inclusion of the words "by him or by them" would be redundant. In his view, one must presume that Parliament did not intend to include a redundant clause in the legislation.

He also mentioned that the construction of the statute, which he was urging the Tribunal to adopt, was most consistent with the overall purpose of the Act. The federal sales tax is a single incidence tax. Therefore, exemption provisions have been introduced, such as the section at issue, which allow manufacturers to purchase, on a tax-free basis, the articles and materials that go into the making of taxable goods. Tax may be collected on the materials which go into the making of products such as the imaged article, but the article itself is not taxed as long as it, in turn, becomes a component part of a taxable product. Hence, section 4, Part XIII, Schedule III to the Act ought not to be limited to only those producers or manufacturers who used the article themselves because this would defeat the purpose and spirit of the Act.

Finally, he contended that Parliament did not intend to tax services and intellectual input. Rather, the Act is one that is primarily designed to impose a tax on goods. Because the imaged article consists, for the most part, of intellectual value, it was submitted that Parliament intended this component of the printing process to be exempt regardless of who produced and then subsequently used the imaged article in the production of printed matter.

For his part, counsel for the respondent argued that it was possible to read the Act as limiting the exemption to those manufacturers and producers who themselves use the imaged articles in their own printing without adding any words. The extra words would only be there for greater certainty.

2. [1986] 1 F.C. 346.

He also argued that the scheme of the Act requires the cost of all the components of the ultimate product to be included in the price of the article sold to the consumer. If the printer receives the imaged article free of cost, as he did in the present case, the cost of the imaged article is not included in the cost of the printed matter. This would otherwise violate the scheme of the Act and would therefore not be permissible.

He further contended that the appellant's distinction between hard goods and intellectual material is spurious. He submitted that a car is also comprised of a substantial amount of engineering, creative and intellectual effort, and testing. However, cars are taxed on the total cost of all such component parts.

Counsel urged the Tribunal to consider Excise Memorandum ET 207³ (the Memorandum) as an aid to the interpretation of the Act. He relied on the authority provided by the case *Nowegijick v. The Queen*⁴ in which Dickson J. held that administrative policy can be an important factor in cases of doubt about the meaning of legislation. In his view, the Memorandum provides evidence that the interpretation, which has been given to this provision, limits the exemption to those imaged articles produced and used by the same manufacturer or producer.

He also added that there is a greater burden on the appellant in this case to establish that the goods fall within the exemption provision. Counsel submitted that the burden is heavier on those attempting to claim an exemption than on those who are attempting to avoid a charging provision. He argued that the appellant had not met the standard of proof required to establish that the goods fell within the exemption provision of the Act. Finally, counsel for the respondent urged the Tribunal to give the provision the most reasonable interpretation. He relied on the case law cited by the appellant in which the Federal Court declared that one must assume that Parliament intends to act reasonably. Therefore, a reasonable interpretation of the statutory provision is preferred if there is a choice. He contended that the most reasonable choice would be an interpretation limiting the exemption to manufacturers and producers who used the imaged article themselves because this interpretation is in keeping with the scheme of the Act.

Having reviewed the evidence and considered the arguments, the Tribunal is of the view that the appeal must be allowed. The section at issue, as it stands, appeared in the Act in 1963 under the portion of the Schedule bearing the heading "Printing and Educational."⁵ In 1966, this exemption provision was moved by Parliament to Part XIII (entitled "Production Equipment and Processing Materials") of a new Schedule III.⁶ In the very same Act effecting these legislative amendments, Parliament also added a Schedule V which, *inter alia*, sought to exempt, from the federal sales tax, goods such as machinery and apparatus when used for certain purposes. In the case of Schedule V, Parliament frequently qualified the exemption by using the words "for use by them." For instance, paragraph (a) of that schedule referred to "machinery and apparatus sold to or imported by manufacturers or producers for use by them directly in the manufacture or production of goods." Unlike these specific instances provided for in Schedule V, Parliament

3. Revenue Canada, Customs and Excise, March 5, 1990.

4. [1983] 1 S.C.R. 29.

5. *An Act to amend the Excise Tax Act*, S.C., 1963, c. 12.

6. *An Act to amend the Excise Tax Act*, S.C., 1966, c. 40.

decided not to have recourse to any such limiting words in the case of Part XIII, including the section at issue. In the Tribunal's view, this was a deliberate decision on the part of the legislator. Such a choice indicates that Parliament had no intention to restrict the scope of the exemption provision upon which the appellant relied.

In 1968, Parliament repealed Schedule V and adopted a new Part XIII of Schedule III entitled "Production Equipment, Processing Materials and Plans."⁷ This part incorporated provisions of the repealed Schedule V. Parliament, despite its knowledge of the terms "for use by them" contained in some of the new provisions of Part XIII, decided not to resort to such restricting words vis-à-vis the exemption provision relevant to the present case. Again, in the Tribunal's opinion, this choice by the legislator shows Parliament's obvious intention not to restrict the scope of section 4, Part XIII, Schedule III to the Act. It must be noted that the wording of this section has remained unchanged since 1968, in spite of amendments which have since been made by Parliament to this and other parts of Schedule III. Thus, the Tribunal cannot narrow the application of this provision by merely reading into it or implying limiting words.

The appeal is allowed.

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7. *An Act to amend the Excise Tax Act, S.C., 1967-68, c. 29.*