

Ottawa, Friday, September 13, 1991

Appeal No. AP-90-106

IN THE MATTER OF an appeal heard on June 6, 1991,
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 July 6, 1990, with respect to a
notice of objection filed under section 81.15 of the
Excise Tax Act.

BETWEEN

**GOVERNMENT OF ONTARIO,
MINISTRY OF TRANSPORTATION**

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-90-106

**GOVERNMENT OF ONTARIO,
MINISTRY OF TRANSPORTATION**

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The licensed print shop operated by the Government of Ontario, Ministry of Transportation (the Ministry) was assessed the total amount of \$94,416.74 federal sales tax, inclusive of interest, with respect to tender documents produced in connection with the Ministry's highway program. The Ministry filed a notice of objection on October 19, 1989, on the basis that the tender documents fell within the exemption granted to printed books that contain no advertising and are solely for technical purposes under paragraph 3(1)(a), Part III, Schedule III to the Excise Tax Act. A notice of decision was issued by the respondent on July 6, 1990, upholding the assessment and rejecting the appellant's objection. The Ministry appealed the assessment to this Tribunal.

HELD: *The appeal is allowed.*

Place of Hearing: Ottawa, Ontario
Date of Hearing: June 6, 1991
Date of Decision: September 13, 1991

Tribunal Members: Michèle Blouin, Presiding Member
Sidney A. Fraleigh, Member
Charles A. Gracey, Member

Counsel for the Tribunal: Brenda C. Swick-Martin

Clerk of the Tribunal: Nicole Pelletier

Appearances: M.G. Forbes, for the appellant
Joseph de Pencier, for the respondent

Cases Cited: *Canadian Broadcasting Corporation v. Nova Scotia Tax Review Board, Unreported, S.C.A. (Nova Scotia), No. 02338, May 2, 1991; MacLean Hunter Limited v. The Deputy Minister of National Revenue for Customs and Excise, 10 C.E.R. 282 (F.C.A.).*

Appeal No. AP-90-106

**GOVERNMENT OF ONTARIO,
MINISTRY OF TRANSPORTATION**

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
SIDNEY A. FRALEIGH, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

ISSUE AND APPLICABLE LEGISLATION

This is an appeal pursuant to section 81.19 of the *Excise Tax Act*¹ (the Act) and subsection 10(1) of the *Reciprocal Taxation Memorandum of Agreement, Canada-Ontario* (the Agreement), dated April 23, 1987, from a decision of the Minister of National Revenue (the Minister), dated July 6, 1990, with respect to a notice of objection filed on December 19, 1989, pursuant to section 81.17 of the Act.

The appellant, the Government of Ontario, Ministry of Transportation (the Ministry), seeks a declaration that tender documents produced by its licensed print shop are "printed books" within the meaning of paragraph 3(1)(a), Part III, Schedule III to the Act and thus exempt from federal sales tax payable under the Act. In the alternative, if the goods in issue are not exempt from federal sales tax under the Act, the issue arises as to whether the appellant is required to pay interest pursuant to the Agreement and the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*² (the Fiscal Arrangements Act).

The relevant portions of the Act, as they read at the relevant times, are as follows:

2.(1)³ *In this Act,*

...

"manufacturer or producer" includes

...

-
1. R.S.C., 1985, c. E-15, as amended.
 2. R.S.C., 1985, c. F-8.
 3. R.S.C., 1985, c. E-15, as amended.

(c) any department of the government of Canada or any province ... that manufactures or produces taxable goods,

...

27.(1)⁴ 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

...

29.(1)⁵ The tax imposed by section 27 does not apply to the sale or importation of the goods mentioned in Schedule III ...

SCHEDULE III

PART III

EDUCATIONAL, TECHNICAL, CULTURAL, RELIGIOUS AND LITERARY

3.(1)⁶ The following printed matter, articles and materials:

(a) ... printed books that contain no advertising and are solely for educational, technical, cultural or literary purposes; ...

32.⁷ Agreements entered into for the purposes of this Part by the Minister with the government of any province shall provide in accordance with and subject to such terms and conditions as the agreement prescribes for the following matters:

...

(b) for the payment by Her Majesty in right of that province of any tax or fee imposed or levied under the Excise Tax Act that is payable by Her Majesty in right of that province and the waiver of the right to a refund of that tax or fee provided in subsection 68(3) of that Act; ...

2.(1)⁸ The Province covenants to satisfy any tax exigible under the Excise Tax Act R.S.C. 1970 c. E-13, as amended, and its regulations as amended, ...

4. Now subs. 50(1), see also R.S.C., 1970, c. E-13, as amended; S.C. 1986, c. 54, s. 4 and S.C. 1986, c. 9, s. 16.

5. R.S.C., 1970, c. E-13, as amended; see also R.S.C., 1985, c. E-15, as amended, s. 51.

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

7. *Supra*, footnote 2.

8. *Reciprocal Taxation Memorandum of Agreement, Canada-Ontario*, April 23, 1987.

FACTS AND EVIDENCE

By notice of assessment dated September 20, 1989, the licensed print shop operated by the Ministry was assessed the total amount of \$94,416.74 federal sales tax for the period December 1, 1984, to May 31, 1989, inclusive of interest to September 30, 1989. The assessment was for tender documents produced by the print shop as part of a tender package produced in connection with the Ministry's highway program.

On December 19, 1989, the Ministry filed a notice of objection to the assessment on the grounds that the tender documents fell within the federal sales tax exemption granted to printed books that contain no advertising and are solely for technical purposes under paragraph 3(1)(a), Part III, Schedule III to the Act.

By notice of decision dated July 6, 1990, the Minister upheld the notice of assessment on the grounds that the tender documents were not printed books within the meaning of the said exemption.

On September 14, 1990, an appeal in respect of the decision by the Minister was made to the Tribunal by the appellant.

Mr. R. Barry Reynolds, Head of the Graphics Services Section of the Ministry's print shop, and Mr. Joseph Charpentier, Head of the Contract Preparation and Control Section of the Contract Management Office at the Ministry, testified for the appellant at the hearing. The respondent did not call witnesses during the hearing.

Mr. Reynolds gave testimony on the history of the print shop. The print shop was established in the late 1970s. It produces tender packages for the Ministry's highway contracts, each of which typically includes the tender document, contract drawings, reinforcing steel schedule and the foundation investigation report.

Mr. Reynolds testified that, in the late 1970s, officers of the Ontario Ministry of Revenue and seconded officers from the Department of National Revenue (the Department) analyzed the print shop and designated certain publications as taxable and others as non-taxable. Subsequently, as a result of the analysis, policies were devised within the print shop to differentiate between taxable and non-taxable items. Mr. Reynolds testified that since the inception of such procedures, the Department has never advised the print shop that the tender documents or any other documents in the tender package are not tax exempt under the Act.

On cross-examination by the respondent, it was discovered that the appellant had been unable to locate the documents referred to in the attachment to the letter from Mr. Willoughby found under tab 4 of the appellant's brief and that Mr. Reynolds had not examined the document referred to in the internal memorandum contained under tab 5 of same.

Mr. Reynolds also testified that the term "book" is used loosely in the publishing industry, and that a document begins to be termed a "book" when the number of pages becomes significant, that is approximately 25 or 30 pages, and it is bound in some way.

Mr. Charpentier's testimony concerned the generation of tender documents. Mr. Charpentier reviewed the contents of the tender documents for contract nos. 91-223, 91-28 and 91-300 before the Tribunal. The witness testified that only prequalified contractors were entitled to bid on such contracts.

Each tender document includes a summary page on which the contractor summarizes his tender. Subsequent pages in the document set out the specifications for the work to be done in the particular contract and require the contractor to insert the unit prices at which such work will be completed. The specification codes on such pages refer to items in the Ontario Provincial Standards Specifications (OPSS) and Ontario Provincial Standards Drawings (OPSD), which tell the contractor how the work must be done and the method of payment. If a reference is made in the specification code to "SP," the abbreviation for "Special Provisions," the contractor must refer to the pink pages appended to the tender document, which specify "deviations" from the standard specifications.

Evidence reveals that the tender documents also contain pages that summarize the relevant sections of the special provisions, plans, standard specification in the OPSS, and general conditions applicable to the contract. Reference is also made to the relevant sections of the OPSD that tell the contractor how to do the work and the materials to be used. The tender documents can also be amended over time by the issue of addenda or amendments to the specifications printed on blue pages.

Mr. Charpentier further testified that prior to submitting a bid, the contractor must execute the last page of the white pages of the tender documents warranting that the bid has been prepared and submitted without collusion. Thereafter, once a successful bidder has been determined, a series of formalities is initiated by which the contract is actually concluded.

ARGUMENTS

The appellant submitted that the tender documents fall within the exemption in paragraph 3(1)(a), Part III, Schedule III to the Act in that they are printed books that contain no advertising and are solely for technical purposes.

The appellant argued that the essence of a book is a substantial number of pages fastened together in some fashion, and that the nature of the fastening is not determinative of the issue. It is therefore submitted that the tender documents themselves consist of a substantial number of sheets of paper, organized in a particular form, fastened together by a single staple and are therefore "books" within the meaning of the exemption.

The appellant also argued that the tender documents interrelate with the other documents in the tender package and the OPSS and OPSD, all of which have been accepted as exempt publications by the Minister. The appellant submitted that viewed as a whole, the tender documents constitute part of a series of books, which are extremely technical in nature, the sole purpose of which is to set out the technical requirements for a particular contract. It is therefore argued that the tender documents are entitled to receive the same tax exempt treatment as the other documents in the tender package.

On the issue of whether the Ontario government is assessable with respect to interest, the appellant argued that neither subsection 2(1) of the Agreement passed pursuant to paragraph 32(b) of the Fiscal Arrangements Act nor the Excise Memorandum ET 404⁹ impose an obligation on the Ontario government to pay interest related to the federal sales tax. More specifically, the appellant argued that subsection 2(1) of the Agreement contrasts with subsections 1(1) and 1(4) therein, in which the Federal government specifically agrees to pay "taxes," "fees" and "interest." In addition, the appellant referred to *Canadian Broadcasting Corporation v. Nova Scotia Tax Review Board*¹⁰ where the Supreme Court of Nova Scotia, Appeals Division, recently upheld the dichotomy of taxes and interest for the purposes of paragraph 32(d) of the Fiscal Arrangements Act.

The respondent argued that the tender documents are not printed books within the meaning of the exemption provision in the Act.

In the absence of a statutory definition, it was submitted that tender documents are not "printed books" as per the ordinary meaning of that phrase. The respondent argued that the central hallmark of a book is a collection of documents that have an integral whole with some internal logic and that stand alone. The respondent agreed with the appellant that the nature of the binding is not a determinative issue.

The respondent submitted that the tender documents do not display the hallmark characteristics of a book. First, the tender document itself is not a book, but rather a collection of documents covering different matters, albeit all related to one product. Second, the document fails to constitute a book because it does not stand alone, but rather incorporates by reference books containing the general and standard specifications and drawings. Third, the tender document itself is not described as a "book." Fourth, the tender document is not a book because it requires additional information and formalities to become a completed product. As such, it does not exhibit, by itself, the sort of coherence associated with a collection of documents properly classified as a book.

The respondent also argued that the province of Ontario is liable for interest on federal sales tax payable under the Act. Ontario's tax liability flows from the Act itself, in its entirety, and the federal power to raise revenue by taxing the provinces. It is further argued that the Fiscal Arrangements Act and the Agreement do not create provincial liability to pay tax and interest, but rather authorize arrangements for the payment of taxes and monies otherwise exigible.

REASONS

The issue to be decided in this case is whether the tender documents produced by the Ministry's print shop are printed books that contain no advertising and are solely for technical purposes and therefore exempt from federal sales tax by virtue of paragraph 3(1)(a), Part III, Schedule III to the Act. If such documents do not qualify for tax exempt treatment, the issue then becomes whether the appellant is liable to pay interest on the sales tax assessment.

9. Excise Memorandum ET 404, March 15, 1989.

10. Unreported judgement, S.C.A. (Nova Scotia), No. 02338, May 2, 1991.

It is evident to the Tribunal that to qualify for exempt treatment, the tender documents must be "printed books" and must be solely for technical purposes. The Tribunal is of the opinion that the tender documents are "printed books" within the meaning of the exempting provision.

The Act does not provide a definition of the term "book" and, as submitted by the respondent and appellant, it is therefore necessary to interpret the term "book" in accordance with its grammatical and ordinary meaning.

The Tribunal accepts the appellant's submission that the common dictionary definitions of the term "book" indicate that the essence of a book is a number of sheets fastened together in some way, and that the nature of the fastening, i.e., by staple, hardcover or binding, is not determinative of the issue. The Tribunal reached this decision after reviewing The Concise Oxford Dictionary (Fifth Edition) where "book" is defined as "Portable, written or printed treatise filling a number of sheets fastened together.... " Similarly, in Webster's Seventh New Collegiate Dictionary, "book" is defined as "a set of written sheets of ... paper ...; a set of written, printed or blank sheets bound together into a volume." Le Petit Robert defines the French equivalent of "book," "livre" as "*Assemblage d'un assez grand nombre de feuilles portant des signes destinés à être lus....* " The Tribunal concludes that the tender documents are printed books within the ordinary meaning of the term in that they consist of a number of sheets fastened together in some way, in this instance by a single staple.

The Tribunal is also of the opinion that the fact that the tender documents can be amended on occasion by the replacement of some of the white pages in the document with blue pages, or revised as indicated by the code number on the bottom corner of some of the white pages, does not detract from the interpretation of these documents as "books." Reference is here made to a ruling issued by the Department in Excise Memorandum ET 404 dated March 15, 1989, wherein it was held that replacement pages inserted in a looseleaf book for the purpose of updating and expanding text qualify for the exemption at issue.

The Tribunal also finds that the tender documents are solely for technical purposes. The Act is silent on the definition of the term "technical," and reference is therefore made to *MacLean Hunter Limited v. The Deputy Minister of National Revenue for Customs and Excise*¹¹ cited by both parties to this appeal, wherein the Tariff Board held that the term "technical" for the purpose of the exemption at hand refers to "matter having to do with the mechanical arts or the applied sciences."

In the absence of submissions by the respondent on this issue, the Tribunal finds that the technical nature of the tender documents, as defined by the Tariff Board in *MacLean*, is evidenced by the numerous references in the white pages of the document to the relevant sections of the other technical documents in the tender package, including namely OPSS, OPSD, contract drawings, reinforcing steel schedule and foundation investigation report.

11. 10 C.E.R. 282 (F.C.A.).

The Tribunal further finds that upon receipt by the contractor and prior to his insertion of offering prices and execution of the tender documents, the sole purpose of the tender documents is to provide the contractor with detailed technical specifications and standards on how the contract is to be performed.

As the Tribunal finds that the tender documents are exempt from federal sales tax payable under the Act, it is not necessary to issue a decision on the liability of the appellant for interest on sales tax payable under the Act.

CONCLUSION

The appeal is allowed. Assessment Number G-TOR11072 dated September 20, 1989, which assesses tender documents produced by the Ministry's licensed print shop for consumption by the Ministry, is set aside and the tender documents are exempted from sales tax by virtue of paragraph 3(1)(a), Part III, Schedule III to the Act.

Michèle Blouin

Michèle Blouin
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh
Member

Charles A. Gracey

Charles A. Gracey
Member