

Ottawa, Tuesday, August 11, 1992

**Appeal No. AP-90-123**

IN THE MATTER OF an appeal heard on May 6, 1992,  
under section 81.19 of the *Excise Tax Act*, R.S.C., 1985,  
c. E-15, as amended;

AND IN THE MATTER OF a decision of the Minister of  
National Revenue dated July 27, 1990, with respect to a  
notice of objection served under section 81.17 of the *Excise  
Tax Act*.

**BETWEEN**

**MCA (CANADA) LTD.**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Presiding Member

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Michèle Blouin  
Michèle Blouin  
Member

Robert J. Martin  
Robert J. Martin  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-90-123**

**MCA (CANADA) LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*The appellant, MCA (Canada) Ltd., is a distributor of videocassettes in the Canadian market. Once it obtains a master tape from its parent company in the United States, the appellant enters into an agreement with VTR Productions Ltd., a Canadian laboratory and independent company, to produce copies of the videocassette. The issue in this appeal is whether the appellant is entitled to a refund of federal sales tax paid in error, pursuant to section 68 of the Excise Tax Act, because it is not the manufacturer of videocassettes pursuant to either paragraph (b) or (f) of the definition of "manufacturer or producer" in section 2 of the Excise Tax Act and, therefore, should have paid sales tax on the basis of the sale price of its supplier rather than on its own sale price to its dealers.*

**HELD:** *The appeal is allowed. With respect to paragraph 2(1)(b) of the Excise Tax Act, the Tribunal finds that one of its conditions is that the goods be "manufactured," which is not the case here, as the Tribunal is of the view that the goods are produced rather than manufactured. The Tribunal finds that mere reproduction of videocassettes and simple packaging, as in the case at point, are production activities, not manufacturing. The Tribunal is also of the view that the appellant is not a "manufacturer or producer" within the meaning of paragraph 2(1)(f) of the Excise Tax Act. Given that the essence of the production of the goods in issue occurs when the master tape is being copied to the videocassette, the Tribunal finds that the activities of VTR Productions Ltd. fall beyond the scope of paragraph 2(1)(f) of the Excise Tax Act. Therefore, the appellant was not the producer nor the manufacturer of the videocassettes during the refund period.*

*Place of Hearing: Ottawa, Ontario*

*Date of Hearing: May 6, 1992*

*Date of Decision: August 11, 1992*

*Tribunal Members: Robert C. Coates, Q.C., Presiding Member  
Kathleen E. Macmillan, Member  
Michèle Blouin, Member*

*Counsel for the Tribunal: Gilles B. Legault*

*Clerk of the Tribunal: Janet Rumball*

*Appearances: Rick H. Kesler, for the appellant*

*Ian M. Donahoe, for the respondent*

**Appeal No. AP-90-123**

**MCA (CANADA) LTD.**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member  
KATHLEEN E. MACMILLAN, Member  
MICHÈLE BLOUIN, Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) from a decision made by the Minister of National Revenue under subsection 81.17(5) of the Act.

The appellant, MCA (Canada) Ltd., is a distributor of videocassettes in the Canadian market. Before July 1, 1985, the appellant paid federal sales tax on the sale of videocassettes based on their selling price to dealers. On April 8, 1986, the appellant filed a refund claim for a portion of the federal sales tax that it paid on these sales. The appellant contended that, not being the producer of videocassettes, it should have paid federal sales tax based on its supplier's sale price rather than on the price charged to its dealers and, therefore, that it paid sales tax in error. On June 26, 1987, the appellant's refund claim was denied by notice of determination on the grounds that the appellant, as it supplied packaging materials to the actual producer of the goods, was deemed a producer according to section 2 of the Act. On September 18, 1987, the appellant served a notice of objection against the said determination, but the latter was confirmed on July 27, 1990.

The issue in this appeal is whether the appellant is entitled to a refund of federal sales tax paid in error pursuant to section 68 of the Act. More specifically, the question is whether the appellant is the manufacturer of videocassettes distributed in Canada, pursuant to either paragraph (b) or (f) of the definition of "manufacturer or producer" in section 2 of the Act (hereafter referred to as paragraphs 2(1)(b) and (f) of the Act).

During the relevant period, paragraphs 2(1)(b) and (f) of the Act read as follows:

*"manufacturer or producer" includes*

*(b) any person, firm or corporation that owns, holds, claims or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name or for or on their behalf by others, whether that person,*

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

*firm or corporation sells, distributes, consigns or otherwise disposes of the goods or not,*

...

*(f) any person who, by himself or through another person acting for him, prepares goods for sale by assembling, blending, mixing, cutting to size, diluting, bottling, packaging or repackaging the goods or by applying coatings or finishes to the goods, other than a person who so prepares goods in a retail store for sale in that store exclusively and directly to consumers.*

At the hearing, the parties agreed on the following facts. The appellant receives from MCA Home Video Inc., its parent company in the United States, a master tape of a video on which Universal Studios holds the copyright. Once it obtains the master tape, the appellant enters into an agreement with VTR Productions Ltd. (VTR), a Canadian laboratory and independent company, to produce copies of the videocassette onto blank cassettes that it purchases itself. The cardboard sleeves in which the videocassettes are packaged are supplied to VTR by the appellant. VTR packages the videocassettes in its facilities using its equipment and employees. The copies of the videocassettes are made at the cost of VTR until payment is received from the appellant.

Two witnesses were called by the appellant. The first witness, Mr. Erich Pertsch is the President of MCA Home Video Canada, a division of MCA (Canada) Ltd., as well as the Vice-President, Finance and Administration, of the latter company. The witness explained the relationship between MCA (Canada) Ltd. and MCA Home Video Inc. in the United States. According to Mr. Pertsch, MCA Home Video Inc. has the rights of all the motion pictures produced by Universal Studios. The appellant, therefore, has a licence allowing exclusive distribution in Canada of videocassettes of these motion pictures. As for the nature of the relationship between the appellant and VTR, the witness qualified it as a normal client/supplier relationship. He mentioned that it was a relationship based on confidence (given the characteristics of the goods) and involving an exclusive arrangement for the sale to MCA (Canada) Ltd. of the videocassettes that VTR copies from the masters that it obtains through the appellant. The witness added that it supplies VTR not only with the master for the motion picture, but also with the cardboard sleeves and the labels attached to the cassettes, both obtained from MCA Home Video Inc. of the United States. Mr. Pertsch testified that VTR supplies its own shrink wrap used to wrap up the videocassettes, although the appellant supplies VTR with samples of the shrink wrap that is used in the United States and with the logo to be applied on it.

The second witness, Mr. Jerry Zaludek, was the President of VTR during the refund period. He explained that, at the beginning, VTR and the appellant did not have a formal contract, and purchases were based on a price list or rate card. The witness also confirmed that the nature of the relationship between the two companies was strictly a client/business relationship. The witness also enumerated a list of companies, namely, studios, that were also clients of VTR during the refund period and that appeared to have paid sales tax on their purchase of videocassettes reproduced by VTR.

In argument, counsel for the appellant first submitted that the appellant's activities do not come within the definition of "manufacturer or producer" in paragraph 2(1)(b) of the Act. In counsel's view, in order to fall within the terms of that definition, one must own, hold, claim or use any patent, proprietary, sales or other right to goods being manufactured. In this regard, counsel added that until it purchases the videocassettes, the appellant has no rights to the goods referred to in paragraph 2(1)(b), i.e. the cassette components, or more specifically, the plastic tape container, the tape itself and other ancillary parts. Counsel also argued that the appellant does not carry on any physical manufacturing activities. In addition, counsel submitted, VTR's activities constitute "production" not "manufacture" as these terms are distinguished by the jurisprudence. Therefore, these activities do not fall within the meaning of the definition which only refers to "goods being manufactured."

Counsel affirmed that the appellant also does not fall within the definition of "manufacturer or producer" in paragraph 2(1)(f) of the Act as one must prepare goods "through another person acting for him," which is not the case here, since VTR, the producer, is not acting for the appellant. Furthermore, the appellant is not acting through the producer since the producer is acting on its own account, assumes the cost of producing the goods and the risk of loss and, finally, holds title and possession of the goods until delivery.

Lastly, counsel submitted that the new and specific provision of paragraph 2(1)(j) of the Act, that was enacted after the refund period, deals with situations as in the case at point, involving distributors of videocassettes that are now deemed producers for the purpose of the Act. Paragraph 2(1)(j), he said, is a new taxing provision whose function is to fill a gap in the Act. Counsel urged the Tribunal to apply its decision in *Bois-Aisé de Roberval Inc. v. The Minister of National Revenue*<sup>2</sup> where the Tribunal found that the addition of a product in Schedule III to the *Softwood Lumber Products Export Charge Act*<sup>3</sup> meant that the product was not covered by the general provision of that act prior to its modification.

Counsel for the respondent argued that the appellant is deemed the manufacturer under paragraph 2(1)(b) of the Act because it "owns ... right to goods being manufactured," although VTR owns the videocassettes until payment. According to counsel, the appellant has proprietary rights in the "goods being manufactured" because it has an exclusive licence from MCA Home Video Inc. to distribute the videocassettes that VTR, on the other hand, has the obligation to sell to the appellant. The evidence, counsel also stated, suggests that the appellant has some control over VTR and that VTR is nothing less than an agent for MCA (Canada) Ltd. which provides the former with the master tape, the sleeves and the label. Counsel further argued that the process by which blank cassettes are transformed into videocassettes adds new forms, qualities and properties or combinations to the goods within the meaning of the Supreme Court of Canada decision in *The Queen v. York Marble, Tile and Terrazzo Limited*<sup>4</sup> and, therefore, those goods are "manufactured." Counsel also relied upon a decision of the Federal Court of Canada,

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2. Canadian International Trade Tribunal, Appeal Nos. AP-90-169 and AP-91-100, March 20, 1992, at 3.

3. R.S.C., 1985, c. 12 (3rd Supp.), as amended.

4. [1968] S.C.R. 140.

Trial Division, in *The Queen v. E.J. Piggott Enterprises Ltd.*<sup>5</sup> where the Court found that Ferropak cartridges loaded with tapes were produced or manufactured within the meaning of the Act.

Counsel alternatively argued that if the appellant is not a "manufacturer or producer" under paragraph 2(1)(b) of the Act, then it is deemed the manufacturer under paragraph 2(1)(f) of the Act because the videocassettes are produced solely for the appellant by VTR. There is evidence, counsel submitted, that VTR is "acting for" the appellant within the meaning of paragraph 2(1)(f). In this regard, counsel submitted that the word "for" shows Parliament's intention to broaden the type of relationship encompassed by the provision, while terms such as "on behalf of" are used elsewhere in section 2, namely, in paragraph 2(1)(b). Finally, counsel argued that the use of shrink wraps by VTR constitutes evidence that VTR is packaging within the meaning of paragraph 2(1)(f).

The Tribunal first notes that, contrary to the respondent's apparent position in this appeal, the paragraphs defining "manufacturer or producer" in section 2 of the Act should not be seen as exhausting all types of relationships that may exist between two or more persons involved in the production or manufacturing of goods. In that sense, it is still possible that certain types of relationships are not dealt with by these paragraphs. There are, and have been indeed, situations not encompassed by these provisions. The purpose of the addition of paragraph 2(1)(j) in 1986,<sup>6</sup> for instance, was to deal properly and satisfactorily with the situation of the distributors of videocassettes. Paragraphs 2(1)(a) to (j), as they read now, address therefore specific circumstances and not all circumstances. Moreover, one must not forget that the qualification of "manufacturer or producer" under the Act has the effect of imposing a fiscal burden. For these reasons, the Tribunal is of the view that every condition of one of the above-mentioned definitions must be met before finding that a person is deemed the producer or manufacturer under the Act and thus liable to pay the sales tax on its sale price pursuant to section 50 of the Act.

Having said that, the Tribunal turns its attention to paragraphs 2(1)(b) and (f) of the Act which were in force during the relevant period. With respect to paragraph 2(1)(b), the Tribunal finds that one of its conditions is that the goods be "manufactured." In the Tribunal's view, mere reproduction on videocassettes and simple packaging, as in the case at point, are not manufacturing activities, but production, in light of the Supreme Court of Ontario decision in *Gruen Watch Company of Canada Ltd. et al. v. Attorney General of Canada*.<sup>7</sup> That decision was cited in the *York Marble*<sup>8</sup> decision relied upon by the respondent where the Supreme Court recognized that the words "produced" and "manufactured" are not synonymous.

The Tribunal also concludes that the appellant is not a "manufacturer or producer" within the meaning of paragraph 2(1)(f) of the Act. Given that the essence of the production of the goods in issue occurs when the master is being copied to the videocassette, the Tribunal finds that VTR's activities fall well beyond the scope of paragraph 2(1)(f). In that sense, although VTR did some packaging, the Tribunal concludes that it was not "acting for" the appellant and did not merely

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5. 73 D.T.C. 5013.

6. S.C., 1986, c. 9, s. 1.

7. [1950] C.T.C. 440.

8. *Ibid.*, footnote 4, at 147.

prepare the "goods for sale by assembling, blending, mixing, cutting to size, diluting, bottling, packaging or repackaging the goods or by applying coatings or finishes to the goods." VTR indeed was the true physical producer of the goods which needed to be packaged afterwards. The packaging of the videocassettes by VTR, even with cardboard sleeves supplied by the appellant, did not change the fact that VTR was first and foremost a supplier of produced goods to the appellant.

For the foregoing reasons, the Tribunal concludes that the appellant was not the producer or manufacturer of the videocassettes during the refund period and allows the appeal.

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Presiding Member

Kathleen E. Macmillan  
Kathleen E. Macmillan  
Member

Michèle Blouin  
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