CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, November 7, 1994

Appeal No. AP-93-127

IN THE MATTER OF an appeal heard on May 16, 1994, 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 May 7, 1993, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

MH MEDIA MONITORING LIMITED **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-127

MH MEDIA MONITORING LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue that rejected the appellant's application for a refund of federal sales tax paid in respect of video and audio tapes during the period from November 1, 1989, to December 31, 1990. The issue in this appeal is whether the appellant manufactures or produces video and audio tapes within the meaning of section 50 of the Excise Tax Act and is, therefore, liable to pay federal sales tax on the sale price of those tapes.

HELD: *The appeal is dismissed. The Tribunal finds that the activities performed by the appellant in relation to the video and audio tapes constitute production and that the appellant is, therefore, liable to pay federal sales tax on the sale price of the tapes, which includes both the amounts charged for the tapes and any amounts for what is described as "RADIO/TV MONITORING" charged in respect of those tapes. As a result, the appellant did not pay federal sales tax in error within the meaning of section 68 of the Excise Tax Act and is, therefore, not entitled to a refund.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 16, 1994*
Date of Decision:	*November 7, 1994*
Tribunal Members:	*Charles A. Gracey, Presiding Member* *Anthony T. Eyton, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Shelley Rowe*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Claude P. Desaulniers, for the appellant* *Pamela D. Owen-Going, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-127

MH MEDIA MONITORING LIMITED **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
ANTHONY T. EYTON, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of a determination of the Minister of National Revenue (the Minister) that rejected the appellant's application for a refund of federal sales tax (FST) paid in respect of video and audio tapes during the period from November 1, 1989, to December 31, 1990. The issue in this appeal is whether the appellant manufactures or produces video and audio tapes within the meaning of section 50 of the Act and is, therefore, liable to pay FST on the sale price of those tapes.

At the hearing, the manager of the appellant's office in Ottawa, Ontario, Mr. Helmut Turkowsky, explained that the appellant is in the business of monitoring news media, namely, print media, television and radio, for various customers for a fee. This appeal concerns television or radio broadcasts copied by the appellant from a master tape, unmodified, onto blank video or audio tapes and provided to customers.

Mr. Turkowsky referred to two rate schedules for Bowdens Information Services Limited[2] (Bowdens), one for 1989 and one for 1990, to illustrate how the fee charged to a customer for radio and television monitoring is derived. The rate schedules show the fees charged to both casual customers and subscribers for radio and television monitoring. For casual customers, there are rates listed for the first audio item, the first video item, the transcript without a monitoring item plus an amount for set-up. For subscribers, there are rates listed for the monthly monitoring fee, each video or audio item, the summary service, and the transcript without a monitoring item plus an amount for set-up.

Both the 1989 and 1990 rate schedules indicate that there is no charge for audio tapes, but that there is a $15 fee for VHS and Beta video tapes and a $30 fee for up to one-half hour on a 3/4-in. video tape. The 1989 rate schedule, unlike the 1990 rate schedule, states that, of the fee charged for the video tape, $10 will be reimbursed if the original tape is returned in good condition within 15 days of receipt. Mr. Turkowsky estimated that approximately 80 percent of customers in Ottawa supply their own tapes and do not, therefore, pay the $15 fee. However, he could not provide estimates for the other regions.

Mr. Turkowsky also introduced three sample invoices for May 31, 1990. One invoice was for "AUDIO/VIDEO RECORDINGS" in the amount of $26 plus FST and provincial sales tax (PST). Another invoice was for "VIDEO 1ST ITEM," "ADDITIONAL ITEMS AUDIO-VIDEO," "VIDEO

1. R.S.C. 1985, c. E-15.
2. Bowdens Information Services Limited operates as a division of MH Media Monitoring Limited.

TAPE 1/2 [in.]" and "DELIVERY — COURIER" in the amounts of $45, $26, $15 and $13, respectively, plus FST and PST. The third invoice was for "VIDEO 1ST ITEM," "AUDIO — 1ST ITEM," "ADDITIONAL ITEMS AUDIO-VIDEO," "VIDEO TAPE 1/2 [in.]" and "DELIVERY COURIER" in the amounts of $45, $38, $26, $15 and $13, respectively, plus FST and PST.

According to Mr. Turkowsky, during the period at issue, the audio tapes cost between $0.75 and $0.90 each, and the cost of the video tapes ranged from $3.00 to $4.00 plus $0.90 for the box. For inventory purposes, he believes that new video tapes were valued at $3.00 and used tapes at $1.50.

This appeal is the culmination of several attempts by the appellant to get a ruling that the activities that it performs in respect of the video and audio tapes do not constitute manufacturing and that, as a result, it is not liable to pay FST in respect of the tapes.

The first attempt to get a ruling resulted in a letter dated December 8, 1982, from Ms. Mary Maitland, Regional Office, Tax Interpretations of the Excise Branch of the Department of National Revenue (Revenue Canada). In that letter, Ms. Maitland outlined her understanding of the appellant's business. She stated that the appellant supplied video tapes "on a returnable, refundable basis" and that the appellant charged its customers $30 for a "Tape Deposit Fee" and $5 for a "Usage Fee." Ms. Maitland also stated that the appellant manufactured the video tapes and, unless the video tapes were sold under conditions warranting exemption, it should charge FST on the selling price of the video tapes, which should include the "Tape Deposit Fee" and the "Usage Fee." It was suggested in the letter that, in the event that the video tapes were returned, the appellant could deduct the tape deposit fee from its monthly FST liability.

In response to two later requests by Taxsave Consultants Limited (Taxsave) on behalf of Bowdens that Revenue Canada reconsider the ruling dated December 8, 1982, Revenue Canada, in two letters dated June 17, 1987, and March 18, 1988, confirmed the December 8, 1982, ruling.

Finally, in a letter dated October 3, 1988, in response to another request by Taxsave, Mr. David A. Crawford of Revenue Canada stated that the "charge made by Bowden[s] ... to its customers is for the monitoring service and the supplying of the tape is incidental." Based on that understanding, Mr. Crawford stated that the appellant should pay FST "using the formula for goods manufactured for own use." This method, which has been established by Revenue Canada, is set out in Excise Memorandum ET 207[3] (Memorandum ET 207).

In response to questions by counsel for the respondent, Mr. Turkowsky agreed that the "charge is for a particular share of a process." The fee covers the cost of taping, storing and monitoring news and public affairs programs, the preparation of summaries and transcripts, and the labour involved in reviewing the master video and audio tapes and finding particular items. Mr. Turkowsky stated that the market value of an item on a tape is the amount that is charged on an invoice.

Mr. Steven Mosher, who was previously employed in Tax Interpretations of the Excise Branch of Revenue Canada, appeared at the request of counsel for the appellant. He stated that he was only briefly involved with the matter at issue in 1987 when he responded by letter dated June 17, 1987, as referred to above, to a letter from Taxsave. Mr. Mosher stated that he considered the production of the audio and video tapes to be a major component of the work

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3. Goods Manufactured or Produced for Own Use, Department of National Revenue, Customs and Excise, March 5, 1990.

carried out by Bowdens and that the charge was for an end product of a manufacturing or production process.

Counsel for the appellant referred Mr. Mosher to several Revenue Canada rulings, namely, 1130/16, 1130/13-1, 1125/58-1 and 1130/17-1. Mr. Mosher stated that, to his knowledge, these rulings were in force until January 1, 1991, when the Goods and Services Tax became effective.

With respect to Memorandum ET 207, Mr. Mosher explained that the method for calculating the sale price of goods for own use is a cost-plus method that takes into account the cost of materials and labour, overhead and appropriate markup. He stated that this method is intended to establish a price roughly comparable to the sale price. He was unable to confirm whether the appellant, in calculating the sale price of the tapes for FST purposes, used a determined value or the method for goods manufactured for own use. In addition, neither Mr. Turkowsky nor counsel for the appellant was able to confirm the method used by the appellant to calculate the amount of its refund claim.

In argument, counsel for the appellant submitted that section 50 of the Act, which imposes FST on the sale price of goods produced or manufactured in Canada, does not apply to the appellant's media monitoring activities since the appellant is providing a service and not producing or manufacturing goods. Counsel referred to several Revenue Canada rulings. In particular, he referred to Revenue Canada Rulings 1130/16[4] and 5755/302-1,[5] which provide that the preparation of computer programs is regarded to be an engineering type of service and, as such, is not regarded as manufacture or production. He also referred to the decision of the Federal Court of Appeal in *Canadian Wirevision Limited v. The Queen*[6] that the distribution of television and radio signals to subscribers is not the sale of goods within the meaning of the relevant provision of the *Income Tax Act*.[7] Finally, counsel referred to the decision of the Tariff Board in *G.H. Poulin Contractor Limited v. The Deputy Minister of National Revenue for Customs and Excise*[8] that a highway is not considered goods within the meaning of the Act.

Counsel for the appellant also submitted that section 50 of the Act only requires that FST be paid in respect of marketable goods that are produced or manufactured in Canada. To support this contention, he referred to the decisions in *Quebec Hydro-Electric Commission v. The Deputy Minister of National Revenue for Customs and Excise*,[9] *The Queen v. Stuart House Canada Limited*[10] and the *G.H. Poulin* case. Counsel argued that, since the tapes only have value to the customers that want the specific information contained on those tapes, as he submitted was stated by Mr. Turkowsky, the tapes have no marketable value and are not, therefore, produced or manufactured by the appellant. Furthermore, counsel argued that the information on the tapes is not tangible goods.

Alternatively, counsel for the appellant submitted that the agreement between the appellant and its customers could be viewed as a mixed contract for goods and services and, if that is the case, that the appellant should only pay FST on the product, that is, the tape, and

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4. Whether Manufacturing: Preparation of Computer Diskettes, Placed in a Folder with an Instruction Manual, December 22, 1983.
5. Computer Software Programs - Sold to Education Institutions, September 30, 1987.
6. [1979] 2 F.C. 164.
7. R.S.C. 1985, c. 1 (5th Supp.).
8. (1985), 10 T.B.R. 170.
9. [1970] S.C.R. 30.
10. [1976] 2 F.C. 421.

not on the service, that is, the monitoring. Counsel referred to Excise Communiqué 187/TI,[11] which, he stated, provides that, for lump sum contracts for goods and services, FST applies to services directly attributable to goods produced and to artwork and its related consultation. Applying this provision to the facts of this appeal, counsel submitted that only the sale price or deemed sale price of the tapes would be subject to FST.

In the view of counsel for the appellant, if the Tribunal finds that the appellant does produce or manufacture the tapes, then FST should only apply to the sale price of the tapes. Since the appellant does not charge any fee for audio tapes, no FST should be payable. For tapes supplied by the appellant, the sale price is $15 for VHS and Beta video tapes and $30 for up to one-half hour on a 3/4-in. video tape. For tapes supplied by customers, counsel submitted that the sale price should be calculated in accordance with section 45.1 of the Act, which provides that the sale price of goods manufactured or produced from materials supplied by another person is deemed to be the charge for the goods made under the contract. As the appellant does not charge a fee when the customer supplies the tape, no FST would be payable.

In the further alternative, counsel for the appellant submitted that, if the main object of the contract, namely, the monitoring service, is not taxable, then the tape should follow the exempt nature of the exempt quality of the principal object of the contract.

Counsel for the respondent argued that the appellant produces or manufactures the video and audio tapes. She submitted that a determination of whether the appellant manufactures the video and audio tapes should be based upon the test set out in *Her Majesty the Queen v. York Marble, Tile and Terrazzo Limited*,[12] that is, whether the activities performed by the appellant give the tapes "new forms, qualities and properties or combinations." She submitted that the appellant's activities in respect of the video and audio tapes meet this definition of manufacture.

To support her view that the video and audio tapes are manufactured or produced, counsel for the respondent referred to the decision of the Federal Court of Canada in *Her Majesty the Queen v. E.J. Piggott Enterprises Limited*[13] that reproducing music and sound from a pre-recorded tape onto an audio tape constitutes production. She also referred to the decision in *ICAM Technologies Corporation v. The Minister of National Revenue*,[14] in which the Tribunal found that the development of custom-made software constituted the manufacturing or production of goods.

Counsel for the respondent submitted that, in considering this appeal, the Tribunal should take into account the fact that technology is changing and that these changes are affecting the way in which goods and services are viewed. Counsel pointed out that information is increasingly being treated as marketable goods and, as an example, referred to the sale of video tapes containing bits and pieces of news shows and sports events that may have an entertaining or educational value.

In reply argument, counsel for the appellant submitted that the facts in the *Piggott* case were distinguishable from the facts in this appeal. Counsel submitted that, unlike in the *Piggott* case, the appellant in this appeal takes non-proprietary, public information, unmodified, and copies that information onto video and audio tapes as required by particular customers.

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11. Commercial Art and Imaged Articles, Department of National Revenue, Customs and Excise, September 1989.
12. [1968] S.C.R. 140.
13. [1973] C.T.C. 65, Federal Court of Appeal, Court File No. T-971-71, November 27, 1972.
14. Canadian International Trade Tribunal, Appeal No. 2669, June 27, 1991.

Counsel for the respondent made a motion to the Tribunal to dismiss the appeal, since it did not have the jurisdiction to enforce the ruling in Revenue Canada's letter dated October 3, 1988, and there was insufficient argument and evidence to show that the appellant paid taxes in error and was, thus, entitled to a refund under section 68 of the Act.

In response, counsel for the appellant submitted that, under section 81.19 of the Act, the appellant has the right to appeal to the Tribunal. He submitted that the appellant is appealing the determination, in which it was found that the appellant manufactures the video and audio tapes and that the sale price of the tapes is subject to FST, and that it is not asking the Tribunal to apply the October 3, 1988, ruling.

The Tribunal stated that it would address the issue of jurisdiction in its reasons. Thus, before proceeding to consider the merits of this appeal, the Tribunal must first dispose of the motion. In the Tribunal's judgment, it does have the jurisdiction to consider the merits of this appeal. First, there is no indication from the submissions at the hearing that the appellant is asking the Tribunal to enforce the October 3, 1988, ruling. Second, under sections 81.17 and 81.19 of the Act, respectively, taxpayers may object to and subsequently appeal determinations of the Minister respecting applications for a refund under section 68 of the Act. The issue as to whether the appellant has discharged the onus of proving that it paid FST in error and is, therefore, entitled to a refund under section 68 of the Act, is, therefore, a question properly before the Tribunal in this appeal under section 81.19 of the Act.

Whether or not the appellant is liable to pay FST depends upon whether the appellant produced or manufactured the tapes within the meaning of paragraph 50(1)(*a*) of the Act. If the Tribunal finds that the appellant did not produce or manufacture the tapes, then the FST that the appellant paid in respect of the sale of those tapes was paid in error, and the appellant is, therefore, entitled to a refund of FST under section 68 of the Act.

In considering whether or not the appellant produced or manufactured the tapes, the Tribunal relied on the following definition of "manufacture" taken from *Minister of National Revenue v. Dominion Shuttle Company Limited*[15] and adopted by the Supreme Court of Canada in the *York Marble* decision:

> *manufacture is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery*.[16]

The Tribunal also relied upon the following interpretation of "production" by the Federal Court of Appeal in *The Minister of National Revenue v. Enseignes Imperial Signs Ltée*[17] in referring to *Gruen Watch Company of Canada Ltd. v. Attorney General of Canada*:[18]

> *A thing is produced if what a person does has the result of producing something new; and a thing is new when it can perform a function that could not be performed by the things which existed previously*.[19]

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15. (1933), 72 Que. S.C. 15.
16. *Supra*, note 12 at 145.
17. (1990), 116 N.R. 235, Federal Court of Appeal, File No. A-264-89, February 28, 1990.
18. [1950] O.R. 429, [1950] C.T.C. 440.
19. *Supra*, note 17 at 239.

These interpretations of "manufacture" and "production" have been applied by the Federal Court of Canada and the Tribunal in several decisions, many of which have been cited by counsel in this appeal. Of the decisions cited by counsel, the Tribunal finds that the facts in the *Piggott* case closely resemble the facts in this appeal. In the *Piggott* case, the appellant copied music and sounds onto blank audio tapes from master tapes. The Federal Court of Canada concluded that the company "produced" the background music tapes and was liable to pay FST on both the tapes that it used itself to transmit music and the tapes that it supplied to its customers for their use.

In the Tribunal's view, copying television and radio broadcasts from master tapes onto video and audio tapes, respectively, as is the case in this appeal, is similar to copying background music onto audio tapes, which activity was found to be production in the *Piggott* case. By copying the television and radio broadcasts onto the tapes, the appellant is enhancing the tapes' function or purpose. The tapes are originally blank and are not capable of displaying or communicating any information. Once the appellant records broadcasts on the tapes, they can display or communicate those broadcasts to customers. Thus, the copying of the broadcasts onto the tapes enables them to perform a function or purpose that they could not previously perform.

Under section 50 of the Act, the appellant is required to pay FST on the sale price of the tapes that it produces. "[S]ale price" is defined under section 42 of the Act to mean "the amount charged as price" before taxes are added and "any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price." The Tribunal has previously interpreted "sale price" to be the total value realized by the vendor in respect of the sale of goods and has acknowledged that the sale price may be greater than the amount charged as the price.[20] Having considered the definition and interpretations of that definition, the Tribunal is of the view that the sale price of the tapes in issue includes the amount charged for the tapes and any amounts for what is described as "RADIO/TV MONITORING" charged in respect of the tapes.

For those invoices on which there is no charge for a tape, because it was supplied by the customer, the Tribunal is of the view that, under section 45.1 of the Act, the sale price of that tape is the amount that the customer pays for "RADIO/TV MONITORING." Section 45.1 of the Act provides as follows:

> *a person who, pursuant to a contract for labour, manufactures or produces goods from any article or material supplied by another person ... shall be deemed to have sold the goods, at a sale price equal to the charge made under the contract in respect of the goods.*

In the Tribunal's judgment, a charge made to a customer for radio/tv monitoring is made in respect of the tape provided by a customer onto which radio or television broadcasts have been copied. The amount charged for radio/tv monitoring is, therefore, subject to FST.

Having determined that the appellant is liable to pay FST in respect of the video and audio tapes, the Tribunal finds that the appellant has not paid FST in error and is, therefore, not entitled to a refund under section 68 of the Act.

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20. See, for example, *Dure Foods v. The Minister of National Revenue*, Appeal No. AP-89-158, November 21, 1991, and *Sunset Lamp Manufacturing Company Ltd. v. The Minister of National Revenue*, Appeal No. AP-89-032, December 12, 1991.

The Tribunal has considerable empathy for the appellant's contention that it is providing a service similar to a press clipping service. However, the evidence indicating that the press clipping service has not been considered taxable cannot form an adequate basis upon which to find that the copying of radio and television broadcasts onto audio and video tapes is also not taxable.

Furthermore, the Tribunal does not accept the argument advanced by counsel for the appellant that the tapes have no marketable value. It is quite true that the tapes do not have broad market value, but they clearly have some marketable value to the customer.

After having carefully reviewed and considered the evidence and submissions of the parties, the Tribunal is persuaded that the appellant produced the video and audio tapes which it provided to customers and is, therefore, liable to pay FST on the sale price of those tapes.

Accordingly, the appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Lise Bergeron
Lise Bergeron
Member