CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 31, 1995

Appeal No. AP-94-022

IN THE MATTER OF an appeal heard on September 21, 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 January 21, 1994, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

VENTES J.V.F. INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Raynald Guay
Raynald Guay
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-94-022

VENTES J.V.F. INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is a manufacturer and vendor of programmable illuminated signs, which also sells advertising messages to be displayed on these signs. This appeal concerns two types of commercial transactions carried out by the appellant, that is, transactions with a related company (Recomm International Display Corporation Ltd.) and transactions with a leasing company (Crédit-Bail CEL). The three issues in this appeal are: (1) whether the transactions with Crédit-Bail CEL constitute sales within the meaning of the Excise Tax Act; (2) the reasonable sale price for the signs sold to Recomm International Display Corporation Ltd.; and (3) whether the imposition of interest and penalties is founded in law.

***HELD**: The appeal is dismissed. The Tribunal finds that the transfer of the signs by the appellant to Crédit-Bail CEL constitutes a sale. The Tribunal considers that the appellant transfers full right of ownership in the signs to Crédit-Bail CEL for an amount of $8,000 and that the transfer of full right of ownership is indicated primarily by the fact that Crédit-Bail CEL can subsequently enter into lease agreements with third parties, under which the third parties have the option of purchasing the signs after the thirty-sixth month of the lease.*

Although the Tribunal is not required to take excise communiqués into account, they can be an "important factor" where doubt exists concerning the meaning of legislation. The Tribunal is of the opinion that the method used by officials of the Department of National Revenue to determine a value for tax is reasonable in this case. The sale price of $8,000 for the signs sold to independent purchasers, such as Crédit-Bail CEL and certain pharmacists, is a logical point of departure for determining the reasonable sale price for the signs sold to Recomm International Display Corporation Ltd. Deducting certain amounts for delivery and installation costs and for profit markup takes into consideration the major differences between the two types of sales, that is, sales to independent companies and sales to the related company.

With respect to the imposition of interest and penalties, the Tribunal notes that it does not have jurisdiction to apply principles of equity.

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*September 21, 1994*
Date of Decision:	*March 31, 1995*
Tribunal Members:	*Lise Bergeron, Presiding Member* *Arthur B. Trudeau, Member* *Raynald Guay, Member*
Counsel for the Tribunal:	*Heather A. Grant*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Serge Fournier, for the appellant* *Anick Pelletier, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-022

VENTES J.V.F. INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: LISE BERGERON, Presiding Member
ARTHUR B. TRUDEAU, Member
RAYNALD GUAY, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*[1] (the Act) of an assessment of the Minister of National Revenue (the Minister) for the period from May 2, 1988, to November 30, 1990. In a notice of assessment dated July 17, 1991, the Minister assessed the appellant an amount of $228,507.68, including interest and penalties, for unpaid federal sales tax (FST).

The appellant is a manufacturer and vendor of programmable illuminated signs, which also sells advertising messages to be displayed on these signs. This appeal concerns two types of commercial transactions carried out by the appellant, that is, transactions with a related company, Recomm International Display Corporation Ltd. (Recomm), and transactions with a leasing company, Crédit-Bail CEL (CEL).

The three issues in this appeal are: (1) whether the transactions with CEL constitute sales within the meaning of the Act; (2) the reasonable sale price for the signs sold to Recomm; and (3) whether the imposition of interest and penalties is founded in law.

The relevant provisions of the Act read, in part, as follows:

> *50. (1) 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*
>
> *(a) produced or manufactured in Canada*
>
> *(i) payable ... by the producer or manufacturer at the time when the goods are delivered to the purchaser.*
>
> *58. (1) Notwithstanding any other provision of this Act ... , where goods that were manufactured or produced, or deemed to have been manufactured or produced, in Canada are sold or deemed to be sold, or the property therein is otherwise transferred, by the manufacturer or producer thereof to a person with whom the manufacturer or producer was not dealing at arm's length at ... the time the goods*

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

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> *were delivered ... for no sale price or for a sale price that is less than the sale price (in this subsection referred to as the "reasonable sale price") that would have been reasonable in the circumstances if the manufacturer or producer and that person had been dealing at arm's length at that time, the manufacturer or producer shall be deemed to have sold the goods at that time for the reasonable sale price.*

The appellant's only witness was Mr. Paul Ryan, President of Ventes J.V.F. Inc. During the period at issue, Mr. Ryan was a CEL representative. At the beginning of his testimony, Mr. Ryan described a sign manufactured by the appellant in order to give a visual idea of the type of advertising messages prepared by the appellant and displayed on the signs. Mr. Ryan stated that the appellant's primary role is to prepare advertising messages, for pharmaceutical companies, for display on illuminated signs. Pharmacists who are part of the advertising network can also display their own messages (such as their working hours). According to Mr. Ryan, the appellant prepares new advertising messages on a monthly basis according to the requests of the pharmaceutical companies using its services. The advertising messages are stored on diskettes and sent to the pharmacists. Mr. Ryan stated that the pharmaceutical companies derive immediate benefits from the advertising messages. In fact, the appellant advises the pharmacists a month in advance of the goods that will be advertised so they can order these goods.

According to Mr. Ryan, a display network had to be set up from the time the business was started, since the appellant's income is based on the advertising revenues. Without the participation of a number of pharmacists, the pharmaceutical companies would not have been interested in this kind of advertising.

Mr. Ryan added that the appellant entered into an agreement with about 30 pharmaceutical companies during the period at issue in order to promote their products in some 300 pharmacies in the province of Quebec. Each pharmaceutical company pays an average of $30 for each pharmacy in which the advertising messages for its products are displayed.

The manufacturing cost for each sign is $1,650. The sale price of the signs sold to Recomm is double their manufacturing cost, or $3,300. This markup enables the appellant to manufacture other signs. Mr. Ryan said that this price is for the sign only and does not include maintenance, delivery or warranty. Mr. Ryan said that Recomm's activities are the same as those of the appellant, except that Recomm does not manufacture signs.

However, the appellant set up a financing program for the signs used to establish its network of advertising messages, since it was difficult for the appellant to obtain financing when it first started out. There are three parties involved in the financing program, that is, the appellant, CEL and the pharmacists. The appellant and a pharmacist first sign a participation contract. At the same time, CEL and the pharmacist enter into a lease agreement for the sign. Under the participation contract, the appellant guarantees the pharmacist a share of its advertising revenues starting in the seventh month of the lease agreement. In addition, under that contract, the pharmacist agrees to pay CEL $266[2] monthly

2. The amount varied between $262 and $266 for the period at issue.

for 43 months. After the two contracts have been signed and the appellant has delivered the illuminated sign to the pharmacist, CEL pays the appellant $8,000 to finance its manufacture of illuminated signs.

Mr. Ryan also raised three points: (1) the pharmacist never sees a CEL representative; (2) the appellant receives the pharmacist's first lease payment; and (3) the appellant checks the pharmacist's credit rating. In addition, the amount that the appellant agrees to pay the pharmacist on a monthly basis is equal to the amount paid by the pharmacist for leasing the illuminated sign. Mr. Ryan said that the two contracts are signed at the same time, without CEL being involved.

In addition, Mr. Ryan stated that the appellant is responsible for installing and maintaining the illuminated signs throughout the duration of the lease agreement and that it remains in contact with the pharmacists concerning the signs and the advertising messages. Mr. Ryan said that the appellant has ongoing control over the illuminated signs.

Once the lease has expired, the appellant generally purchases the illuminated sign from CEL for $100 under the terms of a verbal agreement between the parties which was confirmed in writing in 1991. The appellant then suggests that the pharmacist enter into another agreement whereby the appellant prepares a monthly diskette and offers the pharmacist a share of the advertising revenues, which are distributed as follows: 70 percent for the appellant and 30 percent for the pharmacist. The purpose of this new agreement is to allow the appellant to maintain the advertising network that it has set up. Under this agreement, the appellant continues to maintain the illuminated signs.

When the participation contracts expired, all the pharmacists renewed their contracts with the appellant for advertising services. A small number of pharmacists, 12 out of 135, purchased the signs from CEL under an option to purchase included in the lease agreement. Finally, Mr. Ryan testified that three pharmacists purchased illuminated signs directly from the appellant for a unit price of $8,000.

Mr. Ryan testified that an illuminated sign costs $3,620. Costs for installation, delivery, warranty, maintenance, sales commission and a profit markup are added to the manufacturing cost of $1,650. According to Mr. Ryan, the difference between this amount and the amount of $8,000 paid by CEL represents the financing obtained by the appellant to set up its network. However, the appellant reimburses the pharmacist $9,842 (including interest) for its lease payments.

Mr. Ryan said that the signs were of no value without the appellant's services, since the signs would not work without the appellant's software. Mr. Ryan said that the appellant did not reimburse the pharmacist for the first six months of lease costs since it took three to six months to integrate the pharmacist into the network and to generate advertising revenues.

Concerning the invoices prepared by the appellant with respect to CEL, Mr. Ryan confirmed that the word "*facture*" (invoice) appears at the top of the document and that the words "*vendu à Customized Equipment Leas*." (sold to Customized Equipment Leasing Ltd.) appear in the body of the document. Mr. Ryan said that the document entitled "*Certificat d'acceptation et de livraison*" (Acceptance and Delivery Certificate) is signed by the pharmacists once the signs are installed, thus

allowing the appellant to invoice CEL.[3] However, Mr. Ryan stated that, owing to a lack of better documentation and legal advice, the appellant did not properly indicate the nature of the transaction in the documentation.

Mr. Ryan said that CEL was not interested in the signs themselves, but that, as a leasing company, it was interested in dealing with health professionals and knew that, in the event that it would have to take back a sign, the sign would be of no use to it.

In his testimony, Mr. Ryan mentioned the three signs that the appellant sold to three pharmacists during the period at issue. He said that the appellant asked for $8,000 for each of these signs, since that was the amount that it received from CEL.

During cross-examination, Mr. Ryan admitted that, after having received the amount of $8,000 from CEL, the appellant never remitted this amount directly to CEL. In addition, the signs were delivered directly to the pharmacists, and the pharmacists kept the signs throughout the duration of the agreement with CEL.

Mr. Ryan said that, under the terms of the option to purchase granted to the pharmacists in the thirty-sixth month of the lease, the pharmacists can purchase the signs for an amount of $1,600 payable to CEL. If the pharmacists do not exercise this option, CEL returns the signs to the appellant for an amount of $100 under the terms of an agreement between CEL and the appellant. Mr. Ryan admitted that the appellant does not take back the signs without having paid the amount of $100.

In response to questions concerning a sales invoice prepared by the appellant with respect to a pharmacist, Mr. Robert Vachon, Mr. Ryan admitted that he felt that the transaction does indeed constitute a sale in the amount of $8,000. Mr. Ryan also admitted that CEL makes a single payment of $8,000 to the appellant a few days after the invoice is prepared by the appellant.

The only witness for the respondent was Mr. Ghislain Bourbeau, who was an appeals officer with the Department of National Revenue (Revenue Canada) during the period at issue and who was responsible for the appellant's file. Mr. Bourbeau explained how the Minister had arrived at the assessment. He stated that $8,000 had been assessed for the illuminated signs sold to CEL and for signs sold directly to the pharmacists. For signs sold to Recomm, the sale price was established at $5,463, since these sales were made to a related company. For these sales, the reasonable sale price was established on the basis of the market price of $8,000 minus $1,200 for the commission, $800 for installation costs and an amount for profit markup.

Counsel for the appellant argued that there has not been a sale of signs between the appellant and CEL. He stated that the series of transactions between the appellant, CEL and the pharmacists, despite certain contractual appearances, constitute one and the same transaction, the purpose of which was to provide financing for the advertising network. Counsel argued that it is necessary to look at the transactions as a whole and to consider their true impact before determining the tax implications.

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3. The invoice submitted as evidence indicated an amount of $7,710.06. According to Mr. Ryan, a pharmacist sometimes made the first payment to the appellant rather than to CEL.

Counsel for the appellant also pointed out that, since there is no definition of the word "*vente*" (sale) in the Act, it is necessary to refer to civil law practised in the province of Quebec. For a sale to take place under civil law, the appellant has to have been divested of its full rights to the signs. According to counsel, the divestiture of the signs in favour of CEL was not complete, since the appellant remained the user of the goods during the term of the lease agreement.

To support this argument, counsel for the appellant referred to the commercial situation of which the transaction as a whole was a part, that is, that the appellant intended to return the signs at the end of the lease agreement between CEL and the pharmacists, that it had reimbursed the pharmacists for the major portion of the $8,000 during the term of the lease and that it would benefit from the profits generated by the goods. Counsel also raised a number of other points which he felt distinguish the transaction from a sale, such as the fact that only the appellant knows how to operate the signs and that, without the appellant's diskette, the signs are worthless. Counsel also claimed that the transaction as a whole resembles a sale with option of repurchase within the meaning of civil law rather than a simple sale and that both the civil and tax implications of a sale with option of repurchase are such that the sale is rendered non-existent when the signs are returned to the original owner.

By way of analogy, counsel for the appellant referred to the refrigerators provided free of charge to grocers by companies such as Coca-Cola Ltd., provided grocers agree to use such refrigerators exclusively for products of Coca-Cola Ltd.. Counsel said that the appellant, like Coca-Cola Ltd., is the ultimate user of the signs for tax purposes, but that, because the appellant did not have the means to provide the signs free of charge to the pharmacists, it had to set up a method of financing.

Counsel for the appellant also claimed that a single transaction took place because the individual transactions would not have existed without the participation of the three parties at every step. The lease would not have existed without the participation agreement between the appellant and the pharmacist, and the participation agreement would not have existed without the transaction between CEL and the appellant with respect to the transfer of the signs. Counsel stated that, since no sale took place and since the appellant is the consumer of these signs, the reasonable sale price of the signs should be established at $4,134.

Counsel for the appellant also noted that, if the Tribunal considers that there has been a sale, $8,000 is not the actual sale price, since the appellant paid the largest portion of this amount to the pharmacists. Counsel felt that the price should not include the portion that represents the financing. To support this position and to establish that $3,300 is the reasonable sale price for the signs sold to Recomm, counsel claimed that the actual price has to be established arbitrarily, since there is no open market for the signs. He said that a reasonable sale price for the signs transferred to CEL would be $4,134, that is, the sale price for a sign sold to Recomm plus sales costs and a higher profit markup. In counsel's opinion, the actual sale price for the signs sold to Recomm, determined primarily on the basis of the manufacturing cost multiplied by two, is a more reasonable sale price than the price established by Revenue Canada officials.

Counsel for the appellant closed by stating that the imposition of interest and penalties is inappropriate and constitutes an abusive exercise of rights on the part of the respondent.

In her arguments, counsel for the respondent noted that, although several transactions are associated with a single procedure, there is a single transaction, the sale transaction, from which they all derive. Counsel referred to a definition of the word "*vente*" (sale) taken from the Précis du droit de la vente et du louage[4] to support her position. She maintained that an amount of $8,000 was paid to the appellant by CEL in a single payment. Moreover, CEL leases the signs to the pharmacists while offering them an option to purchase the signs at the end of the lease agreement. According to counsel, this indicates that CEL became the owner of the goods during the transaction with the appellant. Consequently, a complete transfer of the goods was made in favour of CEL.

Counsel for the respondent also claimed that, in order for the appellant to once again become the owner of the goods, the pharmacists have to decide not to exercise the option to purchase, and the appellant has to remit $100 to CEL. The appellant has no control over these two conditions. As for the appellant's claims concerning the user of the signs, counsel argued that the pharmacists are also users of the signs since they use them to display their own messages and participate in the profits generated by the sale of advertising messages. Furthermore, the "reimbursement" of the lease costs is associated with the revenues generated by the sale of advertising messages and is not a simple reimbursement. Counsel was of the opinion that the non-arm's length relationship between the appellant and its clients is not based on the goods as such, but on the sale of advertising messages. Therefore, according to counsel, the appellant is liable for FST on the unit sale price of $8,000 for the signs sold to CEL.

With respect to the signs sold to Recomm, counsel for the respondent maintained that the reasonable sale price of $5,463 was determined by Revenue Canada officials on the basis of Excise Communiqué 165/PL,[5] which describes three methods of determining value for tax. Revenue Canada officials used the first method, that is, the comparable uncontrolled price method. Counsel stated that this method was used because the sales to CEL and the sales made directly to the three pharmacists are comparable sales. Revenue Canada officials then adjusted the price to take into account the commission, the installation costs and the net profit on the sales, since these factors are not present in the case of the sales to Recomm.

Finally, with respect to the appellant's request that interest and penalties be waived, counsel for the respondent argued that the Tribunal has to comply with the Act and has no jurisdiction to apply principles of equity.

The first issue in this appeal is whether the transactions between the appellant and CEL constitute sales within the meaning of the Act. If so, FST is payable on the sale price of the goods.

After having examined the evidence and the relevant case law, the Tribunal finds that the transfer of signs by the appellant to CEL constitutes a sale. Article 1472 of the *Civil Code of Lower Canada* stipulates that a sale is "a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay for it."

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4. T. Rousseau-Houle, 2nd ed. (Quebec: Presses de l'Université Laval, 1986) at 12.
5. Fair Market Value (Reasonable Sale Price), Department of National Revenue, Customs and Excise, December 1987.

In the Tribunal's opinion, the appellant transfers full right of ownership in a sign to CEL for an amount of $8,000. According to the oral testimony and the invoice prepared with respect to CEL and submitted as evidence, the appellant received an amount of $8,000 as a lump sum payment in return for the sign. The Tribunal also finds that the transfer of full right of ownership is indicated primarily by the fact that CEL can subsequently enter into lease agreements with third parties, under which the third parties have the option of purchasing the signs after the thirty-sixth month of the lease. Moreover, the option to purchase is not fictitious, in that 12 pharmacists exercised the option to purchase and, thus, obtained full right of ownership in CEL's goods.

In the Tribunal's opinion, the appellant and CEL knowingly entered into sales contracts. This opinion is supported by the fact that the appellant and CEL entered into another contract under which CEL offered a sign to the appellant for an amount of $100 if the pharmacist did not exercise the option to purchase. According to the Tribunal, it is obvious that the appellant realized, at the time that ownership was transferred to CEL, that CEL's lease agreement included an option to purchase clause for the pharmacists. Moreover, the appellant's witness admitted that the pharmacists' decision concerning the purchase of the signs was independent of the appellant's wishes.

The Tribunal also finds that the appellant's argument that the various transactions between the appellant, CEL and the pharmacists must be considered a single transaction is not convincing. In the Tribunal's opinion, it is obvious that there was a contract between the appellant and CEL whereby the signs were sold to CEL. The Tribunal feels that both parties intended to carry out a sale, be it within or outside of the broader context of the establishment of the appellant's advertising network. Although the signs were a component of the appellant's advertising business, the signs were in fact sold to CEL.

Furthermore, even if the procedure as a whole is considered a single transaction, the Tribunal is not convinced that the transaction can be described as a sale with option of repurchase. In the Tribunal's opinion, the return of the sign to the appellant when the lease agreement expires constitutes a promise of resale rather than an actual sale with option of repurchase. Thus, a sale did take place, and the tax should be determined according to the sale price of the signs.

Regarding the second issue in this appeal, the Tribunal finds that the reasonable sale price for the signs sold to Recomm is $5,463, as established by Revenue Canada officials. Under subsection 58(1) of the Act, when goods are sold to an individual with whom the manufacturer or the producer is not dealing at arm's length, the manufacturer or the producer is deemed to have sold the goods on that date for a reasonable sale price.

According to the Revenue Canada witness, in order to determine the reasonable sale price for the signs, Revenue Canada officials took into account the sale price for comparable goods sold on the open market, in accordance with Excise Communiqué 165/PL. In other words, Revenue Canada officials established the reasonable sale price for the goods sold to Recomm by using the amount of $8,000 as a base price. Certain amounts were then deducted for delivery and installation costs, since the transactions with Recomm do not include these services.

Although the Tribunal is not required to take excise communiqués into account, they can be an "important factor" where doubt exists concerning the meaning of legislation.[6] The Tribunal is of the opinion that the method used by Revenue Canada officials to determine a value for tax is reasonable in this case. The sale price of $8,000 for the signs sold to independent purchasers, such as CEL and certain pharmacists, is a logical point of departure for determining the reasonable sale price for the signs sold to Recomm. Deducting certain amounts for delivery and installation costs and for profit markup takes into consideration the major differences between the two types of sales.

With respect to the imposition of interest and penalties, it is a well-established principle that the Tribunal does not have jurisdiction to render decisions based on principles of equity.[7] The Tribunal can amend interest and penalty amounts only where there has been a calculation error or where an assessment has been amended or cancelled. Because neither of these two conditions applies in this case, the Tribunal has no authority to grant the adjustment that has been requested.

Consequently, the appeal is dismissed.

Lise Bergeron
Lise Bergeron
Presiding Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Raynald Guay
Raynald Guay
Member

6. *Gene A. Nowegijick v. Her Majesty the Queen*, [1983] 1 S.C.R. 29.

7. See, for example, *Pelletrex Ltée v. The Minister of National Revenue*, Canadian International Trade Tribunal, Appeal No. AP-89-274, October 15, 1991, and decisions referred to therein.