

Ottawa, Thursday, January 25, 1996

Appeal No. AP-94-350

IN THE MATTER OF an appeal heard on September 8, 1995,
under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of National
Revenue dated November 16 and December 16, 1994, with
respect to notices of objection served under section 81.17 of the
Excise Tax Act.

BETWEEN

MACLEAN HUNTER LIMITED

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Anita Szlajak
Anita Szlajak
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-350

MACLEAN HUNTER LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act of determinations of the Minister of National Revenue that rejected the appellant's applications for refund of federal sales tax paid in respect of sales of various publications. The issue in this appeal is whether the appellant is entitled to a refund of federal sales tax in respect of its sales of the Toronto Blue Jays Scorebook magazine and of Canadian Hockey Magazine, as these publications are exempt from federal sales tax as magazines, and of the U.S. Troll Book catalogues, which are claimed to have been exported to the United States.

***HELD:** The appeal is allowed in part. The Tribunal finds that the appellant's sales of both Canadian Hockey Magazine and the Toronto Blue Jays Scorebook magazine during the period at issue were exempt from federal sales tax, as the publications fell within the ordinary meaning of a "magazine," as a periodical containing articles, stories, etc., usually with photographs, illustrations, etc., and neither publication served as a program or contained more than the allowable percentage of advertising space. The appellant is, therefore, entitled to a refund of federal sales tax paid in respect of its sales of those publications.*

With respect to the issue of whether the appellant is entitled to a refund in respect of its sales of the U.S. Troll Book catalogues, which it claims to have exported to the United States, the Tribunal is of the view that, under section 66 of the Excise Tax Act and section 7 of the General Excise and Sales Tax Regulations, it is within the Minister of National Revenue's discretion to determine whether there is satisfactory evidence to show that the goods have been exported.

*Place of Hearing: Ottawa, Ontario
Date of Hearing: September 8, 1995
Date of Decision: January 25, 1996*

*Tribunal Members: Lyle M. Russell, Presiding Member
Anthony T. Eyton, Member
Anita Szlazak, Member*

Counsel for the Tribunal: Shelley Rowe

Clerk of the Tribunal: Anne Jamieson

*Appearances: Paul E. Hawa, for the appellant
Anne M. Turley, for the respondent*

Appeal No. AP-94-350

MACLEAN HUNTER LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ANTHONY T. EYTON, Member
ANITA SZLAZAK, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of determinations of the Minister of National Revenue (the Minister) dated June 3 and 10, July 15 and August 19, 1992, that rejected the appellant's applications for refund of federal sales tax (FST) paid in respect of sales of various publications and of food wrap during the period from January 1 to December 31, 1990. At the hearing, counsel for the appellant conceded that, of the issues identified in the appellant's brief, he would only proceed to argue that the appellant was entitled to a refund of FST in respect of its sales of the Toronto Blue Jays Scorebook magazine (Scorebook) and of Canadian Hockey Magazine, as these publications are exempt from FST as magazines, and of the U.S. Troll Book catalogues, which are claimed to have been exported to the United States.

Counsel for the appellant argued that the sales of Scorebook and Canadian Hockey Magazine were exempt from FST under subsection 51(1) of the Act, which reads, in part, as follows:

The tax imposed by section 50 does not apply to the sale or importation of the goods mentioned in Schedule III.

Subsection 3(1) of Part III of Schedule III to the Act reads, in part, as follows:

(b) magazines and parts thereof; newspapers and parts thereof; articles and materials for use exclusively in the manufacture or production of the foregoing; all the foregoing other than:

- (i) cultural, entertainment, sports or like publications that serve as programs,*
- (ii) magazines that are not issued regularly at stated intervals or that are so issued but at stated intervals less frequently than four times yearly,*
- (iii) any single issue of a magazine if*
 - (A) the printed space therein devoted to advertising is more than ninety per cent of the total printed space therein, or*

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

(B) the aggregate of the printed space devoted to advertising in the four issues of the magazine immediately preceding that issue is more than seventy per cent of the aggregate of the total printed space in those four issues.

The appellant's witness, Mr. Ali Hirji of Ninecan Management Inc., explained that he was responsible for reviewing the appellant's books and records and assessing the taxability of the publications in issue. Three samples of Canadian Hockey Magazine were introduced: Vol. 15, No. 4; Vol. 16, No. 4; and Vol. 17, No. 2. The volume number coincides with the year of publication, such that Vol. 15 refers to 1992-93, Vol. 16 to 1993-94 and Vol. 17 to 1994-95. Mr. Hirji pointed out to the Tribunal that, at page 5 of each issue, the price is set out, and it is stated that Canadian Hockey Magazine "is published a minimum of four times during the hockey season" and may be purchased by subscription. During cross-examination, Mr. Hirji confirmed that the samples introduced were not from the period at issue, that is, from January 1 to December 31, 1990.

According to Mr. Hirji, Canadian Hockey Magazine is sold at newsstands, for example, United Cigar Stores, through subscription and at junior hockey league games across Canada; however, he agreed during cross-examination that the major market for the publication is at hockey games. Mr. Hirji confirmed that several United Cigar Stores were contacted and confirmed that they, in fact, carried the publication. However, Mr. Hirji could not confirm whether, in fact, United Cigar Stores carried the publication in 1990. Based on his discussions with representatives of the publisher, St. Clair Group Investments Inc., Mr. Hirji indicated that, subsequent to 1990, there had been no major changes in the format of Canadian Hockey Magazine or in the way that it was marketed or sold.

When asked to compare the indexes of Vol. 15, Nos. 3 and 4, submitted to the Department of National Revenue (Revenue Canada) by the appellant, Mr. Hirji agreed that pages 39 through 134 in both issues contained exactly the same articles. Mr. Hirji confirmed that there was also considerable overlap in the articles appearing in Vol. 16, Nos. 2, 4 and 5 and Vol. 17, Nos. 1 and 2.

Two samples of Scorebook were also introduced at the hearing: Vol. 14, Issue I, dated April 23 to May 9, 1990, and Vol. 14, Issue III, dated July 24 to August 12, 1990. At page 5 of both issues, it is stated that "Scorebook Magazine is issued 26 times during the baseball season. Scorebook Magazines 1990 (\$7 each) and the 1990 Blue Jays Yearbook (\$8 each) are available from the Controlled Media publishing office." The front cover indicates that the issue price is \$3.70 plus \$0.30 for provincial sales tax. Mr. Hirji stated, based on the information in the publication and on information obtained from Controlled Media, that Scorebook is available by subscription. However, he was unable to confirm the annual subscription price. In terms of distribution other than by subscription, Mr. Hirji stated that Scorebook is available at newsstands, such as United Cigar Stores, and at booths at Toronto Blue Jays baseball games.

Counsel for the appellant submitted that, in order to find that the publications in issue are exempt from FST under subsection 3(1) of Part III of Schedule III to the Act, the Tribunal must be satisfied that the publications (1) are "magazines" and (2) do not fall within any of the exclusions under paragraph 3(1)(b) of Part III of Schedule III and, more particularly, that they do not serve as programs and are issued regularly at stated intervals, not less frequently than four times yearly.

It was counsel for the appellant's contention that the Tribunal should give the term "magazines" in the Act its ordinary meaning, and he cited the decision of the Supreme Court of Canada in *Miln-Bingham*

Printing Company Limited v. His Majesty the King,² as well as the decision of the Tariff Board in *Master Media Inc. v. The Deputy Minister of National Revenue for Customs and Excise*,³ in support of his contention. Counsel referred to the following definition as the ordinary meaning of “magazine:”

*a periodical publication containing articles, stories, etc., usu. with photographs, illustrations, etc.*⁴

It was submitted by counsel that Canadian Hockey Magazine and Scorebook meet this definition, as they contain editorials, articles and pictures.

In further support of his contention, counsel for the appellant referred to the criteria identified by the Tariff Board in *Master Media* in determining that a crossword puzzle magazine qualified as a “magazine” and was, therefore, exempt from FST. Counsel referred to the following excerpts from that decision:

For 30 years the magazines have been published on a regular basis and the stale-dated unsold magazines are returned for credit.... Each has a volume number, issue number and date of issue which indicate that the magazine is a continuing publication.

...

The goods in issue are displayed and sold through newsstands and magazine racks with other publications which may or may not contain editorials, photos, advertising or contributed works. A limited number of crossword puzzle publications are also distributed to the public through a mail order system on a regular basis, and each issue contains the volume number, issue number and date of issue.

The Board concludes that the format, regularity of publication and method of sales of the goods in issue satisfy the definition of a periodical.

Applying the same criteria to Canadian Hockey Magazine and Scorebook, counsel submitted that the fact that the publications have volume and issue numbers, are published “a minimum of four times during the hockey season” and “26 times during the baseball season,” respectively, are sold through subscription and are available at newsstands, hockey arenas and baseball stadiums indicates that they are magazines.

In addressing the remaining issue, that is, whether Canadian Hockey Magazine and Scorebook fall within any of the exclusions under paragraph 3(1)(b) of Part III of Schedule III to the Act, counsel for the appellant submitted that the publications are not “cultural, entertainment, sports or like publications that serve as programs.” Counsel referred to the following definition as representing the ordinary meaning of the word “programme:”

*a usu. printed list of a series of events, performers, etc. at a public function etc.*⁵

2. [1930] S.C.R. 282.

3. (1982), 8 T.B.R. 140.

4. The Shorter Oxford Dictionary (Oxford: Clarendon Press, 1993) at 712.

5. *Ibid.* at 953.

Counsel submitted that Canadian Hockey Magazine is not event-specific, in that the articles are of general interest to people in junior hockey and that it cannot be used to follow a particular game. With respect to Scorebook, counsel submitted that it is also not event-specific and pointed out that, although there is a stapled insert in the centre of the publication listing all of the Toronto Blue Jays players, as well as the players of the Toronto Blue Jays' opponents during the period of time to which the publication relates, there is no indication on that insert of the starting line-up, pitchers or batting order for a particular game.

Alternatively, counsel for the appellant submitted that, if the Tribunal finds that some of the contents of Scorebook are used as a program, then only that part of the magazine should be subject to FST in order to give meaning to the words "magazines and parts thereof" in paragraph 3(1)(b) of Part III of Schedule III to the Act.

Finally, counsel for the appellant addressed the fact that the issues of Canadian Hockey Magazine introduced as exhibits were not from the period covered by this appeal. Counsel submitted, based on Mr. Hirji's testimony, that there was no material change in format, content or style from the period covered by this appeal to the time that the issues entered as exhibits were published, that excess issues were routinely destroyed or thrown away and that the samples introduced were the best evidence available to bring before the Tribunal.

Focusing first on Canadian Hockey Magazine, counsel for the respondent highlighted the fact that the appellant was unable to produce issues of that publication from the period covered by this appeal. Moreover, counsel submitted that, even if the Tribunal accepts Mr. Hirji's testimony that the issues from that period were in the same format as those entered as exhibits, there is substantial overlap among issues from a particular volume, and the publications are sold primarily at sporting events.

In considering whether Canadian Hockey Magazine might fall within one of the exclusions to the exemption, counsel for the respondent submitted that the Tribunal should take into account: (1) whether it serves as a program; (2) whether it is issued regularly at stated intervals; and (3) the advertising content. Counsel submitted that it would be impossible to make a determination as to the amount of advertising, since the appellant was unable to produce any of the issues from the relevant time period. With respect to the issue of whether the publication was issued "regularly at stated intervals," counsel submitted that there is no indication as to the intervals, i.e. whether it is published biweekly, monthly, etc.

In addressing Scorebook, counsel for the respondent submitted that it is not a magazine in the ordinary meaning of the word, since it contains a substantial amount of advertising, is seasonal, is sold primarily at Toronto Blue Jays baseball games and contains an insert with program-type information.

Counsel for the respondent also argued that, under Revenue Canada Ruling 5715/76 Passive⁶ (the Ruling), the publications in issue do not qualify as "magazines" under paragraph 3(1)(b) of Part III of Schedule III to the Act. The Ruling provides that publications in "the format of a cultural, entertainment or sports program" consisting of a "magazine section ... together with an event or local sports team insert plus a centre section that serves as a program to a given cultural or entertainment event or a sports event" are specifically excluded from the exemption under subparagraph 3(1)(b)(i) of Part III of Schedule III as

6. Publications Issued As Magazines and Programs, February 12, 1985.

“cultural, entertainment, sports or like publications that serve as programs” and are, therefore, subject to FST. Counsel submitted that sales of the publications in issue are subject to FST as they serve as programs.

Also referring to the Ruling, counsel for the appellant submitted that the Tribunal should find that the publications in issue meet the following description of a publication in “magazine type format” as opposed to the description of publications “that serve as programs:”

It contains general information about the cultural or entertainment scene or the sports team or league. Different cultural events, entertainers, players or teams are featured and the publication may take on the name of the cultural event, entertainer, player or team. However, the publication is not in itself a program but is a magazine published at stated intervals not less frequently than four times yearly.

Counsel submitted that the publications in issue meet this definition, as they are sold at newsstands, at sporting events and through subscription and are published at stated intervals not less than four times a year.

After having considered the parties’ evidence and submissions, the Tribunal is persuaded that the appellant’s sales of Scorebook and Canadian Hockey Magazine during the period from January 1 to December 31, 1990, were exempt from FST, as these publications are magazines within the meaning of paragraph 3(1)(b) of Part III of Schedule III to the Act. The Tribunal agrees with the appellant’s submission that the word “magazine” should be given its ordinary meaning and accepts the definition provided by the appellant as the ordinary meaning of that word. The Tribunal also relies on the following definition of “magazine:”

*a publication issued at regular intervals, especially weekly or monthly, which contains stories, articles, photographs, etc., by various contributors.*⁷

From its examination of the samples of Canadian Hockey Magazine and Scorebook provided by the appellant, the Tribunal is of the view that both publications meet these general definitions of “magazine” and that neither publication falls within the exceptions. First, with respect to Canadian Hockey Magazine, the Tribunal notes that it is published regularly at stated intervals, as it is “published a minimum of four times during the hockey season,” and that it contains stories, articles and photographs by various contributors. While there may be substantial repetition in the stories, articles and photographs from issue to issue, there are significant portions that are unique to each issue. In terms of the applicability of the exceptions, the Tribunal is not persuaded that one page containing a season schedule makes the publication a program, whether a program is defined as a printed list of a series of events at a public function, as suggested by counsel for the appellant, or as an event or local sports team insert plus a section that serves as a program to a given sports event, as described in the Ruling. Moreover, based on an examination of the samples provided at the hearing, the Tribunal is satisfied that the amount of printed space devoted to advertising in Canadian Hockey Magazine does not exceed the allowable percentage of total printed space.

The Tribunal recognizes that the samples of Canadian Hockey Magazine provided by the appellant are not from the period at issue. However, the Tribunal accepts the testimony of Mr. Hirji that attempts were made to obtain samples from the period at issue and that there have been no major changes in terms of

7. Gage Canadian Dictionary (Toronto: Gage Publishing, 1983) at 691.

format, distribution and marketing of the publication from the period at issue to the period in which the samples introduced as exhibits were published. Therefore, the Tribunal believes that the samples provided are representative of the issues of the publication from the period at issue in this appeal.

Like Canadian Hockey Magazine, Scorebook is published regularly at stated intervals, that is, “26 times during the baseball season,” and contains stories, articles and photographs by various contributors. The fact that each issue contains general information about tickets, special events, the Skydome, the Toronto Blue Jays players, managers, coaches, and statistics, as well as an insert showing a blank score sheet and a player list for the Toronto Blue Jays and the opposing team, does not, in the Tribunal’s view, constitute the publication of a program. In addition, based on an examination of the samples provided at the hearing, the Tribunal is satisfied that the amount of printed space devoted to advertising in Scorebook does not exceed the allowable percentage of total printed space.

Counsel for the appellant further submitted that, under section 66 of the Act, the sales of the U.S. Troll Book catalogues were not subject to FST, as those books were exported to Troll Associates Inc. in the United States. Section 66 provides as follows:

No tax imposed by this Act shall be levied or collected if evidence satisfactory to the Minister is produced to establish

(a) that the goods in respect of which it is imposed have been exported from Canada by the manufacturer, producer or licensed wholesaler by whom the tax would otherwise be payable in accordance with such regulations made under this Act as are applicable thereto, if any.

As evidence that the U.S. Troll Book catalogues were exported to the United States, Mr. Hirji introduced samples of invoices which he obtained through his audit of the appellant’s records. He explained that, during his audit, he discussed the invoices with the Controller and Vice-President of Finance who confirmed that the U.S. Troll Book catalogues had, in fact, been exported and that the appellant had simply failed to file the appropriate refund claims. Mr. Hirji pointed out that the invoices include brokerage fees, duties and taxes paid, which, he submitted, would only relate to export shipments. As further support, he referred to the fact that the invoices indicate that provincial sales tax was paid only on that portion of the books that was retained in Ontario. It was confirmed by Mr. Hirji during cross-examination that customs documentation was unavailable to support the appellant’s claim that the U.S. Troll Book catalogues were exported. In response to questions from the Tribunal, Mr. Hirji stated that, based on his discussions with the appellant’s management, the publication was distributed only in Ontario and the United States. He also stated that the invoice amounts, including the brokerage fees and duties, were entered as accounts receivable and were paid.

Counsel for the appellant submitted that the invoices introduced by Mr. Hirji, as well as his testimony, provided sufficient evidence that the U.S. Troll Book catalogues were exported to the United States.

Counsel for the respondent submitted that, under section 66 of the Act, the issue of whether FST is payable on goods that are exported depends upon whether “evidence satisfactory to the Minister is produced to establish a) that the goods ... have been exported from Canada by the manufacturer, producer or licensed wholesaler.” Counsel questioned whether the Tribunal had the jurisdiction to consider the issue when the

Minister had determined that the evidence was unsatisfactory. Counsel further submitted that, whether or not the Tribunal had jurisdiction to consider the issue, the evidence produced by the appellant was insufficient to show that the U.S. Troll Book catalogues were exported to the United States.

The Tribunal agrees with counsel for the respondent that, under section 66 of the Act, it is within the Minister's discretion to determine whether there is satisfactory evidence to show that goods have been exported. Moreover, pursuant to section 7 of the *General Excise and Sales Tax Regulations*,⁸ a refund of FST paid on goods which are subsequently exported may only be granted if evidence of the payment of FST is maintained on file by the exporter and evidence satisfactory to the Minister is produced to establish that the goods have been exported from Canada.

Accordingly, the Tribunal allows that portion of the appeal relating to sales of the Canadian Hockey Magazine and the Scorebook during the period from January 1 to December 31, 1990, and dismisses that portion of the appeal relating to sales of U.S. Troll Book catalogues during the same period.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Anita Szlajak
Anita Szlajak
Member

8. C.R.C. 1978, Vol. VI, c. 594 at 3941.