Ottawa, Thursday, December 18, 1997

Appeal No. AP-96-226

IN THE MATTER OF an appeal heard on August 5, 1997, 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 December 19, 1996, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

FLECK MANUFACTURING INC. **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-96-226

FLECK MANUFACTURING INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The goods in issue are various articles manufactured by the appellant and described in its brief as electric cable, extension cords, automotive wire, and booster cable and trailer wiring harnesses and connectors. The appellant was denied a refund of federal sales tax that was collected pursuant to paragraph 50(1.1)(*b*) of the *Excise Tax Act*.

HELD: The appeal is dismissed. Having carefully considered all the evidence and taking into account the evolving jurisprudence of the courts, the Tribunal is of the view that electric conducting wire and cable qualify for the lower tax rate only if they form a component part of a building or other construction project. To conclude, for example, that a detachable electric frying pan cord qualifies for the lower tax rate as a product under Schedule IV to the *Excise Tax Act*, "Construction Materials" and "Equipment for Buildings," would be absurd. To come to this conclusion, the Tribunal would have to ignore entirely the headings "Construction Materials" and "Equipment for Buildings." This, according to the courts, cannot be done.

In the Tribunal's view, headings do give context to the items enumerated thereunder. While paragraph 61-085 of the *Canadian Sales Tax Reports*, to which both counsel referred, is not a model of clarity or consistency, it does seem to suggest that finished goods were not the type of goods which were to be taxed at the lower rate.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 5, 1997
Date of Decision:	December 18, 1997
Tribunal Members:	Charles A. Gracey, Presiding Member Raynald Guay, Member Arthur B. Trudeau, Member
Counsel for the Tribunal:	Gerry Stobo
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael Kaylor, for the appellant Kathleen McManus, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-96-226

FLECK MANUFACTURING INC. **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
RAYNALD GUAY, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

The goods in issue are various articles manufactured by the appellant and described in its brief as electric cable, extension cords, automotive wire, and booster cable and trailer wiring harnesses and connectors. The appellant was denied a refund of federal sales tax that was collected pursuant to paragraph 50(1.1)(*b*) of the *Excise Tax Act*[1] (the Act), which reads:

> 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
>
> (1.1) Tax imposed by subsection (1) is imposed
>
> (*b*) in the case of goods enumerated in Schedule IV (Construction Materials and Equipment for Buildings), at the rate of nine per cent.

Under Part I of Schedule IV to the Act, there are more than 30 categories of goods that qualify for this lower rate of tax. Section 4 of Part I of Schedule IV to the Act reads: "Electric conducting and telecommunication wire and cable; transformers, circuit breakers and related electrical equipment designed for permanent installation in a system for the supply of electricity."

Counsel for the appellant called one witness, Mr. Ted Paul Novakowski, a cost analyst for NOMA Industries (NOMA), the successor firm to Fleck Manufacturing Inc. Mr. Novakowski introduced three exhibits which, he explained, were representative of the range of the goods in issue. These exhibits were:

1. a simple extension cord of the type in regular use within the home;
2. a set of automotive booster cables; and
3. an outdoor extension cable.

Mr. Novakowski explained how NOMA manufactures the finished goods from its constituent parts. He explained that it is necessary to add the plug or connectors to both ends of the electrical cable when marketed. The goods were in a finished state and were called extension cords, booster cables, etc. Mr. Novakowski acknowledged that, while an extension cord would have use at a construction site, it would not be incorporated into the construction project or building. He indicated that NOMA also manufactures electrical wiring used in the making of major appliances, such as washers, dryers, etc., and that these are considered to be articles falling under section 4 of Part I of Schedule IV to the Act.

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

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Counsel for the appellant then entered several brochures as exhibits which showed printer cables, modem cables, multi-use accessory cables, etc. as evidence that items, such as the goods in issue, are indeed referred to as "cables," despite their being fitted with various types of connectors. He pointed out that each item had an adjectival adjunct, much as the words "extension" or "booster" are adjectival adjuncts to the goods in issue.

Counsel for the appellant stated that there were two issues in this appeal. The first issue was whether the goods qualified as electric conducting cable pursuant to the terms of section 4 of Part I of Schedule IV to the Act. If they qualified as electric conducting cable, the second issue was whether they also had to be a "construction or building" material in order to qualify for the lower rate of tax.

In dealing with the first issue, counsel for the appellant stated that the goods in issue, being booster cables, indoor and outdoor extension goods, are properly described as "electric conducting … wire and cable" and, as such, fall within the scope of Schedule IV to the Act. The wording of section 4 is not, he maintains, restricted to electric wiring and cable installed in a building, rather it encompasses all wire and cable. If the wire or cable transmits electricity, it is entitled to the lower tax rate under Schedule IV. The fact that the goods in issue have connectors attached to them, which enable them to be used without further alteration, is irrelevant. Simply put, they are electric conducting wire or cable. He stated that brochures entered as exhibits would support this view, as the products depicted, although in a finished state, are referred to as cables. Counsel continued by stating that the lower rate of tax would apply to any cable or wire capable of conducting electricity, whether in a finished condition or not. And so, following counsel's arguments, any wires or cables, be they detachable cords for an electric frying pan, extension cords used in a home for some transient domestic purpose or wire put into the frame of a building, are taxable at this lower rate.

Turning to the second issue, counsel for the appellant argued that there is no requirement that the goods enumerated in Schedule IV to the Act necessarily be used as construction materials or equipment for buildings. In support of that, he pointed out that, when Parliament wished to include the requirement with respect to goods in that schedule, it said so explicitly. He reviewed some of the sections in Schedule IV which have qualifications attached or conditions for use included, such as section 5, "Fire-fighting and fire-detection equipment for <u>installation in buildings</u>" (emphasis added), or section 9, "Hot water tanks and water heaters <u>for permanent installation</u> in water systems for buildings" (emphasis added). Counsel pointed out that no such similar qualification was appended to "electric conducting … wire and cable" under section 4. Consequently, Parliament had clearly not intended that conditions such as "for installation in buildings" apply to electric conducting wire and cable.

Counsel for the appellant then dealt with the weight to be given to the headings "Construction Materials" and "Equipment for Buildings." In his view, only cursory reference should be made to the section headings and titles because there is no ambiguity in either the wording of section 4 or the purpose for which these cables or cords were designed. The fact that they have connectors attached and are in a finished state does not alter the fact that they are electric conducting wire or cable. In support of that view, counsel referred to the case of *Skoke-Graham* v. *The Queen*[2] in which Kellock J. is cited with approval regarding a decision[3] which held that titles and headings should not control the meaning of "enacting words" which, in themselves, are "clear and unambiguous."

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2. [1985] 1 S.C.R. 106.
3. *Attorney-General of Canada* v. *Jackson*, [1946] S.C.R. 489.

Counsel for the appellant cited the Tribunal's decision in *Microtel Limited* v. *The Minister of National Revenue*[4] in support of his view that it is not necessary to look to headings and titles for context or qualification. In *Microtel*, the Tribunal concluded that telephone switching equipment and connection cables not incorporated into a construction project could, nevertheless, qualify under section 4 of Part I of Schedule IV to the Act for a reduced rate of tax. In that decision, the Tribunal relied on the Federal Court of Appeal's decision in *Chateau Manufacturing Limited* v. *The Deputy Minister of National Revenue for Customs and Excise*,[5] in which it was held that the heading "Construction Materials" did not limit or circumscribe the items described in section 4. Consequently, the Tribunal gave the words within this section the "broadest meaning possible consistent with the context in which they were found.[6]" Furthermore, the Tribunal stated that, had Parliament intended to impose qualifications on the cables or wires, it would have stated that the connection cables must be incorporated into a construction project.

In coming to this decision, the Tribunal distinguished two earlier decisions[7] which concluded that, in order to qualify for the lower tax rate, the goods must be part of a construction project. The distinction between *Microtel* and the previous cases cited was found in the specific wording of the sections being considered in those cases. In one case, the wording read "for permanent installation in buildings," in *Selenia*, and "for use in buildings," in *Perma Tubes*. The qualifications in those cases specifically provided for the installation of goods in buildings or other construction projects.

Counsel for the appellant submitted that the *Microtel* decision should be followed, not only because of its approach to the interpretation of the goods in Schedule IV to the Act but because of the similarity of products: telephone connection cords and, in the present appeal, extension cords and booster cables.

Counsel for the appellant urged the Tribunal to disregard its earlier decision in *Rova Products Canada Inc.* v. *The Minister of National Revenue*[8] because this decision was pronounced two years before *Microtel* and was, therefore, superseded by the reasoning in *Microtel*, even though it was not referred to in that later decision. In *Rova*, the goods in issue included telephone cords which were connected to a wall jack and telephone receiver. In dismissing the appeal, the Tribunal stated:

> After considering the entire context of Part I, Schedule IV, the Tribunal concludes that it was not the intention of Parliament to include the cords in issue within the provisions of section 4. Rather, its context suggests that it includes only materials and articles that will form component parts of a building or other construction project.[9]

This interpretation was, according to counsel, simply wrong and should not be followed.

However, if the Tribunal felt that there was some ambiguity in the meaning of section 4 of Part I of Schedule IV to the Act, then reference could be made to headings and, for example, to interpretative documents. Counsel for the appellant then made reference to paragraph 61-085 of the *Canadian Sales Tax Reports*[10] where it states: "1. <u>All wire and cable designed for conducting electricity</u> will qualify for the lower

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4. 2 G.T.C. 5025, Appeal No. AP-90-113, January 26, 1994.
5. 51 N.R. 29, Court File No. A-797-80, December 9, 1983.
6. *Supra* note 4 at 5026.
7. *Perma Tubes Ltd.* v. *The Minister of National Revenue*, 4 T.C.T. 3299, Canadian International Trade Tribunal, Appeal No. AP-89-267, August 19, 1991; and *Selenia Food Equipment Limited* v. *The Deputy Minister of National Revenue for Customs and Excise* (1988), 13 T.B.R. 139.
8. 5 T.C.T. 1154, Appeal No. 3107, March 18, 1992.
9. *Ibid.* at 1155.
10. (North York: CCH Canadian, 1990).

rate of tax" (emphasis added). However, counsel went on to note that, according to paragraph 61-085, appliance cords (without fittings) of random length attracted a lower rate of tax, while appliance cords with fittings attracted a higher rate of tax. Counsel pointed out that appliance cords, with or without fittings, are not normally used in construction projects and, therefore, cannot in any way be considered "construction materials," yet, according to the *Canadian Sales Tax Reports*, they qualify for the lower rate of tax. Moreover, he noted that "[a]utomotive wire, copper" attracts a lower rate of tax, according to paragraph 61-085. That wire, like appliance cords, cannot be used in construction projects and cannot, therefore, be considered "construction materials." Finally, counsel commented that, wherever there exists confusion in a taxing provision, it should be interpreted in a manner favourable to the taxpayer.[11]

Counsel for the respondent pointed out that, in *Rova*, the Tribunal developed a two-stage test. First, it must ask itself if the goods in issue come within the description of goods set out in a particular provision of Schedule IV to the Act and, if so, it must continue by asking itself if the goods are also a part of a construction project.

In the view of counsel for the respondent, the goods in issue do not qualify as "electric conducting … wire and cable" because that phrase refers to wire or cable without connectors attached. Consequently, on the plain reading of that phrase, the goods in issue are not as described in section 4 of Part I of Schedule IV to the Act.

Counsel for the respondent then addressed the inconsistency between the Tribunal's decisions in *Microtel* and *Rova*. She noted that, in *Microtel*, the Tribunal relied heavily upon the 1983 Federal Court of Appeal decision in *Chateau Manufacturing*. That decision, she said, did not deal with a finished product, rather it dealt with an unassembled garden shed kit which needed other parts and work to make it into a finished product. The facts of the cases are, therefore, distinguishable. Furthermore, counsel noted that *Chateau Manufacturing* was decided before the Supreme Court of Canada's more current pronouncements on the use of headings and titles. Consequently, the Tribunal's reliance on that case with respect to the role of headings and titles was incorrect.

In the view of counsel for the respondent, the modern approach with respect to the interpretative role played by headings and titles was clearly articulated by Estey J. in *The Law Society of Upper Canada* v. *Joel Skapinker*[12]:

> It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*. The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the *Charter*; and the relationship of the terminology employed in the heading to the substance of the headlined provision. Heterogeneous rights will be less likely shepherded by a heading than a homogeneous group of rights.
>
> At a minimum the heading must be examined and some attempt made to discern the intent of the makers of the document from the language of the heading. It is at best one step in the constitutional interpretation process. It is difficult to foresee a situation where the heading will be of controlling

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11. *Québec (Communauté urbaine)* v. *Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3.
12. [1984] 1 S.C.R. 357.

> importance. It is, on the other hand, almost as difficult to contemplate a situation where the heading could be cursorily rejected.[13] (Emphasis added)

Counsel for the respondent continued by referring to Driedger,[14] a leading authority on statutory interpretation who, when considering the significance of headings and titles, said: "The chief use of headings, however, is to cast light on the meaning or scope of the provisions to which they relate. They function much as titles.[15]"

In responding to other matters raised by counsel for the appellant, counsel for the respondent asserted that all of the articles in the various sections of Schedule IV to the Act had in common the fact that they were not end products in themselves, but were "materials/articles which go into the making of something else.[16]" Consequently, they could fairly be characterized as construction materials. Counsel cited *Selenia*, wherein the Tribunal noted that the different sections of Part I of Schedule IV to the Act contain "an xtensive list of raw materials and articles … that are or will be employed in the construction of buildings [and various other things].[17]" Further, "the common denominator of products listed under that Part is that they must be used in the construction of any of the projects enumerated therein.[18]" Counsel reminded the Tribunal that each of the goods in issue was a finished product or end product and that none was used in building projects.

Counsel for the respondent acknowledged that paragraph 61-085, to which counsel for the appellant referred, was not entirely consistent as counsel for the appellant suggested. However, counsel for the respondent found no inconsistency in paragraph 61-085, in which it is stated that "[a]ll wire and cable designed for conducting electricity will qualify for the lower rate of tax" and later when certain "end products" were taxed at the higher rate. Indeed, it would appear that paragraph 61-085 confirms the higher rate of tax for finished goods, such as extension cords with fittings, while the lower rate applies to extension cords of random lengths, without fittings.

In conclusion, counsel for the respondent stated that, even if the Tribunal finds that these finished goods are cable or wire for conducting electricity, they fail on the second limb of the test established in *Rova* because they are not materials and articles that will form component parts of a building or other construction project.

In reviewing the conflicting jurisprudence of the Tribunal and the evolving jurisprudence of the courts, it appears to the Tribunal that the clearest statement regarding the use of headings and titles was that articulated in *Skapinker*. Moreover, this case was cited with approval in a recent Federal Court of Appeal case dealing with the interpretation of a provision of the Act. In that case, the Federal Court of Appeal was faced with deciding whether or not a tax, provided for in the Act, was a specific tax on the volume of gasoline and diesel fuel sold or an *ad valorem* tax. The Federal Court of Appeal, in analyzing the facts and law, stated in part:

> This interpretation of the tax as a specific one is supported by reference to the heading in Schedule II.1, "Specific Tax Rates on Petroleum Products". The heading clearly indicates that Parliament intended Schedule II.1, which is incorporated into the statute by paragraph 50(1.1)(c), to

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13. *Ibid.* at 376-77.
14. R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994).
15. *Ibid.* at 270.
16. *Transcript of Argument*, August 5, 1997, at 43.
17. *Supra* note 7 at 152.
18. *Ibid.*

impose a specific tax on gasoline and diesel fuel. For the purposes of interpretation of federal statutes, headings should be considered part of the legislation and should be read and relied upon like any other contextual feature of the statute.

While *Skapinker* addressed the use of headings in constitutional interpretation, the same approach to statutory interpretation applies to ordinary federal legislation…. Thus, in this case, the heading in Schedule II.1 should have been given at least some interpretative weight, particularly since the terminology of the heading relates directly to the content of the provisions in Schedule II.1.[19] (Emphasis added)

Having carefully considered all the evidence and taking into account the evolving jurisprudence of the courts, the Tribunal is of the view that electric conducting wire and cable qualify for the lower tax rate only if they form a component part of a building or other construction project. To conclude, for example, that a detachable electric frying pan cord qualifies for the lower tax rate as a product under Schedule IV to the Act, "Construction Materials" and "Equipment for Buildings," would be absurd. To come to this conclusion, the Tribunal would have to ignore entirely the headings "Construction Materials" and "Equipment for Buildings." This, according to the courts, cannot be done.

In the Tribunal's view, headings do give context to the items enumerated thereunder. For the reasons submitted by counsel for the respondent, the Tribunal prefers the reasoning of its earlier decision in *Rova* to the more recent decision in *Microtel*.

For the foregoing reasons, the appeal is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Raynald Guay
Raynald Guay
Member

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Member

19. *Her Majesty the Queen* v. *Canadian Turbo (1993) Ltd.*, unreported, Court File No. A-375-95, December 3, 1996, at 9-10.