



Ottawa, Thursday, January 29, 2004

**Appeal Nos. AP-2002-034 to AP-2002-037**

IN THE MATTER OF appeals pursuant to section 81.19 of the  
*Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a request to the Tribunal, pursuant to  
rule 23.1 of the *Canadian International Trade Tribunal Rules*,  
S.O.R./91-499, for a decision on whether Pierre Roy et Associés  
Inc., for Lithochrome (1974) Inc. (in Bankruptcy), Le Groupe  
Lithochrome Inc. (in Bankruptcy), Filmographie P.F. Inc. (in  
Bankruptcy) and Opticouleur Inc. (in Bankruptcy), is correct in its  
interpretation of the obligations to keep records, etc., as set out in  
section 98 of the *Excise Tax Act*.

**BETWEEN**

**PIERRE ROY ET ASSOCIÉS INC. FOR LITHOCHROME (1974)  
INC. (IN BANKRUPTCY), LE GROUPE LITHOCHROME INC. (IN  
BANKRUPTCY), FILMOGRAPHIE P.F. INC. (IN BANKRUPTCY)  
AND OPTICOULEUR INC. (IN BANKRUPTCY)**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION**

The Tribunal rejects the argument advanced by Pierre Roy et Associés Inc. that its obligations to keep records, etc., pursuant to section 98 of the *Excise Tax Act*, are extinguished.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



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INC. (IN BANKRUPTCY), LE GROUPE LITHOCHROME INC. (IN  
BANKRUPTCY), FILMOGRAPHIE P.F. INC. (IN BANKRUPTCY)  
AND OPTICOULEUR INC. (IN BANKRUPTCY)**

**Appellant**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**STATEMENT OF REASONS**

**BACKGROUND**

On October 24, 2003, the Tribunal authorized the parties in these appeals to file amended briefs. Pierre Roy et Associés Inc. (Pierre Roy), for Lithochrome (1974) Inc. (in Bankruptcy), Le Groupe Lithochrome Inc. (in Bankruptcy), Filmographie P.F. Inc. (in Bankruptcy) and Opticouleur Inc. (in Bankruptcy), and the Minister of National Revenue (the Minister) did so on October 28 and November 21, 2003, respectively. The Tribunal authorized this measure in order to allow Pierre Roy to submit an argument that was not contained in its original brief filed on April 1, 2003, and to allow the Minister to amend his original brief, if necessary.

In a letter dated October 27, 2003, that was filed with its amended brief,<sup>1</sup> Pierre Roy, among other statements, requested that the Tribunal decide the validity of that argument as a preliminary matter. The

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1. Titled "Appellant's Supplementary Brief".

Minister opposed this request, stating that “he wishe[d] to examine a representative for the Appellants on the issue concerning the requirement to keep documents.”<sup>2</sup>

Pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,<sup>3</sup> the Tribunal decided to treat, as a preliminary matter, the additional argument raised by Pierre Roy in its amended brief and to determine the validity of that argument at this time. The Tribunal, having determined that there was sufficient information on the record, proceeded to decide the matter on the basis of the written record.

## ARGUMENT

The Tribunal summarizes Pierre Roy’s argument as follows:

- Pursuant to subsection 72(4) of the *Excise Tax Act*,<sup>4</sup> the Minister is required to consider a refund application with all due dispatch.
- Pursuant to subsection 98(2) of the *Act*,<sup>5</sup> the taxpayer who makes a refund application is required to keep records, etc., for six years from the end of the calendar year that is relevant to that refund application or until written permission for their prior disposal is given by the Minister.
- If the Minister fails to consider the refund application with all due dispatch within the period for which records, etc., are required to be kept pursuant to subsection 98(2) of the *Act* (i.e. the six-year period), that requirement is extinguished.
- This view is taken notwithstanding subsection 98(2.1) of the *Act*,<sup>6</sup> which states that the taxpayer’s obligation to keep records, etc., past the period of time set out in subsection 98(2), is

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2. Letter from Mr. Jean-Robert Noiseux to the Tribunal dated November 21, 2003.

3. S.O.R./91-499.

4. R.S.C. 1985, c. E-15 [*Act*]. Subsection 72(4) reads as follows: “On receipt of an application, the Minister shall, with all due dispatch, consider the application and determine the amount, if any, payable to the applicant.”

5. Subsections 98(1) and (2) of the *Act* read as follows:

98.(1) Every person who

(a) is required, by or pursuant to this Act, to pay or collect taxes or other sums or to affix or cancel stamps, or

(b) makes an application under any of sections 68 to 70,

shall keep records and books of account in English or French at that person’s place of business in Canada in such form and containing such information as will enable the amount of taxes or other sums that should have been paid or collected, the amount of stamps that should have been affixed or cancelled or the amount, if any, of any drawback, payment or deduction that has been made or that may be made to or by that person, to be determined.

(2) Every person required by subsection (1) to keep records and books of account shall retain those records and books of account and every account and voucher necessary to verify the information contained therein until the expiration of six years from the end of the calendar year in respect of which those records and books of account are kept or until written permission for their prior disposal is given by the Minister.

6. Subsection 98(2.1) of the *Act* reads as follows:

(2.1) Notwithstanding subsection (2), where a person required by subsection (1) to keep records and books of account serves a notice of objection under section 81.15 or 81.17 or is a party to an appeal under this Part, he shall retain those records and books of account and every account and voucher necessary to verify the information therein until the objection or appeal has been finally disposed of by appeal or otherwise.

extended until final disposition of an appeal made under section 81.17 because the obligation contained in subsection 98(2.1) is activated only, it is argued, if the Minister, in acting with all due dispatch, sends the taxpayer a notice of determination within that time frame. In other words, Pierre Roy argues that “the Minister is well aware of the fact that a taxpayer’s obligation to keep books and records beyond the six years is *conditional* upon the taxpayer having filed a notice of objection to a notice of determination. . . . [I]f the Minister satisfies the obligations imposed pursuant to subsections 72(4) . . . of the Act, *he forces the taxpayer* to keep the books and records as described in subsection 98(2.1) through to the ultimate disposition of the taxpayer’s appeal. On the other hand, where the Minister is negligent (such as [is alleged] in the case of the present appeal), the taxpayer’s obligation to keep books and records beyond the six (6) years is *extinguished*.”<sup>7</sup> [Emphasis added]

In his amended brief, the Minister argued that Pierre Roy had the onus of proving that it was entitled to the requested tax refund and that it could not discharge that onus. The Minister argued that Pierre Roy failed to comply with the provisions of section 98 of the *Act*, which requires that claims be substantiated by documentary evidence. The Minister acknowledged that Pierre Roy’s refund application for federal sales tax paid in error on imaged articles was not answered by a notice of determination until some time after the expiry of the time frame set out in subsection 98(2). The Minister claimed that this delay was to allow time for the Tribunal to dispose of the appeal in the matter of *Tom Baird & Associates Limited v. M.N.R.*,<sup>8</sup> where the same matter was in issue.

The Minister submitted that Pierre Roy knew the reasons for this delay, but that it destroyed its substantiating documentation nonetheless. The Minister submitted that “[s]ection 98 of the Act sets forth a mandatory time period during which a taxpayer must keep books and records. It is surely not the intention of Parliament to give the taxpayer the possibility to destroy their books and records after the time requirement when the taxpayer knows or ought to know that once the notice of determination will be issued, the taxpayers might file a notice of objection.”<sup>9</sup> The Minister further submitted that neither the Supreme Court of Canada’s decision in *Hickman Motors Ltd. v. R*<sup>10</sup> nor the Tax Court of Canada’s decision in *E.F. Anthony Merchant v. R*<sup>11</sup> is applicable to the facts in these appeals. Finally, the Minister submitted that were the Tribunal to decide that the obligation to keep books and records is extinguished, Pierre Roy would still have had the onus to establish that it is entitled to a tax refund, which it is unable to do.

## DECISION

The Tribunal rejects the argument advanced by Pierre Roy that its obligations to keep records, etc., pursuant to section 98 of the *Act*, are extinguished.

With respect to the issue of whether the Minister acted with all due dispatch, the Tribunal will limit itself to noting that subsection 72(4) of the *Act* is unrelated to either subsection 98(2) or subsection 98(2.1). The Tribunal does not view the *Act* as ascribing any consequence whatsoever upon the obligations set out in section 98 by reason of the Minister not acting according to what is provided for in subsection 72(4).

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7. Pierre Roy’s amended brief at para. 22.  
8. (28 July 1992), AP-90-037 (CITT).  
9. Minister’s amended brief at para. 48.  
10. [1997] 2 S.C.R. 336 (S.C.).  
11. 98 D.T.C. 1734.

Likewise, because Parliament enacted subsection 98(2.1) of the *Act* “notwithstanding” subsection 98(2), the obligations set out in those subsections are also unrelated to each other; contrary to what has been submitted by Pierre Roy, the obligation of subsection 98(2.1) is *not* conditional upon anything provided for in subsection 98(2). Consequently, for the purposes of subsection 98(2.1), the time frame set out in subsection 98(2) is irrelevant. The obligations set out in each of these subsections exist on their own and are not interdependent.

Subsection 98(2.1) of *Act* simply states that, notwithstanding anything that might be set out in subsection 98(2), where a person who is required to keep records, etc., serves a notice of objection or is party to an appeal such as one lodged under section 81.19, as is the case in this proceeding, the person must retain those records, etc., until the objection or appeal has been finally disposed of by appeal or otherwise.

Richard Lafontaine

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Presiding Member

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