C.A. No. 02898

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Roscoe and Pugsley, JJ.A.
Cite as: Nova Scotia (Finance) v. Videopost Inc., 1994 NSCA 20

BETWEEN:

MINISTER OF FINANCE Appellant - and - VIDEOPOST INC. Respondent	)	John Wood for the Appellant Joel Fichaud, Q.C. for the Respondent Appeal Heard: January 13, 1994 Judgment Delivered: January 24, 1994

THE COURT: Appeal dismissed with costs to the respondent in the amount of $1,000 per reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Pugsley, J.A. concurring.

ROSCOE, J.A.:

This is an appeal from a decision of the Nova Scotia Utility and Review Board which allowed an appeal from the Provincial Tax Commissioner regarding the respondent's assessment pursuant to the **Health Services Tax Act**, R.S.N.S. 1989, c. 198. The Board found that the respondent's machinery and equipment was not subject to sales tax at the time it was purchased, as it was used in the manufacturing or production of goods for sale.

The respondent company operates a business of producing video tapes for broadcast on television. Its customers bring in field tapes containing hours of film not of broadcast quality. The respondent transfers images from the field tapes to a previously blank master tape, enhances the quality of those images, and then adds music, graphics, narration and special effects such as slow motion. The master tape is of broadcast quality and in cases where television commercials are produced, less than one minute in length. After the master tape is edited, it is sold to the client and his field tapes are returned unaltered. The respondent uses expensive, high quality, audio, video and computer equipment in the process of making the master tape.

Before purchasing the equipment, in 1989, an officer of the respondent contacted the Provincial Tax Commission and was advised that the equipment was exempt from Health Services Tax. Originally the respondent charged its customers sales tax on its entire fee but was advised by the Commission in 1991, that too much tax was being charged.

After an audit in 1992, the respondent was assessed for Health Services Tax in the amount of $50,528.49, including penalty and interest. The respondent's Notice of Objection was denied by the Provincial Tax Commissioner who said in his reasons:

> "In my opinion, your firm is not producing goods for sale. It is providing an editing service to television broadcasters, industrial and educational institutions. Therefore, as you are not producing goods for sale this Section [12(1)(n)] of the **Act** is not applicable."

On appeal to the Board, the Tax Commissioner's decision was reversed.

The issue is whether the Board erred in law in finding that the respondent's equipment was used in the manufacture or production of goods for sale and therefore tax exempt.

The relevant sections of the **Health Services Tax Act** are as follows:

Section 2(e):

"In this Act...

(e) 'manufacture or production' means the transformation or conversion of raw or prepared material into a different state or form from that in which it originally existed as raw or prepared material but does not include production or processing;"

Section 12(1):

" The following classes of tangible personal property are specifically exempted from the provisions of this Act:

...

(n) subject to the regulations, machinery and apparatus and parts thereof which are to be used or which are used in the manufacture or production of goods for sale;"

The standard of review to be applied to the Utility and Review Board, the successor of the Tax Review Board, was recently stated by Mr. Justice Hallett of this Court in **Attorney General of Nova Scotia v. Haddad Brothers Enterprises Limited**, (1993), 121 N.S.R. (2d) 75, at page 79 as follows:

"... The Board is a specialized statutory tribunal; the courts recognize such tribunals have an expertise in their field not possessed by the courts. A recent and oft-quoted statement of the law on the subject of judicial review of decisions of statutory tribunals is that of Justice McLachlin, speaking for the majority, in **Planet Development Corp. and Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry in the United States and Canada Local 740**, [1990] 3 S.C.R. 664; 123 N.R. 241; 88 Nfld. & P.E.I.R. 15; 274 A.P.R. 15, where she stated at p. 669:

'Courts should exercise caution and deference in reviewing the decisions of specialized administrative

> tribunals, such as the Labour Board in this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere.'
>
> That statement was made in the context of judicial review of a decision of a statutory tribunal that was protected by a strong privative clause. The matter before us is by way of an appeal on a point of law only. The remarks relating to curial deference are clearly applicable to the latter; although the scope of appellate review on a point of law requires the Board to be correct in its interpretation of the **Act**."

The main thrust of the appellant's argument is that the Board erred by finding that the respondents "transformed and converted" raw or prepared material into a different state. It is argued that no transformation or conversion took place because the field tapes and the computer created effects are still intact in their original state when the master tape is completed. The appellant characterizes the respondent's work as acts of creation or art, not those of manufacturing and production.

I agree with the respondent's contention that the ruling by the Board that raw material is transformed into a different state is a finding of fact and that there is evidence to support that finding. The raw material which is transformed is not the field tapes, but the images, or electronic signals taken from both the field tapes and the respondent's data bank and those produced in their studio. The end products, the goods for sale, are the master tapes. The end product is very different from the raw materials and it was the respondent's equipment that converted or transformed the raw material into the finished product.

The ruling of the Board is consistent with decisions of this Court dealing with manufacturing and production exemption under the **Act,** including **Sobey's Inc. v. Nova Scotia** (1993), 120 N.S.R. (2d) 392, **Construction Aggregates Limited v. Nova Scotia** (1991), 104 N.S.R. (2d) 89, **Silver Spoon Desserts Enterprises Limited v. Nova Scotia** (1989), 89 N.S.R. (2d) 363, **Stora Forest Industries Limited v. Nova Scotia** (1991), 105 N.S.R. (2d) 115 and

Maritime Beverages Limited v. Provincial Tax Commission (1992), 113 N.S.R. (2d) 244. Although conceptually it is difficult to compare crushed rock, pastries or soft drinks with computerized video and audio images and electronic signals, the legal principles are the same. In **Construction Aggregates**, Hallett, J.A. said at page 90:

> " You cannot isolate the final process of washing from the crushing and screening operations. You look at what the respondent started with, a rock hillside from which rock was blasted free, and compare that to the finished product of the manufacturing operations which produced the goods for sale to its U.S. customers; this includes the washing. Therefore, the Rinse Plant is exempt from tax."

Here, the finished product is as different from the raw material as was the rock in that case. The difference in this case is that the source of the raw material is not consumed in the process of making the end product as it was in the crushed rock case. It was to deal with this difference that the Board considered cases decided pursuant to the federal **Income Tax Act**: **The Queen v. McGraw -Hill Ryerson Ltd.** (1982), 82 D.T.C. 6142 (F.C.A.) and **International Petrodata Inc. v. The Queen** (1992), 93 D.T.C. 110 (Tax Ct.). In these cases the court had to determine whether the companies were entitled to the "manufacturing and processing" deduction. In **Petrodata**, the company collected technical data on oil wells, edited and analyzed the data and then placed the information on microfiche or tape and sold it to their customers. Crown counsel argued that the taxpayer was not entitled to the deduction because "the editing and interpretation of information were not necessarily changing the information and that the information remained the same." Bell, J. said, at page 116:

> " The thrust of the argument of counsel for the respondent was that the appellant provided a service to its customers by furnishing them with information which had not been changed in any form following receipt of that information by the appellant. I do not agree with this analysis of the evidence. In my view the appellant sold computer tapes and leased fiche to its customers, both tapes and fiche being goods in the sense of being physical and tangible objects. **The appellant's activities resulted in the alteration both in character and value of these goods by the addition of information which made them commercially desirable**."

Bell, J. relied on the **McGraw-Hill** case which concerned the production of books from manuscripts supplied by the authors where the taxpayer contracted out the typesetting and printing duties. It was held in that case that the taxpayer was entitled to the manufacturing or processing deduction.

The appellant herein argues that the Board erred by relying on **Income Tax Act** cases. This court, in **Silver Spoons** referred to several cases decided pursuant to other federal legislation and indeed under American taxing statutes that contained similar words as a guide to interpretation of the **Health Services Tax Act.** Although the words used in the **Income Tax Act** are different from those in the **Health Services Tax Act**, the test, that is whether there is a transformation of raw material or a change in the form, character and appearance of the goods thereby producing a commercially desirable product for sale, appears to be the same under both Acts. The Board in this case did not err by relying on **Petrodata** and **McGraw-Hill**.

Having found no error in law by the Board, I would dismiss the appeal with costs to the respondent in the amount of $1000.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Pugsley, J.A.