

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

NZ Law Reports (1)

873

M.257/81

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IN THE MATTER of the Sales Tax Act
1974 and its amendments

AND

IN THE MATTER of an appeal pursuant to
Section 33 of the Sales Tax
Act 1974 (as amended by
Section 20 of the Customs
Acts Amendment Act (No 2)
1976 and Section 20 of the
Customs Acts Amendment Act
(No 2) 1979 against certain
assessments of sales tax by
the Collector of Customs

BETWEEN

WEA RECORDS LIMITED a duly
incorporated company having
its registered office at
Auckland and carrying on
business as Record
Distributors

Appellant

AND

COLLECTOR OF CUSTOMS an
officer duly appointed under
the State Services Act 1962

Respondent

Hearing 2 September 1981
Counsel R A Heron for appellant
J R F Fardell for respondent
Judgment 18 December 1981

JUDGMENT OF DAVISON C.J.

This is an appeal brought pursuant to s 33 of
the Sales Tax Act 1974 against a decision of the Collector
of Customs levying sales tax at the rate of 40 per cent on
certain video cassette tapes.

In the course of the hearing a question arose
as to whether or not the video tapes were exempt from
sales tax. The decision on that matter was for the Minister
to determine - see s 15(4) and Baugh v Coad (C/A 81/79,

reported [1981] NZLR 239

6 May 1981). I deferred decision on this appeal until the decision of the Minister had been given. That decision given in a letter dated 18 September 1981 has now been filed in Court and reads:

" There is a clear difference between film and video; video does not come within the exemption intended for film: therefore video cassettes must be subject to sales tax. "

It remains therefore to determine the rate of sales tax properly payable on video cassette tapes.

THE NATURE OF THE TAPES

Evidence was filed on affidavits from a Mr Smith on behalf of the appellant, and Mr Skelley on behalf of the respondent, describing the nature of a video cassette tape. There was little disagreement on the topic. Mr Smith said:

" The main component of a video recording is the aggregate of visual images, with or without associated sounds, embodied in a carrier so as to be capable of being reproduced in sequence to impart an impression of moving pictures. The carrier consists of a plastic base material coated with a metallic oxide on which the aggregate of visual images is electronically fixed. "

Mr Skelley said:

" A video recording can be understood as a magnetic composition upon which is recorded either image or sound or both depending of course on the requirements of the user. In short, video recording is a magnetic process capable of reproducing sound and image and such recordings can be used for a variety of purposes. "

THE POSSIBLE RATES OF SALES TAX

The rates of duty which were submitted in argument as possibly applying to video cassette tapes

in accordance with the First Schedule of the Sales Tax Act 1974 (as set out in the Second Schedule to the Customs Acts Amendment Act 1980) are as follows:

" Part C (Sales Tax 40 per cent)

Item 4

Prepared tapes, wires, strips, and like articles of a kind used for sound recording.

Item 11

Sensitised unexposed photographic film, photographic plates, or similar photographic material, whether or not in combination with other materials (but excluding sensitised surfaces specially suited for use in X-ray photography).

Part E (Sales Tax 30 per cent)

Item 4

Cinematograph and other image projectors, and parts and accessories therefor.

Item 11

Gramophones, dictating machines, and other sound recorders and reproducers, including record players and tape decks, with or without sound heads, television image and sound recorders and reproducers, magnetic, being all goods classified under heading 92.11 of the Customs Tariff and parts and accessories for such apparatus. "

Part G (Sales Tax 20 per cent)

Item 1

All other goods, being goods not subject to any other rate of sales tax. "

DECISION

This case involves the construction of a taxing statute, the Sales Tax Act 1974, and a decision as to the category of goods specified in the First Schedule to that Act into which video cassette tapes properly fall to be taxed. I adopt the approach to this task as described by Turner P. in CIR v International Importing Ltd [1972] NZLR 1095, 1096:

" The approach enjoined upon Courts of construction by s 5(j) of the Acts Interpretation Act 1924 is normally of little material assistance in the construction of revenue statutes. The 'object of the Act' which the section designates as a key to questions of statutory construction is often only too clearly simply the collection of funds to swell the general revenues of the State; and Courts of construction have consistently declined to read implications into such statutes to catch a taxpayer, who in his business dealings has relied upon the text of the statute, by some extension of the wording accepting the notion of a moral duty to pay a 'proper' amount of tax. The taxing provision is read as prescribing the tax for which its text plainly provides, no more and no less. "

Since the Minister has decided that video cassette tapes are not exempt from sales tax, the problem now is to slot video cassette tapes into the appropriate part of the First Schedule to the Act and thus find the percentage of sales tax payable upon them.

It will be helpful at the outset to set out the characteristics which define the nature of the video cassette tape. It is a magnetic composition capable of electronically recording both sound and image on an appropriate recorder and of reproducing such sound and image through a television receiver. It has therefore the two functions which may be used together, or which may each be used separately, to record and reproduce sound and to record and reproduce image.

The suggested categories into which it was variously suggested that the video cassette tapes might fall are now dealt with.

Part C Item 4:

" Prepared tapes, wires, strips, and like articles of a kind used for sound recording. "

This was the item under which the respondent considered the video cassette tapes to fall when imposing the tax rate of 40 per cent. He took the view that a tape susceptible to being magnetised, and upon which sounds capable of reproduction are recorded, comes within the wording "and like articles of a kind used for sound recording".

The criticism of applying this item, however, is that it takes no account of the function of recording images. It covers only one of the two functions of the tape, neither of which can be said to be really more important than the other. The item does not therefore fully cover the tape.

For the Crown it was submitted that the tapes clearly were included in item 4 because of their sound recording function and that the fact that they had another equally proper function of image recording was of no consequence. I do not agree. The tapes must be looked at in their dual function. They do not fall completely within item 4.

Part C Item 11:

" Sensitised unexposed photographic film, photographic plates, or similar photographic material, whether or not in combination with other materials (but excluding sensitised surfaces specially suited for use in X-ray photography). "

A similar reason for the tapes not being included in item 11 exists to that given for not placing them in item 4. Whereas item 4 covers only the recording function, item 11 covers only the image recording function. But there is some doubt as to whether it even includes the image function. It refers to "unexposed" materials, an expression hardly appropriate to a magnetic tape, and uses the adjective "photographic" in relation to film, plates and material. The word "photo" refers to light;

thus "photography" is the process of producing pictures by means of the chemical action of "light" on a sensitive film. A video tape does not use the light process at all - it uses an electronic magnetic process.

Video tapes do not fall completely within item 11.

Part E Item 4:

" Cinematograph and other image projectors, and parts and accessories therefor. "

A video tape produces an image on a television screen not by projecting the image but by actually producing the image electronically on the screen. Mr Skelley described the process in this way:

" In the case of television or video recording the image reproduced is constructed on the screen rather than being projected forward on to the screen as is the case with film. Therefore a television screen or a video recorder could not be described as a projector. "

I find therefore that a television set is not an image projector within the meaning of item 4 and that consequently the video tape is not a part or accessory for such an image projector.

Video tapes do not come within item 4.

Part E Item 11:

" Gramophones, dictating machines, and other sound recorders and reproducers, including record players and tape decks, with or without sound heads, television image and sound recorders and reproducers, magnetic, being all goods classified under heading 92.11 of the Customs Tariff and parts and accessories for such apparatus. "

In the above item, reference is made to "television image and sound recorders and reproducers, magnetic". This description covers the video recorder

in which the video cassette tape is used to record sound and image and which when used in association with the television set produces the sound and image on that set. It covers the equipment in which the video cassette tape is used.

But item 11 goes on to include in addition to that equipment:

" and parts and accessories for such apparatus".

Mr Heron submitted that it would be to unduly strain the meaning of "accessory" to classify a video cassette tape as accessory for a television image and sound recorder magnetic. He pointed out that "accessory" is defined as -

" additional, subordinately contributive of things"

or

" an additional piece of equipment usually of secondary importance; an accompaniment"

and submitted that a video cassette tape was not of secondary importance or merely an accompaniment, but an essential part of the operation of the recording and reproducing equipment.

His submission was "that a video cassette could not possibly be deemed to be not an integral part of a sound recorder or reproducer".

If he is correct in that submission then it seems to me inescapable that the video tape is then a part of the equipment and is thus caught by those words of item 11 which refer to the equipment mentioned "and parts ... for such apparatus". The video tape is either a "part" of the equipment or it is an "accessory" and it matters not which because both fall within item 11.

In my opinion the video cassette tapes fall squarely within Part E Item 11 of the First Schedule and

are liable for sales tax at the rate of 30 per cent of their sale value.

As the sales tax was originally assessed by the respondent at 40 per cent. the appeal is allowed. The appellant is entitled to costs which I fix at \$350 and disbursements.

R. Dawson J.

Solicitors for the appellant: Young Swan McKay & Co
(Wellington)

Solicitors for the respondent: Crown Law Office
(Wellington)