



[2022] 2 F.C.R. D-15

INCOME TAX

COMPUTATION OF TAX

*Canadian Film or Video Production Tax Credit*

Judicial review of respondent's refusal to issue certificates entitling holders to Canadian Film or Video Production Tax Credit (tax credit) for three productions on ground productions constituting "advertising", a genre excluded from tax credit by *Income Tax Regulations*, C.R.C., c. 945 (Regulations) — Applicants related corporations, incorporated solely for purpose of television productions in question — Credit granted for Canadian workers hired to work on Canadian television productions — Access to tax credit limited by definition of "film or video production" found under *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 125.4(1) providing certain types of productions, listed in Regulations, s. 1106(1), not eligible — Respondent determining eligibility for tax credit on basis of information provided by producer, recommendation made by Canadian Audio-Visual Certification Office (CAVCO) — In 2014, 2016, CAVCO notifying applicants television series *Croisières de rêves*, *Soleil tout inclus* constituting excluded advertising, earlier certificates issued in error — Applicants notified all future productions based on same concept excluded — In 2017, respondent publishing new advertising definition in guidelines — Productions "where more than 15 percent of the running time consists of: extolling the virtues of one or more products, services, events, organizations or businesses" considered advertising — In Advance Notice of Denial, CAVCO indicating content of episodes submitted with applications to CAVCO in nature of infomercial centering on promotion of various hotels, tourist destinations — CAVCO inviting applicants to provide any new information likely to influence CAVCO's assessment of file, which applicants did — In 2018, respondent forwarding Notice of Denial to applicants regarding three applications under review — Respondent of view productions in nature of infomercial centering on promotion of various cruises, sun destinations, tourist activities — Whether respondent erred in interpretation of Regulations, s. 1106(1), whether respondent breached duty of procedural fairness in processing applications — Respondent's decision unreasonable, not falling within range of outcomes defensible in respect of facts, especially with regard to Act, Regulations — *Canada (Attorney General) v. Zone3-XXXVI Inc.*, 2016 FCA 242 (*Zone 3 FCA*), *Serdy Vidéo II Inc. v. Canada (Heritage)*, 2018 FC 413 particularly relevant in present case — Respondent's role under Regulations, s. 1106(1) not to characterize production, but to ensure production not in excluded category — In using 15 percent threshold, respondent doing exact thing not within Court's jurisdiction to do according to Federal Court of Appeal in *Zone 3 FCA* — CAVCO's desire to expand scope of "advertising" exclusion set out in Regulations in era of traditional television advertising losing out to, *inter alia*, advertising placements, understandable — However, decision up to Parliament, not Minister — Application allowed.

9616934 CANADA INC. V. CANADA (HERITAGE) (T-148-19, T-149-19, T-150-19, 2023 FC 432, Gagné A.C.J., reasons for judgment dated April 3, 2023, 25 pp.)