Date: 20060928

Docket: A-521-05

Citation: 2006 FCA 317

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

RÉAL BEAULIEU

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on September 27, 2006.

Judgment delivered at Montréal, Quebec, on September 28, 2006.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

Date: 20060928

Docket: A-521-05

Citation: 2006 FCA 317

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

RÉAL BEAULIEU

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a judgment of the Honourable Mr. Justice Dussault of the Tax Court of Canada (TCC) dated October 18, 2005, ([2005] GSTC 161) allowing the appeal, in part, from the assessment issued December 15, 2000, for the period January 1, 1997, to March 31, 2000, under Part IX of the *Excise Tax Act*—*Goods and Services Tax*, R.S.C. 1985, c. E-15 (ETA). The judge referred the assessment back to the Minister of National Revenue (the Minister) for reconsideration and reassessment on the basis that the adjustment of $30,509.43 made to the Goods and Services Tax (GST) must be reduced to $15,318.88.

[2] In so doing, Dussault J. vacated the assessment as issued, but accepted the alternative position put forward by the Minister. The appellant maintains that this alternative position was raised for the first time after the limitation period had expired, and therefore Dussault J. did not have jurisdiction to order a new assessment giving effect to that position.

LEGISLATIVE CONTEXT

[3] Under subsection 298(6.1) of the ETA, the Minister may advance an alternative argument in support of an assessment, subject to two conditions. Subsection 152(9) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) contains a similar provision.

(6.1) The Minister may advance an alternative argument in support of an assessment of a person at any time after the period otherwise limited by subsection (1) or (2) for making the assessment unless, on an appeal under this Part,	(6.1) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation établie à l'égard d'une personne après l'expiration des délais prévus aux paragraphes (1) ou (2) pour l'établissement de la cotisation, sauf si, sur appel interjeté en vertu de la présente partie:
(*a*) there is relevant evidence that the person is no longer able to adduce without leave of the court; and	*a*) d'une part, il existe des éléments de preuve que la personne n'est plus en mesure de produire sans l'autorisation du tribunal;
(*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.	*b*) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

[4] Subparagraph 298(1)(*a*)(i) of the ETA sets out the limitation period applicable to the assessment in this case:

298. (1) Subject to subsections (3) to (6.1), an assessment of a person	**298.** (1) Sous réserve des paragraphes (3) à (6.1), une

shall not be made under section 296	cotisation ne peut être établie à l'égard d'une personne en application de l'article 296 après l'expiration des délais suivants:
(*a*) in the case of	*a*) s'agissant d'une cotisation visant l'un des montants suivants, quatre ans après le dernier en date du jour où la personne était tenue par l'article 238 de produire une déclaration pour la période et du jour de la production de la déclaration:
(i) an assessment of net tax of the person for a reporting period of the person,	(i) la taxe nette de la personne pour sa période de déclaration,
. . .	…
more than four years after the later of the day on or before which the person was required under section 238 to file a return for the period and the day the return was filed;	

RELEVANT FACTS

[5] The appellant operates a business in Montréal under the name *Aubaines Plus R.B. Enr.*, which sells taxable supplies (tobacco products, etc.) within the meaning of the ETA.

[6] In 2000, Sylvie Lynch, an official of the Ministère du Revenu du Québec, and acting on behalf of the Minister of National Revenue, began an audit of the books of account of the appellant's business with respect to the application of both the *Act respecting the Québec sales tax*, R.S.Q. c. T-0.1 (AQST) and the ETA.

[7] The auditor found numerous discrepancies in the appellant's documents. There was, *inter alia*, a discrepancy between the bank statements and the cash register tapes (Z tapes) of the business. The fact that the tobacco sales were almost never recorded for one day per week, and other

deficiencies in Mr. Beaulieu's accounting system (the cash registers were not equipped with a second roll to record sales) exacerbated the problem.

[8] Ms. Lynch decided to attempt to reconstruct the sales based on [TRANSLATION]"purchase invoices and purchases recorded in the appellant's accounting records plus a gross profit margin" (respondent's reply to the notice of appeal, appeal book at page 38). Using this method, $12,855.72 of QST and $30,509.43 of GST had not been remitted to the taxation authorities for the period January 1, 1997, to March 31, 2000.

[9] These amounts were claimed in assessments issued by the Ministers acting within their respective jurisdictions under the AQST and the ETA, and the appellant exercised his right to appeal in both cases.

[10] The QST appeal was heard by the Court of Québec prior to the appeal before the Tax Court under the ETA. At the Court of Québec, the appellant, through his expert (Mr. Hamelin), challenged the auditor's calculation method. He established that this method was unreliable, as Ms. Lynch had failed to take into account the cost of opening and closing inventories in determining the cost of goods sold. During his testimony, the appellant's expert acknowledged, however, that the appellant had not remitted $3,721.30 of QST and $15,318.88 of GST during the relevant time period.

[11] In a judgment dated June 10, 2004, the Court of Québec accepted the expert's conclusions that the method of reconstructing sales used in making the assessments was without merit. However, the judge refused to order that an assessment be issued to collect the QST that the appellant's expert had acknowledged was owing. Indeed, after referring to the appellant's argument that such an assessment would be out of time, the Court of Québec judge explained his decision as follows:

> [TRANSLATION]
>
> No. 500-02-099049-012, Court of Québec (Aznar, J.C.Q.), June 10, 2004
>
> [45] On this issue, the Court is of the view that it is not necessary, at this stage, to rule on the legality or validity of any future assessment.
>
> [46] If the Minister of Revenue decides to issue an assessment, and the applicant decides to challenge its validity based on the limitation period or for any other reason, he may do that at the appropriate time.
>
> [47] At this stage, it is not necessary for the Court to determine whether the assessment that might be issued by the Ministère du Revenu would be out of time.

[12] It should be clarified that Dussault J. did not have the luxury of avoiding this issue. On an appeal of an assessment under the ETA, the TCC can either vacate it or refer it back to the Minister for a new assessment, depending on the evidence. Faced with the appellant's admission that $15,318.88 of GST had not been remitted, the TCC had to determine whether the Minister could issue a new assessment to collect that amount, and, if necessary, the Court had to refer the assessment back to the Minister so that the unremitted tax could be assessed under the Act.

[13] After the Court of Québec's ruling and on consent of the appellant, the respondent amended its reply to the notice of appeal to include the following paragraph:

> [TRANSLATION]
>
> [9] If not, the respondent submits in the alternative that the adjustment to the net tax should be $15,318.88, based on the appellant's cash register tapes (or "Z" tapes), as will be established at the hearing through the appellant's documents to be filed and his own testimony.

[14] The respondent acknowledges that the limitation period had expired before the amendment was made.

[15] As stated in the agreement as to the facts filed by the parties, the appeal before the TCC was heard on the evidence that had been before the Court of Québec, although both the appellant's expert and the auditor were called to testify again. The agreement set out the issue in dispute as follows:

> [TRANSLATION]
>
> **C. <u>THE APPELLANT AND THE RESPONDENT STATE THAT THE ONLY ISSUE IS THE QUESTION OF THE $15,318.88 THAT APPEARS ON PAGE 10 OF THE REPORT BY THE EXPERT, FILED AT TAB 7 OF THIS AGREEMENT</u>**
>
> 9. The appellant submits that the $15,318.88 is not part of the amounts determined and assessed by the notice of (re)assessment, and the respondent submits that this sum is included in the assessment at issue.
>
> 10. More specifically, the appellant submits that the Tax Court of Canada does not have jurisdiction to decide in respect of the $15,318.88 and that under the ETA, the Minister of National Revenue may not issue a notice of assessment in respect of that $15,318.88, having regard to the four-year limitation.
>
> 11. The respondent submits that because the issue is one of net tax, the $15,318.88 is included in the assessment at issue.

12. The appellant does not agree with the respondent's statement in paragraph 11, and points out that according to the notice of (re)assessment, a $30,509.43 adjustment was made at the time of the audit and that this figure cannot include the $15,318.88.

13. The appellant acknowledges that the amounts shown on page 10 of the report by the expert (Tab 7) are not contested.

D. CONCLUSIONS

ACCORDINGLY, the parties state that this is the only issue in this case and agree to proceed on the basis of the documents appended to this agreement.

[16] At the hearing before the TCC, the appellant's expert reiterated his opinion that the $30,509.43 adjustment in the notice of assessment was incorrect, because it was based on an invalid method. He also repeated that the unpaid GST and QST amounted to $15,318.88 and $3,671.30, respectively. According to the expert, the discrepancies between the taxes reported and remitted according to the FPZ-500 forms and the taxes collected according to the Z tapes were used to identify these amounts (Exhibit A-1, Tab 7).

[17] The auditor acknowledged that she had adopted the reconstructed sales method, and not the discrepancies revealed by the Z tapes, to determine the assessment of $30,509.43.

DECISION OF THE TCC

[18] Dussault J. pointed out in his decision that counsel for the respondent was no longer defending the $30,509.43 adjustment in the assessment, but rather the lower amount of $15,318.88—which the appellant himself admitted was valid (Reasons, paragraph. 34).

[19] After explaining the method used by the auditor to arrive at the $30, 509.43, Dussault J. recognized at the outset that the amounts of $30,509.43 and $15,318.88 cannot be added together. (Reasons, paragraph 30).

> It seems obvious, and only logical, that she could not have added the discrepancies previously identified by analysing other documents or records, including the Z tapes, to the discrepancies identified based on all the reconstructed sales. The result of doing that would obviously have been double taxation, since some sales, and the GST applicable to those sales, would have been counted more than once.

[20] Despite this, he ruled that the $15,318.88 was included in the assessment. According to him, the underlying assumption of the assessment in dispute is that the GST collected by the appellant on all of his sales was not remitted, and the method used for determining the amount of the shortfall is only one means of identifying the extent of the unremitted amount. It follows that the lower amount established based on discrepancies in the Z tapes is included in the assessment. (Reasons paragraph 53).

[21] Counsel for the respondent acknowledged that the assessment was only valid with respect to the discrepancies revealed by the Z tapes. Dussault J. found that an assessment that was reduced in this way is included in the first assessment. The alternative argument advanced in support of the assessment is at most a new argument, under subsection 298(6.1) of the ETA (Reasons, paragraph 54).

ALLEGED ERRORS IN THE DECISION UNDER APPEAL

[22] The appellant contends that the $15,318.88 is not part of the $30,509.43 adjustment that underlies the disputed assessment. In fact, the appellant says, it is clear that the unremitted taxes that

make up the first amount are not the same as the taxes that make up the second. That is the only finding the judge had to make to dispose of the dispute in accordance with the issue submitted by the parties.

[23] Be that as it may, the appellant maintains that Dussault J. could not ignore the "admission" by the auditor at the hearing that the $15,318.88, as determined by the discrepancies between the remitted amounts and the Z tapes, is not included in the amount assessed under her calculation method.

ANALYSIS

[24] As Dussault J. noted at the beginning of his analysis, it is clear that the $30,509.43 cannot be added to the $15,318.88 (see paragraph 15, above) and, therefore, that we are not talking about the same taxes, strictly speaking. However, that is not the issue. In order to resolve the dispute, the trial judge had to ask whether the $15,318.88, as determined by the discrepancies in the Z tapes, even if not included per se in the auditor's calculation method, was part of the intellectual process underlying the assessment.

[25] To answer this question, the trial judge began with the auditor's testimony and the facts she considered in issuing the assessment. It is useful to reproduce, in its entirety, part of the reply to the notice of appeal, as filed by the respondent in its original form, entitled [TRANSLATION] "Facts Considered in Support of the Notice of (Re)assessment":

[TRANSLATION]

8. In order to determine the assessment in dispute, the auditor authorized by the respondent to perform the said audit considered the following findings of fact:

(a) The appellant was a registrant under the E.T.A. during the entire period in dispute, i.e. January 1, 1997 to March 31, 2000, as it appears from paragraph 9 of the notice of appeal;

(b) The appellant operates a business under the name *Aubaines Plus R.B. Enr.* located at 2325 rue Des Ormeaux, in Montréal, as it appears from paragraphs 1 and 8 of the notice of appeal;

(c) The taxable supplies sold by the appellant included tobacco products and small items in the $1 to $5 range, which are all taxable supplies under the ETA;

(d) An officer of the respondent began an audit of the appellant's activities following the appellant's application for a permit under section 6 (collection officer) of the *Tobacco Tax Act*, R.S.Q. c. I-2. In addition, the appellant's tax returns had shown credit balances several times, which, at first glance, is unusual for this type of business;

(e) The audit was made more difficult because of the appellant's lack of co-operation, i.e. he refused to provide the information and the documents required to determine his net tax. Accordingly, on April 12, 2000, the auditor directed the appellant to produce his purchase invoices, cash register tapes and accounting records;

(f) On April 19, 2000, the appellant asked the auditor for three more weeks to provide the documents and records;

(g) On May 1, 2000, the auditor began an audit at the appellant's place of business. Her first step was to count the tobacco products. There were 1300 cartons of cigarettes at that time. The appellant had two cash registers, one in front for the various small items, and the other at the back of the store for tobacco and lottery ticket sales;

(h) The auditor then examined the accounting records, invoices, cash disbursements and cash receipts, and bank statements for the period covered by the audit (from 1997 to 2000).

(i) During her visit, the auditor noted unrecorded sales and, according to the cash register "Z" tapes, there were almost never any cigarette sales for one day per week;

(j) Based on that determination and numerous discrepancies in the documents presented by the appellant (e.g.: GST vs. QST; bank statements vs. cash register "Z" tapes; taxes according to

accounting records vs. taxes remitted to the Department, etc.) the auditor decided to reconstruct the sales based on the purchase invoices and purchases recorded in the appellant's accounting records, plus a gross profit margin, that method having been determined to be the one that offered the best guarantee of reliability for the purpose of establishing the appellant's net tax;

(k) To calculate the tax, the auditor determined and applied the gross margin based on the financial statements provided and prepared by the appellant or in his name, i.e. from the profit margin reported by the appellant in fiscal years 1997, 1998, 1999 and the first three months of 2000. Non-taxable supplies and sales of lottery tickets were not included in the calculation of the markup of purchases by the gross margin of sales of purchases;

(l) To avoid burdening the presentation of the facts, the purchase data collected by the auditor is presented in tables for the years 1997 to 2000, attached and incorporated. All of them are numbered as pages 5 to 10-4;

(m) As it appears from the table "Reconstruction of Revenues", attached and incorporated, in order to calculate the reconstructed sales, the auditor marked up the purchases by a factor equivalent to the profit margin reported by the appellant based on the category. She was then able to calculate the tax that the appellant should have collected;

(n) The auditor then prepared a summary table showing the difference between the net tax reported and remitted and the net tax that should have been remitted based on the reconstructed sales, as set out in that summary table, attached and incorporated into this reply;

(o) The appellant disputed the auditor's calculation method by submitting his own calculation sheets, but those sheets led to the same result: that the tax reported and remitted was lower than the tax that should have been remitted to the Department;

(p) The appellant was assessed as follows:

Period ending on:	**Unremitted taxes collected**
March 31, 2000	$5,991.70$
December 31, 1999	$12,026.51
December 31, 1998	$10,058.47
December 31, 1997	$2,432.75
Total adjustments:	**$30,509.43**
Penalties:	$2,635.15

Interest:	$2,283.09
Amount due:	**$35,427.67**

9. The respondent submits that this reply is well-founded in fact and law.

[Emphasis added.]

[26] It is evident from paragraphs 8(g), (h), (i) and (j), that the auditor in fact based the assessment as issued on the discrepancies between the Z tapes and the taxes remitted. However, because the auditor believed, based on the evidence, that the appellant's books of account were not reliable, and that the discrepancies revealed by the Z tapes might establish a higher amount of tax evasion, she decided to reconstruct the sales and to fix the shortfall at $30,509.43, instead of $15,318.88 according to the Z tapes.

[27] In my view, this does not have the effect of removing the discrepancies based on the Z tapes from the assessment. The appellant knew it was those discrepancies that caused the auditor to issue the assessment, and he could not legitimately expect the assessment to be reduced to nil without dealing with them. Indeed, paragraph (o) of the reply to the notice of appeal points out that the appellant objected to the method used by the auditor, but concedes that, despite these representations, the tax remitted was "lower than the tax that should have been remitted."

[28] The auditor's alleged "admission" during her testimony corresponds to the allegation in the reply to the notice of appeal. In fact, it is not disputed that the auditor decided to reconstruct the sales, and to fix the shortfall at $30,509.43 instead of $15,318.88, according to the discrepancies

revealed by the Z tapes. However, as the reply to the notice of appeal indicates, it cannot be argued that these discrepancies were not among the facts relied on by the auditor in issuing the assessment.

[29] In the final analysis, Dussault J. properly concluded at paragraph 53 of his reasons that the basic assumption on which the assessment is based is that the tax collected by the appellant on all of his sales was not reported and remitted. The fact that the amount is lower than the amount determined by the reconstructed sales does not preclude imposing a lesser amount based on the discrepancies established by the Z tapes.

[30] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I concur.
Gilles Létourneau, J.A."

"I concur.
J.D. Denis Pelletier, J.A."

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-521-05

APPEAL FROM A JUDGMENT OF MR. JUSTICE DUSSAULT OF THE TAX COURT OF CANADA DATED OCTOBER 18, 2005, DOCKET NO. 2001-3358(GST)G.

STYLE OF CAUSE:	Réal Beaulieu v. Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 27, 2006
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. PELLETIER J.A.
DATED:	September 28, 2006

APPEARANCES:

Yves Ouellette	FOR THE APPELLANT
Gérald Danis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GOWLING LAFLEUR HENDERSON s.r.l. Montréal, Quebec	FOR THE APPELLANT
VEILLETTE, LARIVIÈRE Montréal, Quebec	FOR THE RESPONDENT