Date: 20080207

Docket: A-604-06

Citation: 2008 FCA 48

CORAM: **NADON J.A.**
SEXTON J.A.
PELLETIER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

UNITED PARCEL SERVICE CANADA LTD.

Respondent

Heard at Toronto, Ontario, on December 12, 2007.

Judgment delivered at Ottawa, Ontario, on February 7, 2008.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
SEXTON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from the decision of Chief Justice Bowman of the Tax Court of Canada allowing United Parcel Service Canada Ltd.'s appeal from a reassessment made under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA) with respect to the latter's reporting period from February 1, 1996 to December 31, 1997. In that reassessment, the Minister disallowed the sum of $2,900,858 which United Parcel Service Canada Ltd. (UPS) had deducted from its net tax payable in the reporting period. At the same time, the Minister assessed interest in the amount of $456,606.20 and a penalty of $632,229.47. Chief Justice Bowman referred the reassessment back to the Minister for reconsideration and reassessment on the basis that UPS was entitled to a rebate of $2,900,858 which

was to be taken into account pursuant to subsection 296(2.1) of the ETA in determining its net tax payable. The penalty and the interest assessed were set aside.

FACTS

[2] The appeal was argued before the Chief Justice on the basis of an Agreed Statement of Facts supplemented by the evidence of two witnesses called by UPS.

[3] UPS operates a courier business, transporting goods from one place to another in Canada. It charges its customers GST with respect to the courier services which it provides.

[4] UPS also carries goods into Canada from other countries. The entry of those goods into Canada is subject to the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the Act) and the provisions of Division III of Part IX of the ETA dealing with imported goods. As a convenience to its customers, UPS operates a customs brokerage service which is available to clear the customer's goods through customs. As part of that service, UPS pays whatever customs and GST are due on the imported goods and collects those amounts from its customers in due course. UPS' fees for its customs brokerage service are also subject to GST. UPS deducted the amounts in question in this appeal from the amounts it would otherwise have had to remit to Revenue Canada with respect to its courier and brokerage services.

[5] The problem which gives rise to this litigation is best illustrated by two examples. UPS transports a package from the United States to a consignee in Canada. The shipper of that package declares its value to be $200. In the course of preparing the custom and GST owing, UPS mistakenly records the $200 shipment as a $2,000 shipment and calculates the amounts payable on that basis. When the goods are delivered, the customer produces an invoice from the shipper which shows the value of the shipment as $200, and not $2,000, and disputes its liability for GST on the $1,800 difference. UPS would either forego collection of the disputed GST or collect the GST in full but credit its customer's account in the amount of the disputed GST.

[6] In the second example, the shipper declares the value of the shipment to be $2,000. UPS calculates and pays customs and GST on that basis. When UPS, in its capacity as a customs broker, seeks to collect from its customer, the consignee, the latter produces an invoice from the shipper showing the value of the shipment to be $200 and objects to paying GST on the $1,800 difference. Once again, UPS would either forego collection of the disputed GST or would collect it in full but would credit its customer's account with the amount of the tax on the difference.

[7] The Agreed Statement of Facts discloses that both types of errors occurred, even though it describes the second type as an error on UPS' part, which is clearly not the case.

[8] In their Agreed Statement of Facts, the parties referred to the difference between the GST remitted by UPS and the net amount collected from its customer as an overpayment, subject to the qualification that the use of this word did not imply any right to repayment of that amount. This is

an awkward characterization given that overpayment, by its nature, suggests a right to reimbursement. I propose to refer to the difference between the amount remitted by UPS and the net amount collected from its customer simply as a Shortfall. The aggregate of all such Shortfalls in the reporting period is $2,900,858, the amount which UPS deducted from the amounts which it was obliged to remit.

[9] There were 11 types of cases where UPS ended up remitting GST in respect of which there was a Shortfall. Those cases are described as follows in the Agreed Statement of Facts:

> a) wrong value for duty - (34% of the dollar value of overpayment errors) – The shipper or UPS declared the wrong value of the goods being imported or used the wrong currency to determine the value of the goods. (emphasis added – see the examples of errors described above.)
>
> b) returned shipments – (12% of the dollar value of overpayment errors) – UPS brokered and paid GST on goods that were rejected by the consignee … or the consignee no longer resided at the delivery location …
>
> c) Canadian goods returned – (12% of the dollar value of overpayment errors) – UPS brokered and paid GST on goods that were exempt from duties and taxes because they originated in Canada and were not advanced in value while temporarily outside Canada.
>
> d) GST free goods –(9% of the dollar value of overpayment errors) – UPS brokered and paid GST on goods that were not subject to GST on importation (e.g. medical supplies).
>
> e) Part-Lot/Split shipments (9% of the dollar value of overpayment errors)- UPS brokered and paid GST on the entire shipment when only part of the shipment entered Canada and then paid all or part of the GST again when the balance of the parcels in the shipment entered the country.
>
> f) temporary Imports -(2% of the dollar value of overpayment errors)- UPS brokered and paid GST/duty on the full value of the goods imported, where a reduced level of GST/duty was actually owing based on special rules dealing with imports for short periods of time for specified uses. The most common example was goods imported into Canada for trade shows.

> g) Consignee had own broker (1% of the dollar value of overpayment errors) - UPS proceeded to act as broker for customers who already had a customs broker. In these situations, the customer would often refuse to pay any of the amounts being charged by UPS or would refuse to pay UPS' brokerage fees.
>
> h) Wrong tariff classification (1% of the dollar value of overpayment errors) - UPS or the shipper incorrectly classified the imported goods.
>
> i) Warranty replacement – UPS brokered and paid GST on goods that were not subject to GST because they were being sent back to Canada or the United States for warranty repairs.
>
> j) Gifts – UPS brokered and paid GST on goods that were not subject to GST because they were gifts under $60 in value and, as such, GST exempt.
>
> k) NAFTA – UPS brokered and paid GST/duty on goods that fell under NAFTA and, as such, were duty free on importation.

[10] All of this arose in the course of UPS' business as a customs broker, a business in which it had two kinds of business arrangements, described as follows in the Agreed Statement of Facts:

> 11. If the consignee had an active brokerage account with UPS, UPS would have a general agency agreement on file for that consignee and would act as broker to bring the shipment into Canada.
>
> 12. If the consignee did not have an active brokerage account with UPS, UPS would offer its own brokerage services. For residential consignees, UPS's practice was to act as broker and, upon delivery of the shipment to the consignee, request that the consignee sign a one-time power of attorney to confirm that UPS had been authorized to broker the shipment at the port of entry.

[11] UPS' brokerage activities are also described in the Agreed Statement of Facts:

> 13. When UPS acted as broker, either prior to or at the time the shipment arrived at the UPS import site location [facilities located in Vancouver, Calgary, Winnipeg, Fort Erie, Windsor, Hamilton and Montreal], a copy of the commercial invoice for the shipment [prepared by the shipper] was forwarded to UPS's brokerage rating department in Fredericton, New Brunswick. The rating department would use the information from the commercial invoice to determine if the goods in the shipment were dutiable and/or taxable and the appropriate

tariff treatment. This rating was done at different times depending on the type of shipment involved (as discussed in further detail below).

14. When the shipment physically arrived at the UPS import site location, it was processed through a sufferance warehouse. The waybill accompanying the shipment was scanned, which would pull up [previously entered information] about the shipment and indicate whether Revenue Canada had identified the shipment as one it wished to inspect. The process by which the shipment was released from sufferance is discussed below:

a) Courier Remission: If the value of the shipment was less than $20 CAD, the shipment was classified as a "courier remission". These shipments were duty and GST free, and as such, no specific transaction-related documents had to be submitted to Revenue Canada. Provided that Revenue Canada had not identified the shipment as one it wished to inspect, courier remission shipments passed through the sufferance warehouse and were delivered to the consignee.

b) Low-Value Shipments ("LVS"): If the value of the shipment was between $20- $1,599 CAD, the shipment was classified as a Low-Value Shipment. Duty and GST were payable on these shipments. Provided that the LVS shipment had satisfied certain requirements applicable to LVS shipments (e.g. the shipment had been assigned to an approved broker (UPS or another broker)) and the shipment had not otherwise been identified by Revenue Canada as a shipment it wished to inspect, the shipment could be released from the sufferance warehouse. Because these shipments were LVS, the shipments could be delivered to the consignee before being rated by UPS. UPS would rate the shipments after they were delivered to the consignee (with the exception of COD shipments, which were always rated before being delivered to the consignees.) As broker, UPS paid the duty and GST which it believed was owing on these shipments to Revenue Canada by the 24th day of the month following the release date.

c) High-Value Shipments ("HVS"): If the value of the shipment was $1,600 CAD or more, the shipment was classified as a High-Value Shipment. These shipments remained in the sufferance warehouse until the necessary paperwork (i.e. a manifest and supporting documentation) was presented to Revenue Canada. Once the paperwork was reviewed by Revenue Canada and the necessary approvals obtained, the HVS shipment was released from the sufferance warehouse. Duty and GST were payable on these shipments. However, unlike LVS shipments, UPS had to account to Revenue Canada for these shipments within five days of their release date.

. . .

16. Once the shipment was released by Revenue Canada, there were two methods of delivery. The first involved UPS delivering the shipment to the consignee and then sending

> the consignee an invoice by mail later on. This invoice would set out UPS's computation of the duty and tax owing on the shipment as well as UPS's charge for its service (for "express shipments", the UPS brokerage fee was included in the price paid by the shipper.) The second method of delivery was for COD shipments. In those cases, the consignee was required to pay the entire amount owing to UPS before the shipment was released to the consignee.

[12] Based on the Agreed Statement of Facts, it appears that the fact that too much GST had apparently been paid came to light when the goods were delivered (in the case of COD deliveries) or when UPS invoiced its customer for services rendered. Prior to the reporting period in issue in this appeal, UPS had two ways of recovering the Shortfall. For those customers who had no GST registration numbers, the customer's account was credited with the Shortfall and UPS debited the same amount from its General Ledger account #203470 (entitled "Goods and Services Tax") which resulted in a reduction in the amounts which UPS was liable to remit to Revenue Canada.

[13] For Shortfalls larger than $50 where the customer had a GST registration number, UPS would credit the customer's account by the amount of the Shortfall and would debit the same amount from a different General Ledger account, account #113511 (entitled "Account receivable – Other customs duty and tax refund"). UPS would then file a rebate application in respect of that amount. Once UPS received payment, it would credit account #113511.

[14] The processing of UPS' rebate application took a certain amount of time, anywhere from 60 days to over a year. Dissatisfied with this process and reluctant to trouble its customers with the paperwork involved, UPS changed its method of recovery in December 1996 by treating all Shortfall claims in the same way as it treated Shortfall claims for non-registrant customers, in other

words, by deducting the Shortfall from the account in which it recorded the amount of GST it was liable to remit. However, in order to get the benefit of these arrangements, the customer who was a GST registrant would have to sign a "Credit Note" which purported to authorize UPS to claim an Input Tax Credit with respect to the Shortfall while representing that the customer would not claim an Input Tax Credit with respect to the same transaction. The Shortfall in issue in this appeal is the aggregate of all such deductions for the reporting period February 1, 1996 to December 31, 1997.

[15] Those are the material facts. I turn now to the applicable legislation.

THE LAW

[16] The liability to pay GST on imported goods and the mechanics of collecting it are set out at sections 212 and 214 of the ETA:

212. Subject to this Part, every person who is liable under the *Customs Act* to pay duty on imported goods, or who would be so liable if the goods were subject to duty, shall pay to Her Majesty in right of Canada tax on the goods calculated at the rate of 6% on the value of the goods.	212. Sous réserve des autres dispositions de la présente partie, la personne qui est redevable de droits imposés, en vertu de la *Loi sur les douanes*, sur des produits importés, ou qui serait ainsi redevable si les produits étaient frappés de droits, est tenue de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 6% sur la valeur des produits.

In short, GST is payable if duty is payable under the Act:

214. Tax on goods under this Division shall be paid and collected under the *Customs Act*, and interest and penalties shall be imposed, calculated, paid and collected under that Act, as if the tax were a customs duty levied on the goods under the *Customs Tariff* and, for those purposes, the *Customs Act*, with such modifications as the	214. Les taxes sur les produits prévues à la présente section sont payées et perçues aux termes de la *Loi sur les douanes* et les intérêts et pénalités sont imposés, calculés, payés et perçus aux termes de cette loi, comme s'il s'agissait de droits de douane imposés sur les produits en vertu du *Tarif des douanes*. À cette fin et sous réserve des

circumstances require, applies subject to this Division.	dispositions de la présente section, la *Loi sur les douanes* s'applique, avec les adaptations nécessaires.

GST is collectible with respect to imported goods as if it were duties on those same goods.

[17] Section 215 of the ETA, which need not be reproduced here, deems the value of the goods for GST purposes to be the value of the goods for customs purposes plus the amount of any duties and taxes payable with respect to those goods other than GST.

[18] The recovery of overpayments is dealt with at section 261 of the ETA:

261. (1) Where a person has paid an amount (*a*) as or on account of, or (*b*) that was taken into account as, tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.	261. (1) Dans le cas où une personne paie un montant au titre de la taxe, de la taxe nette, des pénalités, des intérêts ou d'une autre obligation selon la présente partie alors qu'elle n'avait pas à le payer ou à le verser, ou paie un tel montant qui est pris en compte à ce titre, le ministre lui rembourse le montant, indépendamment du fait qu'il ait été payé par erreur ou autrement.
(2) A rebate in respect of an amount shall not be paid under subsection (1) to a person to the extent that (*a*) the amount was taken into account as tax or net tax for a reporting period of the person and the Minister has assessed the person for the period under section 296;	(2) Le montant n'est pas remboursé dans la mesure où : *a*) le montant est pris en compte à titre de taxe ou de taxe nette pour la période de déclaration d'une personne et le ministre a établi une cotisation à l'égard de la personne pour cette période selon l'article 296;

(*b*) the amount paid was tax, net tax, penalty, interest or any other amount assessed under section 296; or	*b*) le montant payé était une taxe, une taxe nette, une pénalité, des intérêts ou un autre montant visé par une cotisation établie selon l'article 296;
(*c*) a rebate of the amount is payable under subsection 215.1(1) or (2) or 216(6) or a refund of the amount is payable under section 69, 73, 74 or 76 of the *Customs Act* because of subsection 215.1(3) or 216(7).	*c*) un remboursement du montant est accordé en application des paragraphes 215.1(1) ou (2) ou 216(6) ou des articles 69, 73, 74 ou 76 de la *Loi sur les douanes* par l'effet des paragraphes 215.1(3) ou 216(7).
(3) A rebate in respect of an amount shall not be paid under subsection (1) to a person unless the person files an application for the rebate within two years after the day the amount was paid or remitted by the person.	(3) Le remboursement n'est versé que si la personne en fait la demande dans les deux ans suivant le paiement ou le versement du montant.

[19] Persons who pay tax which they are not legally obligated to pay can obtain a rebate of the tax provided they apply within two years of making the payment and providing as well that the tax has not been the subject of an assessment and is not otherwise the subject of a rebate.

[20] If the amount of tax payable is reduced by reason of an appraisal or re-appraisal of the value of the goods, or a determination as to the tax-status of the goods, then a rebate of the excess payment is payable to the person who paid the tax as though the excess amount were excess duty:

216.(6) If, because of an appraisal, a re-appraisal or a further re-appraisal of the value of goods or a determination of the tax status of goods, it is determined that the amount that was paid as tax under this Division on the goods exceeds the amount of tax that is required under this Division to be paid on the goods and a refund of the excess would be given under paragraph 59(3)(*b*) or 65(1)(*b*) of the *Customs Act* if the tax under this Division on the goods were a customs duty on the goods levied under the *Customs Tariff*, a rebate of the	216.(6) Si, par suite de l'appréciation de la valeur de produits, de la révision de cette appréciation, du réexamen de cette révision ou du classement de produits, il est établi que le montant payé sur les produits au titre de la taxe prévue à la présente section excède la taxe à payer sur les produits aux termes de cette section et que cet excédent serait remboursé en application des alinéas 59(3)*b*) ou 65(1)*b*) de la *Loi sur les douanes* si la taxe prévue à la présente section constituait des droits de douanes imposés sur les produits en application du

excess shall, subject to section 263, be paid to the person who paid the excess, and the provisions of the *Customs Act* that relate to the payment of such refunds and interest on such refunds apply, with any modifications that the circumstances require, as if the rebate of the excess were a refund of duty.	*Tarif des douanes*, l'excédent est remboursé à la personne qui l'a payé, sous réserve de l'article 263. Dès lors, les dispositions de la *Loi sur les douanes* qui portent sur le versement du montant remboursé et des intérêts afférents s'appliquent, avec les adaptations nécessaires, comme si le remboursement de l'excédent de taxe était un remboursement de droits.

[21] Subsections 216(2) and (3) of the ETA provide that any determination of the tax status of the goods, or of the value of the goods respectively is to be done according to the procedures provided in the *Customs Act*. It is sufficient for our purposes to note that such determinations or appraisals are to be undertaken either by designated officers of the Canada Border Services Agency or by the responsible Minister.

[22] Finally, there is provision in Division VIII ("Administration and Enforcement") of the ETA for setting off unclaimed rebates against GST otherwise owing:

296.(2.1) Where, in assessing the net tax of a person for a reporting period of the person or an amount (in this subsection referred to as the "overdue amount") that became payable by a person under this Part, the Minister determines that	296.(2.1) Le ministre, s'il constate les fais ci-après relativement à un montant (appelé « montant de remboursement déductible » au présent paragraphe) lors de l'établissement d'une cotisation concernant la taxe nette d'une personne pour une période de déclaration de celle-ci ou concernant un montant (appelé « montant impayé » au présent paragraphe) qui est devenu payable par une personne en vertu de la présente partie, applique tout ou partie du montant de remboursement déductible en réduction de la taxe nette ou du montant impayé comme si la personne avait payé ou versé, à la date visée aux sous-alinéas a)(i) ou (ii), le montant ainsi appliqué au titre de la taxe nette ou du montant impayé :
(*a*) an amount (in this subsection referred	*a*) le montant de remboursement déductible

to as the "allowable rebate") would have been payable to the person as a rebate if it had been claimed in an application under this Part filed on the particular day that is	aurait été payable à la personne à titre de remboursement s'il avait fait l'objet d'une demande produite aux termes de la présente partie à la date suivante et si, dans le cas où le remboursement vise un montant qui fait l'objet d'une cotisation, la personne avait payé ou versé ce montant :
(i) if the assessment is in respect of net tax for the reporting period, the day on or before which the return under Division V for the period was required to be filed, or	(i) si la cotisation concerne la taxe nette pour la période de déclaration, la date limite de production de la déclaration aux termes de la section V pour la période,
(ii) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,	(ii) si la cotisation concerne un montant impayé, la date à laquelle ce montant est devenu payable par la personne;
and, where the rebate is in respect of an amount that is being assessed, if the person had paid or remitted that amount,	
(*b*) the allowable rebate was not claimed by the person in an application filed before the day notice of the assessment is sent to the person, and	*b*) le montant de remboursement déductible n'a pas fait l'objet d'une demande produite par la personne avant le jour où l'avis de cotisation lui est envoyé;
(*c*) the allowable rebate would be payable to the person if it were claimed in an application under this Part filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that application only because the period for claiming the allowable rebate expired before that day,	*c*) le montant de remboursement déductible serait payable à la personne s'il faisait l'objet d'une demande produite aux termes de la présente partie le jour où l'avis de cotisation lui est envoyé, ou serait refusé s'il faisait l'objet d'une telle demande du seul fait que le délai dans lequel il peut être demandé a expiré avant ce jour
the Minister shall apply all or part of the allowable rebate against that net tax or overdue amount as if the person had, on the particular day, paid or remitted the amount so applied on account of that net tax or overdue amount	

[23] UPS claims that this disposition, in particular, allows it to do exactly what it did with respect to the Shortfall.

THE DECISION UNDER APPEAL

[24] After reciting the facts and the law, the Chief Justice began his analysis with the following observation:

> [16] There is merit to the argument that in fairness the appellant should be entitled to recover the overpayments. UPS is the only person who paid the money and is out of pocket. Its customers are not out of pocket and the government admits that the GST has been overpaid.
>
> [Paragraph 16 of the Reasons.]

[25] The Chief Justice returned to the matter of overpayment later in his reasons when he commented that:

> [21] Whether there was an overpayment or the amount thereof is not before me. The fact of the overpayment and the amount thereof are admitted.
>
> [Paragraph 21 of the Reasons.]

[26] It is clear from this that the Chief Justice understood the Agreed Statement of Facts as settling two questions:

> - as between the facts as UPS believed them to be when it remitted GST and the facts as UPS agreed they were in dealing with its customers, the latter facts are the correct basis upon which GST was to be assessed.
>
> - when GST is assessed on the correct basis, the difference between what UPS paid and the amount which was legally payable was $2,900,858.

[27] On the basis of these facts, and the interplay between the Act and the ETA, the Chief Justice concluded that UPS, as the person who paid the GST, was entitled to claim the rebate for the overpayment.

[28] The Chief Justice began by establishing that UPS was required to pay the GST. Section 212 of the ETA, quoted above, establishes that every person who is liable to pay customs on goods is liable to pay GST on those goods. Section 12 of the Act provides that all imported goods must be reported to the nearest customs office that is open for business. The Chief Justice then looked to section 18(2) of the Act to establish the liability to pay duty on imported goods. It is reproduced below:

18.(2) Subject to subsections (3) and 20(2.1), any person who reports goods under section 12, and any person for whom that person acts as agent or employee while so reporting, are jointly and severally or solidarily liable for all duties levied on the goods unless one or the other of them proves, within the time that may be prescribed, that the duties have been paid or that the goods	18.(2) En cas d'application de l'article 12, le déclarant et son mandant ou employeur sont, sous réserve des paragraphes (3) et 20(2.1), solidairement responsables de tous les droits imposés sur les marchandises, sauf si, dans le délai réglementaire, l'un d'eux établit le paiement des droits ou, à propos des marchandises, l'un des faits suivants :
(*a*) were destroyed or lost prior to report or destroyed after report but prior to receipt in a place referred to in paragraph (c) or by a person referred to in paragraph (d);	*a*) elles ont été soit détruites ou perdues avant la déclaration, soit détruites entre le moment de la déclaration et leur réception en un lieu visé à l'alinéa c) ou par la personne visée à l'alinéa d);
(*b*) did not leave the place outside Canada from which they were to have been exported;	*b*) elles n'ont pas quitté le lieu de l'extérieur du Canada d'où elles devaient être exportées;
(*c*) have been received in a customs office, sufferance warehouse, bonded warehouse or duty free shop;	*c*) elles ont été reçues dans un bureau de douane, un entrepôt d'attente, un entrepôt de stockage ou une boutique hors taxes;
(*d*) have been received by a person who transports or causes to be transported within Canada goods in accordance with subsection 20(1);	*d*) elles ont été reçues par une personne qui fait office de transitaire conformément au paragraphe 20(1);
(*e*) have been exported; or	*e*) elles ont été exportées;
(*f*) have been released.	*f*) elles ont été dédouanées.

[29] The Chief Justice found that UPS was either the person who reported the goods or the agent of that person, its customer. As a result, UPS was jointly and severally liable for the payment of the duties which meant that it was also jointly and severally liable for the payment of the GST.

[30] Applying subsection 261(1) to the facts as he found them the Chief Justice held that the $2,900,858 in issue was paid by UPS as or an account of tax and that it was paid by mistake. Therefore subsection 261(1) of the ETA required the Minister to pay a rebate. The fact that UPS did not claim the rebate within the two year limitation period is not fatal to UPS' position since subsection 296(2.1) requires the Minister to give UPS the benefit of unclaimed rebates, notwithstanding the expiry of the relevant limitation period for claiming such rebates.

ISSUES

[31] This appeal raises the following issues:

1- Is a rebate payable?

2- Is UPS, as the person who remitted the GST, entitled to claim any rebate owing?

3- Is UPS, as the person who was bound to pay the GST, entitled to claim any rebate owing?

4- Is UPS, as the person who bore the cost the GST, entitled to claim any rebate owing?

5- Is UPS entitled by contract to claim any rebate owing?

ANALYSIS

1- Is a rebate payable?

[32] A significant portion of the Crown's case was devoted to the proposition that a payment of money on account of tax in excess of the legal requirement is not recoverable as an overpayment unless and until the procedures established under the ETA for the processing of rebates had been

complied with. Those procedures were not invoked by UPS. The statutory procedures ultimately require a public official to rule on whether GST ought to have been paid on a basis other than the basis on which it was remitted. Given that a return of GST is payment of public funds, whether it is paid by cheque or by set-off, there is considerable logic in having the decision as to entitlement made by a public official. In other words, the Minister must be satisfied that a return of tax is justified. It is not sufficient that a commercial undertaking is satisfied that one of its customers has paid too much tax.

[33] In this case, the question of whether it has been proved to the Minister's satisfaction that too much tax has been remitted does not arise because the Crown has admitted that the Shortfall is the result of UPS' error. By agreeing that the remittance of GST on the basis of the facts as they originally appeared was an error, the Crown has admitted that UPS' determination of the facts was correct. If it were not, there would be no reason to speak of an error. Nor would the Crown be in a position to quantify the amount of the GST overpayment, or to agree to UPS' calculation of the amount of the overpayment. Consequently, on the basis of the facts agreed to by the Crown, an overpayment of GST has occurred. Whether that overpayment is recoverable in these proceedings is another question.

2- Is UPS, as the person who remitted the GST entitled to claim any rebate owing?

[34] Recently, in *West Windsor Urgent Care Centre Inc. v. Canada*, 2008 FCA 11, [2008] F.C.J. No. 24 (*West Windsor*), this Court held that only the person who has paid GST in excess of the legal requirement can claim a rebate with respect to the overpayment. A person who collects GST in error

is bound to remit those amounts: see *Gastown Actors' Studio Ltd. v. Canada*, [2000] F.C.J. No. 2047 (F.C.A.) and *800537 Ontario Inc. v. Canada*, 2005 FCA 333, [2005] F.C.J. No. 1732. Thereafter, any claim for a rebate must be made by the person from whom the overpayment was collected.

[35] Consequently, UPS is not entitled to claim a rebate of an overpayment of tax by its customers simply on the basis that it was the person who "paid" the tax, in the sense of being the person who remitted the tax.

3- Is UPS, as the person who was bound to pay the GST, entitled to claim any rebate owing?

[36] However, the Chief Justice did not decide the case in UPS' favour on the basis that it had remitted the tax. He decided it on the basis that UPS is entitled to recover the overpayment because it was required to pay the GST in its own right. It was therefore the person who bore the burden of paying the tax and, even under the law as stated in *West Windsor*, UPS would be the person entitled to the rebate.

[37] The Chief Justice's analysis turns on his view of the effect of subsection 18(2) of the Act. In my view, subsection 18(2) has no application to the facts of this case. Section 18 deals with a particular situation as indicated by the marginal note which says "Liability of person reporting goods short-landed". Goods are short-landed when they are reported for importation at a particular time and place and are not imported at that time and place. The possibility of a discrepancy arises because goods can be reported prior to importation. In this case the relevant provision is section

13.87 of the *Reporting of Imported Goods Regulations*, SOR/86-873, which deals with electronic reporting, in advance, of goods imported into Canada by air carriers. The Agreed Statement of Facts discloses that UPS did report goods to be imported into Canada in advance by electronic means: see paragraph 10 of the Agreed Statement of Facts. The potential discrepancy between the reporting of the goods and their importation explains the presumption contained in subsection 18(1) of the Act:

18. (1) For the purposes of this section, all goods reported under section 12 shall be deemed to have been imported.	18. (1) Pour l'application du présent article, toutes les marchandises déclarées conformément à l'article 12 sont réputées avoir été importées.

[38] This deeming provision operates to ensure that that duty is imposed on goods which have been reported unless it can be shown that they have otherwise been taken into the system and accounted for (in the non-technical sense of that expression). Where goods are acknowledged to have entered the customs systems, the deeming provision ceases to have effect.

[39] Thus where the person reporting the goods or a person acting as that person's agent proves to the Minister's satisfaction that those goods either have not entered Canada (paragraphs 18(2)(*a*) and (*b*)) or have been dealt with in accordance with the Act i.e. received in a designated facility (paragraph 18(2)(*c*)), received by a bonded carrier (paragraph 18(2)(*d*)), exported from Canada (paragraph 18(2)(*e*)) or have been released (paragraph 18(2)(*f*)), the effect of section 18 is spent. In each of those cases, the goods are either not liable for duty or the duty has been properly accounted for. It is only if these conditions are not met that the goods will be deemed to have been imported (illegally) and duties and taxes assessed accordingly.

[40] In this case, the Agreed Statement of Facts makes it clear that the goods entered the country as reported, that they were accounted for and that they were released. Had they not been, there would be no opportunity for an overpayment. Just as the Agreed Statement of Facts precludes the Crown from alleging that no overpayment was made, it precludes UPS from asserting that the goods were not imported as reported, accounted for and released. Consequently, subsection 18(2) has no application to this case so that UPS was not primarily liable to pay duty and GST. UPS, therefore, cannot claim the benefit of subsections 216(1) or 296(2.1).

4- Is UPS, as the person who bore the cost the GST, entitled to claim any rebate owing?

[41] The Chief Justice was influenced by the fact that UPS apparently did not collect the overpayment of tax from its customers so that it was out of pocket to the extent of the Shortfall. The Agreed Statement of Facts makes it clear that the accounting for the goods and the payment of duty was undertaken by UPS in its capacity as a customs broker and not in its capacity as carrier. The significance of this observation is that while UPS' customer in its courier business is ordinarily the shipper, in its customs brokerage business, the customer is the consignee. Thus where the customer paid UPS' account but UPS assumed the liability for the excess GST by crediting its customer's account (as, for example, in the case of COD deliveries- see paragraph 16 of the Agreed Statement of Facts), UPS was only effectively out of pocket when the consignee required further customs brokerage services and UPS' fees for those services were reduced by the amount of the credit in the customer's account. This is not to gainsay the effect of the credit in the customer's account but merely to point out that if the credit was not used, and was eventually written off, then UPS was not,

in fact, out of pocket. For present purposes however I accept that UPS was out of pocket the amount of the Shortfall.

[42] Turning then to UPS' right to claim the rebate, the liability to pay duties (and thus GST) on imported goods is set out in subsections 32(4) and 32(5) of the Act and in the *Accounting for Imported Goods and Payment of Duties Regulations*, SOR/86-1062. Subsection 32(6) of the Act provides that the Governor in Council may make regulations specifying the persons or classes of persons who are authorized to pay duties in lieu of the owner or importer. Those regulations, the *Agents' Accounting for Imported Goods and Payment of Duties Regulations*, SOR/86-944, simply provide that only a licensed customs broker may act as agent for the purpose of accounting for goods and paying duty under section 32 of the Act. The *Customs Brokers Licensing Regulations*, SOR/86-1067, provide that customs brokers must post a $50,000 bond as security for duties where goods are released prior to the payment of duties. There are no claims against UPS' bond in this case because, in all instances giving rise to the Shortfall, UPS paid the required duties in its capacity as a customs broker and as agent for the consignee.

[43] In the end result, UPS was only called upon to pay duties and GST on imported goods because it chose to act as customs broker for those of its customers who did not have a customs broker. When it disbursed its own funds to pay the duty and GST owing, it did so to satisfy its customers' obligation to pay the duties and tax; the customer is credited with the payment.

[44] What, if any, relief is available for a customs broker who has not been reimbursed for such outlays? There are two provisions of the ETA which could be relevant to this issue. The first is section 224 which allows a supplier who has made a supply and remitted the tax for that supply but who has not been paid by the recipient of the supply to sue for the tax "as though it were a debt due by the recipient to the supplier." This does not assist UPS because the problem is not the GST it has charged for its services but rather the GST which it has paid on behalf of its customer. The second provision which may be relevant is subsection 231(1) which allows a supplier who has made a supply and who has charged but not collected the GST on that supply to claim a deduction for the GST written off to the same extent as the consideration for the supply is written off. The write-off reflects the fact that by the terms of paragraph 225(1)(*a*) of the ETA, the supplier's net tax includes an amount which became collectible in a reporting period. Once again, this provision deals with the GST charged by a supplier in respect of the supply it has made. That does not, on its face, extend to GST paid on behalf of another.

[45] I conclude that the ETA does not provide any specific relief for one who pays GST on behalf of another and whose claim for reimbursement remains unsatisfied.

[46] A case which is illustrative, though nothing more, of this proposition is *Clear Customs Brokers Ltd. v. Canada*, [1996] T.C.J. No. 721, where a customs broker claimed a deduction from its net tax payable in respect of an amount of GST which it had paid on behalf of a customer and for which it had never been reimbursed. The broker was subsequently reassessed and deduction for the GST paid on behalf of the customer was disallowed. The appropriateness of the disallowance was

conceded and the matter proceeded to the Tax Court on the issue of penalties and interest as a result of the broker's claim that the deduction of unpaid GST had been approved by officials of the Crown.

[47] Since the issue of the deductibility of the uncollected disbursements was conceded, the case is not authority for the proposition that such amounts are not deductible from a supplier's net tax. Nevertheless, the case is illustrative of the fact that the Minister has rejected such claims in the past and, on the basis of the provisions reviewed above, is clearly entitled to do so.

[48] As a result, I conclude that UPS is not entitled to claim a rebate for the Shortfall on the basis that it has, in effect, borne the cost of the tax.

5- Is UPS entitled by contract to claim any rebate owing?

[49] If UPS was not entitled to claim the rebates for the Shortfall simply as a result of having absorbed that cost (to the extent that it did), did it acquire the right to do so by contract? The Agreed Statement of Facts recites that UPS had its customers sign a form of agreement which appears at paragraph 24 of the Agreed Statement of Facts. In the operative parts of the agreement (described as a Credit Note in the Agreed Statement of Facts) UPS' customer advised the Minister that:

> - Please be advised that United Parcel Services is authorized to take an input tax credit for the Goods and Service Tax, under Part IX of the Excise Tax Act, directly related to [particulars of the shipment].
>
> - As a GST registrant we will not claim a credit (input tax credit) for the same transaction.

For its part, UPS advised its customer that:

> - Upon reception of this authorization United Parcel Service will credit your account # [..] for the above mentioned amount.

[50] The ETA does provide for credit notes in circumstances where a particular person has charged or collected more GST than was due or payable. Section 232 provides a procedure by which the relative accounts between the payor, the remitter and the government may be corrected. The credit note which UPS had its customers sign was not a credit note as contemplated by section 232. It purported to be an authorization to claim an input tax credit for amounts paid on the customer's behalf. Nothing in the ETA contemplates such a form of authorization. To the extent that the credit note purported to represent some form of contractual arrangement, it was ineffective. As a result, UPS acquired no rights under that arrangement.

CONCLUSION

[51] In the end result, it appears that to the extent that the Shortfall was recoverable, it was not recoverable by UPS. UPS was not the person who paid the GST even though it may have been the person who remitted it. The fact that it chose to absorb the cost of the Shortfall does not confer any rights since an unpaid customs broker has no right under the ETA to deduct the unpaid amounts from its net tax. Furthermore, UPS has not brought itself within the provisions of the ETA dealing with refunds. All in all, UPS is not entitled to recover the amount of the Shortfall from its remittance of net tax.

[52] Much has been made of the fact that such a result represents a windfall for the fisc, a windfall which it should not be allowed to retain. If there is an element of windfall in this case, it is only because of the way in which UPS has chosen to approach this problem. UPS has not shown that the other recovery mechanisms in the Act gave it no recourse.

[53] I would therefore allow the appeal, set aside the judgment of the Tax Court of Canada and dismiss UPS' appeal from the Notice of Reassessment dated December 18, 2002, bearing number 05DP117136515.

[54] The Crown is entitled to its costs both here and below.

"J.D. Denis Pelletier"
J.A.

"I agree
M. Nadon J.A."

"I agree
J. Edgar Sexton J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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