

**Date: 20080501**

**Docket: A-218-07**

**Citation: 2008 FCA 160**

**CORAM: DESJARDINS J.A.  
LÉTOURNEAU J.A.  
BLAIS J.A.**

**BETWEEN:**

**FOLZ VENDING COMPANY LIMITED**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Hearing held at Québec, Quebec, on April 28, 2008.

Judgment delivered at Québec, Quebec, on May 1, 2008.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**DESJARDINS J.A.  
BLAIS J.A.**

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**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**Issues**

[1] The appellant is appealing a decision by Bédard J. (the judge) of the Tax Court of Canada.

[2] In that decision, the judge confirmed the assessment of the Minister of National Revenue (the Minister), dated June 11, 2003. The assessment relates to the goods and services tax (GST) and

harmonized sales tax (HST). The amount of the assessment of both taxes was \$388,506.23. In addition, there was a penalty of \$39,859.52.

[3] The appeal raises two questions. As an agent, was the appellant obliged to collect and remit goods and services tax (GST) and harmonized sales tax (HST) on the taxable supplies it sold? It is not disputed that there were taxable supplies within the meaning of section 123 of the *Excise Tax Act*, R.S.C. 1985, c.E-15, as amended (the Act).

[4] Secondly, did the judge err in upholding the penalty assessed by the Minister under section 280 of the Act on the ground that the Appellant did not exercise due diligence?

#### **Facts giving rise to this case and appellant's submissions**

[5] During the October 1, 2000, to June 30, 2002, period, the appellant failed to collect and remit to the Receiver General for Canada the taxes from the sale of candy, gumballs and toys made through vending machines that accept 25-cent and 1- and 2-dollar coins but do not give change. During the same period, it claimed input tax credits in the amount of \$563,892.12 related to the operations of its vending machines.

[6] The appellant relies on the Tax Court of Canada judgment in *Distribution Lévesque Vending (1986) Ltée v. Her Majesty the Queen*, [1997] G.S.T.C. 38 (T.C.C.) to support that it is not an agent within the meaning of section 221 of the Act.

[7] It also argues that, first, its single-coin mechanical devices are not coin-operated devices within the meaning of the Act, as they are operated manually and do not give change. It adds that, secondly, the machines make it impossible to collect taxes from consumers.

[8] Below, I reproduce some of the provisions of the Act that applied at the time and that are useful for understanding the present reasons:

**Coin-operated devices**

**160.** Where a supply is made, and the consideration therefor is paid, by means of a coin-operated device, the following rules apply for the purposes of this Part:

(a) the recipient shall be deemed to have

- (i) received the supply,
- (ii) paid the consideration for the supply, and
- (iii) paid any tax payable in respect of the supply,

on the day the consideration for the supply is inserted into the device; and

(b) the supplier shall be deemed to have

- (i) made the supply,
- (ii) received the consideration for the supply, and
- (iii) collected any tax payable in respect of the supply,

on the day the consideration for the supply is removed from the device.

**DIVISION II  
GOODS AND SERVICES TAX**

**SUBDIVISION A  
IMPOSITION OF TAX**

**Imposition of goods and services tax**

**Appareils automatiques**

**160.** Dans le cas où une fourniture est effectuée, et la contrepartie y afférente payée, au moyen d'un appareil automatique, les présomptions suivantes s'appliquent aux fins de la présente partie :

a) l'acquéreur est réputé, le jour où la contrepartie de la fourniture est insérée dans l'appareil, avoir reçu la fourniture et payé la contrepartie y afférente ainsi que la taxe payable qui y est relative;

b) le fournisseur est réputé, le jour où la contrepartie de la fourniture est retirée de l'appareil, avoir effectué la fourniture, reçu la contrepartie y afférente et perçu la taxe payable qui y est relative.

**SECTION II  
TAXE SUR LES PRODUITS ET  
SERVICES**

**SOUS-SECTION A  
ASSUJETTISSEMENT**

**Taux de la taxe sur les produits et services**

**165.** (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

**165.** (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5% sur la valeur de la contrepartie de la fourniture.

#### **165.1**

...

##### **Coin-operated devices**

(2) Where the consideration for a supply of tangible personal property or a service is paid by depositing a single coin in a mechanical coin-operated device that is designed to accept only a single coin of twenty-five cents or less as the total consideration for the supply and the tangible personal property is dispensed from the device or the service is rendered through the operation of the device, the tax payable in respect of the supply is equal to zero.

#### **165.1**

[...]

##### **Appareils automatiques**

(2) La taxe payable relativement à la fourniture d'un bien meuble corporel distribué, ou d'un service rendu, au moyen d'un appareil automatique à fonctionnement mécanique qui est conçu pour n'accepter, comme contrepartie totale de la fourniture, qu'une seule pièce de monnaie de 0,25 \$ ou moins est nulle.

### **DIVISION V COLLECTION AND REMITTANCE OF DIVISION II TAX**

#### **SUBDIVISION A COLLECTION**

##### **Collection of tax**

**221.** (1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

##### **Interest**

**280.** (1) Subject to this section and section 281, if a person fails to remit or pay an amount to the Receiver General when

### **SECTION V PERCEPTION ET VERSEMENT DE LA TAXE PRÉVUE À LA SECTION II**

#### **SOUS-SECTION A PERCEPTION**

##### **Perception**

**221.** (1) La personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe payable par l'acquéreur en vertu de la section II.

##### **Intérêts**

**280.** (1) Sous réserve du présent article et de l'article 281, la personne qui ne verse pas ou ne paie pas un montant au receveur

required under this Part, the person shall pay interest at the prescribed rate on the amount, computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

général dans le délai prévu par la présente partie est tenue de payer des intérêts sur ce montant, calculés au taux réglementaire pour la période commençant le lendemain de l'expiration du délai et se terminant le jour du versement ou du paiement.

[Emphasis added.]

### **Analysis of the appellant's submissions**

a) Are the appellant's single-coin mechanical devices coin-operated devices?

[9] In *Distribution Lévesque Vending (1986) Ltée, supra*, at page 13, Tremblay J. relied *inter alia* on section 160 of the Act to conclude that single-coin devices were not coin-operated devices.

[10] The appellant refers us to this conclusion, which, in my opinion, is based on an erroneous interpretation of the term “coin-operated devices”, which is found in section 160 of the Act. More specifically, it argues that the term “coin-operated devices” necessarily and exclusively refers to electronic vending machines that give change and therefore make it possible to charge consumers tax.

[11] With respect, I believe that section 160 does not assist the appellant. In fact, section 160 is not about imposition of tax. Instead, by way of presumptions, it merely explains when a supply is made and received, and the consideration therefor is paid and received.

[12] Moreover, the term “coin-operated device” is sufficiently broad and general to include single-coin mechanical devices. In fact, unless there is a technical failure, by inserting the required coin and operating the mechanism, the consumer automatically receives, without intervention of a third party, the advertised supply.

[13] In addition, subsection 165.1(2) of the Act, under the heading “coin-operated devices”, refers to a supply made through “a mechanical coin-operated device that is designed to accept only a single coin of twenty-five cents or less as the total consideration for the supply” (emphasis added). In such a case, the tax payable is equal to zero.

[14] It is clear that the use and application of the term “coin-operated devices” are not restricted to electronic devices. The appellant is exempted from tax for its single-coin mechanical devices that operate with a single coin of 25 cents or less. How can these devices be coin-operated, but stop being so when the single coin used is a one- or two-dollar coin rather than a 25-cent one? I think that to ask the question is to answer it.

[15] Lastly, I would like to draw attention to the English version of subsection 165.1(2). The term “coin-operated devices”, selected in English to render the French term “appareils automatiques” is similarly general and not limited to “electrically coin-operated devices”.

- b) Was it impossible for the appellant to carry out its mandate of collecting tax, as required by the Act?

[16] The Appellant claims that the impossibility of carrying out the tax collection mandate was recognized and accepted in *Distribution Lévesque Vending (1986) Ltée., supra*. It also relies on the *Civil Code of Québec* provisions on mandates to support its argument.

[17] I agree with counsel for the appellant that the mandate in question in this case is a mandate imposed and governed by the Act and not a contractual mandate as described in articles 2130 *et seq.* of the *Civil Code of Québec*. Unless excluded from the general rule concerning imposition of tax, the appellant is obliged to carry out its mandate.

[18] *Distribution Lévesque Vending (1986) Ltée* is a decision that was rendered in equity, but is erroneous in law. As the judge in this case correctly pointed out, during the period at issue, the case gave rise to an exception to the general rule concerning the imposition of tax. This exception can be found at subsection 165.1(2) of the Act, replacing the former subsection 165(3.1).

[19] The exception made by Parliament is a limited exception with regard to its purpose. In fact, it applies to mechanical coin-operated devices, such as the appellant's. But as stated previously, it is limited to devices that are designed to accept only a single coin of 25 cents or less as consideration for the supply. The appellant cannot benefit from this exception for devices that are operated using one- or two-dollar coins.



[20] As for the impossibility of carrying out the mandate, which the appellant claims exists, if there is an impossibility, it is not a physical one, but one that arises from the cost of the modifications to be made to the devices.

[21] There is no doubt that such modifications would incur substantial costs for the appellant and would result in a financial burden. However, as the Supreme Court of Canada reminded us the *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 at paragraph 48, “this is precisely the burden contemplated by the statute”. Tremblay J. erroneously, and I say this with respect, used the notion of cost to dispense Distribution Lévesque Vending (1986) Ltée of its duty, under section 221 of the Act.

[22] Tremblay J. also erred when he then concluded in equity that it was unjust to oblige Distribution Lévesque Vending (1986) Ltée to pay the tax for the consumer considering the cost of modifying the devices: see pages 11 and 12 of the reasons for this decision.

[23] As in the case before us, a seller of supplies always has the option of increasing its prices to cover the tax, reducing the quantity or quality of the supply, reducing its profits, or maintaining its profits by negotiating better conditions of purchase with its own suppliers. A company’s loss of or reduction in profits does not relieve it of its duty to collect tax on the supplies it sells.

[24] I agree with the following excerpt from the reasons for judgment of the Ontario Superior Court of Justice (Divisional Court) in *Roneson Enterprises Inc. v. Ontario (Minister of Finance)*, [2005] O.J. No. 3179, where the judge wrote at paragraph 20:

In any event, just because compliance with the Act may be difficult or may result in the imposition of a cap on the effective purchase price of products sold through the vending machines does not affect the legal duty of vendors to comply with the Act. If it should turn out that it is too difficult or insufficiently profitable for the Respondent to comply, it will have to reassess the financial viability of conducting business through this type of vending machine and perhaps even stop doing so. It may seem harsh but, in law, there is no duty on the Appellant to facilitate this type of business or to help maintain its profitability.

c) Did the judge err in upholding the penalty imposed by the Minister?

[25] Despite the efforts of the appellant's counsel, I am not satisfied that the judge misapprehended the legal principles applicable to the penalty and the due diligence defence. The appellant was unable to identify an error in fact which led it to believe on reasonable grounds in a non-existent state of facts which, if it had existed, would have made the appellant's failure to collect and remit the tax innocent: see *Corp. de l'École Polytechnique v. Canada*, 2004 FCA 127, at paragraph 38.

[26] Similarly, the appellant failed to bring to our attention any steps it took to comply with the Act, the second and last element of a due diligence defence. In the circumstances, the judge was not wrong in concluding that the appellant did not exercise due diligence.

**Conclusion**

[27] For these reasons, I would dismiss the appeal with costs.

“Gilles Létourneau”

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J.A.

I concur in these reasons.

Alice Desjardins J.A.

I concur.

Pierre Blais J.A.

Certified true translation  
Johanna Kratz

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

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**CONCURRED IN BY:** DESJARDINS J.A.  
BLAIS J.A.

**DATED:** May 1, 2008

**APPEARANCES:**

Gaétan Drolet

FOR THE APPELLANT

Gatien Fournier  
Andrew Miller

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Gaétan Drolet  
Sainte-Foy, Quebec

FOR THE APPELLANT

John H. Sims, Q.C.  
Deputy Attorney General of Canada

FOR THE RESPONDENT