

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100310**

**Docket: A-248-09**

**Citation: 2010 FCA 73**

**CORAM: NOËL J.A.  
NADON J.A.  
LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**THE TORONTO-DOMINION BANK**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on March 10, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on March 10, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL J.A.

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario on March 10, 2010.)**

**NOËL J.A.**

[1] This is an appeal from a decision of Miller J. of the Tax Court of Canada (the Tax Court Judge) upholding an assessment issued by the Minister of National Revenue (the Minister) under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act) for the period November 1, 1998 to October 31, 1999.

[2] The assessment in question disallowed input tax credits (ITCs) claimed by the Toronto Dominion Bank (the appellant) on the basis that they were claimed beyond the limitation period set out in subparagraph 225(4)(a)(iii) of the Act and levied a penalty pursuant to section 280 of the Act on the basis that the appellant did not exercise due diligence in claiming the ITCs.

[3] The appellant maintains that the Tax Court Judge committed a number of legal and factual errors in concluding that the ITCs were claimed out of time and in imposing a penalty. In our view none of the alleged errors have been demonstrated.

[4] The total amount of unclaimed ITCs identified by the appellant's consultant for the 1996 reporting period was \$1,275,751. When the appellant filed its return for the 1998 reporting period on January 29, 1999, only a portion of that amount had been identified (i.e., \$624,666). It was open to the Tax Court Judge to find that the remainder (i.e., \$651,085) (the disputed amount) could not have been claimed for the 1998 reporting period since it had yet to be identified.

[5] By the same logic, it was also open to the Tax Court Judge to find that the disputed amount, despite being subsequently depicted by the appellant as relating to the 1997 and 1998 reporting periods, represented ITCs belonging to the 1996 reporting period which were statute barred when they were claimed in the return filed for the 1999 reporting period.

[6] Beyond these factual findings, the Tax Court Judge correctly held that although neither the Act nor the *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45 requires a person to

identify, in its GST return, the period to which any particular claimed ITC relates, it is inherent in both the formula set out in subsection 169(1) of the Act for the calculation of ITCs and in the calculation of net tax pursuant to section 225 of the Act, that the ITCs are claimed in respect to a particular reporting period.

[7] As to whether the Minister should, pursuant to subsection 296(2), have taken into account the disputed amount in assessing the net tax for the 1998 reporting period, the Tax Court Judge properly noted that this period was not before her. It is worth adding however that the appellant did not rely the Minister's action pursuant to subsection 296(2) to resolve its problem.

[8] Finally, it was open to the Tax Court Judge to conclude on the facts before her, and for the reasons that she gave that the appellant failed to exercise due diligence in filing its return for the 1999 reporting period.

[9] The appeal will accordingly be dismissed with costs.

“Marc Noël”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-248-09

**(APPEAL FROM MILLER J. OF THE TAX COURT OF CANADA DATED MAY 22, 2009, NO. 2006-1702(GST)G )**

**STYLE OF CAUSE:** THE TORONTO-DOMINION  
BANK and HER MAJESTY THE  
QUEEN

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 10, 2010

**REASONS FOR JUDGMENT OF THE COURT BY:** Noël, Nadon, Layden-Stevenson  
JJ.A.

**DELIVERED FROM THE BENCH BY:** Noël J.A.

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