Federal Court of Appeal  Cour d'appel fédérale

Date: 20110930

Docket: A-370-10

Citation: 2011 FCA 270

CORAM: **SHARLOW J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

CIBC WORLD MARKETS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on September 21, 2011.

Judgment delivered at Ottawa, Ontario, on September 30, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SHARLOW J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of the Tax Court of Canada (*per* Rip C.J.): 2010 TCC 460.

[2] CIBC World Markets Inc. filed a goods and services tax ("GST") return under the *Excise Tax Act*, R.S.C. 1985, c. E-15 claiming input tax credits for two taxation years, 1998 and 1999. Later, using a different method, it made a second claim, seeking input tax credits at a higher level

for the same two taxation years. The Minister rejected CIBC World Markets' second claim on the basis that the Act did not allow a second claim based on a different method.

[3] The Tax Court of Canada interpreted the GST provisions of the Act and agreed with the Minister. CIBC World Markets appeals to this Court.

[4] There are no words in the GST provisions of the Act that expressly allow a GST registrant, such as CIBC World Markets, to make a second claim for input tax credits concerning a taxation year using a different method. But, in my view, the general scheme and purpose of the GST provisions of the Act support the ability of CIBC World Markets to make such a claim, and there is no statutory wording to the contrary. Therefore, I would allow the appeal.

A. The statutory scheme: an overview

[5] I shall begin with a broad, conceptual review of the general scheme and purpose of the GST provisions of the Act. This will provide context for interpreting the specific provisions at issue in this appeal.

(1) The purpose of the GST provisions of the Act

[6] The GST is a consumption tax. The GST provisions of the Act show that it is meant to be paid by the final consumers of goods and services. An early technical paper issued by the Minister

on the GST confirms this: Canada, Department of Finance, "Goods and Services Tax: Technical Paper" (Ottawa: Department of Finance, 1989).

(2) The key liability provision: subsection 165(1) of the Act

[7] Subsection 165(1) of the Act sets out a general rule: those who receive services or property, such as goods, in the course of a commercial activity (known under the Act as a "taxable supply") are liable to pay GST.

(3) Who is subject to GST

[8] The general rule in subsection 165(1) of the Act applies to all, even those who are not final consumers.

[9] In particular, each recipient of taxable goods and services is potentially liable to pay GST, even if it, as an intermediary, ultimately delivers those goods and services to others. For example, a wholesaler may supply goods to a retailer who supplies them to a consumer. The retailer is liable to pay GST under the general rule in subsection 165(1).

[10] Were the matter left there, the GST would lose its character as a consumption tax imposed on the final consumers of goods and services. It would attach, full force, to each party in a chain of transactions culminating in the final receipt by consumers.

(4) Input tax credits: the general concept

[11] One way in which the Act prevents this consequence is by giving parties credits for "inputs" that they receive.

[12] For example, for the purpose of the selling of goods to consumers, a retailer might receive "inputs," such as inventory. That "input" to the retailer is necessary in order for it to make a supply of the goods to the consumer. Depending on the particular business, there may be all sorts of necessary "inputs."

[13] Obviously, if, in the example above, the retailer were not given credit for the GST paid on inputs needed for the making of a taxable supply of goods to a consumer, the GST would be imposed full force on it and, for that matter, on every intermediary in the chain of distribution. If that happened, the GST would lose its character as a consumption tax imposed on the final consumer of goods and services.

[14] To achieve the purpose of taxing the final consumers of goods and services, the Act allows tax credits for inputs received by parties to make an onward taxable supply. These credits are called input tax credits.

[15] The input tax credits, as explained above, ensure that the fundamental character of the GST as a consumption tax on final consumers is maintained. In the words of the Minister:

> A fundamental principle underlying the GST/HST is that no tax should be included in the cost of property and services acquired, imported or brought into a participating province by a registrant to make taxable supplies…in the course of the commercial activities of the registrant. To ensure that a property or service consumed, used or supplied in the course of commercial activities effectively bears no GST/HST, registrants are generally eligible to claim an input tax credit (ITC) for the GST/HST paid or payable on such property or service. Consequently, the ITC enables each registrant to recover the tax incurred in that registrant's stage of the production and distribution process.

(Canada Revenue Agency, "GST Memorandum 8.1 – General Eligibility Rules" (May 2005) at paragraph 1.)

(5) Input tax credits: a further complication

[16] A further complication needs to be mentioned. Some supplies under the Act are not taxable, because they do not fall under section 165(1) of the Act, or they are otherwise exempt under the Act.

[17] A person may be a supplier of both taxable and exempt goods or services, but is entitled to input tax credits only for inputs relating to the taxable supplies.

[18] Where a person is a supplier of both taxable and exempt supplies, a method must be found to limit the claim for input tax credits to reflect only goods and services acquired or used for making taxable supplies.

[19] The Act solves this problem by allowing parties (in subsection 141.01(5)) to adopt a general allocation method.

[20] Not all methods are acceptable. Subsection 141.01(5) provides that the method must be "fair and reasonable" and must "be used consistently by the person throughout the year." Subsection 141.01(5) reads as follows:

141.01. (5) Subject to section 141.02, the methods used by a person in a fiscal year to determine (*a*) the extent to which properties or services are acquired, imported or brought into a participating province by the person for the purpose of making taxable supplies for consideration or for other purposes, and (*b*) the extent to which the consumption or use of properties or services is for the purpose of making taxable supplies for consideration or for other purposes, shall be fair and reasonable and shall be used consistently by the person throughout the year.	**141.01.** (5) Sous réserve de l'article 141.02, seules des méthodes justes et raisonnables et suivies tout au long d'un exercice peuvent être employées par une personne au cours de l'exercice pour déterminer la mesure dans laquelle : *a*) la personne acquiert, importe ou transfère dans une province participante des biens ou des services afin d'effectuer une fourniture taxable pour une contrepartie ou à d'autres fins; *b*) des biens ou des services sont consommés ou utilisés en vue de la réalisation d'une fourniture taxable pour une contrepartie ou à d'autres fins.

[21] There are also limitation periods or deadlines for the making of claims for input tax credits: see the Act, subsection 225(4). As well, double counting is prohibited – an amount should not be included in a claim for input tax credits if the amount claimed has already been included in a previous claim: see the Act, subsection 225(3).

B. The facts of this case

[22] In this case, the appellant, CIBC World Markets engaged in commercial activities and was liable to pay GST. It was eligible to claim input tax credits for the GST it paid, but because not all of its supplies were taxable supplies, it was required to limit its input tax credit claims in the manner described above.

[23] It fell to CIBC World Markets to determine what portion of the GST it had paid was claimable as input tax credits. It adopted a particular method for determining this in the 1998 and 1999 tax years. Using this method, it calculated its input tax credits at 6.79% of the GST it paid in 1998 and 6.05% of the GST it paid in 1999. It filed returns for the 1998 and 1999 tax years, claiming these amounts.

[24] The Minister accepted these ITC claims as filed. In his view, CIBC World Markets' method in 1998 and 1999 complied with subsection 141.01(5) of the Act in that it was "fair and reasonable" and "used consistently throughout the year."

[25] In 2000, CIBC World Markets adopted a different method. This method resulted in a more favourable claim for input tax credits. It calculated its input tax credits at 25.07% of the GST it paid in 2000. The Minister accepted this input tax credit claim as filed. In his view, CIBC World Markets' method in 2000 complied with subsection 141.01(5) of the Act in that it was "fair and reasonable" and "used consistently throughout the year."

[26] Using this different method, CIBC World Markets also made a second claim for input tax credits for the 1998 and 1999 taxation years, seeking a higher level than previously claimed. It made this second claim within the applicable limitation periods under subsection 225(4) for those years. It claimed only amounts over and above those claimed earlier in those years. In other words, it did not engage in any double counting within the meaning of subsection 225(3).

C. The Minister's position and the Tax Court of Canada's judgment

[27] The Minister rejected the claim for additional input tax credits for the 1998 and 1999 taxation years. There were two reasons underlying the Minister's position, both of which the Tax Court of Canada accepted:

- *Only "one kick at the can" is permitted.* In the Minister's view, the Act permits only one claim for input tax credits to be made for a taxation year. Colloquially put, the Act gives a GST registrant, such as CIBC World Markets, only one kick at the can,

not two. The Tax Court of Canada agreed, noting that after a claim is made, "the tax authority will act on this information," and permitting revisions to a claim that is not subject to error "would permit fiscal uncertainty" (at paragraphs 32 and 35).

- *Subsection 141.01(5) of the Act*. The Minister contended that permitting CIBC World Markets to use a revised method would offend the requirement in subsection 141.01(5) of the Act that a particular method be "used consistently throughout the year." The Tax Court of Canada agreed (at paragraphs 44 and 45).

D. Analysis

[28] As mentioned above, this appeal turns upon the proper interpretation of certain provisions of the Act.

[29] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at paragraph 10, [2005] 2 S.C.R. 601, the Supreme Court of Canada prescribed the proper approach for interpreting taxation statutes:

> …The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

With this approach in mind, I turn now to the two issues before us.

(1) Can more than one claim for input tax credits in the same taxation year be made?

[30] In my view they can. There are several reasons which, taken together, lead to this conclusion.

– I –

[31] There are no words in the text of the Act that prohibit more than one claim for input tax credits concerning the same taxation year.

– II –

[32] In fact, there are words in the Act, specifically in subsection 225(3) of the Act, that contemplate the possibility that more than one claim for input tax credits can be made concerning the same taxation year.

[33] Subsection 225(3) of the Act provides that a GST registrant cannot claim twice for the same amount – double counting is prohibited. Specifically, it provides that "[a]n amount shall not be included…to the extent that the amount was claimed or included as an input tax credit…in determining the net tax for a preceding reporting period." This wording specifically refers to "preceding reporting periods" and contemplates that more than one claim for a taxation year may be

made at different times as long as the same amount is not claimed twice. Thus, a GST registrant who paid $5 GST on a $100 purchase of office supplies cannot claim $5 in input tax credits in one return and then claim the same $5 in a second return. But nothing bars it from claiming $2 in one return and $3 in a second return, as long as both returns are filed within the statutory limitation period. This is exactly the sort of thing that CIBC World Markets has done here, and it has not engaged in any double counting.

– III –

[34] The respondent submits that CIBC World Markets was not acting under any error when it adopted its first method. It observes that the second method was "better" for CIBC World Markets, but was not necessarily the more accurate or appropriate of the two.

[35] That may be so, but that takes nothing away from the fact that the Minister considered both methods to be "fair and reasonable" under subsection 141.01(5) of the Act. Prohibiting a later claim based on a method that has been accepted as "fair and reasonable" works a harsh result that, in my view, is not compelled by anything in the Act.

– IV –

[36] To the Minister, finality is important. Interpreting the Act to allow only one claim for input tax credits does further the objective of finality or, as the Tax Court called it, "fiscal certainty."

[37] But "fiscal certainty" is not an objective that suffuses the entire Act. Indeed, various provisions of the Act work against finality or "fiscal certainty." For example, in the two years after tax has been paid, one may seek a rebate due to mistake or other cause: see Act, section 261.

[38] In support of its conclusion that only one claim for input tax credits is allowed, the Tax Court invoked the objective of finality, noting that "the tax authority will act on [the] information" in the GST registrant's filing. However, the record discloses no evidence that the tax authority will act on the information in the filing in a prejudicial way.

[39] The need for finality and fiscal certainty are achieved through the various deadlines and limitation periods that are set out in the Act. Making more than one claim for input tax credits, provided the deadlines and limitation periods are observed, does not implicate any meaningful policy objectives resident in the Act.

[40] Absent clear wording to the contrary – and there is none here – the Act's objective of allowing GST registrants to obtain relief for recoverable GST through input tax credits should prevail in this case.

– V –

[41] Counsel for CIBC World Markets submitted that the respondent's interpretation transforms the act of filing a return containing a claim for input tax credits based upon a particular method into an irrevocable election – once a method is chosen, one cannot depart from it at a later time, even within the limitation period. In essence, the respondent's interpretation makes the act of filing a return based on a particular method an opportunity to "speak now or forever hold your peace" on the subject of input tax credits.

[42] I agree with this characterization. I also agree with the observation of counsel for CIBC World Markets that there are no statutory words that signal those legal consequences. This is especially significant. Parliament knows how to signal those legal consequences. When an election is to be made and when it is to be irrevocable, Parliament's practice is to use express words in the GST provisions of the Act. There are no express words of irrevocable election concerning the taxpayer's choice of method.

[43] Indeed, in an amendment made in July 2010, Parliament used clear wording to change this legal situation for certain GST registrants in the financial sector. Subsection 141.02(17) of the Act, added by S.C. 2010, c. 12, s. 57, now prevents certain parties, such as CIBC World Markets, from unilaterally changing its method for a particular taxation year after the return for that year has been filed. Under this new subsection, once a method has been chosen by a financial institution for a particular year, the method cannot be changed without the Minister's written consent.

[44] The words of new subsection 141.02(17) of the Act are exactly the sort of precise words that one would expect to see if the respondent's interpretation in this appeal were sound. But in the version of the Act at issue in this appeal, words such as that are not present.

– VI –

[45] Both the respondent and the Tax Court found certain United Kingdom decisions concerning that country's value added tax to be of use in this case: see, *e.g.*, *Victoria and Albert Museum Trustees v. Customs and Excise Commissioners*, [1996] S.T.C. 1016 (Q.B.). Those decisions must be regarded with caution. They are based on differently worded legislation concerning a consumption tax system that is somewhat different from ours. For one thing, in the United Kingdom a method cannot be changed without prior approval, and a retrospective change to a method is not allowed unless it is shown that the method is not fair and not reasonable: VAT Notice 706, "Partial Exemption" (December 2006) at paragraph 6.11.

[46] For all of the foregoing reasons, I conclude that CIBC World Markets was entitled within the limitation period to change its method for the 1998 and 1999 taxation years and claim additional input tax credits.

(2) Is the use of a revised method contrary to subsection 141.01(5) of the Act?

[47] Subsection 141.01(5) provides that a method must be "used consistently throughout the year." The Tax Court (at paragraph 44) found that it would be "perverse" for a GST registrant to use one method for a taxation year, and then, later, to revise it for that year. In its view, subsection 141.01(5) prevents this.

[48] The Tax Court appears to have read subsection 141.01(5) as if a GST registrant were required to select a method at the beginning of a fiscal year and then use that method consistently until the end of the year. That does not reflect what is permitted under the Act. Perhaps in recognition of the imprecise science involved in choosing a method, Parliament allows registrants a number of years after a taxation year has ended to choose their method and file a claim for input tax credits for the taxation year: Act, subsection 225(4).

[49] In my view, subsection 141.01(5) merely requires consistency throughout the year whenever a method is chosen. This prevents a GST registrant from using one method for one part of the year and then another method for another part of the year, for example to take advantage of a seasonal fluctuation.

[50] This interpretation is consistent with the plain meaning of "used consistently throughout the year" in subsection 141.01(5). CIBC World Market's first method was used consistently throughout

the 1998 and 1999 taxation years. Its second method was also used consistently throughout the 1998 and 1999 taxation years.

[51] The interpretation also accords with explanatory notes issued by the Minister concerning a new provision in the Act that is worded similarly and related closely to subsection 141.01(5): paragraph 141.02(16)(*b*), enacted by S.C. 2010, c. 12, s. 57. Paragraph 141.02(16)(*b*) is related to subsection 141.01(5) in that it supersedes subsection 141.01(5) for financial institutions. Paragraph 141.02(16)(*b*) provides that a method must be "used consistently by the financial institution throughout the fiscal year," wording that is substantially similar to subsection 141.01(5). The Minister's Explanatory Notes on this wording, published in September 2009 provide as follows:

> …Paragraph 141.02(16)(*b*) requires that such a method be used consistently throughout the financial institution's fiscal year (*i.e.*, a financial institution cannot change a method partway through its fiscal year). The conditions in paragraphs 141.02(16)(*a*) and (*b*) are the same as those found in subsection 141.05, which apply to input tax credit allocation methods in general.

[52] Had CIBC World Markets used one method for part of a taxation year and a second method for another part of the taxation year, an objection founded upon subsection 141.01(5) would lie. That is not the case here. It follows that subsection 141.01(5) does not bar CIBC World Markets' revised claim for input tax credits in this case.

E. Proposed disposition

[53] I would allow the appeal, set aside the judgment of the Tax Court of Canada in file 2007-3926(GST)G dated September 8, 2010, allow the appeal of CIBC World Markets from the assessment, and refer the matter back to the Minister for reassessment in accordance with these reasons. I would also award the appellant its costs in this Court and in the Tax Court of Canada.

"David Stratas"
J.A.

“I agree
K. Sharlow J.A.”

“I agree
Carolyn Layden-Stevenson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-370-10
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DATED:	September 30, 2011

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