

Docket: 2002-2150(GST)G

BETWEEN:

BIRD'S EYE COVE MARINA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on June 9, 2004 at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: Richard N. Toews

Counsel for the Respondent: Patricia Babcock

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JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated July 16, 1999 and bears number 11CU0301709, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 20th day of August 2004.

"L.M. Little"

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Little J.

Citation: 2004TCC536  
Date: 20040820  
Docket: 2002-2150(GST)G

BETWEEN:

BIRD'S EYE COVE MARINA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Little J.**

[1] The Appellant filed a Notice of Appeal to an assessment issued under the *Excise Tax Act* (the "Act") on July 16, 1999.

[2] At the commencement of the hearing the parties filed an Agreed Statement of Facts and Definition of Issues.

[3] The Agreed Statement of Facts reads as follows:

The parties agree that the facts are as follows:

1. This is an appeal in the case of the Appellant, Bird's Eye Cove Marina Ltd. ("Bird's Eye") from an assessment of Goods and Services Tax ("GST") dated July 17, 1999, adjusting by \$18,670.25 the amount of claimed Notional Input Tax Credit ("NITC") relating to the disposition of a vessel, Illusions III (the "Vessel"), by Bird's Eye and imposing a penalty of \$1,097.90 and interest of \$683.80;
2. Skeena was incorporated in British Columbia on April 1, 1976 and operated a rental business, but was not a registrant at the time of these transactions;

3. Mr. John Morgan ("Morgan") is Skeena's sole shareholder;
4. Bird's Eye was incorporated in BC on June 26, 1976, and operated a marina and brokered, bought and sold boats;
5. Skeena is the Appellant's sole shareholder;
6. Royce-Pacific Properties Ltd. ("Royce") was incorporated in BC on November 25, 1988, and is in the real property rental business and was a registrant at the material times;
7. Morgan is Royce's sole shareholder;
8. On or about September 16, 1988, Morgan purchased the Vessel from Mr. Bill Bonnette of Palm Beach, Florida;
9. By a Declaration of Trust dated September 22, 1988, Skeena as bare trustee for Morgan, held the right, title and interest in the Vessel, and would follow Morgan's directions and instructions respecting the Vessel;
10. On or about February 10, 1989, Skeena imported the Vessel into Canada;
11. On or about May 13, 1995, Morgan, or his assignee agreed to purchase (the "Deal") real property (the "Property") with the legal description of Lots 14, 15, Block 13, Plan 734, DL 4588, having the civic address 562 2<sup>nd</sup> Avenue, Fernie, BC, from Brewmaster Distribution Inc. ("Brewmaster") for the price of \$546,000.00;
12. As consideration for the Property, Brewmaster would receive the Vessel, valued at \$285,000.00, and the balance by cash upon closing;
13. The Deal had not been completed and specific performance litigation was pending between Brewmaster and Morgan relating to the property and the Vessel, and was not the reason for the sale of the Vessel to Bird's Eye;
14. On May 20, 1996, Bird's Eye entered into an interim agreement to purchase the Vessel from Skeena for \$287,000.00;

15. On June 15, 1996, Bird's Eye entered into a second agreement to purchase the Vessel from Skeena for real property located in Washington State, USA, having a legal description Lot 2, short of plan No. 578073, King County rec. # 79081011161 (the "Lot");
16. Prior to July 2, 1996 Morgan had entered into an agreement to sell the Vessel to Mr. Gary B. Price ("Price") of Woodville, Washington, USA, but this agreement was not consummated due to the Brewmaster specific performance litigation. On or about July 2, 1996, Morgan entered into a second agreement, which provided a time period for Morgan to obtain permission to sell the Vessel without prejudice to Morgan's claim against Brewmaster for specific performance. This Agreement was for Morgan to sell the Vessel for US \$195,000.00, to Price, as partial consideration for the Vessel, Morgan would receive the Lot having a value of US \$115,000.00;
17. The sale to Price was subject to the Courts approval on or before July 19, 1996;
18. By Consent Order of the Supreme Court of British Columbia on July 19, 1996, Morgan, personally, was granted permission to sell the Vessel to Price for US \$195,000.00;
19. On July 24, 1996, Bird's Eye entered into an agreement to sell the Vessel to Royce for \$268,224.30, which is less than the \$287,700.00 Bird's Eye agreed to pay for the Vessel. Bird's Eye was to recover the difference of \$18,776.00, between what it had agreed to pay for the Vessel and what it had agreed to sell the Vessel for, by claiming a notional ITC of \$18,775.70;
20. As partial consideration for the Vessel, Bird's Eye would receive the Lot valued at US \$115,000.00, or CDN \$158,183.65;
21. On July 24, 1996, the purchase of the Vessel by Bird's Eye, from Skeena, pursuant to the agreement of June 15, 1996 was completed;
22. On July 24, 1996, Bird's Eye's sale of the Vessel to Royce for \$268,224.30 was registered with the Department of Transportation;

23. On July 25, 1996, Royce entered into an agreement to sell the Vessel to Price for US \$195,000.00 [equivalent to \$268,224.00 CDN at a conversion rate of 1.37551], with no "trade-in". This sale was on a tax-free basis;
24. Morgan negotiated the purchase of the boat by Bird's Eye from Skeena, the resale by Bird's Eye to Royce and the eventual sale by Royce to Price;
25. Morgan had already negotiated the sale of the Vessel to Price;
26. The sole purpose for the sale of the Vessel from Skeena to Bird's Eye was to attempt to allow Bird's Eye to claim a NITC as Morgan could not have claimed a NITC if he sold directly to Price;
27. For the reporting period ending September 30, 1996, Bird's Eye claimed ITCs of \$34,882.84, including the NITC of \$18,775.70, being 7/107ths of the purchase price of the Vessel, \$287,000.00;
28. At all material times, up to these transactions Morgan was the beneficial owner of the Vessel and the Vessel was the personal use property of Morgan; and
29. At all material times all negotiations took place directly between Morgan and Price relating to the purchase and sale of the Vessel.

**Issues:**

30. The issues to be determined in this appeal are:
  - a. did Bird's Eye acquire the Vessel for use or supply in the course of a commercial activity;
  - b. did Bird's Eye acquire the Vessel in the course of its ordinary business;
  - c. did Bird's Eye acquire the Vessel as an undertaking of any kind; and
  - d. was the penalty appropriately applied?

Statutory References (excerpts)

[4] For the relevant period (both sections have subsequently been amended) paragraph 176(1)(a) and subsection 169(1) of the *Act* read as follows:

**176.(1)** Acquisition of used goods - Subject to this Division, where

(a) used tangible personal property is supplied in Canada by way of sale after 1993 to a registrant, tax is not payable by the registrant in respect of the supply, and the property is acquired for the purpose of consumption, use or supply in the course of commercial activities of the registrant, or

(b) used tangible personal property is supplied in Canada by way of sale before 1994 to a registrant, tax is not payable by the registrant in respect of the supply, and the property is acquired for the purpose of supply in the course of commercial activities of the registrant,

for the purposes of this Part, the registrant shall be deemed (except where the supply is a zero-rated supply or where section 167 applies to the supply) to have paid, at the time any amount is paid as consideration for the supply, tax in respect of the supply equal to the tax fraction of that amount.

**Note:** The current subsection 176(1) is applicable to supplies made after April 23, 1996 except in two circumstances. The Appellant could still apply under the former subsection 176(1) because the contract was signed on June 15, 1996 i.e. before the July 1, 1996 deadline.

**169.(1)** Subject to this Part, where property or a service is supplied to or imported by a person and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply or importation becomes payable by the person or is paid by the person without having become payable, the input tax credit of the person in respect of the property or service for the period is the amount determined by the formula

$$A \times B$$

where

A is the total of all tax in respect of the supply or importation that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is [...]

(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service for consumption, use or supply in the **course of commercial activities of the person**.

**123.(1) “commercial activity”** of a person means

(a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

(b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

“**business**” includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

## **Case Law and Technical Notes**

[5] In *Fedak v. Canada*<sup>1</sup>, Lamarre-Proulx T.C.J. describes subsection 176(1) of the Act as follows:

[11] Subsection 176(1) of the Act provided a notional input tax credit to a registrant who bought used goods from a non-registrant for resale. The person who was entitled to the notional input tax credit was the registrant, not the individual trading in a property. The purpose behind this provision was that an amount of tax originally paid by the trader was part of the price of the traded-in property acquired by the registrant (vendor) and that the registrant was entitled to claim that notional tax as an input tax credit. A supplier was to tax the full amount of a supply when there was a trade-in and then claim a notional input tax credit under section 176 of the Act. There was no requirement in the legislation to pass the value of the trade-in to the recipient. In such a case, the notional input tax credit under subsection 176(1) of the Act is 7/107 of the trade-in value.

[6] The technical notes for subsection 176(1) state (in part):

Technical Notes (May 1990): Paragraph 176(1)(a) applies to the situation where, after 1993, a registrant purchases a used good and no tax is paid on the purchase, e.g., if the good was purchased from a non-registrant or from a registrant who had not used the good primarily in a commercial activity (see subsection 200(3)). Provided that the registrant acquires the used good for use, consumption or supply in the course of the registrant's commercial activities, this subsection treats the registrant as having paid GST, equal to 7/107ths of the purchase price. The registrant may then claim an input tax credit in respect of this amount under the rules in section 169. [...]

Paragraph 176(1)(b) is a transitional provision dealing with used goods supplied to a registrant before 1994. It differs from the rule described in paragraph (1)(a) in that it applies only to those circumstances where used goods are acquired by a registrant for purposes of supply (i.e., to be resold or leased) [and not for use or consumption] in the course of the registrant's commercial activities. As a result, a registrant acquiring used goods before 1994 from a non-registrant for use other than for the purposes of subsequent supply (e.g., if the used good was acquired for use as capital property) is treated as not paying any GST on the goods. Hence, the person is not able to claim an input tax credit in respect of the acquisition.

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<sup>1</sup> [1999] T.C.J. No. 392.



## Conclusion

[7] As set out above, a claim for a NITC requires the Appellant to satisfy paragraph 176(1)(a) and subsection 169(1). Paragraph 176(1)(a) requires that used tangible personal property is supplied tax free, by way of sale and after 1993, to a registrant and that the property is acquired for the purpose of consumption, use or supply in the course of commercial activity. Where these requirements are met, the registrant is deemed to have paid tax on the supply for which the registrant can then claim a NITC. The NITC is claimed pursuant to subsection 169(1) and to the extent that the property was acquired for consumption, use or supply in the course of commercial activities of the registrant. A commercial activity is statutorily defined to require a reasonable expectation of profit. Case law suggests that in addition to the *Act* requirement of finding of a reasonable expectation of profit, other factors ("indicia of commerciality") such as those reviewed in the Supreme Court decision of *Stewart v. Canada*<sup>2</sup>, can assist in determining a commercial activity.

[8] I have concluded that the sale of the Vessel from Skeena to the Appellant and then from the Appellant to Royce was not in the course of the commercial activity of the Appellant. My reasons for reaching this conclusion are as follows:

1. The purpose of the sale of the Vessel was to claim a tax refund<sup>3</sup>.
2. There was no reasonable expectation of profit when Bird's Eye sold the Vessel at less than fair market value to Royce.
3. For each transaction beneficial ownership and control of the Vessel rested with Morgan<sup>4</sup>.

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<sup>2</sup> [2002] 2 S.C.R. 645.

<sup>3</sup> See Paragraph 26 in the Agreed Statement of Facts.

<sup>4</sup> See Paragraph 28 in the Agreed Statement of Facts.

[9] I have also concluded that the penalty that has been assessed is applicable.

[10] The appeal is dismissed, with costs.

Signed at Vancouver, British Columbia, this 20th day of August 2004.

"L.M. Little"

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Little J.

CITATION: 2004TCC536

COURT FILE NO.: 2002-2150(GST)G

STYLE OF CAUSE: *Bird's Eye Cove Marina Ltd. and  
Her Majesty the Queen*

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: June 9, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: August 20, 2004

APPEARANCES:

    Counsel for the Appellant: Richard N. Toews

    Counsel for the Respondent: Patricia Babcock

COUNSEL OF RECORD:

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