Docket: 2004-4698(GST)I

BETWEEN:

LORRAINE McDONELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on April 19, 2005, at Ottawa, Ontario

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Peter Chisholm, Q.C. |
| Counsel for the Respondent: | Rosemary Fincham |

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**JUDGMENT**

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated February 16, 2004 is dismissed in accordance with the reasons for judgment.

Signed at Ottawa, Canada, this 28th day of April 2005.

"D.G.H. Bowman"

Bowman, C.J.

Citation: 2005TCC301
Date: 20050428
Docket: 2004-4698(GST)I

BETWEEN:

LORRAINE McDONELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR JUDGMENT**

Bowman, C.J.

[1] This appeal is from an assessment of Goods and Services Tax (GST) made under the *Excise Tax Act* (*E.T.A.*) whereby the Minister of National Revenue denied a refund of GST remitted by the appellant on behalf of the purchaser of property. Briefly, the question is whether a supplier who erroneously collects GST from a recipient and remits it to the government is entitled to claim a refund of the tax.

[2] The appellant was the owner of a parcel of vacant land of approximately 80 acres. She agreed to sell it to Louis Garth Riley.

[3] The agreement of purchase and sale states the purchase price is $50,000. Clause 7 of the agreement provides:

> 7. **GST:** If this transaction is subject to Goods and Services Tax (G.S.T.), then such tax shall be included in the Purchase Price. If this transaction is

not subject to G.S.T., Vendor agrees to provide on or before closing, a certificate that the transaction is not subject to G.S.T.

[4] The Amended Statement of Adjustments reads as follows:

**AMENDED**
**STATEMENT OF ADJUSTMENTS**

| | |
|---|---|
| **VENDOR:** | Mary Lorraine McDonell |
| **PURCHASERS:** | Louis Garth Riley and Betty Ann Riley |
| **PROPERTY;** | RR#1, St. Andrews West (Township of South Stormont (formerly the Township of Cornwall)) |
| **ADJUSTED AS OF:** | August 17, 2001 |

| | | | |
|---|---|---|---|
| **ADJUSTED SALE PRICE** | | | |
| Sale Price, including GST: | 50,000.00 | | |
| GST calculated at 7.00%: | 3,271.03 | | |
| Credit Vendor: | | | $46,728.97 |
| **DEPOSIT** | | $1,000.00 | |
| **REALTY TAXES** | | | |
| Total 2001 total taxes | 1,367.38 | | |
| Adjustment based on 1/3 the cost of current assessed taxes (estimated portion of lands being transferred): | 455.79 | | |
| Vendor has paid: | 455.79 | | |
| Vendor's share for 228 days: | 284.71 | | |
| Credit Vendor: | | | 171.08 |
| **BALANCE DUE ON CLOSING** payable to McDonald Duncan, in trust or as further directed | | ***$45,900.05*** | |
| | | $46,900.05 | $46,900.05 |

E. & O. E.

[5] The transaction closed and the deed of land that was registered in the registry office shows the consideration to be $46,728.97. The figure set out in the Amended

Statement of Adjustments, i.e. $50,000 less the $3,271.03. The Land Transfer Tax was calculated on the basis of $46,728, not $50,000.

[6] On August 22, 2001, after the transaction closed, the solicitors for the appellant sent a letter to the Summerside Tax Centre in Prince Edward Island stating:

> Enclosed please find the following:
>
> 1. A trust cheque in the amount of $3,271.03 payable to the Receiver General;
> 2. Form 62; and
> 3. Copy of the registered Transfer/Deed of Land.
>
> Please provide us with a receipt for payment of the GST applicable on the sale of this property.

[7] The evidence was that this cheque was drawn on the trust account of the purchaser's solicitors.

[8] It will be obvious that up to this point the appellant's solicitors believed that the sale was subject to GST.

[9] It is conceded by the respondent that this view was erroneous and that the sale of the vacant land was exempt. This conclusion was reached by the appellant's solicitors after a question was raised by the appellant's accountant. This conclusion was confirmed by Canada Customs and Revenue Agency, who sent the appellant's solicitors a GST memorandum confirming that vacant land that has previously been farmed but that was purchased for personal use was exempt from GST.

[10] On December 2, 2003, the solicitor for the appellant wrote to Leo D. Courville, the solicitor for the purchaser, Mr. Riley. He said:

> The above transaction was completed in August, 2001.
>
> CCRA has determined that this transaction is not subject to GST and I am enclosing for your information a copy of a five page fax forwarded from the Ottawa Tax Services Office.
> Ms. Taylor's concern is that the registered transfer, Instrument No. 306138 indicates consideration in the amount of $46,728.97 was paid.

> The offer signed by the parties provided for a purchase price of $50,000.00 inclusive of GST.
>
> The statement of adjustments amended as of August 17, 2001, a copy of which is enclosed, contained an adjusted sale price of $46,728.97 net of the GST calculated at $3,271.03 which was paid directly to the Receiver General.
>
> Before CCRA will rebate the GST to the vendor, it has requested confirmation from the purchaser or his solicitor that $50,000.00 was the total consideration and the vendor is entitled to receive the GST which was paid on the transaction.
>
> Please provide me with your letter confirming, (a) the total consideration was $50,000.00, and (b) the vendor, Lorraine McDonell, is entitled to receive the GST which was paid in the amount of $3,271.03.
>
> I would appreciate your early response as Mrs. McDonell is anxious to complete this matter with CCRA.

[11] Having received no reply he wrote on January 14, 2004 to Mr. Courville and enclosed a draft letter for him to sign. Mr. Courville signed the letter and returned it to the solicitor for the appellant. It read as follows:

> The above transaction was completed August 17, 2001.
>
> The purchase price paid pursuant to the agreement of purchase and sale was $50,000 inclusive of any applicable GST.
>
> The registered transfer Instrument No. 306138 (Stormont) reflects a consideration of $46,728.97 and GST in the amount of $3,271.03 was remitted to the Receiver General by the solicitor for the vendor.
>
> I confirm the vendor is entitled to receive any rebate of the GST paid.

[12] The CCRA refused the rebate claimed by letter dated February 13, 2004, as follows:

> Further to our review of your General Application for rebate of GST/HST, this letter is to confirm that the rebate has been disallowed in full.
>
> We acknowledge that representations were provided to support that the sale of the land would have been exempt of GST pursuant to Schedule V, Part I, Section 9 of the Excise Tax Act. However, we would like to draw your attention to page 7 of the enclosed guide which states “Amounts collected in error – If you collected an amount as or on account of GST/HST that you should not have collected, you

> have to include that amount in the calculation of your net tax. You are not entitled to claim a rebate for amounts you collected as GST/HST in error."

[13] It appears that the refusal of the refund was contained in the notice of assessment dated February 16, 2004, although the notice of assessment was not put in evidence.

[14] A notice of objection was filed. It read:

> **NOTICE OF OBJECTION/STATEMENT OF FACT**
>
> The taxpayer sold vacant land to a purchaser, Louis Garth Riley in August, 2001.
>
> The Agreement of Purchase and Sale provided for a purchase price in the total amount of $50,000.00 inclusive of any applicable GST.
>
> On completion of the transaction, the vendor taxpayer delivered to the purchaser a Transfer/Deed of Land indicating a consideration of $46,728.97 and remitted GST in the amount of $3,279.03. The Transfer/Deed was registered in the Land Registry Office for the County of Stormont as Instrument No. 306138.
>
> The Taxpayer claimed a rebate of the GST paid on the sale of personal use land by reason of GST/HST Memoranda Series 19.5 "Land and Associated Real Property" as supplied by CCRA on November 28, 2003.
>
> The purchaser of the land, through his solicitor, provided correspondence to CCRA dated January 14, 2004 confirming the vendor was the proper party entitled to receive any rebate of the GST paid.
>
> CCRA by correspondence dated February 13, 2004 disallowed the application for rebate of GST stating the taxpayer was not entitled to claim a rebate for amounts collected as GST in error.
>
> The taxpayer did not collect GST in error. Under the terms of the Agreement of Purchase and Sale the taxpayer was and is entitled to receive $50,000.00 from the purchaser. The taxpayer made a self-assessment of GST and paid $3,271.03 to CCRA. The tax should not have been paid.

[15] The CCRA confirmed the assessment. The notice of decision reads in part as follows:

> The *Minister of National Revenue* has carefully reconsidered the assessment with reference to the information and reasons set forth in your notice of objection and renders the following decision.
>
> Your objection is disallowed and the assessment is confirmed.
>
> Your representation is that GST on the sale of land was submitted in error. It has been acknowledged that GST should not have been charged on the sale of real property. However, a rebate under Section 261(1) is available to the payer. The purchaser paid the amount and is eligible for the rebate. As you collected GST on the transaction you were obligated to remit it.

[16] The reporting letter to the appellant from her solicitors contains the following statements:

> **AGREEMENT OF PURCHASE AND SALE**
>
> This transaction was completed in accordance with the Agreement of Purchase and Sale executed by you and the purchasers. The sale price was $46,728.97 with $1,000.00 being paid as a deposit and the balance payable to you by certified cheque on closing subject to adjustments.
>
> **STATEMENT OF ADJUSTMENTS**
>
> . . .
>
> The sale price which, pursuant to the Agreement of Purchase and Sale was $50,000.00 inclusive of GST, was adjusted so that you, as vendor, received credit with the sum of $46,728.97, being the net sale price after deducting the GST component. The purchaser was credited with the deposit monies of $1,000.00.

[17] In her return of income, prepared by a tax preparer, the appellant showed the proceeds of disposition of the land as $46,728.97.

[18] On the basis of these facts the appellant, through her counsel, claims that she is entitled to the refund of GST paid in error. The Crown recognizes that the tax was paid in error but says that since it was paid by the purchaser, (although the cheque drawn on the purchaser's solicitor's trust account was remitted by the appellant's solicitors to CCRA) only the purchaser can claim it back. The purchaser has shown no inclination to do so and in any event it is probably now too late.

[19] One thing is clear: the Minister is the last person who should be trying to hang onto the money. If the only criterion were fairness, obviously the money should go back to the appellant. If the money were refunded to the purchaser he would have an obligation to pay it to the appellant. However, we all know what is said about the absence of equity in a taxing statute. If it means that a judge's sense of fairness cannot override the clear words of a statute, I agree with the statement. If it means that, where there are two possible interpretations, the Court cannot adopt a construction of the statute that is consistent with fairness as opposed to one that is not, I do not agree with it.

[20] I start from the premise that the right of a taxpayer to obtain a refund of GST must, at least so far as this Court's jurisdiction is concerned, be found within the confines of the *E.T.A.* which contains a complete code. Section 261 of the *E.T.A.* reads:

> **261. (1) Rebate of payment made in error —** 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.
>
> **(2) Restriction —** 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;
> (b) the amount paid was tax, net tax, penalty, interest or any other amount assessed under section 296; or
>
> (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).
>
> **(3) Application for rebate —** 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.
>
> **(4) One application per month —** Subject to subsections (5) and (6), not more

than one application for a rebate under this section may be made by a person in any calendar month.

**(5) Application by branches and divisions —** Where a person who is entitled to a rebate under this section is engaged in one or more activities in separate branches or divisions and is authorized under subsection 239(2) to file separate returns under Division V in relation to a branch or division,

(a) the person may file separate applications under this section in respect of the branch or division; and
(b) not more than one application for a rebate under this section in respect of the branch or division may be made by the person in any calendar month.

**(6) Application of s. 239 —** Where a person who has not made an application under section 239 is entitled to a rebate under this section and is engaged in one or more activities in separate branches or divisions,

(a) section 239 applies to the person as if the references therein to "commercial activities" were references to "activities", as if the references therein to "returns under this Division" and "returns" were references to "application under section 261" and as if the references therein to "registrant" were references to "person"; and

(b) where, because of this subsection, the person is authorized under section 239 to file separate applications for rebates under this section in relation to a branch or division, nor more than one application for a rebate under this section in respect of the branch or division may be made by the person in any calendar month.

[21] I do not think that a supplier who has collected GST in error from a purchaser and who has remitted it to the government is a person who has "paid an amount as or on account of as that was taken into account as tax..." The purchaser is the person who has paid the tax, rightly or wrongly, and the supplier has simply remitted it. This strikes me as the plain meaning of the words in subsection 261(1).

[22] The cases are not entirely consistent on this point. The appellant relies on a decision of this Court in *R. Mullen Construction Ltd. v. Canada*, 1997 G.S.T.C. 106. There, the vendor of a house paid GST on the sale in which the purchase price was said to include GST.

[23] The judgment reads in part as follows:

> [3] The agreement of purchase and sale between the Appellant as vendor and Jacques and Deanna LaPierre as purchasers is Exhibit A-1. It is difficult to determine from Exhibit A-1 whether the parties expected GST to apply to their transaction because of two conflicting conditions which appear as paragraphs 1(a) and 1(h) on the second page of Exhibit A-1:
>
> > 1(a) Balance of the purchase price, subject to usual adjustments, to be paid to the Vendor on date of closing. Purchase price to include GST.
> > 1(h) If this transaction is subject to GST imposed by Part IX of the *Excise Tax Act* R.S.C. 1985, c. E-15, then such GST shall be in addition to and not included in the purchase price, and GST shall be collected and remitted in accordance with applicable legislation. If this transaction is not subject to GST, the vendor agrees to provide on or before the closing to the purchaser or purchaser's solicitor a certificate, in a form reasonably satisfactory to the purchaser or purchaser's solicitor, certifying that the transaction is not subject to GST.
>
> [4] Mr. David Melnick, the Appellant's lawyer in the sale transaction, testified at the hearing and stated that both he and the solicitor representing the purchasers were of the view that condition 1(a) applied and the purchase price of $101,900 included GST. He also stated that this was the view most favourable to the purchaser, as opposed to condition 1(h). The statement of adjustments and accompanying trust statement for the closing of the sale are together in Exhibit A-2. The statement of adjustments accounts for the transaction as follows:

STATEMENT OF ADJUSTMENTS

| | | |
|---|---|---|
| CREDITS TO VENDOR | | |
| PURCHASE PRICE | $95,233.64 | |
| TAXES PAID IN ADVANCE | | |
| FUEL OIL ADJUSTMENT | | |
| GST | $ 6,666.36 | |
| TOTAL COSTS TO PURCHASER | | $101,900.00 |
| CREDITS TO PURCHASER | | |
| DEPOSIT | $ 3,000.00 | |
| VENDOR'S PORTION OF CURRENT | | |

| | | |
|---|---|---|
| TAXES CALCULATED AS: | | |
| TAXES IN ARREARS | | |
| INTEREST ON O/S TAXES | | |
| TAX CERTIFICATE | $ 40.00 | |
| MORTGAGE PAYOUT | | |
| RECORDING RELEASE(S) | $ 42.00 | |
| TOTAL CREDITS TO PURCHASER | | $ 3,082.00 |
| | | |
| BALANCE REQUIRED TO COMPLETE TRANSACTION | | $ 98,818.00 |

. . . . .

> [5] The statement of adjustments, viewed alone, indicates that GST was payable on the sale and that the amount of GST was $6,666.36. There is a conflict, however, between Exhibit A-1 (agreement of purchase and sale) and Exhibit A-2 (statement of adjustments) because Exhibit A-1 identified $101,900 as the purchase price whereas Exhibit A-2 identified $95,233.64 as the purchase price. There is no evidence that the vendor, the purchasers or the real estate agents had any knowledge of the notional purchase price of $95,233.64 shown in Exhibit A-2. I am satisfied from Exhibit A-1 and the oral testimony of Mr. Melnick and Randy Mullen that the amount of $95,233.64 was never in the minds of the vendor and purchasers when they signed Exhibit A-1. They were looking only at the agreed price of $101,900. If they really thought that condition 1(a) applied and condition 1(h) did not, then the agreed price of $101,900 was the maximum amount which the purchasers would be required to pay, and the vendor would pay any tax out of the proceeds of sale. The amount of $101,900 may have been the fair market value of 35 Armcrest Drive in the spring of 1992.

[24] Justice Mogan allowed the appeal. He referred first to section 232. I need not deal with that section. As Mogan J. said, in paragraph 19 of his reasons, “Section 232 is primarily concerned with one person who has collected excess tax from another person. Section 261 is primarily concerned with a person who has paid excess tax to the Minister”. After quoting subsection 261(1), Mogan J. went on to say:

> The Appellant and the Respondent are in agreement that, on the sale to LaPierre in June 1992, an amount of $6,666.36 was paid to the Minister as or on account of tax; and they further agree that no tax was payable with respect to that sale. The Respondent argues that any amount paid as tax by mistake within the meaning of section 261 was paid by Jacques and Deanna LaPierre. The Respondent relies on the statement of adjustments (Exhibit A-2). The Appellant argues that any such amount was paid by the Appellant and relies on the fair market value of 35 Armcrest in June 1992 as being $101,900, an amount which the purchasers were required to pay regardless of whether GST applied or not. I accept the Appellant's argument and reject the Respondent's argument. In my opinion, the amount of

> $6,666.36 in Exhibit A-2 was a figment of the imagination of the vendor's lawyer in drafting the statement of adjustments. A sale price of $95,233.64 was never in the mind of the vendor Appellant or the purchasers (Jacques and Deanna LaPierre). Their agreed price of $101,900 was fair market value. The vendor, through its lawyer, made a mistake in drafting the statement of adjustments and breaking out a notional sale price of $95,233.64 and a mistaken tax amount of $6,666.36. The purchasers paid what they agreed to pay ($101,900) when they closed the transaction on June 12, 1992 without regard to whether the vendor (Appellant) may or may not have been required to pay some amount as GST. I find that the Appellant paid an amount as tax by mistake within the meaning of section 261.
>
> [20] No argument was made that any provision in subsections (2) and (3) of section 261 would prevent the payment of a rebate by the Minister. Accordingly, I will order that the Minister pay a rebate of the amount of $6,666.36 to the Appellant

[25] The conclusion reached by Justice Mogan appears to have been based on a finding of fact that “the amount of $6,666.36 in Exhibit A-2 was a figment of the imagination of the vendor’s lawyer in drafting the statement of adjustments.”

[26] Whether or not I agree with the principle of law on which the judgment is based, the factual premise of the conclusion is sufficient to distinguish the case from this one.

[27] In this case the amount of GST mentioned in the statement of adjustments and paid to the government was not a figment of anybody’s imagination. It may have been based on a misapprehension of the law but this does not detract from its reality.

[28] Mr. David Sherman, in an editorial comment, criticizes the conclusion as “antithetical to the entire scheme of the legislation”. Mr. Sherman also criticizes certain *obiter dicta* in *GKO Engineering (a Partnership) v. The Queen*, [2000] G.S.T.C. 29, in which Rowe, D.J. dismissed an appeal because the wrong person applied for the rebate, given that GST had been collected by a corporation, not the appellant partnership. Nonetheless he observed:

> Counsel for the respondent submitted - at one point - that section 261 of the Act would not apply to the appellant because the appellant was never "a person who paid an amount" of tax to the Minister. This proposition flies in the face of the plain wording of the provision which refers to an amount that was paid on account of tax that was "remittable" by the person and the Minister's own decision (re: assessment

> 833427) at page 2 - paragraph 4 - that defined net tax as "all amounts collectible or collected as tax or on account of tax by the person during the period". I fail to see how the Minister could insist that section 232 of the Act is the only manner by which an adjustment could be made. If there is no continuing relationship between the parties how can adjustments be made by means of debit or credit notes? It seems to me that a customer who is not a GST registrant must be able to use the provisions of subsection 261(1) in order to recover money paid as tax which - under the circumstances - was not actually "payable" by that person and, further, in paying money - as GST - that was not due, therefore, the amount was not then "remittable" by the person collecting the tax."

[29] This statement seems to imply that a supplier who collects tax in error from a purchaser and remits it to the government can obtain a refund under section 261.

[30] In *Battista v. The Queen*, [2000] G.S.T.C., Rowe D.J. allowed a dentist who had erroneously collected GST from an associate dentist to claim a refund. Mr. Sherman's editorial comment on this case is also critical of the judgment.

[31] We have then two conflicting approaches: One says the recipient of a supply from whom GST is collected in error by the supplier is the person who "paid" the GST and is therefore the only person who can claim a refund.

[32] The other says that if a supplier mistakenly collects GST and pays it to the government, the supplier can claim a refund under section 261. This view is, I think, based on the words in subsection 261(1)

> "where the amount was not payable or remittable by the person..."

[33] The argument is that while the recipient of a service must pay the GST the supplier has the obligation to remit the tax collected. I agree that recipients of a supply do not remit, they pay, whereas suppliers remit.

[34] Once a supplier collects an amount as GST, the supplier has an obligation to remit it even though it was collected in error. Therefore, it cannot be said that GST mistakenly collected from a recipient is not remittable by the supplier.

[35] I do not think that it is necessary in this case to decide whether there can never be circumstances in which a supplier could successfully assert a claim for a refund of tax under section 261. It is sufficient to say that in my view where a supplier collects an amount as GST from a recipient of a supply in circumstances in which GST was not exigible and remits it to the government (as it must: see *ITA*

*Travel Agency Ltd. v. Canada*, [2000] G.S.T.C. 5) it is the recipient, not the supplier who is entitled to claim the refund under section 261. I do not intend these reasons to be taken as saying that a supplier can never claim a refund under section 261. At least two situations occur to me where a claim by a supplier might be considered:

(a) where a supplier does not collect GST from a recipient in respect of an exempt or zero-rated supply and then, erroneously, remits from its own funds an amount as GST to the government.

(b) where a supplier collects, rightly or wrongly, GST from a recipient and then by mistake remits to the government more than was collected.

[36] I need not answer the questions raised by these two hypothetical situations but I do not think that for the supplier to be entitled to claim a refund of the amount paid under example (a) or the excess over the amount collected under example (b) does violence to either the scheme of the *Act* or the wording of section 261.
[37] That is not however the situation that we have here.

[38] Although I am not particularly pleased with the result that I am compelled to arrive at here, the law is in my view clear.

[39] The appeal is dismissed.

Signed at Ottawa, Canada, this 28th day of April 2005.

"D.G.H. Bowman"

Bowman, C.J.

| | |
|---|---|
| CITATION: | 2005TCC301 |
| COURT FILE NO.: | 2004-4698(GST)I |
| STYLE OF CAUSE: | Lorraine McDonell and<br>Her Majesty the Queen |
| PLACE OF HEARING: | Ottawa, Ontario |
| DATE OF HEARING: | April 19, 2005 |
| REASONS FOR JUDGEMENT BY: | D.G.H. Bowman, Chief Justice |
| DATE OF JUDGMENT: | April 28, 2005 |

APPEARANCES:

| | |
|---|---|
| Counsel for the Appellant:: | Peter Chisholm, Q.C. |
| Counsel for the Respondent: | Rosemary Fincham |

COUNSEL OF RECORD:

For the :

Name:

Firm:

| | |
|---|---|
| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Ontario |