Docket: 2004-3065(GST)I

BETWEEN:

ÉVASION HORS PISTE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 11, 2006, at Sherbrooke, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Michel Joncas
Counsel for the Respondent:	Michel Morel

JUDGMENT

The appeal from the assessment under the *Excise Tax Act* for the period from September 1, 2001, to February 28, 2003, notice of which bears the number 22190 and is dated January 21, 2004, is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that a total of $910 in GST must be excluded from the taxable supplies covered by the assessment, in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 1st day of September 2006.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of July 2007
Monica F. Chamberlain, Reviser

Citation: 2006TCC477
Date: 20060901
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REASONS FOR JUDGMENT

Archambault J.

[1] This is an appeal from an assessment of Goods and Services Tax (GST) under the *Excise Tax Act* (ETA) for the period from September 1, 2001, to February 28, 2003 ("the relevant period"). In his assessment of January 21, 2004, the Minister of National Revenue ("the Minister") increased the net tax payable by Évasion Hors Piste Inc. ("EHP") by $35,397.88, plus $788.01 in interest and $1,965.13 in penalties. The issue involves supplies made in Canada to customers of EHP who reside in the United States.

Facts

[2] The parties agree on the relevant facts of this appeal. EHP operates a business that sells off-road vehicles, including snowmobiles and motorcycles. The business is located in St-Élie d'Orford, roughly 50 km from the Canada-U.S. border. During the relevant period, EHP sold 61 vehicles to persons who reside in the United States, but it neglected to collect $35,397.88 in GST. In his testimony, Yanick Le Clerc, EHP's chief executive officer during the relevant period, confirmed that the vehicles in question were transferred to U.S. residents at his place of business.

[3] Before making these sales to the U.S. residents, Mr. Le Clerc contacted the Ministère du Revenu du Québec (MRQ), the Minister's agent, for information about the procedure for exporting off-road vehicles on a GST-exempt basis. The MRQ apparently confirmed that no GST was payable if the goods in question were exported to the United States. Mr. Le Clerc described the procedure that EHP followed in order to export its goods to the United States. The American customer would go to EHP's place of business and pay by cheque or money order, and a representative of EHP would transport the vehicle to the border and cross it, having obtained a Form E 15, "Certificate of Destruction/Exportation", bearing the statement "exported under customs supervision" (Exhibit A-4) and stating the vehicle's serial number. The Minister did not assess GST on the vehicles exported under these circumstances.

[4] EHP later changed this method based on a proposal by Norman G. Jensen, Inc. ("Jensen"), an American customs brokerage company. Jensen offered to fill out all the necessary export paperwork. Mr. Le Clerc described the new procedure as follows. The U.S. resident went to EHP's place of business and signed a form entitled "Proforma Invoice" bearing Jensen's business name and a description of the off-road vehicle, including its serial number. EHP was described on the form as "Exporter, Shipper, Seller" and the U.S. customer was described as "Buyer (if other than consignee)." The U.S. customer signed a portion of the document entitled "Carrier's Certificate":

> To the district director of customs, port of arrival
>
> The undersigned carrier to whom or upon whose order the articles described above must be released hereby certifies that **Norman G. Jensen, Inc.** is the owner or consignee of such articles within the purview of section 484(H), Tariff Act of 1930. I certify that this manifest is correct and true to the best of my knowledge.

[5] Attached to this "Proforma Invoice" was a "Certificate of Origin", a form issued by the Department of the Treasury, United States Customs Service. The form identified EHP as the "Exporter" and also contained the serial number of the recreational vehicle. The certificate was signed by an EHP representative.[1]

[6] Lastly, in addition to the "Proforma Invoice" signed by the recipient of the off-road vehicle, there was the contract of sale between EHP and the recipient, bearing the usual information, including the vehicle's serial number and the terms

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[1] The certificate forming part of Exhibit A-1 is Mr. Le Clerc's.

of payment. The U.S. resident left with the vehicle, which had been delivered to EHP's place of business.

[7] Afterwards, Jensen mailed a copy of the "Proforma Invoice" and "Certificate of Origin" along with another U.S. Customs Service document entitled "Entry Summary", on which EHP is identified as the importer of record, Canada is identified as the exporting country, and the U.S. resident is identified as the "ultimate consignee". As far as Mr. Le Clerc is concerned, the entry summary was proof that his off-road vehicle was being exported. Counsel for the Respondent acknowledged that the document establishes that the vehicle that EHP transferred to the American customer at EHP's place of business was exported to the United States. The last document, another U.S. Customs Service form, entitled "Customs Bond", identifies the "principal" as EHP, represented by Jensen, and provides the name of the insurance company. It is not possible, based on the evidence, to ascertain why such a bond was obtained. It should also be added that Jensen billed EHP for its brokerage services, as shown by Exhibit A-2.

[8] Mr. Le Clerc confirmed that he verified with a competitor in his area that this new procedure was an adequate way to export a product without being subject to GST. In addition, he contacted the MRQ's customer inquiries department, which allegedly confirmed that it would be sufficient if the papers proved the item was exported. This new procedure was attractive to EHP because its gross profit margin on the sale of off-road vehicles was very small and the procedure would save it the cost of transporting the vehicle from its establishment to the U.S. border.

[9] On cross-examination, Mr. Le Clerc acknowledged that Jensen never had physical possession of the off-road vehicles. Jensen merely mailed or faxed him the documents referred to above. In addition, Mr. Le Clerc acknowledged that he did not show the Minister these documents when he contacted the MRQ to verify whether they were sufficient to relieve him of the obligation to collect GST.

Analysis

[10] The Minister's assessment is based on paragraph 142(1)(*a*) of the ETA, which provides:

General rule — in Canada

142(1) For the purposes of this Part, subject to sections 143, 144 and 179, a supply shall be deemed to be made in Canada if

(*a*) in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available in Canada to the recipient of the supply;

[Emphasis added.]

[11] Part V of Schedule VI of the ETA, which defines zero-rated supplies — and, notably, sections 1 and 12 of that Part — did not apply to the supplies covered by the assessment either, with the exception of two sales to merchants. Sections 1 and 12 provide:

1. [Goods purchased for immediate export] A supply of tangible personal property (other than an excisable good) made by a person to a recipient (other than a consumer) who intends to export the property where

. . .

(*b*) the recipient exports the property as soon after the property is delivered by the person to the recipient as is reasonable having regard to the circumstances surrounding the exportation and, where applicable, to the normal business practice of the recipient;

(*c*) the property is not acquired by the recipient for consumption, use or supply in Canada before the exportation of the property by the recipient;

(*d*) after the supply is made and before the recipient exports the property, the property is not further processed, transformed or altered in Canada except to the extent reasonably necessary or incidental to its transportation;

(*e*) the person maintains evidence satisfactory to the Minister of the exportation of the property by the recipient.

12. [Goods for delivery outside Canada] A supply of tangible personal property (other than a continuous transmission commodity that is being transported by means of a wire, pipeline or other conduit) if the supplier

(*a*) ships the property to a destination outside Canada that is specified in the contract for carriage of the property;

(*b*) transfers possession of the property to a common carrier or consignee that has been retained, to ship the property to a destination outside Canada, by
(i) the supplier on behalf of the recipient, or
(ii) the recipient's employer, or

(*c*) sends the property by mail or courier to an address outside Canada.

[Emphasis added.]

[12] Since the off-road vehicles were remitted to consumers at EHP's place of business and were not shipped to the United States or transferred to a "common carrier or consignee . . . retained to ship the property to a destination outside Canada by . . . the supplier on behalf of the recipient", the sales were deemed to have been made in Canada, and the supplies of the vehicles were not zero-rated. However, the Respondent acknowledged that the two of the assessed supplies were made to merchants, and that the corresponding amounts should therefore have been excluded from the assessment. The supplies in question are a supply for $490 made on September 11, 2001, to Jeff Manning, and a supply for $420 to Claude Cotnoir.

[13] In his oral argument, counsel for EHP acknowledged that there was no provision of the ETA based on which he could contest the Minister's assessment. He submits that the assessment should be cancelled because EHP was acting in good faith, and had checked with the MRQ to see whether its approach was sufficient to relieve it of the obligation to collect the GST, and because the vehicles really were exported. In support of his argument, counsel for EHP cited the decision of the Supreme Court of Canada in *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] S.C.J. No. 12 (QL). There, the Supreme Court held that the defence of officially induced error was a valid defence against penalty for a provincial offence. The city of Lévis had charged someone for driving a vehicle without having paid the applicable registration fees, contrary to section 31.1 of the *Highway Safety Code*, R.S.Q., c. C-24-2.

[14] In my opinion, the *Lévis* decision provides no justification for setting aside the Minister's assessment. The case at bar is governed by administrative law, not penal or criminal law. It involves an assessment of taxes, to which interest, and

penalties computed like interest, are added in accordance with subsection 280(1) of the ETA.[2]

[15] In *Lévis (City)*, LeBel J. recognized that the "defence of officially induced error" can be a valid "exception to the rule that ignorance of the law cannot excuse the commission of [an] . . . offence" for, otherwise, "regardless of whether it involves strict liability or absolute liability offences, the fundamental fairness of the criminal process would appear to be compromised." (See paragraphs 20 *et seq*. of the decision). As Robertson J.A. wrote in *Canada (Attorney General) v. Consolidated Canadian Contractors Inc.*, [1999] 1 F.C. 209, 98 G.T.C. 6303 (F.C.A.) upon accepting, at para. 33, the due diligence defence to the penalty under paragraph 280(1)(*a*) of the ETA, "the judicial value being challenged is the general right of persons not to be punished without fault, which is consistent with the common law principle that there should be no liability without fault." Lastly, as Robertson J.A. added, at paragraph 58:

> . . . I am of the view that the application of criminal law concepts in the present context is inappropriate. . . . [The] registrants are not seeking to plead mistake of law as a defence to payment of GST that they failed to collect and remit. That registrants remain liable for any underpayment and restitutionary interest has never been questioned. Indeed, the Act provides that registrants have the right to recover any amounts that should have been collected from those responsible for its payment. It is only the 6% automatic penalty that registrants find objectionable.

[16] The submissions made by counsel for EHP did not distinguish between the taxes and the penalty, perhaps because the GST liability amounts to $35,397.88 and the penalty is only $1,965.13. Even if the criminal law "defence of induced error" can also be applied against the imposition of the penalty under

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[2] Subsection 280(1) provides:

> 280. (1) [Penalty and interest] Subject to this section and section 281, where a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay on the amount not remitted or paid
>
> (*a*) a penalty of 6% per year, and
> (*b*) interest at the prescribed rate,
>
> 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.
>
> [Emphasis added.]

paragraph 280(1)(*a*) of the ETA[3], the conditions precedent to its application, which are set out in *Lévis (City)*, are not met in the instant case. Here is what Le Bel J. wrote about these conditions at paragraphs 26-27:

> 26 After his analysis of the case law, Lamer C.J. defined the constituent elements of the defence and the conditions under which it will be available. In his view, the accused must prove six elements:
>
> (1) that an error of law or of mixed law and fact was made;
> (2) that the person who committed the act considered the legal consequences of his or her actions;
> (3) that the advice obtained came from an appropriate official;
> (4) that the advice was reasonable;
> (5) that the advice was erroneous;
> (6) that the person relied on the advice in committing the act.
>
> (*Jorgensen*, at paras. 28–35).
>
> 27 Although the Court did not rule on this issue in *Jorgensen*, I believe that this analytical framework has become established. . . . The Attorney General of Canada's concerns relate more to the need to demonstrate that the advice was reasonable and that the accused relied on it. It should be noted, as the Ontario Court of Appeal has done, that it is necessary to establish the objective reasonableness not only of the advice, but also of the reliance on the advice (*R. v. Cancoil Thermal Corp*. (1986), 27 C.C.C. (3d) 295; *Cranbrook Swine*). Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion (*Cancoil Thermal*, at p. 303). It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused.
>
> [Emphasis added.]

[17] First of all, EHP adduced insufficient evidence with respect to the role of the unnamed MRQ representative and the error that he may have induced EHP to

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[3] One possible argument against the imposition of such a penalty is that the Minister has the power to cancel penalties under subsection 281.1(2) of the ETA where, *inter alia*, the penalties were "incurred primarily because of the actions of the Department. For example: . . . (*c*) incorrect written information provided in an interpretation or notice given to a specific person by the Department": paragraph 7(c) of GST Memorandum 500-3-2-1 of March 14, 1994. (See the reasons of Robertson J.A. in *Consolidated Canadian Contractors Inc.*, *supra*, at paras. 51 *et seq*.)

commit when he answered the questions asked by Mr. Le Clerc over the telephone. The evidence did not disclose the questions that he was asked or the precise factual background on which those questions were based. If Mr. Le Clerc did not provide the MRQ with all the relevant facts, this could explain why he did not get the right answer. For example, it is not known whether Mr. Le Clerc told the MRQ that his customers included both merchants and consumers, or whether he revealed that the vehicles were delivered to the consumers in question at his place of business and that those consumers then transported the vehicles themselves.

[18] In addition, it is my opinion that EHP acted quite carelessly in limiting its inquiry to a telephone call. The evidentiary problems that it faced in relation to that call are a good illustration of this. The fact that the American customs broker merely provided EHP with Treasury Department forms should have set off the alarm bells. At least one of the following two additional efforts should have been undertaken. First of all, EHP should have submitted a technical interpretation request to the Minister in writing, specifically describing the procedure that it intended to follow in order to export its vehicles to the United States. Under such circumstances, it would have been easier to find out precisely whether or not the MRQ officer made an interpretation error capable of inducing the failure to collect the GST. Secondly, it would have been more prudent of EHP to obtain an opinion from its legal counsel with respect to the application of the ETA. As one can see, ultimately, the wording of paragraph 142(1)(*a*) of the ETA, and sections 1 and 12 of Part V of Schedule VI of that statute, is clear enough to show that the procedure followed by EHP did not enable it to refrain from collecting GST.

[19] Counsel for EHP did not plead the defence of due diligence in relation to the penalty under paragraph 280(1)(*a*) of the ETA, and it is clear that the defence is unavailable in the case at bar. Here is what Bowman T.C.J. (as he then was) wrote in *Stafford, Stafford and Jakeman v. Canada*, [1995] T.C.J. No. 89, at paragraph 15, [1995] G.S.T.C. 7, at 7-4:

> . . . Due diligence involves more than merely accepting, without more, some oral advice that an assessor with the Department of National Revenue may have given them.
>
> [Emphasis added.]

The same judge also held as follows in *Wong v. Canada*, [1996] T.C.J. No. 1237 (QL), at paragraph 24, [1996] G.S.T.C. 73, at 73-5:

> . . . Due diligence is nothing more than the degree care that a reasonable person would take to ensure compliance with the Act. It does not require perfection or

> infallibility. It does, however, require more than a casual inquiry of an official in the Tax Department. I have great sympathy for taxpayers struggling with a complex and difficult statute, particularly in the early years. But the words in the penalty section cannot be ignored completely. I do not think that a defence of due diligence has been made, although I accept that Mr. Wong acted honestly and in good faith.
>
> [Emphasis added.]

In my opinion, these remarks also apply to EHP's efforts.

[20] In conclusion, EHP has not succeeded in showing that the Minister's assessment was erroneous, except in relation to the sales to the two merchants. Accordingly, EHP's appeal must be allowed and the assessment referred back to the Minister for reconsideration and reassessment on the basis that a total of $910 in GST must be excluded from the taxable supplies covered by the assessment.

[21] While the Minister's assessment is consistent with the letter of the ETA, I cannot help but note that it does not conform to its spirit. It is clear from the provisions of the ETA that tangible personal property exported outside Canada should not be subject to GST. In fact, this reflects one of the major reasons for replacing the old federal sales tax with the GST: to make Canadian goods more competitive in the global marketplace. Since both the auditor and counsel for the Respondent acknowledge that some of EHP's vehicles were truly exported to the United States but that the proper procedure was not followed, EHP is being penalized by having to pay a tax that would not have had to be collected if EHP had followed the correct procedure. Consequently, I strongly recommend that the Minister exercise his power under subsection 23(2) of the *Financial Administration Act* and issue a remission order reimbursing EHP for the GST, interest and penalty for which it was assessed, but — and this is obvious — only to the extent that he is satisfied that the vehicles were actually exported to the United States. If the Minister does not take this measure, a grave injustice will be done to EHP, which is unable to force its U.S. customers to pay it the GST that they should have paid it in its capacity as agent for the Minister. Indeed, the American courts refuse to allow foreign countries to enforce tax debts in the United States, and this should be one more reason for the Minister to remedy this injustice.

Signed at Montréal, Quebec, this 1st day of September 2006.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of July 2007
Monica F. Chamberlain, Reviser

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