

Docket: 2006-2304(GST)I

BETWEEN:

SLM DIRECT MARKETING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on May 29, 2007, at Calgary, Alberta.

Before: The Honourable Gerald J. Rip, Associate Chief Justice

Appearances:

Agent for the Appellant: Robin Shorn  
Counsel for the Respondent: Daniel Segal

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**AMENDED JUDGMENT**

This Judgment is issued in substitution for the Judgment signed on August 23, 2007.

The appeal from the assessment made under Part IX of the *Excise Tax Act* for the period April 1, 2002 to September 30, 2004, inclusive, is allowed **without costs** and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant was agent of its clients when it purchased postage for destinations outside Canada.

Signed at Ottawa, Canada, this 17th day of December 2007.

"Gerald J. Rip"

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Rip A.C.J.

Citation: 2007TCC415  
Date: 20071217  
Docket: 2006-2304(GST)I

BETWEEN:

SLM DIRECT MARKETING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **AMENDED REASONS FOR JUDGMENT**

Rip, A.C.J.

[1] SLM Direct Marketing Ltd. has appealed from an assessment under Part IX of the *Excise Tax Act* ("*ETA*") pertaining to the period April 1, 2002 to September 30, 2004, inclusive, in which the Minister of National Revenue ("Minister") assessed the appellant on the basis that its costs of postage (or mailing costs) to destinations outside of Canada were inputs to resupplies of a service to various clients, that the resupplies were taxable supplies and Goods and Services Tax ("GST") is applicable on the entire resupply.

Facts

[2] SLM describes itself as a service company. It provides bulk mail processing including data base management, printing, folding, envelope insertions and tabbing. SLM distributes client's products such as letters and annual reports for a fee. SLM will address envelopes, fold material, laser client's letters and material, insert the material into envelopes and packages and finally deliver it for acceptance to a carrier such as Canada Post, the United States Postal Service ("USPS") or a "remailer" for delivery to its ultimate destination. "Usually", said Mr. Robin Shorn, General Manager of SLM, "this is where [our] responsibility ends". It is the client's

choice whether to send material for destination outside Canada by Canada Post, the USPS or through a remail provider.

[3] An example of a service provided by SLM for a client who is a public corporation sending its annual report to shareholders in Canada and the United States is the following: SLM, among other things, addresses the envelopes, inserts the annual report into the envelope, sorts the mailing based on names and addresses as required by Canada Post, essentially saving Canada Post from sorting the mailing, and delivers the mailing to Canada Post and USPS depots for mailing.

[4] Where mail is to be delivered outside of Canada, SLM may pay the cost of mailing to Canada Post, the USPS or a remailer and in its invoice to the client includes the postage it paid as a reimbursement charge.<sup>1</sup> Or, the client may have provided in advance SLM with money to pay for the postage or provide SLM with a cheque payable to the USPS. SLM did not charge GST to the client for mailings outside of Canada. SLM does charge GST on mailings to destinations within Canada. The Minister has assessed SLM on its failure to charge GST for postage it paid for the clients to Canada Post, the USPS and the remailers and for which it was reimbursed. SLM's position is that it does not mail any material or pay postage for mailings on its own account but, rather, for the account of its clients; SLM is the agent of the client.

[5] Mr. Shorn stated that most of SLM's larger clients prefer to mail the material themselves. In such a situation SLM prepares the material for delivery but the larger client is billed directly by Canada Post.

[6] Also, SLM prepares material for mailing by the USPS in situations where the client may want to show the recipient of the material that the mail originates in the United States. Also, the USPS may charge less than Canada Post. In these circumstances the client pays the cost of mailing to the USPS, which could be paid directly by cheque to the USPS or to SLM as a deposit. If the client provided a cheque payable to the USPS, there is no reference to the payment on SLM's invoice to the client. Or, SLM may pay the cost of mailing and mail the material and enter the cost on its invoice to the client. In the former, no GST is payable, in the latter, according to the Minister, GST is payable. It appears that the Minister is

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<sup>1</sup> The main difference between using Canada Post or the USPS as opposed to a remailer is that the remailer collects the mailing from SLM's own facilities. SLM does not deliver to a depot. Usually the remailer bills the client directly. Mr. Shorn stated SLM has an account with the remailer it normally uses but he has not seen it used since he joined SLM earlier this year.

of the view that if SLM enters the cost of postage on an invoice, then GST is payable. Absent the charge on the invoice, there is no GST. Whether it invoices the client or not, SLM is performing the same task. The same situation is present when SLM arranges postage and mailing with Canada Post.

[7] Mr. Shorn declared that Canada Post will not mail material unless the client has an account with Canada Post even if the material is mailed by, and paid for, by SLM. Mr. Shorn produced a Canada Post "Int'l/U.S.A. Incentive Letter – post Statement of Mailing". This statement is provided to Canada Post by the mailer, in this case, SLM, and describes the service paid for, the number of pieces of mail being mailed, the weight of the mailing and the various prices and total costs. The statement includes both the appellant's Canada Post account number and the client's account number. SLM is identified as the customer who mailed the material and the client is identified as the person on whose behalf the material is mailed. The Statement also indicates the customer paying for the postage, in this case, SLM.

[8] In cross-examination Mr. Shorn explained that SLM charges for addressing envelopes, sortation and other services separately from mailing costs. An invoice from SLM, for example, shows charges for each of collating, inserting, sealing, delivery to postal depot and payment for postage. SLM does not charge a fee to the client for mailing costs it pays to Canada Post, the USPS or a remailer; SLM only seeks reimbursement of the actual costs of mailing.

[9] The appellant claims it is the agent of the client when it purchases postage (or pays mailing costs) for its clients and mails the material to destinations outside Canada. SLM also submits that it is not liable for GST on the postage costs for material shipped to a destination outside of Canada since these services have a zero rate tax pursuant to section 6 of Part VII of Schedule VI of the *ETA*. A supply is zero rated if it is a "a supply of a freight transportation service in respect of the transportation of tangible personal property from a place in Canada to a place outside Canada whether the value of the consideration for the supply is \$5 or more".

[10] It is the Crown's view that the cost of mail in excess of \$5 to a destination outside Canada that was paid by SLM and for which it invoiced the client constituted an input to a resupply of a service which is taxable and applied GST on the whole amount of the supply. In the Minister's view, contrary to that of SLM, no

agency relationship existed between SLM and its client. SLM was assessed as a resupplier of a service.

[11] The facts leading to this appeal are the result of some clients' preference for SLM, rather than itself, to mail the material and be billed by Canada Post, the USPS or the remailer and for SLM then to invoice the client for its services and postage.

[12] Mr. Shorn testified that "we mail nothing . . . the clients do the mailing and we send [it] on their behalf". SLM is a "conduit" for the client.

[13] The appellant claimed input tax credit on any GST it paid even if the GST was charged back to the client. SLM maintains one bank account for all deposits made by the clients.

[14] Counsel for the respondent produced print-outs from SLM's website. In its website, SLM describes to potential clients the work it can do on their behalf. For example, SLM can provide incentive rates through Canada Post or the USPS. It can provide sortation for both Canada Post and the USPS and can deliver U.S. destined mail directly to a USPS depot or a third party courier.

### Analysis

[15] If SLM were an agent of its clients when it purchased postage and mailed the material for its clients, then SLM would not be liable to pay the GST. In Fridman's *Law of Agency*,<sup>2</sup> the author explains when the law of agency may apply:

First, it is meant to indicate that although there may be many situations in which one person represents or acts on behalf of another, it is only when such representation or action on another's behalf affects the latter's *legal* position, that is to say his rights against, and liabilities towards, other people, that the law of agency applies. The law of agency has no relevance to social or other non-legal obligations. Thus, the law of agency has no application to the kind of situation in which, for example, a man sends his wife to represent him at a wedding, and to congratulate on his behalf the bride and groom. For in such circumstances the representation is intended to serve a social purpose, not a legal one. However, the legal purpose intended to be achieved by the employment of an agent need not be a complex or a sophisticated one. A mother who tells her son to buy milk from the milkman is making an agent from him, in the same way as a company makes

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<sup>2</sup> G.H.L. Fridman, *The Law of Agency*, 7<sup>th</sup> ed. (London: Reed Elsevier (UK) Ltd 1996).

agents of directors who enter into contractual obligations on behalf of the company.<sup>3</sup>

[Emphasis added.]

[16] The authors of *Bowstead & Reynolds on Agency*<sup>4</sup> define agency as:

. . . the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents or so acts. [...]<sup>5</sup>

In respect of the acts which the principal expressly or impliedly consents that the agent shall so do on the principal's behalf, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.<sup>6</sup>

[17] The existence of an agency relationship was considered by the Federal Court of Appeal in *Glengarry Bingo Assn. v. Canada*.<sup>7</sup> In relying on Policy Statement P-182R released by the Canada Revenue Agency, the Court of Appeal identified three essential factors required for finding of an agency: (1) the consent of the principal and agent, (2) the authority of the agent to affect the principal's legal position and (3) the principal's control of the agent's actions. In addition, the Appeal Court also identified risk as a significant factor in determining whether an agency relationship exists.

[18] In the appeal at bar, the evidence of Mr. Shorn was that SLM did not receive any consideration for purchasing postage for its clients. *Bowstead & Reynolds* states that the relationship of an agent and its principal is "commercially related rather than commercially adverse" that the agent be remunerated by commission for his or her services "and not take his own undisclosed profit as an independent intermediary".<sup>8</sup> That SLM took no remuneration of any kind to perform the service in question does not affect its relationship with its clients one way or another. SLM was compensated for its other services to the clients and the evidence suggests it

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<sup>3</sup> *Supra* note 2 at p. 12.

<sup>4</sup> F.M.B. Reynolds with the assistance of Michele Graziadei, *Bowstead & Reynolds on Agency*, 17<sup>th</sup> ed.(London: Sweet & Maxwell 2001).

<sup>5</sup> *Supra* note 4, at p. 1.

<sup>6</sup> *Supra* note 4, at p. 1.

<sup>7</sup> [1999] F.C.J. No. 316 (QL).

<sup>8</sup> *Supra* note 4, at p. 7.

took on the mailing and purchase of the postage as a favour to clients and included all charges and costs in one invoice. In *Glengarry, supra*, the association charged the charities for its employees' time and for use of its equipment and so it was required to charge GST since no agency relationship was found to exist.

[19] The three factors of agency enumerated in *Glengarry* are present in the appeal at bar. Mr. Shorn testified that SLM's clients had an option of either mailing the packages themselves, or using SLM's services. SLM's larger clients opted for the former. There is no doubt that when SLM was engaged by a client to arrange a mailing, both SLM and the client consented to this relationship.

[20] When SLM purchased postage and mailed the material it had its client's authority to do so on the client's behalf; the client's legal position was affected. In *Glengarry, supra*, the Court of Appeal could not find that the legal position of the Bingo Association members was affected by the appellant's actions and consequently found no existence of agency. At paragraph 33, Sexton J. stated:

33 The most common example of how an agent might affect the legal position of its principal is by entering a contract on the principal's behalf. It is clear here that GBA was not authorized to enter contracts with third parties on behalf of the members. For instance, GBA could not have entered into a contract for purchase of bingo equipment on behalf of its Members. It was only empowered to bind itself. In the contract of purchase, GBA bound itself; it did not purport to act for its Members nor did it expose them to risk. The fact that the Members were insulated from risk is demonstrated by the reaction of ABS when GBA was in arrears on its equipment payments: ABS made no attempt to seek compensation from the Members and the Members did not entertain the idea that they might be liable. These events illustrate that GBA could not effect [sic] the legal position of its Members, which demonstrates that an essential element of agency was not present.

[Emphasis added.]

[21] Where the identity of the principal is not made known by the agent to the third party, leading the latter to believe that the agent is the other party, the common law permits an undisclosed principal to acquire rights and be subjected to liabilities as a consequence of a contract made by his agent on his behalf. This will be true if the identity of the contracting party is not important to the third party transacting with the agent, if the agent was authorized in what he did, and if the existence of some other principal is expressly or impliedly not excluded by the contract between agent and third party: see G.H.L. Fridman, *The Law of Contract in Canada*.<sup>9</sup> In the case at bar, Canada Post requires the person on whose behalf the

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<sup>9</sup> 5<sup>th</sup> ed. (Toronto: Thomson Canada Limited 2006) at pages 191-193.

material is being mailed to have an account with Canada Post. The name of the client is identified and its account number is noted on the "Int'l/U.S.A. Incentive Letter – post Statement of Mailing". The Statement of Mailing describes the service including the price paid for postage. I assume Canada Post knows who the principal is. To the extent the client's name may not have been disclosed to the USPS or a remailer, SLM was nevertheless engaged by the client to mail the material and to pay the cost of mailing on its behalf.

[22] In the appeal at bar, after SLM did what it was engaged to do, some clients authorized SLM to do one thing more, to attend at a postal facility, mail the material and pay the costs of mailing for the client. In *Bowstead & Reynolds on Agency*<sup>10</sup> it is stated that when agents are authorized only to do specific things, the principal's only control lies in his power to revoke the authority. SLM was authorized by its clients to perform a specific task which consisted of purchasing postage and making arrangements with carriers and remailers for delivery of the mailings to their ultimate destinations. SLM sought reimbursement from its clients by way of an invoice. A client's control was mainly in the power to revoke the authority of SLM to purchase the postage if it changed its mind and opted to attend to the mailing itself.

[23] A SLM client had limited exposure to risk, that SLM may be negligent in mailing material, for example. SLM was exposed to risk to the extent that it may pay the costs of mailing and the client is late in reimbursing the costs.

[24] SLM was an agent of its clients when it paid the costs of its clients' mailings to destinations outside Canada and mailed the material. SLM had completed the work for which it primarily was engaged: to address envelopes, fold material, insert the material into envelopes and deliver the material to a carrier or prepare for a carrier to pick-up. It was then the client's choice whether to mail the material and pay the cost of mailing on its own account or to authorize SLM to do so at no cost. When SLM paid the costs of mailing, it did so on behalf of the client, not for itself; SLM was the client's authorized representative, its client's agent. SLM was no different from the son whose mother tells him to buy milk: SLM and the son are agents of the client and mother, respectively.

[25] Therefore, the appeal will be allowed **without costs**. I need not consider whether the cost of mailing by SLM was a resupply, whether the services supplied by SLM were multiple supplies or whether, if SLM supplied a service of paying postage costs, the service was zero-rated.

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<sup>10</sup> *Supra* note 4 at pages 7-8.



Signed at Ottawa, Canada, this 17th day of December 2007.

"Gerald J. Rip"

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Rip A.C.J.

CITATION: 2007TCC415

COURT FILE NO.: 2006-2304(GST)I

STYLE OF CAUSE: SLM DIRECT MARKETING LTD. v. HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: May 29, 2007

REASONS FOR JUDGMENT BY: The Honourable Gerald J. Rip, Associate  
Chief Justice

DATE OF JUDGMENT: December 17, 2007

APPEARANCES:

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Counsel for the Respondent:	Daniel Segal

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