[OFFICIAL ENGLISH TRANSLATION]

2000-285(GST)G

BETWEEN:

GERMAIN PELLETIER LTÉE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 15, 2001, at Québec, Quebec, by

the Honourable Judge Louise Lamarre Proulx

Appearances

Counsel for the Appellant:	Daniel Bourgeois
Counsel for the Respondent:	Louis Cliche

JUDGMENT

The appeal from the assessment of the goods and services tax made under the *Excise Tax Act*, notice of which is dated September 25, 1998, and which bears number 0252933, is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment to reduce the assessment of penalties to nil in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of July 2001.

"Louise Lamarre Proulx"

J.T.C.C.

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Date: 20010706
Docket: 2000-285(GST)G

BETWEEN:

GERMAIN PELLETIER LTÉE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Lamarre Proulx, J.T.C.C.

[1] This is an appeal from an assessment dated September 25, 1998, for the period from July 1st, 1993, to December 31, 1997, notice of which bears number 0252933.

[2] The case concerns the application of section 281.1 of the *Excise Tax Act* ("the *Act*") with regard to the discretion that the Minister of National Revenue ("the Minister") has to waive interest and penalties. It also concerns the due diligence defence in relation to a penalty assessed under section 280 of the *Act*.

[3] When the hearing began, the parties submitted the following partial agreement on the facts:

> [TRANSLATION]
>
> 1. When the provisions of the *Excise Tax Act* (hereinafter "the *Act*") came into force on January 1, 1991, the appellant made an election

> under section 156 of the *Act*, which made it possible for supplies between "closely related corporations" to be deemed to have been made for no consideration.
>
> 2. That at that time, that is, when the *Act* came into force on January 1, 1991, the appellant and Les Supermarchés GP Inc. were considered to be "closely related corporations" within the meaning of subparagraph 128(1)(*a*)(vi) of the *Act*;
>
> 3. That the transactions between the appellant and Les Supermarchés GP Inc. are what are known as "wash transactions".

[4] Bernard Sylvain, the vice-president of the Germain Pelletier corporate group, and Bernard Blanchet, a socio-economic planning research officer for Revenu Québec, testified at the request of counsel for the appellant. Alain Thérien, a financial management officer for Revenu Québec, testified at the request of counsel for the respondent.

[5] Prior to 1993, Mr. Sylvain was part of an accounting firm and acted as the appellant's external auditor. On March 15, 1993, he was hired by the appellant as its chief financial officer, and he became its chief executive officer and vice-president in 1997.

[6] The appellant is a company that owns and manages various immovable properties, including shopping centres in Matane, Amqui, Trois-Pistoles, Rimouski and Mont-Joli. Les Supermarchés GP Inc. operates a number of food stores and rents space owned by the appellant.

[7] As stated in the partial agreement on the facts, (1) those two corporate entities were closely related corporations within the meaning of subparagraph 128(1)(*a*)(vi) of the *Act*, and (2) the appellant made an election on January 1, 1991, under section 156 of the *Act* so that the supplies made to one of them would be deemed to have been made for no consideration. The appellant therefore did not have to collect tax on the rent paid by Les Supermarchés G.P. Inc., and that company could not claim any input tax credit.

[8] Subparagraph 128(1)(*a*)(vi) of the *Act* read as follows:

> 128(1) For the purposes of this Part, a particular corporation and another corporation are closely related to each other at any time if at that time the particular corporation is resident in Canada and is a registrant and at that time

> (*a*) the other corporation is resident in Canada and is a registrant and not less than 90% of the value and number of the issued and outstanding shares of the capital stock of the other corporation, having full voting rights under all circumstances, are owned by
>
> …
>
> (vi) a person or group of persons (not exceeding five) owning not less than 90% of the value and number of the issued and outstanding shares of the capital stock of the particular corporation, having full voting rights under all circumstances, or

[9] That subparagraph was repealed by S.C. 1993, c. 27, subs. 12(1), retroactive to December 17, 1990.

[10] Subsection 156(1) of the *Act* read as follows in 1990:

> For the purposes of this Part, where a specified member of a closely related group files an election made jointly with a corporation that is also a specified member of the group, every taxable supply (other than a taxable supply by way of sale of real property or a supply of property or a service that is not for use, consumption or supply exclusively in commercial activities of the recipient of the supply) made at a time when the election is in effect between the specified member and the corporation shall be deemed to have been made for no consideration.

[11] During an audit conducted in 1998 by the Minister's officials, Claire Desjardins and Alain Thérien, the appellant was informed of the 1993 legislative amendment that eliminated subparagraph 128(1)(*a*)(vi) of the *Act*. The auditors notified the appellant that it and Les Supermarchés G.P. Inc. were not closely related corporations because of that legislative amendment and that it had to collect and remit tax on the rent.

[12] The auditors also informed the appellant that they had to assess the penalties provided for in section 280 of the *Act* and compute interest.

[13] Mr. Sylvain said that he was very surprised when notified of the legislative amendment. He subsequently checked the correspondence from the Department and the information it sent and found no reference to that amendment. The external

auditor from the accounting firm to which Mr. Sylvain had previously belonged had not mentioned anything during the years at issue either.

[14] Mr. Sylvain said that at all times the appellant's intention was to comply with the *Act*. It kept its books in accordance with what it believed was correct at the time. It kept the supplies made to Les Supermarchés GP Inc. separate from the supplies made to its other clients. It made its returns and remitted the amounts owed on time.

[15] Bernard Blanchet, the Minister's official for objections, said that the Minister felt that the appellant was in a due diligence situation.

[16] Mr. Blanchet explained that he had relied on Memoranda GST-500-3-2 of March 16, 1994, and Bulletin B-074 of November 28, 1994, to reduce the interest and penalties that were in excess of four percent of the tax not collected. The Bulletin is entitled: Guidelines for the Reduction of Penalty and Interest in "Wash Transaction" Situations. It was filed as Exhibit A-8. The conditions of application read as follows:

> The Minister will consider waiving or cancelling the portion of the penalty and interest that is in excess of 4% of the tax not collected in a "wash transaction" situation where the following conditions are satisfied:
>
> (*a*) It must be demonstrated that the supply in question was made to a registrant who would have been entitled to a full input tax credit if the tax had been correctly applied.
>
> (*b*) The supplier must not have been previously assessed for the same mistake and must have a satisfactory history of voluntary compliance.
>
> (*c*) The supplier must have remedied the situation to ensure that tax is collected on future supplies of a similar nature.
>
> (*d*) The supplier must have exercised reasonable care and diligence without being negligent or careless in the conduct of its affairs to ensure that tax is collected on all taxable supplies.
>
> These guidelines will be applied retroactively to January 1, 1991, and may be adjusted in the future if the Minister considers it necessary.
>
> In all circumstances where the Minister is considering whether to waive or cancel penalty and interest, the Minister retains the right to either waive or

> cancel only a portion of the penalty and interest, or all or a portion of one or the other.

[17] Mr. Blanchet admitted that the appellant met all the above criteria, including the one on diligence.

[18] The decision on the objection, which is dated November 25, 1999 (Exhibit A-5), reads as follows:

> [TRANSLATION]
>
> The Minister of Revenue has considered the facts and grounds set out in your notice of objection and has decided that:
>
> The assessment was made in accordance with legislative provisions, particularly—but without limiting the generality of the foregoing—in that the penalties and interest were assessed pursuant to the provisions of section 280 of the Excise Tax Act.

Arguments

[19] Counsel for the appellant argued that, under section 281.1 of the *Act*, the Minister does not have the power to cancel a portion of the interest and penalties. He can only cancel all of them. As an alternative argument, he raised the appellant's due diligence and therefore that the penalties assessed under section 280 should be cancelled. He argued that the appellant's due diligence has been not only admitted by the respondent but also confirmed by the evidence.

[20] Counsel for the appellant referred in particular to Patrice Garant, *Droit Administratif*, 4th ed., vol. 1 (1996), at pages 346 *et seq*., and to Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed., at pages 275-76, to support his assertion that the terms "all" or "any portion" must not be added. I cite the author last mentioned:

> Assuming a statute to be well drafted, an interpretation which adds to the terms of its provisions or deprives them of meaning is not recommended.
>
> Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislature wanted to say: "It is a strong thing to read into an

> Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do." [*Per* Lord Mersey, *Thompson* v. *Goold & Co.*, [1910] A.C. 409, 420.]

[21] He also referred to a few specific legislative provisions, including subsection 220(3.1) of the *Income Tax Act*, which reads as follows:

> **Waiver of penalty or interest.** The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to (5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.

[22] With regard to his second argument, counsel for the appellant submitted that penalties must not be assessed in circumstances of due diligence. On this point, he referred to the Federal Court of Appeal's decision in *Attorney General of Canada v. Consolidated Canadian Contractors Inc.*, which was rendered on September 29, 1998. Robertson J.A. concluded as follows:

> Having regard to the analytical framework outlined in *Sault Ste. Marie* and to the arguments advanced by the Minister, I am not persuaded that section 280 of the *Excise Tax Act* gives rise to absolute liability. In my view, an implied due diligence is neither incompatible with the legislative scheme, nor does it frustrate or undermine the purposes underlying that scheme. The presumption in favour of strict liability has not been rebutted.

[23] Counsel for the appellant also referred to Memorandum 16.3.1, *Reduction of Penalty and Interest in Wash Transaction Situations*, which was issued in September 2000. It replaces Information Bulletin B-074. Paragraph 9 reads as follows:

> In the case of a wash transaction where the penalty and interest is reduced to a penalty of 4% of the tax not collected and the CCRA has determined that the person has exercised due diligence, the remaining penalty will be cancelled. For further information on due diligence, refer to Policy Statement p. 237, *The Acceptance of a Due Diligence Defence for a Penalty Imposed Under Subsection 280(1) of the Excise Tax Act for Failure to Remit or Pay an Amount When Required.*

[24] The respondent argued that the Minister correctly exercised the discretion conferred on him by section 281.1 of the *Act*. He argued that the appellant has not shown that the Minister acted in bad faith or failed to take account of all the relevant facts in exercising his discretion and that the Minister's decision was contrary to the *Act*. He therefore submitted that the Court has no grounds for intervening to review the Minister's decision. He referred on that point to the decision by Reed J. of the Federal Court–Trial Division in *Revivo v. Canada*, [2000] F.C.J. No. 40, especially paragraph 6 of that decision:

> The nature of the Court's jurisdiction when reviewing decisions of the Fairness Committee was described by Mr. Justice Rouleau in Kaiser v. Minister of National Revenue (1995), 93 F.T.R. 66 at 68, quoting McIntyre J. in Re Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2 at 7:
>
> > ... It is, as well, a clearly-established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere. ...

[25] Counsel for the respondent also referred to a decision I rendered in *Marée Haute Enr. v. The Queen*, [2000] T.C.J. No. 3, especially paragraph 16 of that decision:

> With regard to interest, penalties and section 281.1 of the Act, I refer to what was stated by Judge Bowman of this Court in Somnus Enterprises No. 1 Ltd. v. Canada, [1995] T.C.J. No. 23:
>
> > Nor can I provide any relief against the assessment of interest. Interest is exigible automatically where there is a deficiency in the tax paid. The only circumstance in which relief against interest is available is where the Minister of National Revenue exercises his discretion under section 281.1 of the Excise Tax Act. I agree with the respondent that it is not within this court's jurisdiction to review the Minister's exercise of his discretion under section 281.1. Our jurisdiction,

> like that of the Federal Court, is defined by the statute creating the court. If such a jurisdiction is conferred upon the Federal Court it is for that court to determine under the Federal Court Act.
>
> Where this court clearly does have jurisdiction is, not to review the exercise of the Minister's discretion to waive penalties and interest under section 281.1 where interest and penalties have otherwise been properly assessed under the Act, but rather to determine whether the penalties and interest have been properly assessed in accordance with the law. I can do nothing about the interest in this case, but the penalties are another matter. As stated in Pillar Oilfield Projects Ltd. v. The Queen [1993] G.S.T.C. 49 there can be no justification for the routine and automatic imposition of penalties merely because a taxpayer has incorrectly computed his or her tax liability. Such penalties are not absolute. Rather they are strict, in the sense in which that expression is used in The Queen v. Sault Ste Marie [1978] 2 S.C.R. 1299 and are susceptible of a defence of due diligence.

[26] In that case, I had adopted the position taken by this Court's judges that this Court has no jurisdiction to review the Minister's discretion, but I had also noted that, in any event, the evidence did not show that the appellants had exercised due diligence.

Conclusion

[27] Section 281.1 of the *Act* reads as follows:

> **Waiving or cancelling interest**
>
> 281.1 (1) The Minister may waive or cancel interest payable by a person under section 280.
>
> **Waiving or cancelling penalties**
>
> 281.1 (2) The Minister may waive or cancel penalties payable by a person under section 280.

[28] The argument raised by counsel for the appellant presupposes that the power to cancel or waive interest and penalties does not implicitly include the power to cancel or waive a portion of them. This may be too inflexible a position. I refer to Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at pages 276-77:

> The presumption against adding words must be treated with caution because legal communication, like all communication, contains both implicit and explicit elements. The presumption only concerns the explicit element of the legislature's message: it assumes that the judge usurps the role of Parliament if terms are added to a provision. However, if the judge makes additions in order to render the implicit explicit, he is not overreaching his authority. The relevant question is not whether the judge can add words or not, but rather if the words that he adds do anything more than express what is already implied by the statute. [A comparison can be made between Justice Pigeon's dissent in *R.* v. *Sommerville*, [1974] S.C.R. 387, in which he says a judge must not add restrictions to an enactment which is clear, and the views of the majority, which felt the purpose of the law in question justified restricting its application by reading the enactment as if it contained the words "in contemplation of or following upon a purchase or sale . . ."]
>
> [Emphasis added.]

[29] In my view, the position taken by counsel for the appellant is not in line with the *Act*'s objectives either. I refer to the same book he referred to, Patrice Garant's *Droit Administratif*, 4th ed., vol. 1 (1996), at page 351:

> [TRANSLATION]
>
> The extensive case law basically ties the extent or scope of the discretion to a close examination of the legislature's objectives. According to the Supreme Court:
>
> > [D]iscretion cannot be considered in the absence of an examination of the legislative objectives, and the important question is whether the presence of such discretion can be rationally tied to those objectives. (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 73)

[30] Parliament's objectives are those of fairness, and it would be difficult for them to be all-or-nothing in nature. In my view, the Minister's interpretation of his discretion, which would allow him to remit all or any portion of the penalties and interest, is more in keeping with Parliament's objectives than the radical

interpretation proposed by counsel for the appellant, which may become dangerous even for the appellant. This is because counsel's proposition is that all the penalties be cancelled, but the contrary is also possible, with nothing being cancelled. In accordance with the principles of natural justice, the Minister has established criteria that enable him to exercise his discretion objectively and impartially, and that discretion may be exercised with respect to all or any portion of the interest and penalties.

[31] Although he referred me to the Federal Court's decisions concerning the exercise of discretion under the *Act*, counsel for the respondent did not raise this Court's lack of jurisdiction to review that exercise. He confined himself to the argument that the Minister had exercised his discretion in accordance with the principles set out in the case law to which he referred.

[32] My analysis of the *Act*'s provisions relating to that ministerial discretion confirms that he was right not to raise the point that this Court has no jurisdiction. As I stated in paragraphs 25 and 26 of these Reasons, it seemed to be accepted by the courts that the exercise of the Minister's discretion under section 281.1 of the *Act* could not be reviewed by this Court. After reading the *Act* carefully, I think that this is not the case. A provision in the *Income Tax Act* that is apparently similar but is actually different has led to some confusion.

[33] Under subsection 220(3.1) of the *Income Tax Act*, the Minister exercises a similar discretion concerning penalties and interest. The Minister's decision following that exercise of discretion is reflected in an assessment under subsection 220(3.7) of that statute. According to subsection 165(1.2) of the *Income Tax Act*, such an assessment is not subject to the appeal process in this Court. As a result, it is the Federal Court that has jurisdiction pursuant to the powers set out in the statute creating it. I have already considered this Court's lack of jurisdiction to review the exercise of the Minister's discretion in *Gretillat v. The Queen*, T.C.C., No. 96-4454(IT)I, February 18, at pages 7 and 8 (98 DTC, at page 1486).

[34] The provision of the *Act* that authorizes the Minister to waive interest and penalties is section 281.1. Under subsection 296(1) of the *Act*, the Minister may make an assessment after exercising his discretion. The objection procedure is provided for in section 301, and there is no exception for assessments made following the exercise of the Minister's discretion. The appeal procedure is set out in section 302, and it is this Court that hears appeals from assessments under the *Act*. The exercise of the Minister's discretion is therefore reviewable by this Court.

[35] The respondent's position was based solely on the Minister's discretion having been exercised in accordance with the established criteria. However, those criteria were established on the basis of an incorrect legal concept that the *Act* did not allow for a due diligence defence against the assessment of a penalty under section 280 of the *Act*. As stated in paragraph 23 of these Reasons, the Minister amended his memorandum in September 2000. It is therefore surprising that counsel for the respondent did not take that amendment into account and above all did not take into account the effect of the Federal Court of Appeal's decision in *Consolidated*, *supra*, in his argument.

[36] As for whether the Minister exercised his discretion properly, I must note that there was no legal debate on the impact of an error of law resulting from a court decision that is subsequent to both the exercise of the ministerial discretion and the resulting assessment. In these circumstances, it would be difficult for me to decide whether the Minister exercised his discretion properly, even though this Court does have a review power for the reasons I stated in paragraphs 31 to 34 of these Reasons.

[37] The penalties in respect of which the Minister's discretion was exercised were assessed under section 280 of the *Act*. I prefer to limit myself to this aspect. The appellant's due diligence was not questioned by the respondent and was confirmed by the evidence. It is a well-established legal principle that ignorance of the law is not an excuse to argue against the application of the law. However, it is a factor that may be taken into account in assessing penalties if the evidence otherwise shows that due diligence was exercised. In my opinion, the assessment of penalties under section 280 must be cancelled because the appellant exercised due diligence in carrying out its duties under the *Act*.

[38] The appeal is allowed to reduce the assessment of penalties to nil.

Signed at Ottawa, Canada, this 6th day of July 2001.

"Louise Lamarre Proulx"

J.T.C.C.