Docket: 2006-1362(GST)G

BETWEEN:

501638 NB LTD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 26, **2009**, at Fredericton, New Brunswick.

By: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Allen Miles
Counsel for the Respondent:	David Besler

AMENDED JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, for the period of January 1, 1996 to January 20, 2002 is dismissed, with costs.

Signed at Ottawa, Canada, this **6th** day of **May** 2010.

"C.H. McArthur"

McArthur J.

Citation: 2010 TCC 167
Date: 20100416
Docket: 2006-1362(GST)G

BETWEEN:

501638 NB LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] This is an appeal under Part IX (Goods and Services Tax) of the *Excise Tax Act* (*ETA*) from an assessment of the Minister of National Revenue (Minister). The issue is whether the Appellant is entitled to a rebate of $59,992 ($60,000) Harmonized Sales tax (HST) on beer bottle deposits for the reporting period commencing January 1, 1996 and ending January 20, 2002. The Appellant operated several bars in New Brunswick. It sold beer on premises and collected HST on its sales.

[2] The Minister denied the Appellant's claim for the $60,000 Input Tax Credits (ITCs) with respect of 15% of HST calculated and remitted on the 10 cent deposit paid by the pub (bar) customers on beer bottles. The tax was actually paid by the beer purchasers and remitted in error to the Minister by the Appellant (the bar owner) over a period of six years. Both the Appellant and the Minister claim entitlement although it was the customer who actually paid the tax.[1]

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[1] The pleadings reflect some confusion over which assessment is under appeal. The Appellant appeals assessemt number 01EE0103324. The Minister addresses asseswsmernt number 01EE0103329. Despite this, the parties are on the same page with respect to the issues and I will set this aside and deal with the merits.

[3] The Appellant, 501638 NB Ltd. (638) was registered under the *New Brunswick Companies Act* and was a HST registrant. From 1996, it owned and operated at least four bars, two in Moncton and two in Fredericton.[2]

[4] The Minister relied on the following assumptions of fact[3] in denying the Appellant's claim for a rebate of the HST collected in respect of the beer bottles;

> 9(e) the Appellant owned and operated Sweetwaters and Rockin Rodeo in Fredericton, and Looking Glass Lounge and Rockin Rodeo in Moncton, New Brunswick (bars);
>
> f) under New Brunswick law, when beer is sold in a bar it may be served in its original container ("beer bottle") to the consumer or may be poured and served in a cup or glass;
>
> g) the Appellant paid a deposit as required by the New Brunswick *Beverage Container Act*, R.S.N.B. and regulations on the beer bottles it purchased from its supplier, the New Brunswick Liquor Corporation ("NBLC");
>
> h) the Appellant did not charge a different price for beers sold in their bottles and the beer sold in a glass or a cup;
>
> i) the Appellant charged prices for its beer on a tax inclusive basis;
>
> j) the Appellant did not keep books and records indicating the GST/HST paid by its customers on the deposit amount with respect to the provision of beer bottles; and,
>
> k) the Appellant did not keep books and records indicating the GST/HST paid by its customers on the deposit amount with respect to the provision of beer bottles; and,
>
> l) on February 19, 2002 the Appellant filed the Return in which it claimed the amount of $59,992.86 as ITCs for the period ending January 20, 2002.
>
> 10(a) the Appellant never filed a rebate application for taxes paid in error;
>
> b) the sale of beer is a taxable supply;

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2 During part of the period, there was a third bar.

3 Taken from paragraphs 9 and 10 of the Reply to the Notice of Appeal.

c) from January 1, 1996 to December 31, 2001, the Appellant filed returns and reported net tax;

d) when filing its returns, the Appellant included amounts paid to the NBLC on account of GST/HST in calculating its net tax;

e) the Appellant was require to remit the GST/HST on the beer bottles;

f) the Appellant did not pay the amount of $59,992.86 on account of GST/HST for the beer bottles it purchased from the NBLC;

g) the Appellant did not remit the amount of $59,992.86 on account of GST/HST for the sale of beer bottles sold in its Establishment to patrons;

h) during the period from January 1, 1996 to December 31, 2001, the Appellant claimed ITCs with respect to GST/HST paid on purchases of beer from the NBLC;

i) the Appellant's usual practice was to sell beer for prices which were greater than those paid by the Appellant to the NBLC when purchasing the beer;

j) the Appellant did not keep proper books and records, and in such condition as t enable the Minister to determine its liability or its entitlement to a rebate with respect to the beer bottles; and

k) the NBLC is a registrant under the Act.

[5] The only two witnesses were on the Appellant's behalf, namely, Deborah Ann O'Hara, the Appellant's accounting clerk and Brian Miles the director and sole shareholder of the Appellant. Ms. O'Hara looked after the bookkeeping which included calculating and remitting the HST on the deposit. She was aware of the operation of the bars, and the purchase of the bottled beer from the New Brunswick Liquor Commission including a 10 cent bottle deposit together with HST. The Appellant had been collecting and remitting HST on the beer bottles since at least January 1, 1996.

[6] The evidence of both witnesses included that the Appellant during the period in issue had been remitting HST of 15% on the 10 cent returnable container deposit amount resulting in an overpayment of $60,000 which was claimed as an ITC in the reporting period ending January 20, 2002 and, was filed February 19, 2002.[4] After an audit, the Minister denied the ITC. This appeal is made pursuant to section 296.

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[4] In *United Parcel Service Canada Ltd. v. HMQ*, S.C.S. 305 D.L.R. (4th) 385 Rothstein J., for the Court, stated at paragraph 30:

Position of the Appellant

[7] Ms. O'Hara explained how she arrived at the amount of $60,000. The Appellant proceeds on the basis that the Minister is not attacking the calculation but rather whether a rebate is available to the Appellant. 638 calculated the sale of all beer bottles over that period of time through their Point-of-Sale system, and the calculation is found in Exhibit A-1, Tab 11.

[8] The Appellant has built its case upon Sheridan J.'s decision in *SAS Restaurants Ltd. v. R.*, [5] (*SAS*) stating that the only difference being that in *SAS* patrons were not allowed to remove beer bottles from the premises under Nova Scotia law. New Brunswick *Liquor Control Act* does not prohibit a patron from taking an empty beer bottle off the promises, so long as it is emptied of its alcoholic contents. Mr. Miles testified that although the empty beer bottles may be removed by the purchaser but, the establishments try to prevent this from happening to prevent breakage or other mischief. The Appellant adds that the main thrust of the *SAS* decision and the position of 638, is that the bottle is provided to the customer as part of the sale. The beer and bottle are provided to the customer as a unit for a set price and the unit is being taxed as a whole. The bottle should not be a separate sale. The returnable item, the beer bottle, should not have been subject to HST.

[9] In *SAS* the Appellants were allowed to go back four years to claim a rebate that was applied for erroneously through an ITC. In the present matter, the Appellant is trying to go back six years and relies on *United Parcel Service Canada Ltd. v. Canada*,[6] finding that there is no time limit on the application of subsection 296(2.1). Further ITCs were added erroneously in February 2002. They were not aware that

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> As I read s.296(2.1), even if no application for a rebate was made within the applicable limitation period, the rebate shall be applied by the Minister against the net tax owed by the taxpayer in the reassessment process if the Minister determines that a rebate would hae been payable had it been claimed. The section refers to "allowable rebate". Allowable rebate must mean a rebate that would have been allowable had the applicable procedure been followed. In other words, where these procedures have not been followed, it is not fatal to the rebate claim.

5 2005 TCC 649.

6 2009 SCC 20.

they should have made an application for a rebate for taxes paid in error under subsection 296(2.1). It claims $14,275 in interest and costs.

Respondent's Position

[10] Allowing the Appellant to succeed would result in a windfall due to some unfortunate wording in the *Act* which has been since amended. It is customary that the person (here the bar patron) who paid the tax is the one entitled to get it back not the person who over-charged to receive it increasing his profit. The legislation must be strictly applied and to succeed, the Appellant must meet a strict interpretation of the relevant legislation.

[11] With respect to the limitation period, the Respondent argues that the appropriate recourse for the Appellant is under paragraph 296(2)(*a*) and it has a four-year limitation period which is arrived at by reading subsections 296(2) and 234(1) in conjunction with subsection 234(2.1).

[12] The crux of the Respondent's position is that the books and records of the Appellant are not adequate to find that the sales were made in a returnable container and refers to Exhibit A-1, Tab 8, which is an example of the receipts from one of the establishments. The Appellant's witnesses testified that the sale of beer occurs in bottles and in glasses and that the tracking records do not indicate which sales represented bottles and which sales represented glasses. There is nothing in the records that distinguishes a glass from a bottle. The Respondent relies on the evidence of both witnesses to conclude that when the beer was ordered, it was opened and then given to the customer, therefore it was sold unsealed.

[13] The definition of "returnable container" in paragraph 226(1)(*b*) provides that a "returnable container when acquired by consumers, is ordinarily filled and sealed".[7] Presently, when the bottles acquired by the patrons had been opened, and therefore were not sealed, the definition of "returnable container" set out in subsection 226(1) is not met.

[14] Finally, the Respondent attempted to distinguish the present matter from the decision in *SAS*. In *SAS*, there were records that would allow the Court to distinguish how much beer was sold in bottles and how much was not, which is not the case in

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[7] Reference appears to be made to retail outlets authorized by the provinces for opening and consumption in one's residence or other private premises.

the present matter. Further, in *SAS* the price of beer was determined by adding the cost of the beer to the deposit and then marking the total up. In our case, the price of the beer was set by the market. The invoice does not reflect the deposit and the computer does not record it.

[15] The relevant legislation includes the following:

> 226(1) In this section, "returnable container" means a beverage container (other than a usual container for a beverage the supply of which is included in Part III of Schedule VI) of a class that
>
> (*a*) is ordinarily acquired by consumers;
> (*b*) when acquired by consumers, is ordinarily filled and sealed; and
>
> (*c*) I s ordinarily supplied empty by consumers for consideration.
>
> 226(2) For the purposes of this section, where a person supplies a beverage in a returnable container,
>
> (*a*) the provision of the container shall be deemed to be a supply separate from, and not incidental to, the provision of the beverage;
>
> *(b)* section 137 does not apply to deem the container shall be deemed to be equal to that part of the total consideration for the beverage and the container that is reasonably attributable to the container.
>
> [emphasis added.]
>
> 226(3) Tax collectible on returnable containers – Tax that is collected or that becomes collectible by a registrant in respect of a supply of a returnable container shall not be included in determining the net tax of the registrant.
>
> 226(4) Input tax credit for returnable containers – Tax that is paid or that becomes payable by a registrant in respect of a supply or the bringing into a participating province of a returnable container shall not be included in determining an input tax credit of the registrant unless the registrant is acquiring the container or bringing it into the province, as the case may be, for the purpose of making a zero-rated supply of the container or a supply of the container outside Canada

Analysis

[16] When the beer bottle was acquired by the Appellant's consumers on the Appellant's premises it was "filled" but not "sealed." As stated, the Appellant relies

primarily on the reasons and decision in *SAS* wherein Sheridan J. found that *SAS* satisfied the conditions in section 226 and granted the Appellant an HST rebate paid on beer bottles' 10 cent deposits.

[17] Following *SAS*, Parliament enacted Bill C-40 to amend section 226 of the *ETA* to ensure that it no longer applies to situations like the one found in *SAS*.[8] The amendment came into force on May 1, 2002 but was made retroactive to any supply of beverage made after 1995. The retroactive amendments are in force during all the relevant periods of this appeal.

[18] After the decision of Sheridan J. in *SAS*, Parliament responded by enacting Bill C-40, an *Act to amend the Excise Tax Act, the Excise Act, 201 and the Air Travellers Security Charge Act and to make related amendments to other Acts).* Bill C-40 received royal assent on June 22, 2007. For our purposes, the most notable amendment applied by Bill C-40 can be found at section 28, which sought to amend subsection 226(2) of the *Excise Tax Act* by adding the following underlined phrase:

> 226(2) For the purposes of this section, if a person supplies a beverage in a returnable container in circumstances <u>in which the person typically does not unseal the container</u>

The underlined phrase did not form part of the law at the time Sheridan J. rendered her decision in *SAS*. The phrase "in which the person typically does not unseal the container" is designed to specifically prohibit the type of claim that appears before the Court in the present matter.

[19] The coming into force of the amendment to subsection 226(2) of the *ETA* can be found at subsection 28(3) of Bill C-40, where it states that the amended subsection 226(2) applies:

> 226(2) . . . "to any supply of a beverage in a returnable container made after 1995 and before May 2002, unless
>
> (*a*) the supplier included, in determining their net tax, a particular amount as or on account of tax that was calculated on the total amount (excluding any tax prescribed for the purposes of section 154 of the Act or any gratuity) paid or payable by the recipient in respect

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8 The draft amendments of February 8, 2002 were enacted to retroactively to January 6, 1996, to amend subsection 226(2) in July 2007.

> of the beverage and the container and, before February 8, 2002, the Minister of National Revenue received an application for a rebate under subsection 261(1) of the Act of the portion of the particular amount attributed to the container; or
>
> (*b*) the supplier included, in determining their net tax as reported in a return under Division V. of Part IX of the Act received by the Minister of National Revenue before February 8, 2002, an amount as or on account of tax in respect of the supply of the beverage and the container that was calculated on an amount less than the total amount (excluding any tax prescribed for the purposes of section 154 of the Act or any gratuity) paid or payable by the recipient in respect of the beverage and the container.

For the Appellant to succeed, it must prove that it met one of the above two conditions. The legislation sets out the appropriate means for collecting the taxes remitted in error in respect of the beverage and the container, the supplier can seek to retrieve the portion of the amount attributed to the container through an application for a rebate under subsection 261(1).

[20] The amendments apply only in circumstances where the person typically does not unseal the container. The amendment effectively overruled *SAS* at least for our purposes and probably most provinces, where beer bottles must be opened before served in the premises. The *SAS* decision was rendered prior to passing of the amendment. The 2007 amendment added the following underlined phrase to subsection 226(2):

> 226(2) For the purposes of this section, if a person supplies a beverage in a returnable container in circumstances <u>in which the person typically does not unseal the container</u>
>
> (emphasis added)

[21] The underlined words did not form part of the law at the time of the *SAS* decision. “In which the person typically does not unseal the container” is designed to specifically prohibit the type of claim that appears before me.

[22] Although I find that the amendment to subsection 226(2) is fatal to this appeal, I will briefly deal with the Appellant’s submissions.

[23] An application for a rebate under subsection 261(1) of the *ETA* is the proper means for retrieving the portion of the HST paid in error attributed to the container[9] and not through a claim for ITCs. Subsection 261(1) provides that payments made in error may be subject to a rebate by the Minister. This subsection was in force during all relevant times of the present appeal, and continues to be in force today.

[24] The recent Supreme Court of Canada decision in *United Parcel Service* subsection 296(2.1) effectively allows the rebate even if no prescribed form for the rebate was made within the limitation period.

[25] While the decision in *SAS* appears factually similar to the present appeal, there are several important differences. (i) The beer bottles supplied by the Appellant bars do not meet the definition of a "returnable container" and the requirement in subsection 226(2) in that when acquired by consumers they are not sealed; and (ii) the Appellant has not satisfactorily established that, in determining their net tax they included an amount as or on account of tax in respect of the beer bottle. The Appellant's records lack the precision necessary to satisfy subsection 226(2), and specifically the words ". . . the supplier charges the recipient a returnable container charge in respect of the container." I am not prepared to infer or guess that the records included individual beer bottle tax.

[26] I believe in *SAS* at paragraph 6, the Crown had conceded that a beer bottle was a "returnable container". This is not the case in the appeal before me. To qualify as a "returnable container", the container must be "ordinarily filled and sealed" when acquired by a consumer. Contrary to the finding in *SAS*, I conclude that although subsection 226(2) is broken down into paragraphs it is in essence one sentence and it applies to the supply of "returnable containers" that are "ordinarily filled and sealed."

[27] The onus was on the Appellant to prove that it was supplying "returnable containers" to consumers. I find as a fact that it did not. Both witnesses stated that all bottled beer served at the Appellant establishments were "ordinarily"[10] opened by the server and then served unsealed. This is the common practice in the industry. The unsealed beer bottles provided by the Appellant were not a "returnable container" as defined by subsection 226(1) of the *ETA* and would therefore not satisfy subsection 226(2).

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9 Bill C-40 at subsection 28(3)

10 The word "ordinarily" precedes "returnable container" in subsection 226(1).

[28] I will deal briefly with the question: Did the Appellant include an amount as or on account of tax in respect of the beer bottle pursuant to the amended subsection 226(2)? As opposed to my findings in the present situation, Sheridan J. found there was sufficient evidence to conclude that *SAS* marked up beer prices to reflect the deposit cost, and therefore part of the customer's consideration was for the bottle.

[29] The present witnesses testified to the effect that the beer prices were primarily set by the market, making it unclear whether the bottled beer prices reflected the container deposit cost. Further, I find that the financial records of the Appellant company were not sufficiently detailed to determine whether the beer was sold in a glass or bottle or whether the 10 cent bottle deposit was passed on to the consumers.

[30] Section 286 of the *ETA* requires any person applying for a rebate to keep records and books. The Appellant entered into evidence sales summaries to identify the number of beers sold per night per location during the relevant period and a document demonstrating their calculation which forms the basis of their claim. However, it is not clear how one can distinguish between beer provided in a bottle and beer provided in a glass. Although, both witnesses confirmed that the calculations do not include draft beer, the documentation is not convincing.

[31] Ms. O'Hara testified that the daily sales summaries determine how much beer was sold on a particular night during the relevant period. However she admitted that the Point-of-Sale system and the nightclubs themselves do not keep track of whether the beer was supplied in a bottle or whether the contents of the bottle was poured in a glass before being handed to the customer.

[32] Mr. Miles, stated that beer was served to customers at premises such as: (i) the traditional bar; and (ii) from beer tubs at bars. At either location, bottled beer was provided to a customer by removing the top, placing the beer on the bar at the traditional bar locations or handing the beer to the customer at the beer tub locations. A further service was provided at the traditional bar locations if the customers wanted the beer poured into a glass.

[33] For the above reasons, I find that the Appellant did not satisfy the condition set out at subsection 28(3) of Bill C-40, the amending of subsection 226(2) which would have allowed it to claim the rebate.

[34] The appeal is dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 16th day of April, 2010.

"C.H. McArthur"

McArthur J.

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