Docket: 2011-3660(GST)I

BETWEEN:

STANISLAW PAWLAK, JADWIGA PAWLAK,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 28, 2012, at Hamilton, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellants:	Stanislaw Pawlak
Counsel for the Respondent:	Christopher Bartlett

JUDGMENT

The Appellants' appeals under the *Excise Tax Act* are allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) the net tax of the Appellants for their reporting period ending December 31, 2003 is ($11,706.51); and

(b) the net tax of the Appellants for their reporting period ending December 31, 2004 is ($10,330.85).

Signed at Ottawa, Canada, this 16th day of October, 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC355
Date: 20121016
Docket: 2011-3660(GST)I

BETWEEN:

STANISLAW PAWLAK, JADWIGA PAWLAK,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this case is whether in assessing (or reassessing) the Appellants in relation to their net tax for the purposes of the *Excise Tax Act* (the "*ETA*") for the reporting periods ending December 31, 2003 and December 31, 2004, input tax credits ("ITCs") for GST paid (or payable) during these reporting periods should have been taken into account even though the GST returns for these reporting periods were filed more than four years after the dates on which such returns should have been filed.

[2] The Appellants carry on a business, as a partnership, of selling concrete drill bits on the internet. Most of the customers of the Appellants are in the United States and therefore most of the supplies made by the Appellants are zero-rated supplies for the purposes of the *ETA*. The Appellants each have serious health related problems and they did not file their income tax returns nor their GST returns on time. They first concentrated on bringing their income tax returns up to date and then they filed their GST returns.

[3] In the GST returns for the reporting periods ending December 31, 2003 (which was filed on September 28, 2009) and December 31, 2004 (which was filed on September 24, 2009) the Appellants claimed the following amounts:

Reporting Period Ending	GST Collectible	ITCs Claimed	Net Tax (Refund)
December 31, 2003	$1,389.54	$13,096.05	($11,706.51)
December 31, 2004	$3,246.31	$13,577.16	($10,330.85)
Total:	$4,635.85	$26,673.21	($22,037.36)

[4] The input tax credits ("ITCs") that were claimed were mostly for imported supplies for which the Appellants had to pay the GST to have the items released from customs. In paragraph 6 of the Reply it is stated that the GST returns were reassessed[1]. In reassessing the GST returns the ITCs were reduced to the amount of the GST collectible so that the net tax that was reassessed for each reporting period was nil. The only basis for reducing the ITCs from the amounts as claimed to the amount of the GST collectible that was stated in the Reply was that the ITCs were not claimed within the limitation period as set out in subsection 225(4) of the *ETA*.

[5] Subsection 225(4) of the *ETA* provides in part as follows:

> 225 (4) An input tax credit of a person for a particular reporting period of the person shall not be claimed by the person unless it is claimed in a return under this Division filed by the person on or before the day that is
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> …
>
> (b) where the person is not a specified person during the particular reporting period, the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within four years after the end of the particular reporting period;

[6] The Appellants were not a specified person as defined in subsection 225(4.1) of the *ETA* during either reporting period in issue. The last reporting period that ends within four years of the reporting period ending December 31, 2003 would have

[1] In this case it does not appear that the Appellants had previously been assessed for net tax for these reporting periods. The reference to "reassessed" may simply mean that the Canada Revenue Agency did not agree with the amounts as claimed. Unlike subsection 152(1) of the *Income Tax Act* which provides that the Minister *shall* examine a person's income tax return and *shall* assess the amount of income tax payable, subsection 296(1) of the *ETA* provides that the Minister *may* assess the net tax. Subsection 229(1) of the *ETA* also provides that the Minister shall (provided that the person has filed all returns required under the statutes as set out in subsection 229(2) of the *ETA*) pay a net tax refund to a person once a return is filed, without any reference to whether the person was assessed prior to the payment of such refund. However, no collection action may be taken by the Minister unless the person has been assessed (subsection 315(1) of the *ETA*).

ended December 31, 2007. Since the business was being carried on by the partnership and since a partnership is a person for the purposes of the *ETA*[2] (and is not an individual[3] for the purposes of the *ETA*), the GST return for the partnership for 2007 would have been due March 31, 2008. Similarly, the last reporting period that ends within four years of the reporting period ending December 31, 2004 would have ended December 31, 2008 and the GST return for this reporting period would have been due March 31, 2009. The ITCs for 2003 and 2004 were not claimed in any return that was filed within the time specified in subsection 225(4) of the *ETA*.

[7] The Respondent referred to the case of *Layte* v. *The Queen*, 2010 TCC 281, 2010 G.T.C. 66, [2010] G.S.T.C. 80, to support the position that the Appellants should not be entitled to claim ITCs in this case. However, that case did not address the provisions of subsection 296(2) of the *ETA*. This subsection provides that:

> 296 (2) Where, in assessing the net tax of a person for a particular reporting period of the person, the Minister determines that
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> > (a) an amount (in this subsection referred to as the "allowable credit") would have been allowed as an input tax credit for the particular reporting period or as a deduction in determining the net tax for the particular reporting period if it had been claimed in a return under Division V for the particular reporting period filed on the day that is the day on or before which the return for the particular reporting period was required to be filed and the requirements, if any, of subsection 169(4) or 234(1) respecting documentation that apply in respect of the allowable credit had been met,
> >
> > (b) the allowable credit was not claimed by the person in a return filed before the day notice of the assessment is sent to the person or was so claimed but was disallowed by the Minister, and
> >
> > (c) the allowable credit would be allowed, as an input tax credit or deduction in determining the net tax for a reporting period of the person, if it were claimed in a return under Division V filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that return only because the period for claiming the allowable credit expired before that day,

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[2] The definition of "person" in subsection 123(1) of the *ETA* provides that a partnership will be a person for the purposes of the *ETA*.

[3] An "individual" is defined as subsection 123(1) of the *ETA* as a natural person.

> the Minister shall take the allowable credit into account in assessing the net tax for the particular reporting period as if the person had claimed the allowable credit in a return filed for the period[4].

[8] Therefore, provided that the conditions of this subsection are satisfied, in assessing (or reassessing) a person for net tax for a particular reporting period, that person is to be allowed a credit for unclaimed ITCs for that period even if the assessment (or reassessment) is issued after the expiration of the time period within which such ITC could have been claimed.

[9] In this case, the only facts that are assumed by the Minister in the Reply are related to the business of the Appellants, the amounts claimed as ITCs in the GST returns that were filed and the dates on which the GST returns were filed. There are no facts that are assumed by the Minister in relation to the issue of the documentation that the Appellants had (or did not have) with respect to the ITCs that were claimed. In *The Queen* v. *Loewen*, 2004 FCA 146, Justice Sharlow, on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. This is well explained in *Schultz* v. *R.* (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).

[10] The only evidence that was presented at the hearing of the appeal was the statement of one of the Appellants that the ITCs claimed arose as a result of GST that was paid for imported supplies that were used in carrying on their commercial activity and that there were customs documents that supported the amounts claimed. Since no assumptions were made in relation to the lack of the appropriate documentation to support the ITCs that were claimed and since the only evidence confirmed that there was documentation to support the amounts claimed, there is no basis to deny the Appellants' claim for ITCs based on any lack of documentation. The Appellants were carrying on a commercial activity and were acquiring supplies in the course of carrying on that activity and therefore they would have been allowed the ITCs if the GST returns would have been filed by their due dates. As a result the conditions as set out in paragraph 296(2)(*a*) of the *ETA* are satisfied.

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[4] Effective April 1, 2007, the words "unless otherwise requested by the person" were deleted from the closing part of this subsection. Since the Appellants had not "otherwise requested", this amendment is not material in this case.

[11] Paragraph 296(2)(*b*) of the *ETA* provides that:

> (*b*) the allowable credit was not claimed by the person in a return filed before the day notice of the assessment is sent to the person or was so claimed but was disallowed by the Minister, and

[12] The date that the notice of reassessment[5] was sent to the Appellants was not disclosed in the Reply nor was there any evidence on this point. It seems logical however that the notice of reassessment would have been sent sometime after the date that the GST returns were filed by the Appellants. Therefore on the day that the notice of the reassessment was sent to the Appellants, they had claimed the ITCs in a return and, prior to the reassessment being issued, the ITCs claimed had not been disallowed. A literal interpretation of this paragraph would mean that the Appellants would not satisfy the conditions of this paragraph. However, is this the correct interpretation of this paragraph?

[13] The Supreme Court of Canada in *The Queen* v. *Canada Trustco Mortgage Company*, 2005 SCC 54, 2005 DTC 5523 (Eng.), [2005] 5 C.T.C. 215, 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601, stated that:

> 10 It has been long established as a matter of statutory interpretation that "the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the *Act*, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the *Act* as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an *Act* as a harmonious whole.

[14] In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27[6], Justice Iacobucci, writing on behalf of the Supreme Court of Canada, stated that:

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[5] The definition of "assessment" in subsection 123(1) of the *ETA* provides that an assessment will include a reassessment.

[6] This case was cited with approval by Justice Fish, writing on behalf of a majority of the Justices of the Supreme Court of Canada in *R.* v. *Middleton*, [2009] 1 S.C.R. 674.

> 27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, *supra*, at p. 88).

[15] It seems to me that a literal interpretation of paragraph 296(2)(*b*) of the *ETA* will lead to illogical results. Assume, for example, that instead of claiming the ITCs in the GST returns that were filed in 2009, the Appellants would have filed GST returns in which only the GST collectible would have been reported and in a separate letter had identified the amounts expended as GST in relation to supplies that they had purchased. In this example the Appellants would have satisfied the conditions in paragraph (*b*) because the ITCs would not have been claimed in a return. A literal interpretation would lead to the illogical result that claiming the ITCs in a late filed return would result in the Appellants not being able to receive the benefit of having such ITCs taken into account in determining their net tax but failing to include such ITCs in such a late filed return would mean that the Appellants could receive the benefit of having such ITCs being taken into account in determining their net tax, assuming that the Minister is able to determine such ITCs. As well if an auditor for the Canada Revenue Agency would have found the ITCs in auditing the Appellants the condition would be satisfied but voluntarily disclosing the ITCs in a late filed return would disqualify the person from the benefit of being audited to net tax. It does not seem to me that this is the intended result and it seems to me that a literal interpretation leads to illogical results.

[16] In this case the Respondent did not argue that the Appellants did not satisfy the requirements of paragraph 296(2)(*b*) of the *ETA*. In reassessing the Appellants they were allowed ITCs of $1,389.54 for 2003 and $3,246.31 for 2004. Since all of the ITCs were claimed in the same returns, it appears that the Respondent was acknowledging that, at least for these ITCs, the provisions of subsection 296(2) of the *ETA* were applicable and that the Appellants had satisfied the conditions of paragraph 296(2)(*b*) of the *ETA*. Otherwise what was the basis for allowing the Appellants' ITCs of $1,389.54 for 2003 and $3,246.31 for 2004?

[17] If a literal interpretation of paragraph 296(2)(b) of the *ETA* is applied and an order were to be issued by this Court, as provided in subparagraph 309(1)(*b*)(ii) of the *Act*, requiring the Minister to reassess the net tax of the Appellants as provided in subsection 296(2) of the *ETA*, then, when the Appellants are reassessed in compliance with such an Order, the conditions of subparagraph 296(2)(*b*) of the *ETA* would be satisfied as on the date of such reassessment the ITCs claimed would have been previously disallowed. It does not seem to me that it would have been intended that persons affected by an assessment of net tax would be denied the benefit of subsection 296(2) of the *ETA* only to have the benefit of this provision reinstated as a result of an Order of this Court requiring the Minister to again reassess that person.

[18] It does not seem to me that paragraph (b) should be interpreted to mean that a person would be denied the benefit of the provisions of subsection 296(2) of the *ETA* if the person reports ITCs in a late filed return but will receive the benefit of this subsection if the ITCs are not reported (and the CRA determines the ITCs as a result of an audit or as a result of a disclosure made outside a return). It would also seem to me that it would not be intended that the conditions as set out in subsection 296(2) of the *ETA* would not be satisfied because the ITCs were claimed in the return in relation to which the assessment (or reassessment) is issued (which assessment or reassessment disallows such ITCs) but such conditions would be satisfied if the Minister were to subsequently be ordered to reassess the person as a result of an appeal to this Court following such initial assessment (or reassessment).

[19] It seems to me that the purpose of the condition in paragraph 296(2)(b) of the *ETA* is to ensure that a person has not already been allowed the benefit of such ITCs in determining that person's net tax for any reporting period. Therefore, the condition in paragraph 296(2)(b) of the *ETA* will be satisfied as long as the ITCs had not been previously allowed as ITCs in computing the net tax of the person for any reporting period. In this case, the Appellants satisfy this condition.

[20] The last condition as set out in paragraph 296(2)(*c*) of the *ETA* is that the ITCs would be allowed or only disallowed because of the timing of the claim. Since the only reason stated for denying the ITCs is the timing of the filing of the GST returns, the Appellants satisfy this condition.

[21] As a result, the Appellants should be reassessed on the basis that their net tax for 2003 is ($11,706.51) and their net tax for 2004 is ($10,330.85).

[22] Counsel for the Respondent also referred to subsection 296(4) of the *ETA*. This subsection provides that:

> 296 (4) An overpayment of net tax for a particular reporting period of a person and interest thereon under paragraphs (3)(b) and (c)
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> > (a) shall not be applied under paragraph (3)(b) against an amount (in this paragraph referred to as the "outstanding amount") that is payable or remittable by the person unless the input tax credit or deduction to which the overpayment is attributable would have been allowed as an input tax credit or deduction, as the case may be, in determining the net tax for another reporting period of the person if the person had claimed the input tax credit or deduction in a return under Division V filed on the day the person defaulted in paying or remitting the outstanding amount and the person were not a specified person for the purposes of subsection 225(4); and
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> > (b) shall not be refunded under paragraph (3)(c) unless the input tax credit or deduction would have been allowed as an input tax credit or deduction, as the case may be, in determining the net tax for another reporting period of the person if the person had claimed the input tax credit or deduction in a return under Division V filed on the day notice of the assessment is sent to the person.[7]

[23] This subsection provides restrictions on the application of an overpayment of net tax[8] and on the payment of a refund of an overpayment of net tax. It does not change or affect the amount assessed.

[24] The jurisdiction of this Court is set out in the *Tax Court of Canada Act*. Section 12 of that *Act* provides, in part, as follows:

> 12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the ... Part IX of the *Excise Tax Act*, … when references or appeals to the Court are provided for in those Acts.

[25] Therefore the only matters over which this Court has jurisdiction in relation to appeals under Part IX of the *ETA* (the GST provisions) are in relation to appeals that are provided for in that *Act*. Section 309 of the *ETA* provides as follows:

> 309. (1) The Tax Court may dispose of an appeal from an assessment by

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[7] This is the current version of this subsection. By an amendment effective April 1, 2007 part of what had been included in paragraph (b) was expanded and became subsection 296(7) of the *ETA*.

[8] The definition of "overpayment of net tax" is in subsection 296(8) of the *ETA* and an overpayment of net tax includes the amount of a net tax refund if the net tax is a negative amount.

> (a) dismissing it; or
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> (b) allowing it and
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> > (i) vacating the assessment, or
> >
> > (ii) referring the assessment back to the Minister for reconsideration and reassessment.

[26] The only remedies that may be granted by this Court if an appeal is allowed are directly related to the assessment. There is no power to order the Minister to pay a refund. Therefore since subsection 296(4) of the *ETA* does not affect the assessment and only deals with the payment of a refund (in this case), it is beyond the jurisdiction of this Court to determine whether the provisions of this subsection will prevent the Appellants from receiving a refund. Unfortunately for the Appellants, if this matter is to be litigated, it would have to be resolved, in the first instance, by the Federal Court.

[27] As a result, the Appellants' appeals under the *ETA* are allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

(a) the net tax of the Appellants for their reporting period ending December 31, 2003 is ($11,706.51); and

(b) the net tax of the Appellants for their reporting period ending December 31, 2004 is ($10,330.85).

Signed at Ottawa, Canada, this 16th day of October, 2012.

"Wyman W. Webb"

Webb J.

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COURT FILE NO.:	2011-3660(GST)I
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