

Docket: 2023-128(GST)I

BETWEEN:

9331-0688 QUÉBEC INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 31, 2023, at Montreal, Quebec

Before: The Honourable Justice Gaston Jorré, Deputy Judge

Appearances:

For the appellant: Pierre Turgeon
Counsel for the respondent: Gabrielle Dagenais

JUDGMENT

The appeal from the reassessment dated July 1, 2017, made under the *Excise Tax Act* for the periods from July 1, 2017, to December 31, 2018, is dismissed without costs in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 19th day of December 2023.

“G. Jorré”

Jorré D.J.

Citation: 2023 TCC 173
Date: 20231219
Docket: 2023-128(GST)I

BETWEEN:

9331-0688 QUÉBEC INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Jorré D.J.

Issues

[1] The appellant, 9331-0688 Québec Inc., appeals from an assessment dated March 30, 2022, made under the *Excise Tax Act*. The assessment relates to the period from July 1, 2017, to December 31, 2018.

[2] The only issue is whether the appellant could make an election under section 156(2) of the *Excise Tax Act*. If the election was validly made, certain taxable supplies between the companies that made the election are considered to have been made for no consideration.

[3] There is no disagreement regarding the calculation of the amounts assessed.

[4] Either the appellant could make the election and the appeal must be allowed or the appellant could not make the election and the appeal must be dismissed.

Facts

[5] The appellant asked that the election be applied to the following companies:¹

¹ The relevant form is found at pages 98 to 100, as numbered in the middle at the bottom of the page, of Tab 3 of Exhibit I-1.

The appellant, ECJM Ltée, and Excavation McBec Ltée are corporations.

[6] Jason McKie is the sole shareholder of each of the three companies.

Law

[7] To simplify reading of the legislation, I will reproduce only the essential portions of the text. The relevant sections are reproduced in full in Appendix A to these reasons.

[8] Subsection 156(2) of the *Excise Tax Act* provides:

... if... a person that is a specified member of a qualifying group files an election made jointly by the person and another specified member of the group, every taxable supply made between the person and the other specified member... is deemed to have been made for no consideration.

[9] Subsection 156(1) of the *Excise Tax Act* defines “qualifying group” as follows:

(a) a group of corporations, each member of which is closely related, within the meaning assigned by section 128, to each other member of the group;

or

(b) a group of Canadian partnerships, or of Canadian partnerships and corporations, each member of which is closely related, within the meaning of this section, to each other member of the group.

[10] Subsection 156(1) defines “qualifying member” as follows:

qualifying member of a qualifying group means a registrant that is a corporation resident in Canada or a Canadian partnership and that meets the following conditions:

(a) the registrant is a member of the group;

[and meets certain other conditions.]

[11] Subsection 156(1) defines “specified member” as follows:

specified member of a qualifying group means

(a) a qualifying member of the group; or

...

[12] Subsection 128 (1) of the *Excise Tax Act* provides:

... a particular corporation and another corporation are closely related... if...

(a) qualifying voting control in respect of the other corporation is held by, and not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the other corporation are owned by,

(i) the particular corporation,

(ii) a qualifying subsidiary of the particular corporation,

(iii) a corporation of which the particular corporation is a qualifying subsidiary,

(iv) a qualifying subsidiary of a corporation of which the particular corporation is a qualifying subsidiary, or

(v) any combination of the corporations or subsidiaries referred to in subparagraphs (i) to (iv); or

(b) the other corporation is a prescribed corporation in relation to the particular corporation.

(Emphasis added.)

[13] A “qualifying subsidiary” is necessarily a corporation.²

[14] No Canadian partnerships are involved in this case.

Analysis

[15] The appellant’s contention is that it may make the election because the companies are associated corporations.³

[16] However, it is not sufficient for making the election that the corporations be associated. They must be closely related within the meaning of section 128.

[17] Under section 128, only corporations controlled by a corporation can be closely related.

[18] The owner of the appellant and of ECJM Ltée and Excavation McBec Ltée is an individual and not a corporation.

² See the definition of “qualifying subsidiary” in subsection 123(1) of the *Excise Tax Act*.

³ This fact was acknowledged by the auditor. See Exhibit A-1. The appellant also relies on Interpretation Bulletin IT-64R4 relating to the *Income Tax Act*.

[19] Accordingly, none of the three companies is closely related as required by subsection 128(1)(a) of the *Excise Tax Act* and the appeal must be dismissed.⁴

Conclusion

[20] As a final point, I note that the appellant asked that the interest and penalty be reduced. The Act does not allow this Court to reduce the interest or penalty if those amounts were validly determined by the respondent.

[21] Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 19th day of December 2023.

“G. Jorré”

Jorré D.J.

⁴ A similar example, but with more complicated facts, is *Rockport Developments v. The Queen*, 2009 TCC 180; see, *inter alia*, paragraphs 57 to 59.

CITATION: 2023 TCC 173

COURT FILE NO.: 2023-128(GST)I

STYLE OF CAUSE: 9331-0688 QUÉBEC INC. AND HIS MAJESTY THE KING

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: October 31, 2023

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré,
Deputy Judge

DATE OF JUDGMENT: December 19, 2023

APPEARANCES:

For the appellant: Pierre Turgeon
Counsel for the respondent: Gabrielle Dagenais

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the Respondent: Shalene Curtis-Micallef
Deputy Attorney General of Canada
Ottawa, Canada

Appendix A

Excerpts from the *Excise Tax Act* as it read during the period under appeal.

Closely related corporation

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

(a) qualifying voting control in respect of the other corporation is held by, and not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the other corporation are owned by,

(i) the particular corporation,

(ii) a qualifying subsidiary of the particular corporation,

(iii) a corporation of which the particular corporation is a qualifying subsidiary,

(iv) a qualifying subsidiary of a corporation of which the particular corporation is a qualifying subsidiary, or

(v) any combination of the corporations or subsidiaries referred to in subparagraphs (i) to (iv); or

(b) the other corporation is a prescribed corporation in relation to the particular corporation.

Qualifying voting control

(1.1) For the purposes of this Part, a person or a group of persons holds qualifying voting control in respect of a corporation at any time if at that time

(a) the person, or the members of the group collectively, as the case may be, own shares of the corporation to which are attached not less than 90% of the shareholder votes that may be cast in respect of each matter, other than a matter

(i) for which a statute of a country, or of a state, province, or other political subdivision of a country, that applies to the

corporation provides, in respect of the vote of the shareholders of the corporation on the matter, that

(A) any shareholder of the corporation has voting rights that are different from the voting rights that the shareholder would otherwise have under the letters patent, instrument of continuance or other constating instrument by which the corporation was incorporated or continued, including any amendment to, or restatement of, the constating instrument, or

(B) holders of a class or series of shares of the corporation are entitled to vote separately as a class or series, or

(ii) that is a prescribed matter or a matter that meets prescribed conditions or arises in prescribed circumstances; or

(b) the person or group, as the case may be, is a prescribed person or group in relation to the corporation.

Corporations closely related to the same corporation

(2) If under subsection (1) two corporations are closely related to the same corporation, they are closely related to each other for the purposes of this Part.

Investment funds

(3) For the purposes of this section, an investment fund that is a member of a mutual insurance group is deemed to be a corporation.

Voting right controlled by another person

(4) For the purposes of subsection (1.1), a particular person is deemed not to own a share at a particular time if

(a) another person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to control the voting rights attached to the share, unless the right is not exercisable at the particular time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual; and

(b) the other person is not closely related to the particular person at the particular time.

Definitions

156 (1) The definitions in this subsection apply in this section.

Canadian partnership means a partnership each member of which is a corporation or partnership and is resident in Canada. (*société de personnes canadienne*)

distribution has the meaning assigned by subsection 55(1) of the *Income Tax Act*. (*attribution*)

qualifying group means

(a) a group of corporations, each member of which is closely related, within the meaning assigned by section 128, to each other member of the group; or

(b) a group of Canadian partnerships, or of Canadian partnerships and corporations, each member of which is closely related, within the meaning of this section, to each other member of the group. (*groupe admissible*)

qualifying member of a qualifying group means a registrant that is a corporation resident in Canada or a Canadian partnership and that meets the following conditions:

(a) the registrant is a member of the group;

(b) the registrant is not a party to an election under subsection 150(1); and

(c) one of the following conditions is met:

(i) the registrant has property (other than financial instruments and property having a nominal value) and has last manufactured, produced, acquired or imported all or substantially all of its property (other than financial instruments and property having a nominal value) for consumption, use or supply exclusively in the course of commercial activities of the registrant,

(ii) the registrant has no property (other than financial instruments and property having a nominal value) and has made supplies and all or substantially all of the supplies made by the registrant are taxable supplies, or

(iii) the registrant has no property (other than financial instruments and property having a nominal value) and has not made taxable supplies and it is reasonable to expect that

(A) the registrant will be making supplies throughout the next 12 months,

(B) all or substantially all of those supplies will be taxable supplies, and

(C) all or substantially all of the property (other than financial instruments and property having a nominal value) to be manufactured, produced, acquired or imported by the registrant within the next 12 months will be for consumption, use or supply exclusively in the course of commercial activities of the registrant. (*membre admissible*)

specified member of a qualifying group means

(a) a qualifying member of the group; or

(b) a temporary member of the group during the course of the reorganization referred to in paragraph (f) of the definition temporary member. (*membre déterminé*)

temporary member of a qualifying group means a corporation

(a) that is a registrant;

(b) that is resident in Canada;

(c) that is a member of the qualifying group;

(d) that is not a qualifying member of the qualifying group;

(e) that is not a party to an election under subsection 150(1);

(f) that receives a supply of property made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(b)(i) of the *Income Tax Act* from the distributing corporation referred to in that subparagraph that is a qualifying member of the qualifying group;

(g) that, before receiving the supply, does not carry on any business or have any property (other than financial instruments); and

(h) the shares of which are transferred on the distribution. (*membre temporaire*)

Closely related persons

(1.1) For the purposes of this section, a particular Canadian partnership and another person that is a Canadian partnership or a corporation are closely related to each other at any time if, at that time,

(a) in the case where the other person is a Canadian partnership,

(i) all or substantially all of the interest in the other person is held by

(A) the particular partnership,

(B) a corporation, or a Canadian partnership, that is a member of a qualifying group of which the particular partnership is a member, or

(C) any combination of corporations or partnerships referred to in clauses (A) and (B), or

(ii) the particular partnership

(A) both holds qualifying voting control in respect of a corporation that is a member of a qualifying group of which the other person is a member and owns at least 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the corporation, or

(B) holds all or substantially all of the interest in a Canadian partnership that is a member of a qualifying group of which the other person is a member; and

(b) in the case where the other person is a corporation,

(i) qualifying voting control in respect of the other person is held by, and not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the other person are owned by,

(A) the particular partnership,

(B) a corporation, or a Canadian partnership, that is a member of a qualifying group of which the particular partnership is a member, or

(C) any combination of corporations or partnerships referred to in clauses (A) and (B),

(ii) qualifying voting control in respect of a corporation is held by, and not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the corporation are owned by,

(A) if the corporation is a member of a qualifying group of which the particular partnership is a member, the other person, and

(B) if the corporation is a member of a qualifying group of which the other person is a member, the particular partnership,

(iii) all or substantially all of the interest in the particular partnership is held by

(A) the other person,

(B) a corporation, or a Canadian partnership, that is a member of a qualifying group of which the other person is a member, or

(C) any combination of corporations or partnerships referred to in clauses (A) and (B), or

(iv) all or substantially all of the interest in a Canadian partnership is held by

(A) if the Canadian partnership is a member of a qualifying group of which the particular partnership is a member, the other person, and

(B) if the Canadian partnership is a member of a qualifying group of which the other person is a member, the particular partnership.

Persons closely related to the same person

(1.2) If, under subsection (1.1), two persons are closely related to the same corporation or partnership, or would be so related if each member of that partnership were resident in Canada, the two persons are closely related to each other for the purposes of this section.

Interest in a partnership

(1.3) For the purposes of this section, a person, or a group of persons, holds, at any time, all or substantially all of the interest in a partnership only if, at that time,

(a) the person, or every person in the group of persons, is a member of the partnership; and

(b) the person, or the members of the group collectively, as the case may be, is or are

(i) entitled to receive at least 90% of

(A) if the partnership had income for the last fiscal period (within the meaning of the *Income Tax Act*) of the partnership that ended before that time (or, if the partnership's first fiscal period includes that time, for that period), the total of all amounts each of which is the share of that income from all sources that each member of the partnership is entitled to receive, or

(B) if the partnership had no income for the last fiscal period or the first fiscal period referred to in clause (A), as the case may be, the total of all amounts each of which is the share of the income of the partnership that each member of the partnership would be entitled to receive if the income of the partnership from each source were one dollar,

(ii) entitled to receive at least 90% of the total amount that would be paid to all members of the partnership (otherwise than as a share of any income of the partnership) if it were wound up at that time, and

(iii) able to direct the business and affairs of the partnership or would be so able if no secured creditor had any security interest in an interest in, or the property of, the partnership.

Election for nil consideration

(2) For the purposes of this Part, if at any time after 2014 a person that is a specified member of a qualifying group files an election made jointly by the person and another specified member of the group, every taxable supply made between the person and the other specified member at a time when the election is in effect is deemed to have been made for no consideration.

Elections filed before 2015

(2.01) For the purposes of this section, if an election made under this section has been filed by any person before January 1, 2015, the election is deemed never to have been filed.

Non-application

(2.1) Subsection (2) does not apply to

- (a)** a supply by way of sale of real property;
- (b)** a supply of property, or of a service, that is not acquired by the recipient for consumption, use or supply exclusively in the course of commercial activities of the recipient; or
- (c)** a supply that is not a supply of property made in contemplation of a distribution made in the course of a reorganization described in subparagraph 55(3)(b)(i) of the *Income Tax Act*, if the recipient of the supply is a temporary member.

Cessation

(3) An election under subsection (2) made jointly by a particular member of a qualifying group and another member of the group ceases to have effect on the earliest of

- (a)** the day on which the particular member ceases to be a specified member of the group,
- (b)** the day on which the other member ceases to be a specified member of the group, and
- (c)** the day on which the election is revoked jointly by those members.

Form of election and revocation

(4) An election under subsection (2) made jointly by a particular specified member of a qualifying group and another specified member of the group and a revocation of the election by those specified members shall

- (a)** be made in prescribed form containing prescribed information and specify the day (in this subsection referred to as the “effective day”) on which the election or revocation is to become effective; and
- (b)** be filed with the Minister in prescribed manner on or before
 - (i)** the particular day that is the earlier of
 - (A)** the day on or before which the particular specified member must file a return under Division V for the

reporting period of the particular specified member that includes the effective day, and

(B) the day on or before which the other specified member must file a return under Division V for the reporting period of the other specified member that includes the effective day, or

(ii) any day after the particular day that the Minister may allow.

Joint and several liability

(5) A particular person and another person are jointly and severally, or solidarily, liable for all obligations under this Part that result upon, or as a consequence of, a failure to account for or pay as and when required under this Part an amount of net tax of the particular person or of the other person if that tax is attributable to a supply made at any time between the particular person and the other person and if

(a) an election under subsection (2) made jointly by the particular person and the other person

(i) is in effect at that time, or

(ii) ceased to be in effect before that time but the particular person and the other person are conducting themselves as if the election were in effect at that time; or

(b) the particular person and the other person purport to have jointly made an election under subsection (2) before that time and are conducting themselves as if an election under subsection (2) made jointly by the particular person and the other person were in effect at that time.