Docket: 2009-153(GST)G

BETWEEN:

RITA CONGIU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
9100-7146 Québec Inc. (2009-154(GST)G)
on June 25, 2013, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	J. L. Marc Boivin
Counsel for the Respondent:	Josée Fournier

JUDGMENT

The appeal from the assessment of the appellant made on February 1, 2006, under subsections 270(3) and 270(4) of the *Excise Tax Act* is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of August 2013.

"François Angers"

Angers J.

Translation certified true
on this 18th day of December 2013.

Erich Klein, Revisor

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BETWEEN:

9100-7146 QUÉBEC INC.,

Appellant,

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Appeal heard on common evidence with the appeal of
Rita Congiu (2009-153(GST)G)
on June 25, 2013, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	J. L. Marc Boivin
Counsel for the Respondent:	Josée Fournier

JUDGMENT

The appeal from the assessment of the appellant made on February 1, 2006, under section 325 of the *Excise Tax Act* is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of August 2013.

"François Angers"

Angers J.

Translation certified true
on this 18th day of December 2013.

Erich Klein, Revisor

Citation: 2013 TCC 271
Date: 20130829
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Docket: 2009-154(GST)G

BETWEEN:

9100-7146 QUÉBEC INC.,

Appellant,

and

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] These appeals were heard on common evidence. Rita Congiu is appealing an assessment made on February 1, 2006, under subsections 270(3) and 270(4) of the *Excise Tax Act* (ETA), and 9100-7146 Québec Inc. is appealing an assessment made on the same date, but under section 325 of the ETA.

[2] The facts that led the respondent to issue the two notices of assessment being appealed are admitted by the parties. Moreover, the parties filed an agreed statement of facts, being the facts set out by Judge Gilles Lareau of the Court of Québec in a judgment rendered on June 15, 2012. Exhibits supporting the facts were also filed, including the aforementioned judgment of Judge Lareau. No testimony was heard.

[3] The admitted facts are as follows:

> [TRANSLATION]
>
> [1] The appellant Rita Congiu (CONGIU) is appealing a notice of assessment (PL-2005-453) (NOTICE) issued on behalf of the respondent by the Agence du revenu du Québec (REVENU) pursuant to subsection 270(4) of the *Excise Tax Act* (ETA). The NOTICE relates to a tax debt of 3270227 Canada Inc. (CORPORATION) and to a distribution of property done by CONGIU without obtaining a certificate from the Minister.
>
> [2] In a related file (2009-154(GST)G), 9100-7146 Québec Inc. (QUÉBEC INC.) is also appealing a notice of assessment (PL-2005-463). This notice was issued pursuant to subsection 325(2) of the ETA on the basis that the CORPORATION and QUÉBEC INC. were not at arm's length.
>
> [3] CONGIU, QUÉBEC INC. and REVENU agreed to proceed on common evidence in this matter.
>
> [4] The CORPORATION, incorporated on July 12, 1996, was a real estate business. Its main assets were four immovables.
>
> [5] On June 6, 2001, following an audit of the CORPORATION, REVENU issued an assessment against it under the *Act Respecting the Québec Sales Tax* and the *Excise Tax Act*.
>
> [6] In response to this assessment, the CORPORATION filed on October 10, 2001, a notice of intention to make a proposal under section 50.4 of the *Bankruptcy and Insolvency Act*.
>
> [7] An amended proposal in bankruptcy was ratified by the Registrar of the Superior Court on January 25, 2002.
>
> [8] CONGIU became the director of the CORPORATION on October 28, 2002. She was also a shareholder and the signing officer for the bank accounts.
>
> [9] On November 4, 2002, the CORPORATION sold its assets (the four immovables) to CONGIU for $1,625,000. The CORPORATION then transferred the excess of the sale price over the balance of the hypothecary

loan ($406,000) to QUÉBEC INC., a related company (s. 19.1 c) of the Quebec *Taxation Act*.

[10] On May 8, 2003, the CORPORATION failed to meet the conditions of the proposal in bankruptcy by failing to make the third payment of $20,000 to the trustee in bankruptcy.

[11] On December 10, 2004, the Registrar of the Superior Court for bankruptcy, and insolvency matters released the CORPORATION with respect to its failure to make the third payment stipulated in the proposal in bankruptcy, and ordered the CORPORATION to make the third payment of $20,000 to the trustee within 48 hours following his judgment.

[12] The CORPORATION actually did not make this third payment until January 14, 2005.

[13] On February 4, 2005, the bankruptcy trustee for the CORPORATION issued a certificate of performance and filed it with the Superior Court.

[14] On May 26, 2005, the Superior Court granted a motion for revocation of judgment and cancellation of the CORPORATION's proposal and stated that the CORPORATION was deemed to have made an assignment in bankruptcy as of the date of the judgment.

[15] On February 1, 2006, REVENU issued against CONGIU and QUÉBEC INC. the notices that are being appealed herein.

[4] The issues before me are essentially the same as those that were before Judge Lareau of the Court of Québec, which he has already ruled on. Only the legislative provisions on which the assessments are based differ. The parties also informed the Court that Judge Lareau's decision, which dismissed the appeals, had been appealed to the Quebec Court of Appeal and that the case would be heard in the coming months.

[5] This situation led counsel for the respondent to raise at the beginning of the hearing the principle of *res judicata*, the doctrine of abuse of process and the principle of judicial comity or of deference toward the Court of Québec decision.

Res judicata

[6] In *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, the Supreme Court of Canada set out the conditions under the civil law for the application, with respect to judgments,

of the principle of *res judicata* and of the conditions relating to identity. The conditions pertaining to judgments are that (1) the court must have jurisdiction over the matter, (2) the judgment must be final, and (3) the judgment must have been rendered in a contentious matter. The conditions pertaining to identity are identity of parties, object, and cause. The conditions pertaining to judgments, in my opinion, do not present any difficulties in this case.

[7] Authors Jean-Claude Royer and Sophie Lavallée in the fourth edition of *La preuve civile* (Éditions Yvon Blais, 2008, at paragraph 835), explain that there is identity of object if the immediate legal benefit an appellant seeks, or the right that he or she wishes to have sanctioned, diminished or abrogated, is the same. There is identity of cause if the legal fact giving rise to the right claimed is identical (see *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 R.C.S. 440, at paragraph 24).

[8] In this case, I believe that it is possible to find that there is identity of cause: it is the sale of assets without obtaining a certificate from the Minister and the transfer of funds between related persons. It would be more difficult for me to find that the provincial and federal assessments have the same object. The amounts of the assessments and the legal basis of the assessments are different. Lastly, in my opinion, what prevents the application of the principle of *res judicata* is that there is no identity of parties here because the federal and Quebec governments are not the same person.

Abuse of process

[9] The Supreme Court of Canada examined abuse of process in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77. At paragraph 37 of this judgment, the Supreme Court stated that the doctrine of abuse of process may be applied where "the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined." At paragraph 43, the Supreme Court explained that the primary focus of this doctrine is to preserve the integrity of the adjudicative functions of courts, particularly given the possibility that contradictory decisions would bring the administration of justice into disrepute.

[10] The application of the doctrine of abuse of process is a discretionary power of the courts. Justice Arbour, in *Toronto (City) v. C.U.P.E.*, *supra*, described a number of factors to be considered in determining whether relitigation would constitute abuse of process. In paragraphs 51, 52 and 53 it is stated:

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> 52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. . . .
>
> 53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision . . . .

[11] In *Houda International Inc. v. Canada*, 2010 TCC 622, my colleague Justice Boyle reiterated what he had said in *Golden v. Canada*, 2008 TCC 173, affd. by 2009 FCA 86. The relevant passages are paragraphs 26 to 30 of *Golden*:

> 26 It is also open to this Court to apply the doctrine of abuse of process to prevent relitigation of matters already decided in another court proceeding.

> 27 The scope and application of the doctrine of abuse of process to prevent relitigation has recently been thoroughly canvassed by the Supreme Court of Canada in *C.U.P.E.*
>
> 28 The principal difference between issue estoppel and abuse of process to prevent relitigation is with respect to the question of mutuality of parties and privity. Abuse of process does not require that the preconditions of issue estoppel be met. Abuse of process can therefore be applied when the parties are not the same but it would nonetheless be inappropriate to allow litigation on the same question to proceed in order to preserve the courts' integrity.
>
> 29 Abuse of process is also a doctrine that should only be applied in the Court's discretion and requires a judicial balancing with a view to deciding a question of fairness. However, it differs somewhat from a consideration of the possible application of issue estoppel in that the consideration is focused on preserving the integrity of the adjudicative process more so than on the status, motive or rights of the parties.
>
> 30 Relitigation should be avoided unless it is in fact necessary to enhance the credibility and effectiveness of the adjudicative process. This could be the case where (1) the first proceeding is tainted by fraud or dishonesty; (2) fresh new evidence, previously unavailable, conclusively impeaches the original result; or (3) when fairness dictates that the original result should not be binding in the new context.

[12] In this case, the appellants have not submitted any different evidence from that submitted in the Court of Québec. Indeed the agreed statement of facts filed in this Court is based on Judge Lareau's statement of the facts in his judgment of June 15, 2012. Moreover, this Court must rule on an issue very similar to that which was before the Court of Québec. The legislative provision here is not the same, but it is similar to provisions found in Quebec legislation. It is not an exaggeration to say that this is almost an appeal of the Court of Québec's judgment.

[13] I agree with the conclusion of Justice Boyle, who stated in paragraph 21 of *Houda*, *supra*, that the issue before him had already been addressed by the Court of Québec and that it should not be relitigated in this Court as that might result in a different outcome. He also added that reopening the issue would lead to an inefficient use of public and private resources, could lead to inconsistent decisions that could not be reasonably explained to taxpayers in Quebec and elsewhere in Canada, and would unnecessarily erode the principles of finality, consistency, predictability and fairness so important to the proper administration of justice. This is all the more certain in this

case since Judge Lareau's decision has been appealed. Consequently, I am not going to reopen the issues in these appeals.

Judicial comity

[14] It is generally accepted that this Court must show deference toward judgments of the Court of Québec unless one of the exceptional circumstances listed in paragraph 62 of *Almrei v. Canada (Citizenship and Immigration)*, 2007 FC 1025, is present:

> 1. The existence of a different factual matrix or evidentiary basis between the two cases;
>
> 2. Where the issue to be decided is different;
>
> 3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong;
>
> 4. The decision it followed would create an injustice.

[15] Justice Boyle, in *Houda*, *supra*, granted the application for an extension of time for filing an appeal; he did so in deference to the Court of Québec. He states the following at paragraph 28 of his decision:

> 28 . . . Otherwise, there would be unnecessary disorder in the administration of justice with respect to tax appeals, the law would become uncertain and the confidence of the public would be undermined. This would occur whether or not this Court were to decide the matter on the merits in favour of the Applicant or not.

[16] In my opinion, none of the exceptional circumstances set out in *Almrei*, *supra*, are present in this case. Even though I am not bound by Judge Lareau's decision, it is desirable, in my view, to conform with it since it is "important, insofar as it is possible, to help ensure that the judgments on a single issue are consistent" (see *2749807 Canada Inc. v. Canada*, 2004 TCC 457, at paragraph 19).

[17] For these reasons the appeals are dismissed without costs.

Signed at Ottawa, Canada this 29th day of August 2013.

"François Angers"

Angers J.

Translation certified true
on this 18th day of December 2013.

Erich Klein, Revisor

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COURT FILE NOS.:	2009-153(GST)G; 2009-154(GST)G
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PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 25, 2013
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APPEARANCES:

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