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GST & Commodity Tax

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June/July 2009 **Pages 25-32** **Vol. XXIII No. 4**

EDITOR'S COMMENTS

NON-RESIDENT NIGHTMARE

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Recently, at a conference in the US, we heard of a non-resident with a sad tale of woe. The corporation had apparently been wrongly registered for GST, been assessed for non-collection of tax, had paid the assessment and, some months later, decided to close its GST account. Their experience is a cautionary tale of just how badly things can go wrong when GST registration goes awry.

Registration by Proxy

The problems apparently started when a non-resident corporation opened an importer account to clear goods through Canadian customs. Some time later, the corporation apparently registered for GST, presumably so the corporation could recover GST paid when it acted as the importer of record for the imported goods. However, the application was made out in the name of the parent corporation with the result that the parent, rather than the subsidiary, was registered for GST.

The application was processed, with the result that the CRA recorded the non-resident parent corporation as a GST registrant. The corporation filed net refund returns to claim GST paid on its imports.

THIS ISSUE:

GST & Commodity Tax

WE ACKNOWLEDGE THE FINANCIAL SUPPORT OF THE GOVERNMENT OF CANADA, THROUGH THE PUBLICATIONS ASSISTANCE PROGRAM (PAP), TOWARD OUR MAILING COSTS.

PAP REGISTRATION #8919 PUBLICATIONS MAIL AGREEMENT #1410180

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SUBSCRIPTION RATE: $320 PER YEAR
PLUS SHIPPING, HANDLING AND GST
10 ISSUES PER YEAR

ISSN 0847-3528

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GST registration tainted all of the activities of the non-resident parent corporation, resulting in the loss of zero-rating for, amongst others, supplies of services by sales representatives that could otherwise be zero-rated by s. 5 of Part V of Schedule VI.

The Canadian representatives apparently had no idea the parent corporation was registered for GST. It also meant that all supplies of property made in Canada became taxable, no longer afforded the protection of the non-resident override rule in s.143(1) of the *Excise Tax Act* which would otherwise deem such supplies to have been made outside Canada.

An Audit

The parent corporation was audited and assessed for non-collection of GST on supplies which were made in Canada. Because title to the goods sold to Canadians passed in Canada, the supplies were deemed to be made in Canada by s.142(1)(a). Mercifully, the customers agreed to pay the GST assessed. In the result, the non-resident was really only out of pocket for the interest and penalty on the GST not collected, a relatively immaterial amount. The assessment was paid and forgotten, and the business continued to charge GST on sales made in Canada thereafter until the business essentially wound down.

When the corporation began to look into the process of closing its GST account, it discovered that the sales had, in fact, been made by a subsidiary. While the corporation, a GST registrant, had cleared the goods through customs, the business was in fact carried on by a subsidiary that had title to the goods when they were cleared and from whom title passed to the customer in Canada. That subsidiary was not, in fact, registered for GST, but had been using the GST registration number issued to the parent corporation on its invoices.

In other words, the GST assessment appeared to have been levied against a party that made no supplies in Canada.[1] Had the auditor verified the GST registration number and looked at the contract of sale it would have been clear that the parent corporation should never have been assessed, or perhaps registered in the first instance.

The End Game

At this point, the corporation decided to quietly exit the Canadian GST system.

What they found was that the *Excise Tax Act* does not provide non-residents with a clear basis for doing so. S. 242(1) states that:

> the Minister may, after giving a person who is registered under this Subdivision reasonable written notice, cancel the registration of the person if the Minister is satisfied that the registration is not required for the purposes of this Part.

Cancellation is entirely at the Minister's discretion. Moreover, s. 242 implies that it is at the Minister's initiative, not at the request of the non-resident registrant.

It turns out, in practice, that it is not possible for a non-resident to "cancel" their GST registration. The form offered for this purpose, RC145, is a "Request to Close Business Number Accounts", which is different from cancelling registration in that the account can be reactivated at any time if the corporation decides that it might want to try to do business in Canada again. "Deregistration" is a term the CRA uses to refer to what happens when a small supplier cancels their GST registration.

In this case, the corporation accessed the CRA website, read GST Memoranda Series Chapter 2.7 "Cancellation of Registration" and, not seeing their situation clearly described there, called the technical enquiry line listed at the back of the document and confirmed that RC145 was the form to use. They were then referred to the International Tax Services branch of the CRA. A call to that group proved futile because that group deals with non-resident registration for withholding tax purposes.

They were then referred to the Business Window and were given the number for the International Tax Services branch for corporate accounts for information on where to send the form. A call to that number produced the advice that they were to fax the form to the "Non-resident GST Unit" in the Tax Services Office charged with responsibility for their particular territory, accompanied by a letter, signed by an authorized signing officer of the corporation who is listed on the account, requesting a refund of any security they have posted in connection with their GST account.

For multinationals, the practical problem is that they may not entirely know what their far-flung operations are

1 The CRA could argue that the subsidiary was carrying on business in Canada, required to register for GST and collect the tax.

doing. Autonomous divisions far removed from the centre may be doing their own thing, shipping goods into Canada and storing them there. S.171(3) requires a person to pay 5% GST on the fair market value of property in Canada on the date of deregistration. Individuals charged with certifying form RC145 are served notice of this requirement on the form and will be rightly anxious that this requirement has been fulfilled.

Many Questions

This particular account raises many questions, not the least of which is how an erroneous GST registration could have been processed in the first place. Unfortunately, GST registration is sometimes perceived as a benefit, the ability to recover GST paid, without a full understanding of the consequences.

There is a concern that the customers face an exposure to assessment for failing to verify the GST registration number of their supplier, although it could be argued that a s. 261 rebate might be available to them for an amount paid as or on account of tax.[2]

There is also the situation of the Canadian sales representatives who face an uncertain future because they may have failed to collect GST from a person they did not know was registered at the time.[3] It is not clear who they thought they were acting for, as sales representatives, but if they were acting for a person who was, at that time, a GST "registrant" (whether properly registered or required to be so registered), they would be required to collect GST on their commissions.

Finally, it is clear that the legislation and administrative processes around non-resident GST deregistration could benefit from repair. The statutory basis for GST account closure is vague and the roundabout the non-resident apparently engaged in illustrates a couple of points along the way which could be tightened up to make Canada a friendlier place to do business.

2 See *United Parcel Service Canada Ltd. v. R.* (2009), 2009 CarswellNat 907, 2009 CarswellNat 906, [2009] G.S.T.C. 66, 2009 SCC 20 (S.C.C.)

3 See *Chambers v. R.* (2009), [2009] G.S.T.C 62, 2009 TCC 186, 2009 CarswellNat 808 (T.C.C)

GST/HST CASES

FCA DENIES *TELUS* APPEAL

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In a previous edition of the GST & Commodity Tax[1], we discussed the Tax Court of Canada decision in *Telus*[2] which was, at the time, under appeal to the Federal Court of Appeal. On February 18, 2009, the Federal Court of Appeal dismissed the appeal of Telus Communications (Edmonton) Inc. ("Telus") and confirmed the decision of the Tax Court of Canada to the effect that Telus was not entitled to a rebate and/or refund of its net tax in the amount of $1,849,230.75 pursuant to subsection 261(1) of the *Excise Tax Act* (Canada) ("ETA").

Telus had until April 19, 2009 to file an application for leave to appeal this decision to the Supreme Court of Canada, but chose not to do so.

1 J. Perreault, E. Gadbois, "Tax Court Calls Telus on ITC Claim," *GST & Commodity Tax*, Vol. XXII, no. 4 (May 2008).

2 *Telus Communications (Edmonton) Inc. v. R.* (2008), 2008 CarswellNat 3061, 2008 TCC 5, 2008 CarswellNat 314, [2008] G.S.T.C. 39, 2008 G.T.C. 277 (Eng.) (T.C.C), affirmed (2009), [2009] G.S.T.C. 36, 2009 FCA 49, 2009 CarswellNat 442 (F.C.A.)

Facts

The appellant, Telus, had acquired all of the undertaking, property, assets and rights of Edmonton Telephones Corporation ("Target"), a wholly owned subsidiary of the City of Edmonton (the "sale agreement"). Both parties to the transactions made an election under subsection 167(1) of the ETA to allow for the tax-free transfer of assets of a business, effective on March 10, 1995.

Prior to the acquisition, Target had contracted to receive supplies in the normal course of carrying on its business. The supplies in issue were made by various suppliers to Target before the acquisition of the business by Telus but they had not been paid by Target at the time of the acquisition of the assets.

Pursuant to the sale agreement, and as part of the purchase price, Telus assumed the liability to pay for these supplies and did in fact pay for them after the acquisition, including the Goods and Services Tax ("GST") payable, in the ordinary course of operating the business acquired from Target. There was no direct contractual relationship between the suppliers and Telus, save and except, the indirect assumption of liabilities under the agreement between Telus and Target. In accordance with the agreement, Telus claimed input tax credits ("ITCs") in respect of the GST it paid to Target's suppliers.

Tax Court of Canada Decision

Justice Hershfield held that only the recipient of the supplies, which was Target in the present case, could claim the ITCs.

In addition, the Tax Court concluded that Telus was not entitled to a rebate/refund pursuant to subsection 261(1) of the ETA. The Court concluded that the payment of GST was made by Telus on behalf of Target and as such, Telus was not entitled to the rebate/refund under subsection 261(1) of the ETA. Justice Hershfield concluded that what has happened is that Target did not cooperate with Telus to give it the relief is should have secured under the sale agreement had it been properly structured.

Finally, in respect of the calculation methodology employed by the Canada Revenue Agency ("CRA"), which was challenged by Telus, the Court allowed an amount of 10% of the small transaction ITC amounts that were denied by the CRA to Telus.

Federal Court of Appeal Decision

It is noteworthy that Telus decided not to appeal on the question of the Tax Court's decision which holds that only Target, as the recipient, was entitled to claim the ITCs under subsection 169(1) of the ETA. Also, Telus did not appeal in respect of the calculation methodology issue for which the Tax Court allowed an amount of 10% of the small transaction ITC amounts that were denied by the CRA to Telus. Thus, Telus's appeal was solely based on the issue of whether or not it was entitled to a rebate and/or refund of the amount claimed under subsection 261(1) of the ETA.

Justice Noël, writing the unanimous decision of the Federal Court of Appeal ("FCA"), noted that subsection 169(1) and paragraph 263(b) of the ETA must be applied in interpreting the context of subsection 261(1) of the ETA.

Subsection 169(1) of the ETA when read with the definition of the term "recipient" provides in effect that only the person to whom a supply is made can claim the related ITCs. As for paragraph 263(b) of the ETA, it provides that a rebate of an amount under subsection 261(1) of the ETA shall not be paid to a person to the extent that it can reasonably be regarded that the person has claimed or is entitled to claim ITCs in respect of the amount.

Telus pleaded that subsection 261(1) of the ETA should be construed so as to allow it to claim relief for the GST it paid to Target suppliers even though, according to the Tax Court decision, Target was the only person entitled to claim the ITCs for the GST paid to its suppliers under subsection 169(1) of the ETA.[3] However, according to Justice Noël, Telus's position meant that two persons could claim relief for the same amount of tax, *i.e.* (i) the recipient by means of ITCs, and (ii) a third party who made the payment on behalf of the recipient by way of a rebate and/or refund. The FCA held that the Tax Court Judge was on solid ground when he held that different persons could not be entitled to make claims for the same amount under the scheme implemented by the Parliament. Subsection 261(1) of the ETA could not apply to a payment made on account of someone else's tax as Telus had *no obligation to pay tax under the ETA* when it paid Target suppliers.

Justice Noël also noted that subsection 261(1) of the ETA should not be construed in a manner to avoid the windfall to the tax authorities solely because the transaction was not properly structured. In the present case, it appears that the outstanding ITCs were not sufficiently material in the overall context of the transaction to attract attention. Thus, this matter was left unattended by the parties involved.

Finally, Justice Noël distinguished the facts of the *Telus* case with the decisions of the FCA in *Canada v. United Parcel Service Canada Ltd.*[4] and *Windsor Urgent Care Centre Inc. v. Canada.*[5]

3 As noted earlier, Telus did not appealed to the FCA in respect of this aspect of the Tax Court decision which holds that only Target, as the recipient of the supplies, was entitled to claim the ITCs pursuant to subsection 169(1) of the ETA.

4 *United Parcel Service Canada Ltd. v. R.* (2008), 2008 CarswellNat 2307, 2008 CarswellNat 248, 2008 FCA 48, 2008 G.T.C. 1182, [2008] G.S.T.C. 34, leave to appeal allowed (2008), 2008 CarswellNat 1989, 2008 CarswellNat 1988 (S.C.C.) reversed (2009), 2009 CarswellNat 907, 2009 CarswellNat 906, [2009] G.S.T.C. 66, 2009 SCC 20 (S.C.C.)

5 *West Windsor Urgent Care Centre Inc. v. R.* (2008), 2008 G.T.C. 1152, [2008] G.S.T.C. 6, 371 N.R. 297, 2008 CarswellNat 554, 2008 FCA 11, 2008 CarswellNat 28 (F.C.A.)

Instead, Justice Noël referred to the decision of *2955-4201 Québec Inc.* v. *R.*[6] where the FCA reached a similar decision with respect to the interaction with subsections 169(1) and 261(1) of the ETA.

CONCLUSIONS

This decision tends to demonstrate that the Courts will not interpret the sections of the ETA in a manner that was not intended by the Parliament solely because it would result in an unfair advantage to the CRA or that it would lead to an unfair result for the taxpayer. Most importantly, it reflects, once again, the importance for clients or advisors to not leave matters relating to GST and ITCs unattended in the course of corporate reorganizations.

One could question the result of this decision had Telus been able to argue that it was subrogated to the rights and obligations of Target or had it had any other type of legal arrangement that could have helped Telus step into the shoes of Target.[7] These kinds of arguments may be raised by taxpayers in the future in order to counter the unattended and unfavourable decision that was reached by the FCA.

6 *2955-4201 Québec Inc. c. R.* (1997), 98 G.T.C. 6033, [1997] G.S.T.C. 100, 1997 CarswellNat 2657, 1997 CarswellNat 1770 (Fed. C.A.)

7 For example, in Québec, section 1651 of the *Québec Civil Code* provides that a person who pays in the place of a debtor may be subrogated to the rights of the creditors.

GST/HST CASES

ONE-TWO PUNCH: THE *GENERAL MOTORS* AND THE *CANADIAN MEDICAL PROTECTIVE ASSOCIATION* APPEALS

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On April 16, 2009 the Federal Court of Appeal released its decisions in both the *General Motors of Canada Limited* case[1] and *The Canadian Medical Protective Association* case,[2] here referred to as "GM" and "CMPA", respectively. Each was an appeal from a Tax Court decision in favour of the taxpayer, and each, in its own way, involved the tax status of investment management fees. The Tax Court decisions had, at first blush, appeared contradictory, but the Court of Appeal, with the same bench for each appeal, confirmed each of the Tax Court decisions.

1 *General Motors of Canada Ltd. v. R.*, 2008 CarswellNat 3153, 2008 CarswellNat 454, 2008 TCC 117, [2008] G.S.T.C. 41, 2008 G.T.C. 256, (T.C.C.). Affirmed 2009 CarswellNat 880, [2009] G.S.T.C. 64, 2009 FCA 114.

2 *Canadian Medical Protective Assn. v. R.* (2009), 2009 FCA 115, 2009 CarswellNat 879 (F.C.A.)

At the Tax Court level,[3] GM was successful in establishing that it was entitled to recover the GST charged to it by investment managers it had retained to provide advice with respect to investments held by the GM pension plans for the benefit of its employees. The Court had held that the supply of the investment management services was made to GM in its own right, and not as deemed trustee for the pension plan, that GM had both acquired the services and had been legally required to pay for those services, and that the provision of a benefits plan to its employees was an integral part of its commercial activities. GM was therefore entitled to recover the GST charged on those services as an input tax credit. GM also presented an alternative argument that the investment management services were exempt as financial services, but, *obiter*, the Court opined that the services were not exempt. The investment managers did not exercise exclusive authority over the investment choices and did not possess the access to the funds necessary to arrange for the transfer of financial instruments as required by paragraph (l) of the definition of "financial service" under subsection 123(1) of the *Excise Tax Act* ("the Act").

On appeal, the Crown disputed that GM had met the tests for recovering the GST as an input tax credit. First, the Crown argued that GM had acquired the services as deemed trustee, and that therefore, under section 267.1 of the Act, its acts were deemed to be acts of the plan trust. In that event, GM could not be said to have acquired the services. The Tax Court had found that GM had not taken title to any assets under the deed of trust, and that the trust agreements had expressly appointed Royal Trust as trustee. GM's role was that of administrator, and in that separate role, it had acquired the services of the investment managers. The Federal Court of Appeal found no reviewable error in this conclusion. With respect to whether GM had been legally required to pay for the GST on the supply, the Appeal Court also found no reviewable error in the Tax Court's finding that GM had contracted directly with the investment managers and was legally responsible to pay for those services, to the exclusion of the plan trusts.

Lastly, with respect to whether GM had incurred the cost of the investment management services in the course of its commercial activities, the Crown first argued that GM had not acquired the services in the course of its activities of making and selling automobiles, but rather in its separate role as administrator of the activities of a third person, i.e., the plan trust. The Appeal Court found this argument untenable, as the collective agreement between GM and its employees required GM to establish and operate a pension plan, and there was no evidence to suggest that the plan trusts were parties to the agreements with the investment managers. The Crown then argued that the indirect nexus established by the purpose of operating a pension plan was not sufficient to establish a right to claim input tax credits. The Court of Appeal agreed with the Tax Court judge that the operation of the pension plan was not a separate business objective, and disposed of this argument. The Crown's final argument was that the Tax Court erred when applying an economic substance over form analysis in deciding that denying GM input tax credits would ignore the commercial realities of the marketplace. Employing the principles of the *Shell Canada Limited* case,[4] the Appeal Court repeated that economic realities should not re-characterize a bona fide legal relationship, nor supplant the operation of an otherwise unambiguous legal provision. However, in this case, neither had occurred. The Tax Court had found, as a fact, that GM's pension plans were an integral component of GM's commercial activities, but had not re-characterized its legal relationship. The appeal was dismissed by unanimous decision.

The same court then dealt with the CMPA appeal. The CMPA, a not-for-profit organization, retained investment managers to manage, on a fully discretionary basis, funds received from its members and held by it as a reserve for claims. At the Tax Court level,[5] Bowman C.J. held that the appellant association neither sought nor received advice, but rather the investment managers had the discretionary power to purchase and sell securities. In CMPA's circumstances, the investment management services were exempt as financial services.

The reasoning of the Court of Appeal quickly turned to the question of whether the services constituted the "arranging for" a financial service within paragraph (l) of the definition of "financial service" in subsection 123(1) of the Act.

First, the Court drew the distinction between the nature of the service being provided and the expertise of the provider, noting that it is the former that will characterize the service as either exempt of taxable. The court concluded that, while the dominant character of the services supplied may well be the quality of the research and analysis resulting in the trade, it is "purposeless if it does not end with a buy or sell order, or a "hold" decision. The final order is an essential characteristic of the management of the funds by the investment manager." The Court also found that the phrase "arranging for", given its common meaning of "to give instructions" or to "make preparation for" is both wide and elastic. In the result, the Court affirmed, by unanimous decision, that the services provided by the investment managers in the CMPA case were exempt as the supply of financial services within paragraphs (d) and (l) of the definition in the Act.

These two decisions constitute substantial reversals of CRA policy. The GM case now stands as authority, not just for the recovery of GST on investment management fees, but for the recovery of GST charged on any supply contracted for by a recipient notwithstanding that another party may have provided the consideration for the supply or may be the beneficiary of the supply. Technical Information Bulletin TIB-032R, for example, has long denied its administrative concession to invoices addressed to employers in respect of costs paid by the pension plan, allowing employers to recover only those "employer"

3 *General Motors of Canada Ltd. v. R.*, 2008 CarswellNat 3153, 2008 CarswellNat 454, 2008 TCC 117, [2008] G.S.T.C. 41, 2008 G.T.C. 256, (T.C.C.)

4 *Shell Canada Ltd. v. R.*, [1999] S.C.J. No. 30, 1999 CarswellNat 1808, 1999 CarswellNat 1809, [1999] 4 C.T.C. 313, 99 D.T.C. 5669, 178 D.L.R. (4th) 26 (S.C.C.)

5 *Canadian Medical Protective Assn. v. R.* (2008), 2008 CarswellNat 943, 2008 TCC 33, 2008 G.T.C. 461, [2008] G.S.T.C. 88 (TCC) affirmed (2009), 2009 FCA 115, 2009 CarswellNat 879 (F.C.A.)

costs, as defined, that were invoiced to and paid by the pension plan. The case points up a continued emphasis by the courts to support the right of a person to recover GST as the acquirer of goods and services for which it is liable to pay, to the exclusion of another person to whom the supply may, in fact, be rendered. In the CMPA case, the Court of Appeal construed the meaning of "arranging for" in a very wide, inclusive, manner which may well have practitioners straining at the leash to find exemption for recipients of services unable to recover full input tax credits.

For the circumstances of the GM decision, the federal Department of Finance has the "fix" ready in terms of a proposed GST rebate, announced in the January 26, 2007 Finance Canada Special Release. The rate of rebate will be 33% of all GST paid by the plan, and will be payable to the pension plan trust. Under the terms of the rebate, employers will be allowed input tax credits for GST paid on pension-related expenses, but will be required to collect GST on a deemed taxable supply of those expenses to the plan trust. Finance officials confirm that this rebate will proceed, but will not say whether its introduction will be anything other than prospective. For periods prior to the effective date of this new rebate, could the CRA proceed to re-assess taxpayers for failing to collect GST on the hinted-at "re-supply" to the plan by employers using plan funds to pay for supplies of pension-related services? This would appear to be the weaker of the two approaches to denying employers the benefit of the recovery of pension-related GST, as most pension plans permit employers to be reimbursed by the plan funds for administrative expenses incurred for the benefit of the plan. If the funds are held in trust for that purpose, this suggests that an employer is merely using its own money for defined, pension-related, purposes, and is not making a re-supply of an expense to the trust.

One hopes that these decisions will prove final, and that the enactment of the proposed rebate will settle the pension plan issue once and for all. As for the CMPA case, it remains to be seen whether the legislation will be amended to reverse the effect of the decision.

PROPERTY TAX

AFFIXED TPP BECOMES ASSESSABLE FOR PROPERTY TAX PURPOSES

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Whether equipment is personal property or a "real property improvement" (i.e., affixed to the land and ultimately treated as "real property" thereafter) has some significant tax consequences in many different contexts.

Real property is generally liable to assessment and taxation for property tax purposes, whereas personal property is generally not. However, the opposite is generally true for retail sales tax purposes: tangible personal property is taxed, but real property is generally not.

In an interesting case out of Manitoba, *Maple Leaf Foods Inc. v. Winnipeg (City) Assessor*,[1] the Manitoba Court of Appeal (the "MCA") recently upheld a municipal board's decision which found that certain heavy, yet movable cooling equipment was realty, and thus, assessable for taxation for real property purposes.

This is a very significant case for commodity tax practitioners, who often go to great lengths to demonstrate that personal property affixed to real property is in fact a "fixture", and thus outside a particular province's retail sales tax system; the MCA's decision shows a possible flip-side consequence of such an argument for property tax purposes.

Facts

Maple Leaf Foods owned three meat processing plants in Winnipeg, each with a massive evaporator and condenser unit (collectively, the "Equipment"). The Assessor for the City of Winnipeg (the "Assessor") assessed the Equipment as realty, and included its value in the assessed value of the meat processing plants (the "Properties").

The Plaintiff applied to the Board of Revision for relief on that particular point, but the Board affirmed the Assessor's decisions. The Plaintiff then appealed to The Municipal Board of Manitoba (the "Municipal Board"), which it is allowed to do under the Manitoba *Municipal Assessment Act* (the "Act"), again seeking to reduce the assessed value of the Properties by the amount related to the Equipment.

The Municipal Board first decided that it did not have jurisdiction to hear the Plaintiff's appeal. According to the Municipal Board, the case raised an issue concerning liability to taxation, which was outside of its jurisdiction. However, the Municipal Board did opine that it considered the Equipment assessable as a "structure", and thus within the definitions of "improvement" and "real property" under the Act.

The Plaintiff then sought and obtained leave to appeal to the MCA, where there were two essential issues, the jurisdictional issue (i.e., did the Municipal Board have the jurisdiction to hear the appeal), and the substantive issue of whether the Equipment amounts to assessable real property.

The MCA's Decision

On the jurisdictional issue, the MCA ruled that the Municipal Board did in fact have proper jurisdiction, and that it had erred in rejecting jurisdiction. In the MCA's view, the issue before the Municipal Board was the amount of an assessed value, not "liability to taxation".

On the substantive point, the analysis was a bit lengthier. The MCA started by considering whether the Board applied the proper test in its analysis. After reviewing the scheme of the Act, the MCA considered if the Equipment was a structure – if

1 *Maple Leaf Foods Inc. v. Winnipeg (City) Assessor* (2008), 231 Man. R. (2d) 40, 2008 CarswellMan 441, 2008 MBCA 96 (Man. C.A.)

it was, it would bring the Equipment within the definitions of "improvement" and "real property" under the Act, and thus, assessable for taxation.

In this regard, the Act imposes tax on real property, being land and improvements on the land. For this purpose, an "improvement" means, *inter alia*:

> (a) a building, fixture or structure that is erected or placed in, on, over or under land, whether or not the building, fixture or structure is affixed to the land and is capable of being transferred without special mention by a transfer of the land,
>
> and includes
>
> (b) a part of a building, fixture or structure under clause (a),
>
> (c) plant, machinery, equipment and containers that are used in the retail marketing of oil and oil products,

The Plaintiff's Arguments

The Plaintiff's position was that the Equipment was personal property, and therefore, not subject to realty tax. The Plaintiff submitted that although "structure" was not defined under the Act, it had an established meaning from case law which generally referred to something of substantial size, built up from component parts and intended to remain permanently on a permanent foundation.

The Plaintiff further submitted that the Equipment did not meet the common law test as the Equipment was not part of the structural system and it had been relocated within the plants without affecting the integrity of the buildings.

The Assessor's Arguments

The Assessor's position was that the Equipment constituted an improvement to the land. Relying on the test set out in *Field Place Caravan Park, Ltd. v. Harding (Valuation Officer)*,[2] the Assessor asserted that the Equipment became assessable with land if it had been affixed on land with such a degree of permanence that the Equipment and the land could be regarded as one unit of occupation.

The Assessor further submitted that the Equipment was assessable because it (1) was located within the plants; (2) was affixed to the land or building with some permanence; (3) was of a substantial size; and (4) was removable only by means of piecemeal dismantling/ destruction with assistance of machinery and several persons.

The MCA's Conclusions

Ultimately, the MCA found that "structure" was an undefined term that had to be interpreted in proper context, and that the Municipal Board had effectively looked at all of the proper elements in concluding that the Equipment was a "structure."

The MCA thus deferred to the expertise of the Municipal Board in making that determination, and refused to overturn the result.

2 *Field Place Caravan Park v. Harding* (1966), [1966] 3 All E.R. 247, [1966] 2 Q.B. 484 (Eng. C.A.)

Commentary

The Manitoba Court of Appeal's acceptance of the underlying Municipal Board's decision has provided some pretty powerful law in the real property context. Where equipment is so affixed to land as to escape taxation as tangible personal property, it appears that the logical conclusion is that it should be included in that real property when it comes to time for real property assessment for property tax purposes.

Commodity tax practitioners would be wise to consider this when fully advising clients about the likelihood of success on "real property fixtures" issues in the retail sales tax consequence.

PST POLICY

ONTARIO CLARIFIES POLICY ON JOINT VENTURES

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Ontario has clarified its position on the application of retail sales tax to unincorporated joint ventures. It is now clearer that the transfer of an interest in a joint venture will be eligible for the relief afforded to partnerships under s. 13.7 of Regulation 1013.

Joint Venture Policy

Ontario has never clearly articulated its policy for joint ventures. Certainly, none of the province's Sales Tax Guides, Interpretation Bulletins, Small Business Pointers or Interpretation Letters have had anything to say about joint ventures. In fairness, much joint venture activity has involved real property, not subject to retail sales tax. But many have involved commercial operations where title to taxable tangible personal property has been shared.

There is much case law which supports the proposition that joint ventures and partnerships are often indistinguishable.[1] On this basis, Ontario appears to have taken the position that they treat joint ventures like partnerships for retail sales tax purposes. However, this has not been well expressed.

Symposium 2008 statement

At the 2008 CICA Commodity Tax Symposium last September 24, the question of joint ventures was put to the Provincial Panel. Ontario stated that the province follows the same guidelines as British Columbia in the taxation of joint ventures. In the written responses to the 2008 Symposium questions, Ontario states:

> Ontario follows the same administrative guidelines as BC with respect to the RST treatment of bare trusts and joint ventures.

1 See for example J. Reiter and M.A. Shishler, *Joint Ventures: Legal and Business Perspectives*, Toronto: Irwin Law, 1999.

The Confusion

The confusion with Ontario's response arose because BC's position on partnerships and joint ventures is different from Ontario's.

BC's taxation of partnership interests follows the common law as expressed in the *Seven Mile Dam* decision of the B.C. Court of Appeal.[2] In this regard, partners are held to have a direct, pro-rata interest in the underlying tangible personal property of the partnership.

Ontario, on the other hand, expressly provides an exemption from the tax that would otherwise apply if the principles of *Seven Mile Dam* were applied. Specifically, s.13.7 of Regulation 1013 states:

> No tax is payable under the Act, in respect of any tangible personal property held by a partnership on the transfer of an interest in a partnership from a partner in the partnership to another person.

BC's Policy on Joint Ventures

BC's administrative policy with respect to the taxation of joint ventures is expressed in the province's Tax Interpretation Manual ("TIM").

In discussing the transfer of a partnership interest, the TIM states:

> The purchase by an outside party of an interest in an existing partnership is a purchase of an interest in the tangible personal property of the partnership equal to the capital ratio interest acquired in the partnership by that new partner. The purchasing partner is required to pay social service tax on the portion of the value of the tangible personal property of the partnership equal to the capital ratio interest purchased in the partnership.[3]

The Risk

The risk for taxpayers is that a failure to remit 8% retail sales tax on a share of tangible personal property held through a joint venture could only be defended if the courts accepted that the reference to "partnership" in Regulation 1013 s.13.7 extended to joint ventures. To the extent that case law draws a distinction between joint ventures and partnerships, taxpayers could face exposure to assessment and costly and uncertain litigation to defend their view that tax should not apply to the transfer of a joint venture interest.

Ontario's Response

Ontario has stated its policy as follows, in a letter from the Tax Advisory Services Branch of the Ministry of Revenue dated February 9, 2009 to the editor of this publication. The February 9 letter is prefaced by the caveat that the letter pertains to an unnamed taxpayer's situation and that the letter is for reference only and should not be construed as a binding interpretation. Practically, Ontario reserves the right to comment differently on individual facts. Ontario states:

> For the purposes of the Ontario *Retail Sales Tax Act*, joint ventures are treated in the same manner as partnerships.

The letter refers to the definition of a partnership in section 2 of the *Ontario Partnerships Act*, and at subsection 3(1):

> Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

The letter then states:

> We confirm that our position is to treat unincorporated joint ventures in the same manner as partnerships. Thus, section 13.7 of Regulation 1013 under the Act allows for the transfer of an interest in an unincorporated joint venture to be made to another person exempt from the application of RST.

This statement is welcome and will hopefully clear up any lingering confusion on the question.

THUMBTAX

Commodity Tax Symposium, *Canadian Institute of Chartered Accountants*, September 14-15, 2009, Toronto, www.cica.ca

Customs Duty and International Trade Course, *Canadian Association of Importers and Exporters*, September 21-23, 2009, Calgary, www.importers.ca

2 *Seven Mile Dam Contractors v. Finance* [1992] 5006 ETC (B.C.C.A.).

3 *B.C. Social Service Tax Act,* Tax Interpretation Manual, General Rulings, s. 10, July 2008. While that section is headed "Partnerships and Joint Ventures" the section does not, in fact, explicitly mention joint ventures.