Federal Court of Appeal | Cour d'appel fédérale

Date: 20171114

Dockets: A-412-16
A-410-16
A-411-16

Citation: 2017 FCA 220

CORAM: **WEBB J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

407 ETR CONCESSION COMPANY LIMITED

Respondent

Heard at Toronto, Ontario, on June 8, 2017.

Judgment delivered at Ottawa, Ontario, on November 14, 2017.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue in this appeal is the meaning of "municipal service" for the purpose of section 21 of Part VI of Schedule V to the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA). The Tax Court of Canada allowed the appeal of 407 ETR Concession Company Limited (the ETR Company) from certain reassessments that had been issued under the ETA. The ETR Company had been reassessed on the basis that the police services provided to the ETR Company by the Province of

Ontario were taxable supplies of such services. The Tax Court determined that such services were municipal services and therefore the supply of these services was an exempt supply for the purposes of the ETA.

[2] The three appeals (A-410-16, A-411-16 and A-412-16) were consolidated by an Order dated November 22, 2016 and heard together. The lead appeal is A-412-16. These reasons shall be filed in A-412-16 and a copy of these reasons shall be filed in the other two appeals.

[3] For the reasons that follow, I would dismiss these appeals.

I. Background

[4] Highway 407 (407 ETR) is a toll highway near Toronto. The ETR Company is the operator of the 407 ETR as a result of a Concession and Ground Lease Agreement between the ETR Company and the Province of Ontario. The 407 ETR is part of the King's Highway and as a result of the provisions of the *Police Services Act*, R.S.O. 1990, c. P. 15, the responsibility for maintaining a traffic patrol on the 407 ETR rests with the Ontario Provincial Police (OPP). The Province of Ontario charges the ETR Company a fee for providing the policing services of the OPP in relation to the 407 ETR. The issue is whether the provision of these policing services is an exempt supply which would not be subject to GST or HST.

[5] Prior to the Province of Ontario harmonizing its sales tax with the GST on July 1, 2010, the Province of Ontario did not charge GST on its invoices for policing services. Effective July 1, 2010, it added HST to the invoices. As noted by the Tax Court judge, the relevant charging

provisions of the ETA did not change effective July 1, 2010 – only the rate of tax changed as a result of the Province of Ontario becoming a participating province on that day. Whether this particular supply would be an exempt supply or a taxable supply would not be affected by the change in the rate of tax.

II. Legislative Provisions

[6] Under the ETA, GST or HST is only imposed on recipients of taxable supplies (ETA, s. 165). As a result of the definitions of "taxable supply" and "commercial activity" in section 123 of the ETA, exempt supplies are not taxable supplies. Exempt supplies are those supplies listed in Schedule V to the ETA.

[7] In this appeal, the relevant provision is section 21 of Part VI of Schedule V:

21 A supply of a municipal service, if	21 La fourniture d'un service municipal si, à la fois :
(*a*) the supply is	*a*) la fourniture est effectuée :
(i) made by a government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area, or	(i) soit par un gouvernement ou une municipalité au profit d'un acquéreur qui est le propriétaire ou l'occupant d'un immeuble situé dans une région géographique donnée,
(ii) made on behalf of a government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area and that is not the government or municipality;	(ii) soit pour le compte d'un gouvernement ou d'une municipalité au profit d'un acquéreur, autre que le gouvernement ou la municipalité, qui est le propriétaire ou l'occupant d'un

	immeuble situé dans une région géographique donnée;
(*b*) the service is	*b*) il s'agit d'un service, selon le cas :
(i) one which the owner or occupant has no option but to receive, or	(i) que le propriétaire ou l'occupant ne peut refuser,
(ii) supplied because of a failure by the owner or occupant to comply with an obligation imposed under a law; and	(ii) qui est fourni du fait que le propriétaire ou l'occupant a manqué à une obligation imposée par une loi;
(*c*) the service is not one of testing or inspecting any property for the purpose of verifying or certifying that the property meets particular standards of quality or is suitable for consumption, use or supply in a particular manner.	*c*) il ne s'agit pas d'un service d'essai ou d'inspection d'un bien pour vérifier s'il est conforme à certaines normes de qualité ou s'il se prête à un certain mode de consommation, d'utilisation ou de fourniture, ou pour le confirmer.

[8] For ease of reference, section 21 of Part VI of Schedule V to the ETA shall hereinafter be referred to as section 21. The parties agree that the conditions of paragraphs (*a*) and (*b*) of section 21 are satisfied and therefore the only issue that was before the Tax Court and which is before this Court is the meaning of "municipal service" in the opening part of section 21 and, in particular, whether the policing service supplied by the Province of Ontario through the OPP, was a "municipal service". The Province of Ontario is a "government" as defined in section 123 of the ETA as "government" is defined in this section as "Her Majesty in right of Canada or a province".

III. Decision of the Tax Court

[9] The Tax Court judge noted that, as set out in *Canada Trustco Mortgage Co. v. The Queen*, [2005] SCC 54, [2005] 2 S.C.R. 601 [*Canada Trustco*], the general rule for interpreting a statute is the textual, contextual and purposive approach. Applying this approach, he concluded, in paragraph 70 of his reasons that a "municipal service" for the purposes of section 21, means "a service that is in the nature of services typically provided by municipalities".

[10] Since the Tax Court judge found, at paragraph 74 of his reasons, that policing services provided by the OPP "are in the nature of services typically provided by municipalities", he concluded that the supply of these services by the Province of Ontario to the ETR company was an exempt supply.

IV. Standard of Review

[11] The only issue in this appeal is the meaning of "municipal service" in section 21. This is a legal question and the standard of review is therefore correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

V. Analysis

[12] As noted by the Tax Court judge, section 21 is to be interpreted based on the text, context and purpose of this section and the ETA (*Canada Trustco*).

[13] "Municipal service" is not defined in the ETA. An "exempt supply" is defined in section 123 of the ETA as "a supply included in Schedule V". "Supply" is defined in the same section as:

supply means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;	**fourniture** Sous réserve des articles 133 et 134, livraison de biens ou prestation de services, notamment par vente, transfert, troc, échange, louage, licence, donation ou aliénation.

[14] Since the opening words of section 21 are "a supply of a municipal service", the text, in my view, would support the conclusion that section 21 is intended to apply to the provision of a particular type of service, *i.e.*, a municipal service. Therefore the plain meaning of these words would suggest that whether a particular service is a municipal service would be determined based on a finding of what type of services would normally be provided by a municipality. The word municipal is simply used as an adjective to delineate the type of service that will qualify as an exempt supply.

[15] The conditions related to who is providing the service and who is receiving the service follow the opening phrase and are in paragraphs (*a*) and (*b*) of section 21. Paragraph (*c*) of section 21 provides that a certain type of service (which is not the service in issue in this case) will not be a "municipal service". There are no qualifications in paragraph (*a*) related to the government as a supplier. Paragraph (*a*) simply provides that the person making the supply must be either a government (federal or provincial) or a municipality.

[16] The Crown submitted, in paragraph 48 of her memorandum, that, based on the context and purpose, a "municipal service" is a service that "fall[s] within the powers of a municipality

or a municipal authority to provide". The Crown, therefore, submitted that "municipal service" is only intended to apply to a service provided by a federal or provincial government when that government is acting as a municipal authority. However, in my view, this would require additional language to be added to section 21. Section 21 addresses two separate conditions applicable to the supplier – the type of service (municipal service, subject to paragraph (*c*)) and the identity of the supplier (government or municipality). It does not provide that a "municipal service" will only be a service provided by a government acting as a municipal authority. The words "municipal authority" do not even appear in this section. The section simply requires that the relevant service must be provided by a government or a municipality.

[17] To read section 21 as limiting "municipal service" to only a service provided by a government acting as a municipal authority, would require reading into this provision a limitation applicable to a government in relation to the authority under which the service is being provided. It would not be a limitation on the nature of the service. For example, garbage removal is a particular service. In the Crown's view, whether this service would be a municipal service would not be determined by the nature of the service (garbage removal) but rather by the authority or capacity of the government providing the service. In my view, this interpretation of "municipal service" is not justified as it is a limitation on the capacity or authority of the government and not a limitation on the type of service.

[18] The Crown, in paragraph 50 of her memorandum, referred to the *Canada National Parks Act*, S.C. 2000, c. 32, as "an example of the federal government acting as a local municipal authority and directly providing standard municipal services for infrastructure to owners or

occupants of land". While this may well be an example of the federal government acting as a local municipality authority, it does not necessarily lead to the conclusion that only municipal services provided by the federal (or provincial) government acting as such would qualify as exempt supplies. The interpretation adopted by the Tax Court judge also means that the services that would ordinarily be provided by a municipality, but which are provided by the federal government, to individuals residing in a national park, would still be exempt supplies.

[19] The Crown submits that the national park example is a response to the Tax Court judge's finding that:

> 69 … An interpretation of municipal service that limits the application of section 21 to supplies made by a municipality renders the words "made by a government" meaningless.

[20] The Crown submitted that the national park example illustrates that it is possible that restricting "municipal service" to a service that the federal government provides as a municipal authority could result in section 21 applying to certain services. As a result the Crown submitted that her interpretation would not be meaningless.

[21] However, in my view, the reference by the Tax Court judge to rendering the words "made by a government" meaningless was not made in relation to this argument but rather to another argument that is repeated in the Crown's memorandum filed in this appeal. In paragraph 67 of his reasons, the Tax Court judge stated that:

> 67. The Respondent is asking me to adopt an interpretation that would result in section 21 only applying if the supply of a "municipal service" is made by a

> municipality. Counsel referred to services within the "mandate" of the municipality and services that are a municipal "responsibility". In my view, if the service is within the mandate of the municipality or is a municipal responsibility, then that service would only be supplied by the municipality.

[22] This argument that a “municipal service” is only a service that a municipality has the legal obligation to provide is repeated in the Crown’s memorandum filed in relation to this appeal. In particular in paragraphs 66 and 75 of this memorandum, the Crown submitted that:

> 66. This legislative context demonstrates that not all police services are a municipal service; a police service that is outside the mandate of a municipal authority to provide cannot be transformed into one.
>
> …
>
> 75. The Tax Court’s premise that policing services are one of the core services provided by a municipality must be measured against Ontario’s *Police Services Act*. The service supplied to the Respondent was maintaining a traffic patrol on the King’s Highway. That is a provincial responsibility, not a municipal responsibility. That particular police service is never delivered by a municipality and fails to meet the Tax Court judge’s own municipal “core service” test.

[23] This argument is essentially that a municipal service can only be a service that a municipality (and not the federal or provincial government) is obligated to provide. As the Tax Court judge noted, if a “municipal service” was only a service that a municipality had the mandate or the responsibility to provide, it is difficult to determine what services provided by a federal or provincial government would be an exempt supply under section 21.

[24] Applying this interpretation to the national park example would mean that for any residents of a national park, for whom no municipality is obligated to provide services, the services provided by the federal government would not be “municipal services” for the purpose

of section 21, even though such services would normally be provided by a municipality. For example, the provision of a garbage removal service by the federal government to the residents of a national park (where there is no municipality) would not be an exempt supply as no municipality would have the mandate to provide such services.

[25] In my view, this result is not the result that Parliament intended and does not take into account that section 21 applies to services provided by a government or a municipality. The reference to the national park example reinforces, rather than derogates from, the interpretation adopted by the Tax Court judge.

[26] As a result, I would dismiss these appeals, with one set of costs.

"Wyman W. Webb"
J.A.

I agree
D. G. Near J.A.

I agree
Mary J.L. Gleason J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED SEPTEMBER 27, 2016, DOCKET NUMBERS, 2013-4844(GST)G, 2013-4845(GST)G and 2013-4846(GST)G

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CONCURRED IN BY:	NEAR J.A. GLEASON J.A.
DATED:	NOVEMBER 14, 2017

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