

Federal Court of Appeal	 CANADA	Cour d'appel fédérale
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Date: 20100113

Docket: A-159-09

Citation: 2010 FCA 9

**CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

COSTCO WHOLESALE CANADA LTD.

Respondent

Heard at Toronto, Ontario, on January 11, 2010.

Judgment delivered at Toronto, Ontario, on January 13, 2010.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

LÉTOURNEAU J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Justice Campbell J. Miller of the Tax Court of Canada (the Tax Court Judge) allowing the appeal by Costco Wholesale Canada Ltd. (the respondent or Costco) from three concurrent reassessments dated December 15, 2006 made pursuant to Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act) and thereby vacating the reassessments.

[2] At issue is whether Costco ought to have collected GST on a quarterly payment made by American Express (Amex) to Costco pursuant to one of two related agreements (the Co-Branded Agreement). According to the Minister of National Revenue (the Minister), this payment was consideration for a taxable supply by Costco to Amex and therefore subject to GST.

[3] The Tax Court Judge held that the quarterly payment, which he identified as being made pursuant to paragraph 3.01(a) of the Co-Branded Agreement (Reasons, para. 15), was not for the supply of anything by Costco to Amex but was simply a rebate of part of the gross fee payable by Costco to Amex. In so holding, the Tax Court Judge found that the right of exclusivity provided by Costco, although “certainly significant” and “critical to the overall deal between Costco and Amex”, was not a taxable supply by Costco to Amex, but merely a bargaining tool akin to a discounted price based on volume (Reasons, paras. 27 and 30(i)).

[4] The appellant contends that in reaching this conclusion, the Tax Court Judge failed to consider the extended definition of the word “property” in subsection 123(1) of the Act, which includes “a right or interest of any kind”. According to the appellant the right of exclusivity, which the Tax Court Judge found to be critical to the overall arrangement, clearly comes within the ambit of this definition. The appellant submits that this is particularly so when regard is had to numerous judicial pronouncements on the scope and extent of this provision (reference is made to *Vanex Truck Services Ltd. v. Canada*, 2001 FCA 159, at paras. 12 to 14; *RCI Environment Inc. v. Canada*; 2008 FCA 419, at para. 39, and the cases referred to therein).

[5] The definition of “property” was not referred to in the pleadings of the Crown, but it was clearly brought to the attention of the Tax Court Judge during the course of argument (Transcript, Amended Appeal Book, p. 241). Nevertheless, it appears that the Tax Court Judge did not have this definition in mind when he rendered his judgment since no reference is made to it in what is otherwise a complete and well reasoned decision.

[6] Given the findings made by the Tax Court Judge in the course of his reasons, the extended definition of “property” was relevant to the issue which he had to decide and had to be considered. In particular, in order to justify the conclusion that he reached, it was incumbent upon the Tax Court Judge to explain why, when regard is had to this definition, the payment made pursuant to paragraph 3.01(a) of the Co-Branded Agreement was not consideration for a supply of property.

[7] The respondent objects to this argument being raised on appeal. It does not contend that reliance on the definition of “property” is statute barred, or that the Act otherwise prevents the Court from considering this provision. Rather, the respondent suggests that the argument was not made before the Tax Court Judge (memorandum of the respondent, para. 25), and submits that the purpose of an appeal is to correct trial errors and not to re-argue the case on novel grounds (*Kaiman v. Graham*, 75 R.P.R. (4th) 157 (Ont. C.A.); 2009 ONCA 77 (C.A.) at para. 20 (*Kaiman*) citing *Canadiana Towers Ltd. v. Fawcett*, (1978), 21 O.R. (2d) 545 (C.A.) at p. 548).

[8] However, as noted, the defined meaning of “property” was brought to the attention of the Tax Court Judge and he appears to have made a number of findings that are relevant to its

application (Reasons, paras. 27 *in fine*, 30(i) and 32, 2nd sentence). In these circumstances, it would be inappropriate to allow this matter to be decided without consideration being given to this definition.

[9] The respondent nevertheless submits that it would be unsafe for this Court to tamper with the conclusions of the Tax Court Judge in the absence of a full evidentiary record (*Shaver Hospital for Chest Diseases v. Slesar*, (1979) 27 O.R. (2d) 383 at para. 20 citing *The Owners of the Tasmania v. Smith*, (1890) 15 App. Cas. 223 (H.L.); *Braber Equipment Ltd. v. Fraser Surrey Docks Ltd.* [1999] B.C.J. No. 2360, 1999 BCCA 579 at paras. 6 and 7; *Kaiman, supra*, at paras. 18 to 21). It contends that the definition of “property”, if applicable on the facts of this case, gives rise to allocation issues which have yet to be considered and that the record is incomplete on this point.

[10] In the circumstances, I believe that the appropriate remedy would be to allow the appeal, set aside the decision of the Tax Court Judge and remit the matter back to him so that it may be decided again, taking into consideration the defined meaning of “property”, based on the existing evidence, or any further evidence which the Tax Court Judge may decide to allow. I would order that the costs of the appeal be in the cause.

“Marc Noël”

J.A.

“I agree
Gilles Létourneau J.A.”

“I agree
Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-159-09

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE CAMPBELL J. MILLER, DATED MARCH 6, 2009, NO. 2007-1374(GST)G.)

STYLE OF CAUSE: HER MAJESTY THE QUEEN
and COSTCO WHOLESALE
CANADA LTD.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 11, 2010

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Létourneau J.A.
Trudel J.A.

DATED: January 13, 2010

APPEARANCES:

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