Federal Court of Appeal  Cour d'appel fédérale

Date: 20200207

Docket: A-251-18

Citation: 2020 FCA 40

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

PATTERSON DENTAL CANADA INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on November 5, 2019.

Judgment delivered at Ottawa, Ontario, on February 7, 2020.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200207

Docket: A-251-18

Citation: 2020 FCA 40

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

PATTERSON DENTAL CANADA INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this appeal, the appellant seeks to set aside the decision of the Tax Court of Canada in *Patterson Dental Canada Inc. v. Her Majesty the Queen*, 2018 TCC 112, [2018] G.S.T.C. 67 (*per* Favreau J.) in which the Tax Court dismissed the appellant's appeal from an assessment made under the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the *ETA*) for the reporting periods from March 1, 2005 to May 31, 2009. In that assessment, the Quebec Revenue Agency, acting on

behalf of the Minister of National Revenue (collectively the Minister), found that Goods and Services Tax (GST) was payable in respect of local anesthetic solutions sold by the appellant.

[2] For the reasons that follow, I would dismiss this appeal, with costs.

I. Background

[3] The appellant carries on the business of selling and distributing dental products to dentists in Canada. It sells thousands of products, including approximately 20 local anesthetic solutions, 95% of which contain epinephrine.

[4] Prior to May 2005, the appellant sold its anesthetic solutions containing epinephrine as taxable supplies. It changed this effective May 1, 2005, possibly because it then learned that a competitor was selling similar solutions as zero-rated supplies. From May 1, 2005 to December 1, 2008, the appellant considered its anesthetic solutions containing epinephrine to be zero-rated supplies for GST purposes and thus did not charge GST to its clients in respect of them. In the latter part of 2008, it learned of a letter of interpretation issued by the Minister, which indicated that the Minister considered these sorts of solutions to be taxable supplies. The appellant accordingly altered its treatment of these solutions and from December 2, 2008 onward treated them as taxable supplies.

[5] In the assessment under appeal, the Minister assessed the appellant $1,111,930.52 for unremitted GST, principally in respect of the anesthetic solutions sold as zero-rated supplies over the period in issue, plus interest and penalties.

[6] In a decision issued June 6, 2013, reported as *Patterson Dental Canada Inc. v. The Queen*, 2014 TCC 62, [2014] G.S.T.C. 25, the Tax Court allowed the appellant's application for an extension of time to file a notice of objection to the assessment; consequently, the notice of objection the appellant filed on April 27, 2011 was deemed valid. When more than a year elapsed and the Minister had not rendered a decision on the objection, the appellant filed a notice of appeal with the Tax Court on July 8, 2014.

II. The Relevant Statutory Provisions

[7] Subsection 165(1) of the *ETA* provides that every recipient of a taxable supply made in Canada shall pay GST in respect of the supply based on the value of the consideration for the supply. Pursuant to subsection 123(1) of the *ETA*, "supply" means the provisions of property or a service in any manner, including sale, while "taxable supply" means a supply made in the course of a commercial activity.

[8] It is common ground between the parties that the sale of anesthetic solutions is a taxable supply to which GST is applicable, unless the particular supply qualifies as one of the zero-rated supplies listed in Schedule VI to the *ETA*. Part I of that Schedule, entitled "Prescription Drugs and Biologicals", comprises the list of zero-rated drugs. Section 2 of Part I of Schedule VI to the *ETA* provides in relevant part that the following are zero-rated:

A supply of any of the following drugs or substances:	La fourniture des drogues ou substances suivantes :
(a) a drug included in Schedule C or D to the *Food and Drugs Act*,	a) les drogues incluses aux annexes C ou D de la *Loi sur les aliments et drogues*;
(b) a drug that is set out on the list established under subsection 29.1(1)	b) les drogues figurant, individuellement ou par catégories, sur

of the *Food and Drugs Act* or that belongs to a class of drugs set out on that list, other than a drug or mixture of drugs that may, under that Act or the *Food and Drug Regulations*, be sold to a consumer without a prescription,

la liste établie en vertu du paragraphe 29.1(1) de la *Loi sur les aliments et drogues*, à l'exception des drogues et des mélanges de drogues qui peuvent être vendus au consommateur sans ordonnance conformément à cette loi ou au *Règlement sur les aliments et drogues*;

[…]

[…]

(d) a drug that contains a substance included in the schedule to the *Narcotic Control Regulations*, other than a drug or mixture of drugs that may, pursuant to the *Controlled Drugs and Substances Act* or regulations made under that Act, be sold to a consumer with neither a prescription nor an exemption by the Minister of Health in respect of the sale,

d) les drogues contenant un stupéfiant figurant à l'annexe du *Règlement sur les stupéfiants*, à l'exception des drogues et des mélanges de drogues qui peuvent être vendus au consommateur sans ordonnance ni exemption accordée par le ministre de la Santé relativement à la vente, conformément à la *Loi réglementant certaines drogues et autres substances* ou à ses règlements d'application;

[…]

[…]

(e) any of the following drugs, namely,

e) les drogues suivantes :

(i) Digoxin,

(i) digoxine,

(ii) Digitoxin,

(ii) digitoxine,

(iii) Prenylamine,

(iii) prénylamine,

(iv) Deslanoside,

(iv) deslanoside,

(v) Erythrityl tetranitrate,

(v) tétranitrate d'érythrol,

(vi) Isosorbide dinitrate,

(vi) dinitrade d'isosorbide,

(vi.1) Isosorbide-5-mononitrate,

(vi.1) 5-mononitrate d'isosorbide,

(vii) Nitroglycerine,

(vii) trinitrate de glycéryle,

(viii) Quinidine and its salts,

(viii) quinidine et ses sels,

(ix) Medical oxygen,

(ix) oxygène à usage médical,

(x) **Epinephrine and its salts**, and

(x) **épinéphrine et ses sels,**

(xi) Naloxone and its salts,

(xi) naloxone et ses sels;

[Emphasis added]

[Non souligné dans l'original]

III. The Decision of the Tax Court

[9] The issue in the decision under appeal was whether the anesthetic solutions the appellant sold were zero-rated supplies under subparagraph 2 (*e*)(*x*) of Part I of Schedule VI of the ETA. After reviewing the evidence given by the three experts who testified, the Tax Court determined that its earlier decision in *Centre Hospitalier Le Gardeur v. Her Majesty The Queen*, 2007 TCC 425, 2008 G.T.C. 77 [*Le Gardeur*] was inapplicable. In that decision, the Tax Court found that paragraph 2(*a*) of Part I of Schedule VI to the *ETA* applied to those mixed substances that contain substances listed in Schedule D of the *Food and Drugs Act*, R.S.C., 1985, c. F-27 (the *FDA*), where the main substance in the mixture is the substance referred to in Schedule D of the *FDA*. The appellant argued that this case was on all fours with *Le Gardeur* as epinephrine was one of the main components in its anesthetic solutions such that, under the reasoning in *Le Gardeur*, they should be considered to be zero-rated supplies.

[10] The Tax Court found that the holding in *Le Gardeur* did not apply to the epinephrine-containing anesthetic solutions sold by the appellant because of the difference in wording and purpose behind paragraphs 2(*a*) and (*e*) of Part I of Schedule VI to the *ETA*. The Tax Court reasoned as follows at paragraphs 55-59:

> … I do not think that the *Le Gardeur* case enunciates a principle or a rule applicable in this particular instance for the following reasons. First, the *Le Gardeur* case deals with the application of paragraph 2(a) of Part I of Schedule VI of the *ETA* which is a provision having a different objective from paragraph 2(e). Under paragraph 2(a), the supplies of substances or mixtures of substances are zero-rated if they are used for diagnoses and if they are covered by Schedule D of the *Food and Drugs Act*. Secondly, the schedule D drugs cannot be found in a container in their pure state, contrarily to the case here where the epinephrine as the sole active ingredient is sold on the market with the specific objective to treat the life-threatening conditions of a patient.

> The anesthetics in issue supplied by the appellant are not designed to serve as an emergency relief for patients suffering from major death threatening conditions as required for being listed in paragraph (2)(e) of Part I of Schedule VI of the *ETA*.
>
> The Legislator did not use on purpose in paragraph 2(e) the terms "mixture of drugs" as he did in paragraphs 2(b) and 2(d) of Part I of Schedule VI of the *ETA*.
>
> In my view, by allowing epinephrine or any other drug listed in paragraph 2(e) to be mixed with other substances and to characterize this type of mixture with a zero-rating, would be contrary to the policy established by the Department of Finance.
>
> If Parliament wishes to grant a zero-rated status under paragraph 2(e) to other substances or to a mixture of drugs, it should amend the legislation, as he did for the isosorbide -5- mononitrate in 2012 and for the Naloxone in 2017.

IV. The Issues

[11] The appellant alleges that the Tax Court erred in law in reaching the above conclusion. It says that in reasoning as it did, the Tax Court failed to address the legal issues it was required to address, namely, whether the appellant's epinephrine-containing solutions constituted a mixed supply and, if so, whether epinephrine was the main substance in them.

[12] The appellant more particularly says that the approach in *Le Gardeur* is mandated by the controlling authority from the Supreme Court of Canada in *Calgary (City) v. Canada*, 2012 SCC 20, [2012] 1 S.C.R. 689 [*Calgary (City)*] and this Court in *Global Cash Access (Canada) Inc. v. Canada*, 2013 FCA 269, 451 N.R. 358 [*Global Cash Access (Canada) Inc.*] and *Club Intrawest v. Canada*, 2017 FCA 151, [2017] G.S.T.C. 51 [*Club Intrawest*], all of which, according to the appellant, require one to first determine whether a single supply has been made. If so, and if that supply is one comprised of a taxable and a zero-rated element, the appellant contends that the foregoing authorities provide that one must then assess if the zero-rated portion of the single

supply is its main element. If the answer to that question is in the affirmative, the appellant says that the supply is to be characterized as non-taxable.

[13] As the Tax Court did not undertake the foregoing assessment, the appellant submits that it made a reviewable error.

[14] The appellant further contends that, had the correct test been applied by the Tax Court, there was only one possible result, namely, that the appellant's epinephrine-containing solutions must be found to be zero-rated. The appellant submits that the only pertinent evidence before the Tax Court came from its expert, who was the only expert with experience in dentistry and dental surgery. The appellant says that its expert evidence established that, in those situations where dentists administer epinephrine-containing anesthetic solutions, the presence of epinephrine is medically required to control bleeding. It thus contends that epinephrine is the main element in its solutions, thereby bringing them within the scope of paragraph 2(*e*) of Part I of Schedule VI to the *ETA*.

V. Analysis

[15] While the decisions in *Calgary (City)*, *Global Cash Access (Canada) Inc.* and *Club Intrawest* do set out the principles governing single supplies that include taxable and zero-rated elements, I disagree that these cases lead to the result the appellant seeks for two reasons.

[16] First, this line of authority only applies when there is a supply comprised of a taxable and zero-rated element. Here, for much the same reasons as were advanced by the Tax Court, the

appellant's solutions do not constitute such a supply. As the Tax Court rightly noted, there are important differences in wording and legislative history between paragraphs 2(*a*) and (*e*) of Part I of Schedule VI to the *ETA*. The former applies to drugs listed in Schedules to the *FDA* whereas paragraph (*e*), on the other hand, comprises non-prescription drugs used to treat life-threatening illnesses.

[17] This is clear from the relevant legislative history. The Explanatory Notes to Bill C-62 "Goods and Services Tax", issued by the Minister of Finance in 1990, provide that "[A] number of non-prescription drugs used to treat life-threatening illnesses, enumerated in paragraph (e) of the section, are also zero-rated".

[18] Throughout the years, non-prescription drugs have been added to the list under paragraph 2(*e*), always with the same accompanying explanation.

[19] For example, when naloxone was added in 2017, the March 22, 2017 Federal Budget Plan, Tax Measures: Supplementary Information, stated that:

> Prescription drugs and a list of non-prescription drugs that are used to treat life-threatening conditions are relieved from [GST/HST] […] Health Canada removed the requirement for a prescription when naloxone is indicated for emergency use for opioid overdose outside hospital settings. […] In order to restore the GST/HST-free treatment of naloxone, Budget 2017 proposes to add the drug (and its salts) to the list of GST/HST-free non-prescription drugs that are used to treat life-threatening conditions.

[20] To similar effect, the Department of Finance "Explanatory Notes Relating to the Income Tax Act, Excise Tax Act, Excise Act, Excise Act, 2001 and Related Legislation" from April

2017 provided as follows regarding the addition of naloxone to paragraph 2(*e*) of Part I of Schedule VI to the *ETA*:

> Paragraph 2(*e*) of Part I of Schedule VI to the Act enumerates a list of non-prescription drugs used to treat life-threatening conditions that are zero-rated.
>
> Naloxone is a drug used to treat opioid overdose. Prior to March 22, 2016, supplies of the drug were zero-rated, as it was set out on the Prescription Drug List established under the *Food and Drugs Act* and could not be sold to a consumer without a prescription. As of March 22, 2016, a prescription is no longer required for naloxone under the *Food and Drug Regulations* when the drug is indicated for emergency use for opioid overdose outside hospital settings. In order to maintain the GST/HST-free status of the drug under these conditions, new subparagraph (xi) adds naloxone and its salts to the list in paragraph 2(*e*).

[21] Isosorbide-5-mononitrate, a vasodilator that treats angina, was added to paragraph 2(*e*) of Part I of Schedule VI to the *ETA* in 2012. The Department of Finance "Explanatory Notes Relating to the Income Tax Act, the Excise Tax Act and Related Acts and Regulations" from April 2012 noted: "Paragraph 2(*e*) of Part I of Schedule VI to the Act enumerates a list of non-prescription drugs used to treat life-threatening illnesses that are zero-rated at all levels of production and distribution".

[22] David M. Sherman in *Canada GST Service* (Toronto: Thomson Reuters, 1990) (loose-leaf, updated September 2017) vol. C-11, section VI-154.4, confirms that paragraph 2(*e*) drugs are non-prescription, zero-rated drugs because:

> …they are needed for **life-threatening conditions where there is no time to obtain a prescription**. […] Thus, they are not zero-rated under paragraph 2(b) because they are not on the Prescription Drug List; yet it was considered appropriate to zero-rate them.
>
> [Emphasis added in the original]

[23] The appellant's epinephrine-containing solutions are not used to treat life-threatening conditions. Rather, the evidence before the Tax Court established that the epinephrine in the solutions is added to act as a vasoconstrictor to control bleeding at the surgical site and decrease the absorption rate of the local anesthetic into the blood. This was the testimony of the appellant's expert Dr. Gizzarelli, excerpted at paragraphs 13-16 and 51 of the Tax Court's reasons. Thus, the epinephrine in the anesthetic solutions is performing a different function than when administered in a life-threatening circumstance, where it is the sole active ingredient in the medication. Accordingly, the supply of epinephrine in combination with an analgesic in the appellant's solutions is not a single supply containing a taxable and zero-rated element.

[24] Second, and in the alternative, even if the solutions were to be regarded as such a supply, the same result would still be reached. The case law establishes that the zero-rated element must be the principal element in the single supply if the supply is to be zero-rated. Justice Dawson, writing for this Court in *Club Intrawest*, stated as follows at paragraph 82:

> What I take from *Global Cash Access* is that when applying the [*ETA*] regard must be had to the predominant element of a single supply. It is an error of law to apply the [*ETA*] having regard to services that do not form the predominant element of a single supply (see also: *Great-West Life Assurance Company v. Her Majesty The Queen*, 2016 FCA 316, [2016] F.C.J. No. 1408, at paragraph 43).

[25] Here, even though epinephrine is an important element in the appellant's anesthetic solutions, it is not the main or predominant element. It is rather the local anesthetic that is the main element.

[26] In cases of this nature, useful guidance was given by the English Court of Appeal in *Customs and Excise Commissioners v. Scott*, [1978] S.T.C. 191 (Q.B.) (U.K.)[*Scott*], cited with

approval by the Tax Court in *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40, [1995] T.C.J. No. 678, the relevant passages in which, in turn, were cited with approval by this Court in *Hidden Valley Golf Resort Assn. v. Her Majesty The Queen*, 257 N.R. 164, [2000] G.S.T.C. 42 (FCA). In *Scott*, Chief Justice Widgery noted at page 195 that determining whether there is a single non-taxable supply should not be an overly legalistic inquiry but rather "should be [determined] by a little common sense and concern for what is done in real life…".

[27] In the instant case, both common sense and the expert evidence establish that the reason for administration of dental anesthetics - including those containing epinephrine - is pain control (Expert Report of Dr. Gino Gizzarelli, Hearing Exhibit A-3, Appeal Book Tab 12 at p 545; Expert Report of Dr. Pierre Beaulieu, Hearing Exhibit R-1, Appeal Book Tab 14 at. p 588; Expert Report of Eric Ormsby, Hearing Exhibit R-2, Appeal Book Tab 15 at p. 785; examination-in-chief and cross-examination of Dr. Gino Gizzarelli, Appeal Book Tab 8 at p. 96, 119-120; examination-in-chief of Dr. Pierre Beaulieu, Appeal Book Tab 8 at p. 136). Thus, the predominant element in the appellant's epinephrine-containing anesthetic solutions is not epinephrine but rather the local anesthetic.

[28] It therefore follows that the Tax Court did not err in finding that the appellant's epinephrine-containing anesthetic solutions are subject to GST.

VI. Proposed Disposition

[29] I would accordingly dismiss this appeal, with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-251-18
STYLE OF CAUSE:	PATTERSON DENTAL CANADA INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 5, 2019
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	FEBRUARY 7, 2020

APPEARANCES:

Dominic Belley Catherine Dubé	FOR THE APPELLANT
Antoine Lamarre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP Montréal, Québec	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT