Federal Court of Appeal  Cour d'appel fédérale

Date: 20140206

Docket: A-155-12

Citation: 2014 FCA 35

CORAM: PELLETIER J.A.
TRUDEL J.A
MAINVILLE J.A

BETWEEN:

ROGER COUTURE AND CHRISTIANE JOBIN

Appellants

and

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA AND DEPARTMENT OF NATIONAL REVENUE

Respondents

Heard at Québec, Quebec, on January 29, 2014.

Judgment delivered at Ottawa, Ontario, on February 6, 2014.

REASONS FOR JUDGMENT BY: **PELLETIER J.A.**
CONCURRED IN BY: **TRUDEL J.A**
MAINVILLE J.A

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Couture and Ms. Jobin (the appellants) are appealing from a decision of the Tax Court of Canada in which their appeal from the assessment under the *Excise Tax Act* R.S.C. 1985 c. E-5 (the Act) for the period from April 1, 2003, to December 31, 2008, was dismissed.

[2] The appellants purchased land near the Magog River with the intention of building on it a real estate development with various attractions for potential buyers, including a marina, boat launch and "clubhouse". Unfortunately, for various reasons, their hopes for this land did not come to fruition, and they ended up selling nine lots over the course of the assessment period. On the basis of certain advices that they received, they neither collected nor remitted to the Minister any goods and services tax (GST) on these sales. The assessments at issue include the uncollected GST plus interest and penalties.

[3] The issue, before both this Court and the Tax Court of Canada, is whether the sale of these lots of land constitutes a taxable supply within the meaning of the Act or an exempt supply under Schedule V of the Act.

[4] The judge of the Tax Court of Canada commenced his analysis of the issue by considering the definitions of "taxable supply" and "commercial activity" found at subsection 123(1) of the Act, which are reproduced below.

"taxable supply"	« fourniture taxable »
"taxable supply" means a supply that is made in the course of a commercial activity;	« fourniture taxable » Fourniture effectuée dans le cadre d'une activité commerciale.
"commercial activity"	« activité commerciale »
"commercial activity" of a person means (*a*) a business carried on by the person (other than a business carried on without a	« activité commerciale » Constituent des activités commerciales exercées par une personne : *a*) l'exploitation d'une

reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

(*b*) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

(*c*) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

[Emphasis added.]

entreprise (à l'exception d'une entreprise exploitée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées;

b) les projets à risque et les affaires de caractère commercial (à l'exception de quelque projet ou affaire qu'entreprend, sans attente raisonnable de profit, un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où le projet ou l'affaire comporte la réalisation par la personne de fournitures exonérées;

c) la réalisation de fournitures, sauf des fournitures exonérées, d'immeubles appartenant à la personne, y compris les actes qu'elle accomplit dans le cadre ou à l'occasion des fournitures.

[5] A reading of the definition of "commercial activity" leads to two conclusions. The first is that the supply of real property is, according to paragraph (*c*), a commercial activity. The second is that, in all circumstances, the making of an exempt supply falls outside the scope of commercial activities. It is no doubt for this reason that the judge began by considering the issue of exempt supplies.

[6] An exempt supply is a supply listed in Schedule V of the Act. Part I of Schedule V covers exempt supplies of real property. The judge considered subparagraph 9(2)(*b*)(i) of Schedule V, reproduced below, to determine whether the lots sold by the appellants constituted exempt supplies:

9 (2) A supply of real property made by way of sale by an individual or a personal trust, other than	9 (2) La fourniture par vente d'un immeuble, effectuée par un particulier ou une fiducie personnelle, à l'exclusion des fournitures suivantes :
…	…
(*b*) a supply of real property made	*b*) la fourniture d'un immeuble effectuée :
(i) in the course of a business of the individual or trust,	(i) dans le cadre d'une entreprise du particulier ou de la fiducie,…

[7] The judge was of the view that the lots were not exempt supplies for two reasons. First, subsection 9(2) and subparagraph 9(2)(*b*)(i) deal with sales made by an individual. Having reviewed the evidence of record, the judge concluded that the seller of the lots at issue was the partnership constituted by the appellants rather than an individual. In his view, the sales on which the assessment was based did not meet this condition of subsection 9(2) of Schedule V.

[8] Second, the judge was of the view that the sales at issue fell under the exception to the exemption described at subparagraph 9(2)(*b*)(i) because the lots had been sold in the course of a business. The appellants alleged that they had lost all hope of earning any profit from the lots before

the assessment period, which meant that they were not carrying on a business with a reasonable expectation of profit. The judge did not accept this argument.

[9] In the light of the evidence before him, the judge concluded that the appellants were carrying on a real estate development business. He noted all of the efforts made by the appellants to put their lots on the real estate market. Despite the fact that they had ultimately lost all hope of gaining a profit from the sale of the lots, the judge was not persuaded that they were not carrying on a business. He was of the view that a business does not cease to be a business merely because it experiences a rough period. According to the judge:

> [TRANSLATION]
> It would be inappropriate for the tax authorities to refuse the deduction of the business losses while taxing the gains just because the business is going through a difficult period and is suffering only losses.
>
> The judge's reasons, Appeal Book at page 45.

[10] In addition, the case law holds that a real estate development business does not cease operations before all of its inventory has been sold: *Les Entreprises Chelsea Ltée v. Minister of National Revenue*, 70 D.T.C. 6379 (Exchequer Court).

[11] The judge also noted that there was no evidence of a change in the use of the lots. There was no reason to believe that the lots, purchased for commercial purposes, had since become intended for personal use. This was a further basis for the judge's finding that the lots were being used for business purposes.

[12] The legal nature of the sales at issue is a question of mixed fact and law, reviewable by this Court on a standard of palpable and overriding error, absent an extricable question of law: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraphs 34 and 36.

[13] The appellants made elaborate submissions on the issue of double taxation. They argued that the work carried out on some of the lots in preparation for putting them on the market was done before the GST came into force. The contractors who performed the work were therefore subject to the federal taxes applicable at the time on the goods that they supplied with respect to the lots. Subjecting these supplies to the GST regime, according to the appellants, is equivalent to subjecting them twice to the federal tax system and therefore to double taxation.

[14] The appellants' argument on this point is supported by the fact that the tax authorities denied them any credit with respect to the taxes paid by these contractors. Citing the following passage from *Reference re Goods and Service Tax*, [1992] 2 S.C.R. 445, they argue that the refusal to take into account the federal tax already paid in connection with the marketing of these lots distorts the character of the GST, transforming it into a federal sales tax:

> On the question of integration, I am of the opinion that Canada is correct to say that to sever the revenue raising portions of the GST Act from those portions which do not raise revenue would be to change the character of the tax fundamentally, from a value-added tax to a federal retail sales tax.
>
> *Reference re Goods and Service Tax*, at paragraph 35

[15] The difficulty that the appellants failed to overcome is that the federal sales tax was paid by others, the contractors who performed the work. This means that the appellants cannot claim these taxes as input tax credits because section 169 of the Act specifies that these credits are calculated on

the basis of the tax paid by the supplier claiming them. The fact that the appellants are not entitled to a credit for federal taxes paid by others has no bearing on the constitutionality of the Act.

[16] That being said, the issue of imposing federal taxes twice on the same products remains unresolved. However, neither the appellants' Notice of Appeal nor their Memorandum of Fact and Law raises this issue. Section 336 of the Act is a transitional provision dealing with the transfer of real property during the time when the Act comes into force. However, the parties did not address this, and in view of the record, we are not in position to address this issue.

[17] The appellants also made elaborate submissions about the fact that Revenu Québec had, in the past, refused to recognize that the appellants were operating a business and totally refused to recognize their business losses. Counsel for the Minister stated to this Court that the Ministère du Revenu du Québec had, at all times, in connection with the files relating to the lots at issue, recognized that the appellants were carrying on a business, but emphasized that this did not mean that the appellants were necessarily entitled to all of the deductions that they had claimed at any given time.

[18] To conclude, the appellants have failed to persuade me that the judge has erred in any way. His findings with respect to the appellants' commercial activity involving the lots whose sale is at issue are justified by the evidence that was available to him. The arguments raised by the Appellants before this Court have no bearing on these findings. I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
Robert M. Mainville J.A."

Translation

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-155-12
STYLE OF CAUSE:	ROGER COUTURE AND CHRISTIANE JOBIN v. HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA AND DEPARTMENT OF NATIONAL REVENUE
PLACE OF HEARING:	QUÉBEC, QUÉBEC
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CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A
DATED:	FEBRUARY 6, 2014

APPEARANCES:

Roger Couture Christiane Jobin	SELF-REPRESENTED
Michel Rossignol	FOR THE RESPONDENTS HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA AND DEPARTMENT OF NATIONAL REVENUE

SOLICITORS OF RECORD:

LARIVIÈRE MEUNIER (Revenu Québec) Montréal, Quebec	FOR THE RESPONDENTS HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA AND DEPARTMENT OF NATIONAL REVENUE