

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141008

Docket: A-80-14

Citation: 2014 FCA 225

**CORAM : NADON J.A.
GAUTHIER J.A.
SCOTT J.A.**

BETWEEN:

KOSMA-KARE CANADA INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on October 7 and 8, 2014.

Judgment delivered from the Bench at Montréal, Quebec, on October 8, 2014.

REASONS FOR JUDGMENT OF THE COURT:

GAUTHIER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on October 8, 2014)

GAUTHIER J.A.

[1] Kosma-Kare Canada Inc. is appealing from a decision of Justice Lucie Lamarre of the Tax Court of Canada (the judge) dismissing its appeal from an assessment made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c.E-15 (the Act), for the taxation periods between April 1, 2006, and June 30, 2010. In this assessment, the Minister of Revenue Quebec denied input tax credits to Kosma-Kare, because they were based on invoices of convenience and did not describe the true service supplier or intermediary. He also imposed a penalty, and the assessment for the

April 1, 2006, to February 2007 period was made outside the normal deadlines under section 298 of the Act.

[2] Kosma-Kare is a manufacturing company that makes first aid and cosmetic cotton products. It regularly used two employment agencies, namely, 9167-4523 Québec Inc. (9167) and 9199-9201 Québec Inc. (9199), to get personnel to perform certain tasks such as packing.

[3] Kosma-Kare submits that it is not disputed that it paid for personnel that actually worked during the relevant period. According to Kosma-Kare, the documents submitted in support of its tax credit claims meet the strict requirements of the Act. The judge therefore should have followed the reasoning of this Court in *Systematix Technology Consultants Inc. v. Her Majesty the Queen*, 2007 FCA 226, and the assessment should have been set aside.

[4] Kosma-Kare argues that the judge erred in law in imposing on it a (i) moral duty (that of ensuring that it was not using ‘illegal’ workers, that is, workers being paid under the table or less than minimum wage) and (ii) the duty of acting as the tax police by obtaining the information requested by the Quebec Revenue Agency (ARQ) with respect to these workers, such as their social insurance number. According to Kosma-Kare, these factors are of no relevance to determining whether it was entitled to the claimed tax credits.

[5] It is true that in her reasons (2014 CCI 13), the judge commented at length on the scheme set up by 9167 and 9199 and the fact that Kosma-Kare wilfully looked the other way even though it should have known that it was taking advantage of illegal workers. However, before

doing so, the judge had already concluded that the respondent had shown that the workers used by Kosma-Kare could not have been employees of 9167 or 9199, or subcontractors with which these agencies allegedly did business.

[6] The judge concluded that it was very clear from the evidence that the companies that had issued the invoices Kosma-Kare submitted in support of its tax credit claims did not act as employment agencies or as intermediaries between sub-contractors in that field (reasons at paragraph 51).

[7] Consequently, contrary to its allegations, Kosma-Kare had not complied with the strict provisions of the Act requiring, among other things, that it declare the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business, and the registration number assigned under subsection 241(1) of the Act to that supplier or intermediary, as the case may be (*Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45, subparagraph 3(b)(i) (the Regulations)).

[8] Given the evidence of record and the judge's conclusions regarding the lack of credibility of some of the witnesses, Kosma-Kare has not satisfied us that the judge made a palpable and overriding error in this respect. It has also failed to satisfy us that the judge committed any other error that would warrant our intervention in concluding that Kosma-Kare did not make a *prima facie* case that the Minister's assumptions were erroneous.

[9] In the circumstances, it is unnecessary to address the other issues raised by Kosma-Kare to dispose of the appeal on the merit of the rejection of its tax credit claims. This is especially so since, at the hearing, the parties confirmed that these issues, which are serious, are already under appeal in another case (*Salaison Lévesque Inc. v. The Queen*, 2014 TCC 36 (A-134-14)) and that they should be ruled on shortly by this Court. It is obvious that nothing here should be interpreted as endorsing any of the judge's comments in this respect.

[10] Kosma-Kare is further challenging the judge's conclusions confirming the imposition of a penalty under section 285 of the Act. It also submits that the respondent did not meet its burden to establish that it could assess it outside the normal period under subsection 298(4) of the Act for the April 2006 to February 2007 period.

[11] The judge described the correct test for disposing of the two issues at paragraph 74 of her reasons. However, according to Kosma-Kare, she erred in how she applied them.

[12] Her reasons with respect to the penalty and the application of subsection 298(4) of the Act are brief (paragraph 76). The judge writes that Kosma-Kare, despite the warning it received from the ARQ in 2005, agreed to work with people with no concern as to whether they had work permits or a social insurance number, thinking that the blame would be placed on the agencies with which it was working. According to the judge, this demonstrates complete indifference towards the Act and amounts to gross negligence. In this regard, she cites the decision of Justice Strayer in *Venne v. Canada (Minister of National Revenue)*, [1984] F.C.J. No. 314 (QL), 1984 CarswellNat 210, 84 D.T.C. 6247 (*Venne*).

[13] First, the respondent admitted that the Act does not deal with the duty to pay employees minimum wage any more than it requires them to obtain work permits. Then, contrary to Justice Strayer's approach in *Venne*, the judge did not explain the link she established between Kosma-Kare's false statement or omission (the only issue discussed at the hearing before us was the name and business number of the supplier or the intermediary Kosma-Kare had to declare under the Regulations) and the failure to comply with other legislation concerning work permits and the minimum wage.

[14] This is a palpable and overriding error since nothing else in the decision justifies the conclusion that Kosma-Kare committed gross negligence directly related to a false statement or omission within the meaning of section 285 of the Act.

[15] Similarly, in dealing with the application of subsection 298(4) of the Act, the judge also failed to clarify the link she established between Kosma-Kare's wilful blindness to the worker's illegal status and its alleged misrepresentations. At no time did the judge indicate on what basis Kosma-Kare was aware or should have been aware, had it not been for its neglect, carelessness or wilful default, that 9167 and 9199 were not service suppliers or were not acting as intermediaries under the Regulations.

[16] In the circumstances, the judge's two conclusions in this respect must be set aside. The appeal will therefore be dismissed except with regard to the penalty and the assessment for the April 2006 to February 2007 taxation period. The matter will be referred back to the TCC for

redetermination of these two issues. Given the mixed outcome, each party shall bear its own costs.

“Johanne Gauthier”

J.A.

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-80-14

**(APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA DATED
JANUARY 15, 2014, DOCKET 2011-3056(GST)G).**

STYLE OF CAUSE: KOSMA-KARE CANADA INC. v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: OCTOBER 7 AND 8, 2014

REASONS FOR JUDGMENT OF THE COURT BY: NADON J.A.
GAUTHIER J.A.
SCOTT J.A.

DELIVERED FROM THE BENCH BY: GAUTHIER J.A.

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