Docket: 2003-352(GST)I

BETWEEN:

736728 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Lucie Lamarre

Counsel for the Appellant:	Susan Tataryn
Counsel for the Respondent:	Joanna Hill and John Shipley

ORDER

Upon counsel for the respondent having made a motion to the Court, to be disposed of on consideration of written representations and without appearance by the parties, for an order amending the Judgment and Reasons for Judgment dated January 21, 2004, by setting aside on the basis of error arising from an accidental slip or omission the award of costs ordered therein;

And upon counsel for the appellant opposing that motion for an order amending the said Judgment and Reasons for Judgment by setting aside the award of costs ordered therein;

The motion is dismissed in accordance with the Reasons for Order attached hereto.

Signed at Ottawa, Canada, this 31st day of October 2005.

"Lucie Lamarre"

Lamarre, J.

Citation: 2005TCC679
Date: 20051031
Docket: 2003-352(GST)I

BETWEEN:

736728 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Lamarre, J.

[1] The respondent brought a motion for an order setting aside, on the basis of error arising from an accidental slip or omission, the award of costs ordered in the Judgment and Reasons for Judgment dated January 21, 2004.

[2] The appellant asks this Court to refuse to invoke the "slip rule" to set aside the award of costs, as the respondent's delay in bringing the motion has resulted in financial prejudice to the appellant.

[3] In order to decide this motion, it is necessary to begin with a chronology of the relevant events.

[4] On January 16, 2003, the appellant filed a notice of appeal respecting an assessment dated February 6, 2002, wherein the Minister of National Revenue ("Minister") disallowed an input tax credit ("ITC") in the amount of $12,600 pursuant to section 169 of the *Excise Tax Act*. The appellant elected to have its appeal heard under the informal procedure.

[5] On March 26, 2003, the respondent filed her Reply to the Notice of Appeal. The issue to be decided was whether the appellant was eligible to claim an ITC in the amount of $12,600 on the purchase price of an aircraft.

[6] The hearing of the appeal took place on September 24 and 25, 2003, in Ottawa, Ontario. The Judgment and Reasons for Judgment dated January 21, 2004, allowed the appeal and awarded costs against the respondent.

[7] On January 3, 2005, counsel for the appellant sent a letter to the Department of Justice requesting payment of the costs awarded in the Judgment, and enclosed a copy of her bill of costs in the amount of $2,249.22.

[8] On January 13, 2005, a paralegal in the Tax Law Services Section of the Department of Justice sent a letter back to counsel for the appellant stating that she had carriage of the file for costs purposes, and that she would contact counsel after reviewing the bill of costs.

[9] On January 25, 2005, the same paralegal from the Department of Justice sent a second letter to counsel for the appellant, stating therein that the bill of costs had been reviewed and suggesting that it was too high in terms of counsel fees, disbursements and GST.

[10] On March 21, 2005, counsel for the appellant replied in writing to the paralegal at the Department of Justice and agreed to lower the amounts for both her counsel fees and the disbursements, but requested at the same time, in respect of travel and living expenses for two witnesses, an amount of $40 each per day pursuant to subsection 11(1) of the *Tax Court of Canada Rules of Procedure Respecting the Excise Tax Act (Informal Procedure)* ("*Informal GST Rules*").

[11] On May 10, 2005, the paralegal replied in writing to counsel for the appellant; she agreed to pay $50 for each witness and invited counsel for the appellant to submit receipts for any expenses incurred by the witnesses under subsection 11(1) of the *Informal GST Rules*. Furthermore, with respect to GST, the paralegal wrote that, "[a]s I previously stated to you, GST is an allowable item in a Bill of Costs", and went on to explain the conditions to be met under subsection 11(4) of the *Informal GST Rules* in order for GST to be reimbursed (see Exhibit E attached to the affidavit of Manon Hurtubise filed with the appellant's written submissions).

[12] On May 31, 2005, a general counsel with the Tax Law Services Section at the Department of Justice sent a letter to counsel for the appellant informing her that he did not agree to her bill of costs, as the amount in dispute in the appeal exceeded $7,000 and this Court accordingly had no jurisdiction to award costs in the judgment rendered on January 21, 2004.

[13] On June 1, 2005, counsel for the appellant faxed a letter to the general counsel at the Department of Justice in which she stated that even though the Court may have exceeded its jurisdiction, no steps were taken by the Department of Justice to appeal the order and therefore that order should stand.

[14] On June 1, 2005, the general counsel at the Department of Justice responded to counsel for the appellant's fax and continued to dispute the bill of costs.

[15] On June 2, 2005, the general counsel at the Department of Justice sent a letter to counsel for the appellant advising her that he would bring the matter before this Court for resolution.

[16] On June 6, 2005, counsel for the appellant sent a letter to the general counsel at the Department of Justice stating that she had been negotiating the amount of her costs with a representative of the Crown since January 2005 and that, throughout that time, no mention of a jurisdictional issue was raised by the Crown. She also enclosed a revised bill of costs which included most of the concessions requested by the Crown (Exhibit I attached to the affidavit of Manon Hurtubise, filed with the appellant's written submissions).

[17] On June 17, 2005, the respondent brought this motion requesting the Court to set aside the award of costs ordered in the Judgment issued on January 21, 2004.

Submissions of the Parties

[18] The respondent argues that, pursuant to paragraph 18.3009(1)(*c*) of the *Tax Court of Canada Act* ("*TCC Act*"), this Court has no jurisdiction to award costs in appeals heard under the *Informal GST Rules* where the amount in dispute exceeds $7,000. That provision reads as follows:

> **18.3009** (1) If an appeal referred to in section 18.3001 is allowed, the Court shall reimburse to the person who brought the appeal the filing fee paid by that person under paragraph 18.15(3)(*b*). The Court may, in accordance with the

> rules of Court, award costs to that person if the judgement reduces the amount in dispute by more than one half and
>
> . . .
>
> (*c*) in the case of an appeal under Part IX of the *Excise Tax Act*,
>
> (i) the amount in dispute does not exceed $7,000, and
> (ii) the aggregate of supplies for the prior fiscal year of the person did not exceed $1,000,000.

[19] The respondent submits that the amount in dispute was $12,600 and that, in her view, the Court's award of costs was an accidental mistake, error or omission which may be corrected by the Court at any time. In the respondent's view, an inadvertent award of costs which the Court did not have jurisdiction to make is precisely the kind of clerical mistake, error or omission which brings the "slip rule" into play. In that regard, the respondent refers to the case of *Besse v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 1790 (QL), [2000] 1 C.T.C. 174 (FCA). The respondent adds that this Court has inherent jurisdiction to vary orders which do not, as a result of an accidental mistake, error or omission, express the true intent of the Court. In that respect, the respondent refers to the cases of *Bank of Nova Scotia v. Golden Forest Holdings Ltd. (N.S.C.A.)*, [1990] N.S.J. No. 230 (QL), 43 C.P.C. (2d) 16; and *Dumont v. Law Society of Prince Edward Island (P.E.I.C.A.)*, [1989] P.E.I.J. No. 168 (QL), 65 D.L.R. (4th) 687, 80 Nfld. & P.E.I.R. 1.

[20] The appellant submits that the respondent brought this motion seventeen months after the Court ordered costs against the respondent and after having negotiated the proper amount of costs with the appellant for over five months, through the exchange of numerous pieces of correspondence. Counsel for the appellant states that she submitted the bill of costs and negotiated with the respondent in good faith, unaware of any jurisdictional issue. She adds that the appellant incurred significant additional costs both as a result of the respondent’s failure to bring this motion in a timely fashion and its negotiations with respect to the proper amount of costs.

[21] In the appellant's view, the respondent could have brought either an application for judicial review under section 18.1 of the *Federal Courts Act* or a motion before this Court under the "slip rule" either at the time the Judgment was issued, or at the time the appellant initially provided the respondent with its bill of costs.

[22] In the appellant's view, the Court should not make an amendment where an injustice will be done to a party by putting them in such a position that they would be injured. On that point, counsel for the appellant refers to the following passage in *The Queen v. Canderel Limited*, 93 DTC 5357 (FCA), at pages 5360 and 5361:

> As regards injustice to the other party, I cannot but adopt, as Mahoney, J.A. has done in *Meyer* [(1985), 62 N.R. 70 (C.A.) at 72], the following statement by Lord Esher, M.R. in *Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556 at 558:
>
> > . . . There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured it ought not to be made.
>
> and the statement immediately following:
>
> > And the same principle was expressed, I think perhaps somewhat more clearly, by Bowen L.J., who says that an amendment is to be allowed "whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made."
> >
> > To apply that rule to the present case; if the amendment is allowed now, will the plaintiff be in the same position as if the defendants had pleaded correctly in the first instance? . . .

[23] Counsel for the appellant therefore submits that the motion should be dismissed because any amendment made at this time would be prejudicial to the appellant and would put it in a position where it would be injured.

Analysis

[24] There is no dispute here that, pursuant to paragraph 18.3009(1)(*c*) of the *TCC Act*, this Court had no jurisdiction to award costs in the judgment issued on January 21, 2004. Indeed, the amount in dispute was more than $7,000, as in its appeal the appellant claimed an ITC of $12,600.

[25] It is also obvious that, at the time the Judgment and the Reasons for Judgment were issued on January 21, 2004, both the Court and the parties overlooked the restriction imposed by paragraph 18.3009(1)(*c*) of the *TCC Act*.

[26] The question, therefore, is whether the circumstances here justify this Court's exercising, at this stage, its inherent jurisdiction to set aside the order as to costs, as the respondent contends, or whether the proper remedy was either an appeal of the Judgment to the Federal Court of Appeal or a motion to amend the Judgment, brought in a timely fashion before this Court, as asserted by the appellant.

[27] The general rule, as expressed by the Supreme Court of Canada in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at page 860, is that a final decision of a court cannot be reopened or amended on a matter of substantive right after the court's judgment has been drawn up, issued and entered. At that point, the power to rehear the case is transferred to the appellate level. As stated in *Chandler*, *supra*, at page 862, this general rule, whereby a court becomes *functus officio*, is based on the "policy ground which favours finality of proceedings" which were subject to a full appeal (see *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at page 222, [1990] S.C.J. No. 29 (QL), at paragraph 7; see also *Laskaris v. M.N.R.*, [1990] T.C.J. No. 214 (QL) and *Owen Holdings Ltd. v. The Queen*, 97 DTC 380, at page 383, 1997 CarswellNat 495, at paragraph 25).

[28] There are however exceptions to this general rule. A judgment may be amended after it has been issued and entered (1) where there has been a slip in drawing it up, or, (2) where there has been an error in expressing the manifest intention of the court (see *Chandler*, *supra*, at page 860).

[29] The "slip rule" does not authorize a court to substitute for the judgment originally delivered a completely different judgment that it had no intention of delivering when it rendered its original judgment (see *Minister of National Revenue v. Gunnar Mining Ltd.*, [1970] Ex. C.R. 328). As stated in that case, at page 342, a court cannot completely change the substance of its judgment on the ground that it overlooked something when it rendered it.

[30] As contemplated in *Reekie v. Messervey*, *supra*, at page 222, the "slip rule" needs to be narrowly construed except in circumstances where there is no avenue of appeal.

[31] In the present case, I find that the avenue open to the respondent was to appeal the January 21, 2004, decision to the Federal Court of Appeal. When issuing its judgment, the Court overlooked the $7,000 limitation prescribed in paragraph 18.3009(1)(*c*) of the *TCC Act* and it was its intention at that time to award costs. In this sense, there was no clerical mistake. In *The Queen v. Moncton*

Computer Exchange Ltd., 2002 DTC 6751, [2001] G.S.T.C. 143 (FCA), at paragraph 26, Sharlow, J.A., stated the following:

> It follows that if a Tax Court Judge awards costs to an appellant in a GST or GST/HST appeal under the informal procedure without being made aware that the case raises a question as to the $7,000 limitation, this Court will not reverse the award of costs unless there are extraordinary circumstances.

[32] In the present case, the respondent first accepted the judgment and proceeded to negotiate with counsel for the appellant for five months with respect to the bill of costs. In this context, I do not find that the "slip rule" is applicable, especially since the award of costs that is now contested was appealable before the Federal Court of Appeal.

[33] I also find that the present situation is different from that in *Besse*, *supra*, cited by the respondent, a case in which the Federal Court of Appeal found that an award of costs was made in error and that there was no time limit for amending under Rule 397(2) of the Federal Court Rules a judgment with respect to such award.

[34] In *Besse*, there was no allegation of prejudice suffered by the party opposing the motion to vary the judgment.

[35] Where the "slip rule" does not apply the Court has, in exceptional circumstances, power under its inherent jurisdiction to set aside a judgment that has been entered improperly. However, this power is narrow and discretionary, and will not be exercised unless: (1) there has been no delay in making the application; (2) no party has taken the benefit of the judgment; (3) no party will suffer prejudice as a result of setting aside entry of the judgment; and (4) the interests of justice favour setting aside entry (see *Fas Gas Oil Ltd. v. J.H. Automotive Ltd.*, [2004] A.J. No. 394 (Alberta Court of Appeal) (QL) at paragraphs 25 and 26.

[36] Here, there has been a seventeen-month delay in applying to have the January 21, 2004, Judgment amended. The appellant prepared a bill of costs regarding which negotiations were carried on with the respondent over a five-month period. This is a case where the appellant took irrevocable steps in reliance on the Judgment. Further, increased costs have likely been incurred as a result of the time spent by its counsel negotiating with the respondent with respect to the bill of costs. In my view, the appellant would clearly suffer undue prejudice were the Judgment and Reasons for Judgment corrected at this time.

[37] I am therefore of the view that this Court does not have the authority to amend the January 21, 2004, Judgment. The proper means for correcting this error was by appeal to the Federal Court of Appeal, pursuant to subsection 27(1.2) of the *Federal Courts Act*.

[38] The motion is dismissed and the award of costs stands.

Signed at Ottawa, Canada, this 31st day of October 2005.

"Lucie Lamarre"

Lamarre, J.