

Docket: 2004-1427(GST)G

BETWEEN:

LA BANQUE CANADIENNE IMPÉRIALE DE COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

ONTARIO SOCIETY OF COLLECTION AGENCIES,

Proposed Intervener.

ORDER

Upon motion by the Ontario Society of Collection Agencies (OSCA) seeking leave to intervene;

The motion is granted pursuant to s. 28 of the *Tax Court of Canada Rules (General Procedure)*.

The OSCA is allowed to intervene as a friend of the Court for the purpose of rendering assistance to the Court. As such, it will not be allowed to adduce evidence or examine witnesses. Its intervention as a friend of the Court is limited to the presentation of oral arguments or the submission of a written brief.

Signed at Ottawa, Canada, this 7th day of November 2005.

« François Angers »

Angers, J.

Citation: 2005TCC716
Date: 20051107
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REASONS FOR ORDER

Angers, J.

[1] The Ontario Society of Collection Agencies (OSCA) seeks leave to intervene in the above appeal pursuant to s. 28 of the *Tax Court of Canada Rules (General Procedure)*. The appeal concerns the entitlement of the appellant (CIBC) to a refund under the *Excise Tax Act* (“ETA”) of the goods and services tax (GST) which it paid on services performed by collection agencies.

[2] The principal issue is whether the services provided to the CIBC by the collection agencies constitute a “financial service” as defined in subsection 123(1) of the *ETA* and are, therefore, an “exempt supply” under Schedule V of the *ETA* and thus not subject to GST.

[3] The OSCA is an industry association whose members are engaged in the business of collecting outstanding debts owed by borrowers to lenders and which is dedicated to promoting integrity and professionalism in the debt collection

business. In his affidavit in support of the motion seeking leave to intervene, the president of the OSCA sets out the following reasons to explain why it is felt that the interest of the OSCA's members will be affected by the outcome of this appeal:

4. ... if the Appellant's appeal is successful, it will establish the principle that members of the OSCA engage in a "financial service" for purposes of the ETA which are "exempt supplies" not subject to tax under the ETA with the result that the OSCA members would not be entitled to claim input tax credits for GST paid on purchases made in connection with provision of the exempt services.
5. Denial of the input tax credits would be a significant cost to members of the OSCA which must be directly borne by those members. This would have a substantial and wide-spread [*sic*] effect on the businesses of the members of the OSCA.

[4] The OSCA submits that if the perspective of its members is not put before the Court, the Court will be rendering a decision without the benefit of a full understanding of the nature of the services provided to the appellant by the members of the OSCA and of the context in which they are provided.

[5] The appellant, on the other hand, submits that the OSCA should not be allowed to intervene for it has failed to demonstrate how its intervention will assist the Court, that its evidence is irrelevant to the highly specific legal and factual questions at issue and, even if deemed relevant, that evidence can be introduced by a simpler and less intrusive means such as by having the OSCA called as a witness for the Crown. As to legal arguments, the appellant is of the opinion that the OSCA's position is identical to the respondent's and that the respondent is fully capable of arguing that position.

[6] Section 28 of the *Tax Court of Canada Rules (General Procedure)* provides as follows:

Leave to Intervene

28. (1) Where it is claimed by a person who is not a party to a proceeding
 - (a) that such person has an interest in the subject matter of the proceeding,
 - (b) that such person may be adversely affected by a judgment in the proceeding, or
 - (c) that there exists between such person and any one or more parties to the proceeding a question of law or fact or mixed law and fact in common with one or more of the questions in issue in the proceeding,

such person may move for leave to intervene.

(2) On the motion, the Court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, and the Court may,

(a) allow the person to intervene as a friend of the Court and without being a party to the proceeding, for the purpose of rendering assistance to the Court by way of evidence or argument, and

(b) give such direction for pleadings, discovery or costs as is just.

[7] Robert McMechan and Gordon Bourgard, in *Tax Court Practice*, tell us that the General Procedure rule on intervention adopts the same test as most provincial jurisdictions, except for the result that a person who is given leave to intervene does so as a friend of the Court rather than as an “added party”. There are few reported cases on the application of section 28.

[8] In order for a person to make a motion to the Court for leave to intervene, that person must have an interest in the subject matter of the proceeding and show that the person may be adversely affected by the judgment.

[9] In income tax appeals, this threshold test may sometimes be difficult to meet because an assessment usually only pertains to an individual taxpayer. In addition, the confidential character of taxpayer information that may need to be disclosed in order for an intervener to intervene effectively must be considered in weighing the conditions to be met. Intervener status was denied where the only interest shown to exist was jurisprudential in nature (see *Tioxide Canada Inc. v. The Queen*, 94 DTC 6655) and where the position of the intervener was similar to that of the respondent under s. 241 of the *Income Tax Act* (see *Silicate Holdings Limited. v. The Queen*, 2001 DTC 299).

[10] On the other hand, in *Moss v. The Queen*, 99 DTC 1229, the Court granted the wife of an appellant leave to intervene in her husband’s appeal because she might be adversely affected by the outcome of the case, as it related to the disposition of property and to unreported income. Although I agree with counsel for the appellant that income tax appeals may demand a more rigorous standard in applying the threshold test for intervention than do cases involving public law issues, I believe that the situation in GST appeals may be slightly different in that the assessment of the recipient of a supply directly affects how the Minister will assess the recipient’s suppliers. Thus, in the present case, the judgment may adversely affect, at the very least, the specific collection agencies with which the appellant is doing business.

[11] The OSCA is not the specific agency with which the appellant does business, but because it represents its members, who have an interest in and may be affected by the judgment, it may be granted leave to intervene in its capacity as an association representing the members affected. In *Maurice v. Canada (Minister of Indian Affairs and Northern Development)*, [2000] F.C.J. No. 208 (QL), the Federal Court – Trial Division stated the following on the issue of an entity intervening on behalf of those it represents:

While the applicant does not itself have a direct interest, in the outcome of the present litigation, the individuals that it represents do, and those interests are likely to be substantial. The applicant's interest is stronger than a mere jurisprudential interest, although that exists as well. The interests of the individuals that the applicant seeks to protect are grounded in the same fact situation as those of the plaintiffs.

[12] Interventions by associations have been permitted in tax cases. In *Gifford v. Canada*, [2004] 1 S.C.R. 411, for example, the Canadian Bankers Association was granted leave to intervene in the Supreme Court of Canada on the issue of deductibility of interest.

[13] In the present case, I believe that the OSCA has a sufficient interest in the subject matter of this appeal and that its members may be adversely affected by the judgment of this Court. Its intervention will accordingly ensure some protection for its members through the defence of their interest, and that intervention should assist the Court by allowing it to hear all possible legal arguments before rendering a decision.

[14] Even if the threshold test for intervention is met, the Court must consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding. The OSCA has already advised the Court that the hearing date is acceptable to it. Its participation in the trial process may, on the other hand, not only delay that process but also cause prejudice to the appellant. The assessment under appeal before the Court involves the appellant and its contractual relationships with specific collection agencies and the manner in which the respondent interpreted those relationships. It is the basis of the assessment under appeal that is before this Court and not the methods by which collection agencies conduct their business in general. I am confident that the parties in this appeal are fully capable of presenting without the assistance of an intervener all the relevant facts to support their respective positions with regard to the matters raised by the assessment under appeal. Given the confidential character of some of the information that may need to be disclosed in terms of the

appellant's debtors and the refund amount, that information should remain with the parties in this appeal. Thus, the interest of the OSCA and its members as it pertains to the basis of the assessment will, in my opinion, be fully protected.

[15] Nevertheless, I believe that the OSCA can render assistance to the Court in this appeal as a friend of the Court. Even though a friend of the Court is sometimes viewed as having to be an impartial participant, it seems that taking a partisan position is not an absolute bar to intervention in that capacity. In fact, one would expect that an intervener take a partisan position. That is how the interest that the intervener seeks to protect will be heard. On the question of whether that interest can be protected by one of the parties to the litigation, Paul R. Muldoon, at page 143 of his book titled *Law of Intervention* (Aurora, On: Canada Law Book Inc., 1989) has summed the matter up as follows:

The difference in the application of this consideration to added party and friend of the court intervention relates to the role and nature of the intervenor. In added party intervention, the intervenor seeks to protect a specific or general interest; hence the question is whether that interest is already fully protected in the litigation. In friend of the court intervention, the intervenor seeks to assist the court by revealing a unique or different point of view or approach to an issue in the litigation, exploring a relevant issue that would not otherwise be examined, or presenting opinions or views of a constituency that would be affected by the litigation. In the end, the question in added party intervention is whether the interests sought to be protected by the applicant are being fully and fairly protected by the existing parties; in friend of the court intervention, the question is whether there is an issue, point of view, or other perspective that the court would find useful and helpful in its deliberations.

[16] I find that the OSCA's point of view may be useful and helpful to the Court in its deliberations. The motion for leave to intervene is therefore granted. The OSCA is allowed to intervene as a friend of the Court, for the purpose of rendering assistance to the Court. As such, it will not be allowed to adduce evidence or examine witnesses. The OSCA's intervention as a friend of the Court

is limited to the presentation of oral arguments or the submission of a written brief.

Signed at Ottawa, Canada, this 7th day of November 2005.

« François Angers »

Angers, J.

CITATION: 2005TCC716

COURT FILE NO.: 2004-1427(GST)G

STYLE OF CAUSE: La Banque Canadienne Impériale de
Commerce v. Her Majesty the Queen and
Ontario Society of Collection Agencies

REASONS FOR ORDER BY: The Honourable Justice François Angers

DATE OF ORDER: November 7, 2005

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