Docket: 2007-2048(GST)I

BETWEEN:

CARROLL PONTIAC BUICK LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 21, 2008, at Halifax, Nova Scotia

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	Martin Hickey

JUDGMENT

The appeal from the assessment under the *Excise Tax Act* for the period from January 1, 2002 to February 28, 2005 by Notice of Assessment No. 01CB0103003, dated July 28, 2005 is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant has not failed to report and remit HST arising from the personal use of the passenger vehicles in the amounts of $18,704.56, $20,068.50, $23,653.47 and $24,661.80 for the periods ending February 28, 2002, February 28, 2003, February 29, 2004 and February 28, 2005, respectively.

Signed at Halifax, Nova Scotia, this 25th day of July 2008.

"Wyman W. Webb"

Webb, J.

Citation: 2008TCC428
Date: 20080725
Docket: 2007-2048(GST)I

BETWEEN:

CARROLL PONTIAC BUICK LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant was assessed for HST for the period January 1, 2002 to February 28, 2005 for the following amounts that are in dispute:

Increase in HST collectible:	
Period ending February 28, 2002:	$18,704.56
Period ending February 28, 2003:	$20,068.50
Period ending February 29, 2004:	$23,653.47
Period ending February 28, 2005:	$24,661.80
Total:	$87,088.33

[2] The Appellant operated a car dealership in Halifax, Nova Scotia. The Appellant would provide demo vehicles to certain of its employees for their own personal use. This resulted in a standby charge and an operating expense benefit being conferred upon these employees for the purposes of the *Income Tax Act*. In

addition, pursuant to section 173 of the *Excise Tax Act*, the Appellant was deemed to have collected HST based on the total benefit amount taxable to the employees under the *Income Tax Act* and any reimbursements paid by the employees.

[3] With the introduction of the GST in the early 1990s, the Appellant learned that the Appellant would be required to remit GST (and later HST) in relation to the employee benefit amounts as a result of the provisions of section 173 of the *Excise Tax Act.* The Appellant decided that it did not want to bear the burden of the cost of the GST in relation to the shareholder benefits and therefore decided to charge the employees an amount equal to the GST that the Appellant was required to remit in relation to the employee benefits. With the introduction of the HST the amount increased, but the concept remained that the Appellant was charging the employees an amount equal to its HST obligation in relation to the standby charge and the operating expense benefit.

[4] Prior to the periods under appeal, the identification of the amounts that had been deducted by the Appellant in its internal accounting systems had caused the Appellant difficulty in tracking these amounts. For the periods under appeal, the amounts were identified in the paycheque stubs issued to the employees and in the internal records of the Appellant as "HST TB" with the TB standing for "taxable benefit". The total amount collected by the Appellant from its employees during the periods under appeal as "HST TB" was equal to the total amount determined by the Respondent as the HST that was deemed to be collected pursuant to section 173 of the *Excise Tax Act* in relation to the standby charges and operating cost benefits realized by the employees during these periods.

[5] When filing its HST returns for these periods, the Appellant included in its HST liability, the total amount that it had collected from its employees. As noted, this was exactly equal to the amount of HST that the Appellant is deemed to have collected under section 173 of the *Excise Tax Act.*

[6] It is the position of the Respondent that the Appellant was collecting HST from its employees and therefore must remit this amount in addition to the obligations on the Appellant to include in calculating its net tax under section 225 of the *Excise Tax Act* the amounts that it is deemed to have collected under section 173 of the *Excise Tax Act*. Counsel for the Respondent referred to *800537 Ontario Inc. [Acura West] v. The Queen*, 2005 FCA 333, [2005] G.S.T.C. 165, 2005 G.T.C.1553. However in that case the taxpayer was purporting to collect amounts from its customers as GST payable by its customers.

[7] I do not agree with the position of the Respondent in this matter. It seems obvious to me that the amounts that the employees were charged were intended to reimburse the Appellant for a portion of its cost in providing the automobiles to the employees and that the Appellant was not collecting amounts that purported to be HST payable by the employees. The Appellant determined that the amount that the employees would be required to pay would be equal to the HST liability arising as a result of the Appellant being deemed to have collected an amount pursuant to section 173 of the *Excise Tax Act.*

[8] If the Respondent is correct, then this could lead to other situations where amounts would have to be remitted that are collected to reimburse a person for that person's GST or HST obligations. For example a residential condominium corporation will charge the owners of residential units a condominium fee to cover the common expenses related to the condominium. This condominium fee will not be subject to GST or HST as a result of the provisions of paragraph 13 of Part I of Schedule V to the *Excise Tax Act*. The condominium fee would presumably be based on the costs incurred by the condominium corporation. Assume that one of the costs is for snow removal and this cost is $3,000 plus HST of 13% or $3,390 in total. When setting the condominium fee, the condominium corporation will want to collect $3,390 for snow removal and therefore will be collecting an amount that is based on the HST liability incurred (or to be incurred) by the condominium corporation. If this $390 that is collected is, as the Respondent would presumably submit, on account of HST and therefore would have to be remitted, the condominium corporation would not have sufficient funds to pay its obligations and I do not agree that this is the intended result of sections 222 and 225 of the *Excise Tax Act.*

[9] It also should not matter whether the condominium corporation breaks down the condominium fee to show the residents how the fee was determined or simply sends a notice to the residents of the fee without any breakdown. Why would a condominium corporation that shows a detailed breakdown of the condominium fee have to remit a portion of the fee collected as an amount collected as tax or on account of tax while another condominium corporation charging exactly the same fee (based on the same components) would not have to remit any HST? In each case the condominium corporation would be collecting an amount from the residents to compensate the condominium corporation for its HST liability on the goods and services it acquires. In my opinion, as in this case, it would not be an intended result of the application of sections 222 and 225 of the *Excise Tax Act* that the condominium corporation should have to remit the amounts that it collects to cover the HST liability that it has or will incur.

[10] The Supreme Court of Canada in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, 2005 DTC 5523 (Eng.), [2005] 5 C.T.C. 215, 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601, stated that:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[11] Sections 222 and 225 of the *Excise Tax Act* provide, in part, as follows:

> 222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> 225. (1) Subject to this Subdivision, the net tax for a particular reporting period of a person is the positive or negative amount determined by the formula
>
> A – B
>
> where
>
> A is the total of
>
> (a) all amounts that became collectible and all other amounts collected by the person in the particular reporting period as or on account of tax under Division II,…

[12] In my opinion, the references to the amounts collected as or on account of tax in sections 222 and 225 do not include the amounts collected in this situation which were not collected as tax payable by the employees but were collected to reimburse

the Appellant for its HST obligation arising as a result of the provisions of section 173 of the *Excise Tax Act*. In my opinion this interpretation is consistent with the intent of the *Excise Tax Act* and is consistent with reading the provisions of this *Act* as a harmonious whole. As noted above, there are many other situations where amounts are collected to reimburse a person for that person's GST or HST liability and if all of these amounts are treated as amounts collected as or on account of tax, then it will lead to unintended results. The net affect of the Appellant charging the employees this amount is that the burden of the HST obligation has been shifted to the employees who received the use of the vehicles. The general rule, as set out in section 165 of the *Excise Tax Act*, is that it is the recipient of the taxable supply and not the supplier who pays the tax. Since the employees were the recipients of the supply of the vehicles, in my opinion, the net affect of shifting the burden of the HST to the employees is harmonious with the *Excise Tax Act* as a whole.

[13] Section 173 of the *Excise Tax Act* contemplates a situation where an employee reimburses an employer for a portion of the costs of providing the automobile. This section of the *Excise Tax Act* provides in part as follows:

> 173. (1) Where a registrant makes a supply (other than an exempt or zero-rated supply) of property or a service to an individual or a person related to the individual and
>
> (a) an amount (in this subsection referred to as the "benefit amount") in respect of the supply is required under paragraph 6(1)(a), (e), (k) or (l) or subsection 15(1) of the Income Tax Act to be included in computing the individual's income for a taxation year of the individual, or
>
> (b) the supply relates to the use or operation of an automobile **and an amount (in this subsection referred to as a "reimbursement") is paid by the individual** or a person related to the individual **that reduces the amount in respect of the supply that would otherwise be required under paragraph 6(1)(e), (k) or (l) or subsection 15(1) of that Act to be so included**,
>
> the following rules apply:
>
> (c) in the case of a supply of property otherwise than by way of sale, the use made by the registrant in so providing the property to the individual or person related to the individual is deemed, for the purposes of this Part, to be use in commercial activities of the registrant and, to the extent that the registrant acquired or imported the property or brought it into a participating province for the purpose of making that supply, the registrant is deemed, for the purposes of this Part, to have so acquired or imported the property or brought it into the province, as the case may be, for use in commercial activities of the registrant, and

> (d) …
>
> for the purpose of determining the net tax of the registrant,
>
> (v) the total of the benefit amount and all reimbursements is deemed to be the total consideration payable in respect of the provision during the year of the property or service to the individual or person related to the individual,
>
> …
>
> (emphasis added)

[14] Since an amount was deducted from the paycheques of the employees, which was identified as "HST TB", the employees were paying their employer for the use of the automobiles. As a result, this would reduce the amount that the employees would be required to include in their income for the purposes of the *Income Tax Act* under paragraphs 6(1)(e) and 6(1)(k). It would not, in my opinion, be appropriate to tax employees on the full amount of the standby charge and operating expense benefit without taking into account the amounts that the employees had deducted from their paycheques. These amounts are clearly amounts that the employees were paying in relation to the use of the automobiles that had been provided by their employer. The fact that they were calculated based on the HST liability of the employer is simply the means by which the amount was determined. Therefore in my opinion, the amounts that were deducted from the employees' paycheques would reduce the amount included in their income for the purposes of the *Income Tax Act* as standby charges and as operating expense benefits.

[15] As a result, these amounts would be reimbursements for the purposes of section 173 of the *Excise Tax Act*. Since the total consideration for the purposes of section 173 is the total amount of the benefit plus the reimbursement amount, the calculation of the HST deemed to be collected under section 173 of the *Excise Tax Act* is not affected by treating these amounts as reimbursements. For example for the period ending February 28, 2002 the total amount deducted from the employees paycheques in relation to the standby charge was $14,709.36 and therefore the total amount of all standby charges for all employees for this period that would be included in the benefit amount (for the purposes of paragraph 173(1)(*a*) of the *Excise Tax Act*) would be $119,776.68 - $14,709.36 or $105,067.32. The HST that is deemed to have been collected by the Appellant is based on the total of the benefit amounts and the reimbursements and therefore the total consideration for the purposes of section 173 of the *Excise Tax Act* will still be $119,776.68. This will result in the same amount being included as HST collected in determining the net tax

of the Appellant under 225 of the *Excise Tax Act*, as was determined by the Appellant. This is also the same amount determined under section 173 by the Respondent. The difference is that the amount collected by the Appellant from the employees is not, in my opinion, collected on account of tax, but simply collected as a reimbursement of part of the cost of providing the vehicles to the employees, which is based on the calculation on the HST liability of the Appellant. This amount is a reimbursement amount for the purpose of section 173.

[16] The treatment of this amount paid by the employees as a reimbursement should not be any different than if the employer had determined that the employees should pay for the cost of the gasoline, the insurance or any other costs that were incurred by the Appellant in providing the vehicles to its employees.

[17] The Appellant has, with the approval of the auditor from the Canada Revenue Agency, changed the description of the amounts deducted from "HST TB" to "STBYCHRG". Although the amount deducted remains the same, this simple name change in the account appears to remove any issue with the Canada Revenue Agency that the Appellant is collecting HST. The designation of an account should not determine liability under the *Excise Tax Act*. As noted by Associate Chief Justice Bowman (as he then was) in *VanNieuwkerk v. The Queen* 2003 TCC 670, [2004] 1 C.T.C. 2577:

> 6….It has been said on many occasions in this Court that accounting entries do not create reality. They simply reflect reality. There must be an underlying reality that exists independently of the accounting entries.

[18] The simple designation of the amounts deducted as "HST TB" does not make the amounts collected as or on account of tax any more than the change in designation to "STBYCHRG" would change this result. It is the underlying reality that is relevant. As noted above, this underlying reality is that the amounts were collected to reimburse the Appellant for its HST liability arising as a result of the provisions of section 173 of the *Excise Tax Act* and not as or account of tax for the purposes of sections 222 and 225 of the *Excise Tax Act.*

[19] Subsection 18.3009 of the *Tax Court of Canada Act* provides, in part, that:

> 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.

[20] Since this appeal is an appeal referred to in section 18.3001 of the *Tax Court of Canada Act* and since the amount in dispute exceeds $7,000, no costs may be awarded to the Appellant.

[21] As a result, the appeal is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant has not failed to report and remit HST arising from the personal use of the passenger vehicles in the amounts of $18,704.56, $20,068.50, $23,653.47 and $24,661.80 for the periods ending February 28, 2002, February 28, 2003, February 29, 2004 and February 28, 2005, respectively.

Signed at Halifax, Nova Scotia, this 25th day of July 2008.

"Wyman W. Webb"

Webb, J.

CITATION:	2008TCC428
COURT FILE NO.:	2007-2048(GST)I
STYLE OF CAUSE:	CARROLL PONTIAC BUICK LIMITED AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
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APPEARANCES:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	Martin Hickey

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