

Docket: 2008-3277(GST)I

BETWEEN:

SHEFFIELD INTERNATIONAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by written representations
By: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Agent for the appellant: Peter Eickmeier
Counsel for the respondent: Diana Aird

ORDER

UPON reading the notice of motion of the respondent for an Order of this Court that this appeal be heard under the *Tax Court of Canada Rules (General Procedure)*;

AND UPON reading the submissions of counsel for the respondent and of the agent for the appellant;

IT IS ORDERED THAT:

1. Pursuant to section 18.3002 of the *Tax Court of Canada Act*, the provisions of sections 17.1, 17.2 and 17.4 to 17.8 of that Act apply in respect of this appeal.
2. The appellant shall file a notice of appeal in accordance with sections 48 and 51 of the *Rules* and in Form 21(1)(a) of the Rules within 60 days of the date of this Order.

3. The respondent shall file an amended reply to the notice of appeal in accordance with section 49 of the Rules within 60 days of the receipt of the amended notice of appeal; and
4. Respondent's application that the appellant be represented by counsel in accordance with section 17.1 of the *Tax Court of Canada Act* is adjourned, *sine die*.

There is no order as to costs.

Signed at Ottawa, Canada, this 28th day of August, 2009.

"G.J. Rip"

Rip C.J.

Citation: 2009TCC421
Date: 20090828
Docket: 2008-3277(GST)I

BETWEEN:

SHEFFIELD INTERNATIONAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip C.J.

[1] The respondent has made an application for an Order pursuant to subsection 18.3002(1) of the *Tax Court of Canada Act* (“*TCCA*”) that this appeal, made in accordance with the Informal Procedure provisions of the *Tax Court of Canada Rules* respecting the *Excise Tax Act* (“*Act*”), be moved to be governed by the General Procedure provisions of the *Act* and that the appellant be represented by counsel pursuant to section 17.1 of the *TCCA* and section 30 of the *Tax Court of Canada Rules (General Procedure)* (“*Rules*”). The application was made after sixty days after the day the Registry of the Court transmitted to the Minister of National Revenue the notice of appeal: subsection 18.3002(2) of the *TCCA*.

[2] On the request of the respondent her application was disposed of pursuant to section 69 of the *Rules* upon written representations of the parties and without their appearance.

[3] The grounds for the application include the following:

- a) the amount in dispute is not less than \$8,000,000 and therefore exceeds \$7,000, so that no Order as to costs is warranted under subsection 18.3002(3) of the *TCCA*;

b) that it is reasonable to grant the request, pursuant to paragraph 18.3002(2)(a) of the *TCCA*.

[4] The relevant portions of section 18.3002 of the *TCCA* read as follows:

(1) Where the Attorney General of Canada so requests, the Court shall order that sections 17.1, 17.2 and 17.4 to 17.8 apply in respect of an appeal in respect of which sections 18.3003 and 18.3007 to 18.302 would otherwise apply.

(2) A request under subsection (1) shall not be made after sixty days after the day the Registry of the Court transmits to the Minister of National Revenue the notice of appeal unless

(a) the Court is satisfied that the Attorney General of Canada became aware of information that justifies the making of the request after the sixty days had elapsed or that the request is otherwise reasonable in the circumstances; or

....

(3) The Court shall, on making an order under subsection (1), order that all reasonable and proper costs of the person who has brought the appeal be borne by Her Majesty in right of Canada where

...

(c) in the case of an appeal under Part IX of the *Excise Tax Act*, the amount in dispute does not exceed \$7,000 and the aggregate of supplies for the prior fiscal year of the person did not

(1) Sur demande du procureur général du Canada, la Cour doit ordonner l'application des articles 17.1, 17.2 et 17.4 à 17.8 à l'appel auquel les articles 18.3003 et 18.3007 à 18.302 s'appliqueraient par ailleurs.

(2) La demande doit être présentée dans les soixante jours suivant la transmission de l'avis d'appel par le greffe de la Cour au ministre du Revenu national ou après l'expiration de ce délai dans les cas suivants :

a) la Cour est convaincue que le procureur général du Canada a pris connaissance de renseignements tels qu'il est justifié de présenter la demande après l'expiration de ce délai, ou que la demande est par ailleurs raisonnable dans les circonstances;

...

(3) Dans le cas d'une ordonnance rendue aux termes du paragraphe (1), la Cour doit ordonner que les frais entraînés pour la personne qui a interjeté appel soient payés par Sa Majesté du chef du Canada, si les conditions suivantes sont réunies :

...

c) dans le cas d'un appel interjeté en vertu de la partie IX de la *Loi sur la taxe d'accise*, le montant en litige n'excède pas 7 000 \$ et le total des fournitures pour l'exercice précédent

exceed \$1,000,000.

de la personne n'excède pas
1 000 000 \$.

[5] The appellant appealed an assessment under Part IX of the *Excise Tax Act* in which the Minister did not consider the appellant to be engaged in a commercial activity and denied the appellant's claim for input tax credits in the amount of \$5,194,127.13. The Minister also assessed penalties under subsection 280(1) and section 285 of the *Act*.

[6] The appellant is presently represented by an agent, Mr. Peter Eickmeier. Mr. Eickmeier, who is not a lawyer, is an officer of the appellant.

[7] The appellant through its agent submits that there is no need for discovery since the only fact the appellant requires to establish the presence of commercial activity has been admitted by the respondent in paragraph 5 of the reply to the notice of appeal, as follows:

With respect to paragraph 6 of part (c), he admits that the Appellant claimed and received refunds for GST fraudulently.

[8] The appellant adds, in part:

5. To claim and receive refunds for GST fraudulently consists of three things: (1) receiving refunds for GST, (2) doing something to get the refunds for GST (because otherwise the receiving cannot be fraudulent), and (3) illegality.

6. So, all three of these things are admitted by the Respondent.

7. The second of these things – doing something to get the refunds for GST – constitutes an undertaking, and therefore falls within the definition of “business” contained in s. 123(1) of the *Excise Tax Act* ...

[9] To be quite frank I do not understand the appellant's argument. There is no admission by the respondent that the appellant carried on a commercial activity.

[10] I have read the appellant's notice of appeal. It is poorly drafted. The material facts, to the extent they exist, are lost in the plethora of irrelevancies and argument and anticipated arguments. It is difficult for the reader to make sense of the appellant's case.

[11] This is a matter in which the Informal Procedure is not appropriate and the appeal should be moved to the General Procedure. The amount of tax, including penalties, is substantial and an examination for discovery is essential to obtain necessary and relevant information and clarify the facts in issue. The issue is not a simple one and each party should have the right to examine the other on discovery. In this appeal, the respondent has the right to obtain specific answers concerning allegations in the notice of appeal. Of course, the appellant will also have the right to examine for discovery.

[12] The appellant also submits that it need not be represented by counsel since Mr. Eickmeier “has a full understanding of all issues in the case”. The appellant distinguishes its situation from that in *New Haven Development Ltd. v. Canada*.¹

[13] In the written representations on behalf of the appellant, Mr. Eickmeier states that he is a graduate of Osgoode Hall Law School (1969) and the Bar Admissions Course (1971). In this affidavit Mr. Eickmeier says that he practised law in Ontario from 1971 until 1980 and since that time he has had “extensive experience” in litigation. He refers to litigation in Buffalo, N.Y. from 1996 to 2000 as well as “several” lawsuits in Ontario during the same period. He says he also “handled” successfully an Excise Tax case before the Canadian International Trade Tribunal and he has acted for himself before the Federal Court – Trial Division and the Federal Court of Appeal.

[14] If the notice of appeal is an example of Mr. Eickmeier’s “full understanding of all the issues in the case” as he states, his ability to act as agent in the General Procedure would be prejudicial to the appellant itself. It would be preferable if the appellant were to be represented at the trial of the appeal by counsel, preferably one who is a skilled draftsman capable of amending the notice of appeal and skilled in the art of advocacy. I have no independent evidence that Mr. Eickmeier is so qualified.

[15] In his affidavit in support of this application, Henry Pao, a litigation officer with the CRA states he believes Mr. Eickmeier will likely be required to give evidence at trial as he seems to be the only individual with first hand knowledge of the facts in this appeal. Mr. Eickmeier confirms that he will be the appellant’s main witness.

¹ [2006] T.C.J. No. 227, 2006 TCC 328.

[16] The issues in this appeal are serious and, according to the pleadings, potentially complex, notwithstanding Mr. Eickmeier's claim that the issue is a simple one. Also, the amount in issue is substantial. A layman who apparently has a self-interest in the outcome of this appeal is not a person who, ideally, should act as agent for the appellant.

[17] While it may be necessary for me to order that the appellant be represented by counsel, I shall adjourn this question to a later date. Such Order may be premature. I am adjourning this issue based primarily on the representations of Mr. Eickmeier as to his legal background and purported litigation skills as well as the appellant's apparent inability to pay for counsel. However, having regard to the contents of the notice of appeal, I am concerned that Mr. Eickmeier's representation may be unduly exaggerated and optimistic. If it appears that Mr. Eickmeier's conduct of the appeal, including interlocutory matters and examinations for discovery, is prejudicial to the appellant's interests or is inappropriate or is lacking in the degree of competence Mr. Eickmeier represents he possesses, the matter of counsel for the appellant will be recalled for my consideration. It is important that the appellant, as any other litigant before the Tax Court, have competent representation at trial.

[18] For those reasons:

- a) Pursuant to section 18.3002 of the *Tax Court of Canada Act*, the provisions of sections 17.1, 17.2 and 17.4 to 17.8 of that Act apply in respect of this appeal;
- b) The appellant shall file a notice of appeal in accordance with sections 48 and 51 of the *Rules* and in Form 21(1)(a) of the *Rules* within 60 days of the date of this Order.
- (c) The respondent shall file an amended reply to the notice of appeal in accordance with section 49 of the *Rules* within 60 days of the receipt of the amended notice of appeal; and
- (d) The respondent's application that the appellant be represented by counsel in accordance with section 17.1 of the *Tax Court of Canada Act* is adjourned, *sine die*.

[19] There is no order as to costs.

Signed at Ottawa, Canada, this 28th day of August, 2009.

“G.J. Rip”

Rip C.J.

CITATION: 2009TCC421

COURT FILE NO.: 2008-3277(GST)I

STYLE OF CAUSE: SHEFFIELD INTERNATIONAL CORPORATION v. THE QUEEN

DATE OF HEARING: By written submissions

REASONS FOR ORDER BY: The Honourable Gerald J. Rip, Chief Justice

DATE OF ORDER: August, 28, 2009

APPEARANCES:

Agent for the Appellant:	Peter Eickmeier
Counsel for the Respondent:	Diana Aird

COUNSEL OF RECORD:

For the :

Name:

Firm:

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada