Docket: 2009-167(GST)I

BETWEEN:

CARIBBEAN QUEEN RESTAURANTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on August 19, 2009 at Toronto, Ontario.

By: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Hong Ky (Eric) Luu

ORDER

UPON motion by the Appellant for an Order vacating an assessment made on or about July 31, 2009, and for other relief, if necessary;

AND UPON motion made by the Respondent seeking directions from the Court regarding the next steps in these proceedings, and for other relief, if necessary;

AND UPON reading materials filed;

AND UPON hearing counsel for the parties;

IT IS ORDERED THAT:

1, The Appellant's motion is denied, with costs in the amount of $3,000, payable forthwith by the Respondent;

2. The Respondent's motion is granted and:

(a) the Appellant shall file an Amended Notice of Appeal by December 31, 2009;

(b) the Respondent shall file a Reply to the Amended Notice of Appeal by February 1, 2010

Signed at Ottawa, Canada, this 4th day of November, 2009.

"C.H. McArthur"

McArthur J.

Citation: 2009 TCC 566
Date: 20091104
Docket: 2009-167(GST)I

BETWEEN:

CARIBBEAN QUEEN RESTAURANTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

McArthur J.

[1] There were two motions before me, one on behalf of each party. The Appellant sought an Order vacating an assessment made on or about July 31, 2009, and the Respondent sought directions regarding the next steps to be taken in these proceedings.

[2] I had previously granted an adjournment, *sine die*, of the hearing scheduled for September 8, 2009 and an abridgment of time for the filing and serving of the Respondent's motion and affidavits.

[3] The appeal deals with an assessment dated February 5, 2008. All procedural steps appeared to have been taken for the hearing scheduled September 8, 2009. The disruption commenced with the Respondent's reassessment of July 31, 2009. Unless it is vacated, fresh procedural steps will have to be taken. The current appeal cannot proceed in its present form.

[4] In a nutshell, the Appellant submits that it would be prejudiced if the assessment was allowed, and that it is an abuse of process. Expanding on this the Appellant stated:

1. After a pre-hearing conference, this appeal was set down for hearing on a date selected by the respondent.

2. After the appeal was set down for hearing, the respondent attempted to raise new issues and new facts and sought to adjourn the hearing of the appeal. The appellant opposed the adjournment request.

3. After the Tax Court of Canada ("Tax Court") denied the respondent's request to adjourn the hearing, the respondent purported to reassess the appellant to nullify the appellant's appeal and do indirectly that which the Tax Court refused to order directly.

4. The respondent's purported reassessment is an attempt by the Minister to appeal from the Minister's own assessment. The appellant submits the purported reassessment is an abuse of process and a nullity which ought to be vacated by this Honourable Court and that this Court has jurisdiction over its own process.

[5] The Respondent requested the following:

1. Directions from the Court regarding the next steps to be taken in these proceedings.

2. If necessary and further to the latest reassessment from the Minister of National Revenue, an adjournment of the hearing scheduled for September 8, 2009.

3. If necessary, an Order for an abridgment of the time for filing and serving the Notice of Motion and supporting affidavits herein.

[6] The Respondent submitted that the assessment is proper, legal and the Minister of National Revenue has a right and duty to assess taxpayers accurately and this Court does not have jurisdiction to vacate the assessment. Counsel

added that the facts do not warrant a finding of abuse of process and the present facts are distinguishable from those in *Bassermann v. Canada*[1] where the Appellant had breached one or more Court Orders.

[7] The Appellant argued that the July 31, 2009 assessment was a deliberate action by the Minister to obtain an adjournment which had been refused by the Court and that the Minister's action is tantamount to the Minister breaching an Order of the Court, referring to *Bassermann*. In *Bassermann*, an assessment was vacated because the Minister breached an Order of the Court to divulge documents. In the present case, I accept the argument of counsel for the Respondent that the assessment was decided prior to this Court's "no adjournment" decision, although the Appellant's suspicions are understandable.

[8] An abuse of process argument was made in *Obonsawin v. The Queen*,[2] where the Appellant unsuccessfully argued that the Tax Court should vacate an assessment because the Minister's actions would shock the conscience of the community. In denying the motion, Miller J. turned to the Supreme Court of Canada's comments in *Blencoe v. British Columbia (Human Rights Commission)*[3] and *R. v. Power*[4] to the effect that in order to find abuse of process, there must be … overwhelming evidence that the proceedings are unfair to the point that they are contrary to the interest of justice.

[9] For the reasons that follow, I find that the Minister had the right to reassess the Appellant. The Appellant submitted that the Minister cannot appeal from its own assessment and cited several cases set out in the Appellant's Points of Arguments and Authorities which support that position. Bastarache J. of the Supreme Court of Canada, agreed with this principle in *Continental Bank Leasing Corp. v. Canada*.[5] In that case, the Minister was attempting to change the basis for assessment after the expiration of the limitation period. Presently, the Minister is within the four-year statutory limitation period.

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1 [1993] T.C.J. 329.

2 2004 TCC 3.

3 [2000] 2 S.C.R. 307.

4 *R. v. Power*, [1994] 1 S.C.R. 601 at para. 12.

5 [1998] 2 S.C.R. 298.

[10] Subsequent to the *Continental Bank* decision, Parliament enacted subsection 152(9) of the *Income Tax Act* and subsection 298(6.1) of the *Excise Tax Act*. They are almost identical and permit the Minister to make alternative arguments at any time after the normal reassessment period. These subsections do not affect the present situation.

[11] The stumbling block with the Respondent's paragraph 302(b) argument is that it only applies to the taxpayer who is entitled to amend an appeal "on such terms as the Tax Court directs." Paragraph 302(b) reads in part as follows:

> 302. Appeal to Tax Court
>
> Where a person files a notice of objection to an assessment and the Minister sends … an additional assessment, … the person may, …
>
> (a) appeal therefrom to the Tax Court; or
>
> (b) … amend the appeal by joining thereto an appeal in respect of the reassessment …in such manner and on such terms as the Tax Court directs.

[12] Counsel for the Appellant submitted that section 54 of the *Tax Court of Canada Rules (General Procedure)* must be considered. It states:

> 54. A pleading may be amended by the party filing it, at any time before the close of pleadings, and thereafter either on filing the consent of all other parties, or with the leave of the Court, and the Court in granting leave may impose such terms as are just.

[13] The general rule is that: "…an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy, provided that such allowance would not result in an injustice to the other party not capable of being compensated by an award of costs."[6] The comments of Bowman J. in *Continental Bank*[7] are of assistance:

> It would do no credit to our system of justice in Canada if the courts were restricted in their consideration of the merits of a case by an ill-considered admission that is

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6 *The Queen v. Canderel Limited***,** 93 DTC 5357 where reference is made to *Ketteman v. Hansel Properties Limited*, [1988] 1 All E.R. 38.

7 93 DTC 298.

> inconsistent with another position that is being advanced, particularly where it is sought to withdraw such an admission at an early stage in the proceeding. This is equally true whether the party seeking to change its position is the taxpayer or the Crown.

[14] This rule and the comments of Bowman J. apply equally to the present situation. So long as the taxpayer is fully and timely informed of the new basis of argument with ample time to prepare, then the assessments should be allowed.[8]

[15] The trial has yet to begin. Although the parties may disagree as to whether the Appellant had notice of the facts and reasons behind the July 31, 2009 assessment, I believe the Respondent should be permitted to amend the pleadings and an award of costs may help ensure that the taxpayer is not prejudiced. Therefore, costs in the amount of $3,000 are payable forthwith by the Respondent to the Appellant.

Conclusion

[16] This award of costs does not come under the scrutiny of section 18.3009 which is applicable to a judgment after the hearing of an appeal. The present is an interlocutory Order. Subparagraphs 18.3009(*c*)(i) and (ii) refer to an "award of costs to the person who brought the appeal if the judgment reduces the amount by more than one half and in the case of an appeal under Part IX of the *Excise Tax Act*, 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. The legislation states this Court may award costs if certain conditions are met but does not prohibit the awarding of costs if the conditions are not satisfied.[9] The Tax Court being a Superior Court has inherent jurisdiction to award costs.

[17] The Appellant shall have until December 31, 2009 to file an Amended Notice of Appeal and the Respondent shall file a Reply to the Amended Appeal on or before February 1, 2010. Should further directions or clarification be required, a teleconference can be arranged by the Court on the request of either party.

Signed at Ottawa, Canada, this 4th day of November, 2009.

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[8] *The Queen v. Hollinger Inc.*, [1999] 4 C.T.C. 61. (F.C.A.).

"C.H. McArthur"

McArthur J.

[9] Taken from an editorial comment by the highly respected author and GST commentator David Sherman following the reported judgment *736728 Ontario Ltd. v. R.*, 2005 TCC 679.

CITATION:	2009 TCC 566
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DATE OF HEARING:	August 19, 2009
REASONS FOR ORDER BY:	The Honourable Justice C.H. McArthur
DATE OF ORDER:	November 4, 2009

APPEARANCES:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Hong Ky (Eric) Luu

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