Docket: 2007-2489(GST)G

BETWEEN:

MARIO BROUILLETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on September 16, 2010, at Quebec City, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant: Normand Roy

Counsel for the respondent: Éric Labbé

JUDGMENT

Upon motion by the appellant for an order allowing the appeal with costs, in accordance with the Amended Notice of Appeal dated January 20, 2010;

And upon motion by the respondent for an order quashing the appeal;

And upon hearing the parties' allegations;

The appellant's motion is dismissed, the respondent's motion is granted, with costs to the appellant, and the appeal from the assessment concerning the goods

and services tax for the period from November 1, 2004, to April 30, 2005, is quashed.

Signed at Ottawa, Canada, this 2nd day of December 2010.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 5th day of January 2011.

Erich Klein, Revisor

Citation: 2010 TCC 616
Date: 20101202
Docket: 2007-2489(GST)G

BETWEEN:

MARIO BROUILLETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Hogan J.

[1] The appellant has appealed an assessment of May 11, 2006, concerning the goods and services tax (GST) for the period from November 1, 2004, to April 30, 2005. Reassessments were issued on March 26, 2010, replacing the previous notice of assessment. According to these reassessments, the appellant was not required to pay any GST for that period.

[2] The parties acknowledge that the Court no longer has jurisdiction to rule on the assessment of May 11, 2006, which is the basis for the Amended Notice of Appeal dated January 20, 2010.

[3] The appellant brought a motion before this Court to be disposed of without appearance by the parties and upon consideration of written representations, under subsection 69(1) of the *Tax Court of Canada Rules (General Procedure)* (the Rules).

[4] The motion was for an order allowing the appeal with costs, in accordance with the Amended Notice of Appeal dated January 20, 2010, whereas the respondent applied to the Court for an order quashing the appeal.

I. Issue

[5] The only issue is whether the Court should allow or quash the appeal.

II. Appellant's position

[6] The reassessments, which are [TRANSLATION] "nil or credit notices of assessment", constitute a confession of judgment.

III. Respondent's position

[7] The reassessments do not constitute a confession of judgment but, rather, were the result of an administrative error.

[8] This administrative error had the effect of cancelling the previous notice of assessment. There is no longer anything in dispute.

[9] The respondent agreed to pay, as costs, the expenses incurred by the appellant to institute the proceedings before the Tax Court of Canada.

IV. Legislation

[10] Subsection 309(1) of the *Excise Tax Act* (ETA) reads as follows:

Excise Tax Act	*Loi sur la taxe d'accise*
309(1) Disposition of appeal − The Tax Court may dispose of an appeal from an assessment by (*a*) dismissing it; or (*b*) allowing it and (i) vacating the assessment, or (ii) referring the assessment back to the Minister for reconsideration and reassessment.	**309(1) Règlement d'appel** − La Cour canadienne de l'impôt peut statuer sur un appel concernant une cotisation en le rejetant ou en l'accueillant. Dans ce dernier cas, elle peut annuler la cotisation ou la renvoyer au ministre pour nouvel examen et nouvelle cotisation.

Subsection 171(1) of the *Income Tax Act* (ITA) reads as follows:

Income Tax Act	*Loi de l'impôt sur le revenu*
171(1) Disposal of appeal − The Tax Court of Canada may dispose of an appeal by	**171(1) Règlement d'un appel** − La Cour canadienne de l'impôt peut statuer sur un appel :
(*a*) dismissing it; or	*a*) en le rejetant;
(*b*) allowing it and	*b*) en l'admettant et en :
(i) vacating the assessment,	(i) annulant la cotisation,
(ii) varying the assessment, or	(ii) modifiant la cotisation,
(iii) referring the assessment back to the Minister for reconsideration and reassessment.	(iii) déférant la cotisation au ministre pour nouvel examen et nouvelle cotisation.

V. Analysis

[11] In Canadian tax law, a taxpayer cannot appeal from a nil assessment, as issuing a notice of assessment is not the same as an assessment. Justice Hugessen of the Federal Court of Appeal stated the following in *The Queen v. The Consumers' Gas Company Ltd.*:

> . . . What is put in issue on an appeal to the courts under the *Income Tax Act* is the Minister's assessment. While the word "assessment" can bear two constructions, as being either the process by which tax is assessed or the product of that assessment, it seems to me clear, from a reading of sections 152 to 177 of the *Income Tax Act*, that the word is there employed in the second sense only. This conclusion flows in particular from subsection 165(1) and from the well established principle that a taxpayer can neither object to nor appeal from a nil assessment.[1]

[12] Therefore, the appellant cannot file an appeal, and, in turn, the Court cannot dispose of an appeal under subsection 171(1) of the ITA in the absence of an assessment. The Court can neither allow nor dismiss the appeal. It must simply quash it. This position is consistent with the case law of the Tax Court of Canada.[2]

---

[1] [1987] 2 F.C. 60, at page 67 (F.C.A.).
[2] *MacLeod v. The Queen*, 2006 TCC 434, 2006 DTC 3487; *Consoltex Inc. v. The Queen*, 92 DTC 1567, No. 91-231(IT), December 19, 1991 (T.C.C.).

[13] In *Bruner v. Canada*,[3] the taxpayer had sold a trade name to his company for a non-interest bearing promissory note with a face value of $l trillion ($1,000,000,000,000) and having a maturity date 499 years in the future. He also received a non-interest bearing promissory note in the amount of $70 billion, which corresponds to the GST on the $l trillion. The company therefore claimed an input tax credit of $70 billion. Mr. Bruner asked that the two transactions be offset against each other. The Canada Revenue Agency (CRA) refused to grant the input tax credit and made a nil assessment under subsection 296(1) of the ETA for the reporting period at issue. The taxpayer appealed that decision and claimed $300 million in late refund interest. Relying on the case law on nil assessments, the Crown filed a motion for an order quashing the appeal.

[14] Mr. Bruner was successful at trial. However, in a unanimous judgment, the Federal Court of Appeal extended the case law on nil assessments to the ETA. Justice Pelletier stated the following in *Bruner:*

> The respondent is appealing from an assessment in which there is no amount in dispute, a fact which he admitted before Judge Miller and which was in evidence before Judge Bowie. The provisions of the *Income Tax Act* relating to assessments and appeals are mirrored in the *Excise Tax Act* and we see no reason why the principles relating to appeals from nil assessments under the *Income Tax Act* should not apply to appeals under the *Excise Tax Act* providing that the principles extend to input tax credits and refunds as well as to liability for tax. Consequently, a taxpayer is not entitled to challenge an assessment where the success of the appeal would either make no difference to the taxpayer's liability for tax or entitlement to input tax credits or refunds, or would increase the taxpayer's liability for tax. When the respondent took the position that there was no amount in dispute, the Tax Court judge should have applied the nil assessment jurisprudence and quashed the Notice of Appeal.[4]
>
> [Emphasis added.]

[15] The facts in this case resemble those in *Bruner*. In both cases, the taxpayers appealed from assessments where no amounts were in dispute. Furthermore, and contrary to what was the case in *Bruner*, the appellant acknowledged in his motion that the Court no longer has jurisdiction to rule on the assessment of May 11, 2006.

---

[3] 2003 FCA 54.
[4] *Ibid.*

[16] Under the circumstances, it seems appropriate that the Court follow the *ratio decidendi* of *Bruner* and quash the appeal rather than allow it. Accordingly, the appeal is quashed.

Signed at Ottawa, Canada, this 2nd day of December 2010.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 5th day of January 2011.

Erich Klein, Revisor

CITATION:	2010 TCC 616
COURT FILE NO.:	2007-2489(GST)G
STYLE OF CAUSE:	MARIO BROUILLETTE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Quebec City, Quebec
DATE OF HEARING:	September 16, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	December 2, 2010

APPEARANCES:

Counsel for the appellant:	Normand Roy
Counsel for the respondent:	Éric Labbé

COUNSEL OF RECORD:

For the appellant:

Name:	Normand Roy
Firm:	Saint-Augustin-de-Desmaures, Quebec

For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada