Docket: 2014-1(GST)I

BETWEEN:

1336440 ONTARIO LIMITED O/A CAR CLUB LONDON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 1, 2014, at London, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant:	Liliana Pardo
Counsel for the Respondent:	Tamara Watters

AMENDED JUDGMENT

The Appeal from the reassessment made under the *Excise Tax Act* in respect of a Goods and Services Tax/Harmonized Sales Tax (GST/HST) for the period between September 1, 2010 and September 20, 2010 by Notice of Assessment number 10302000532310960, dated January 18, 2013, is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis there is no tax liability under the *Excise Tax Act* in respect of the 2007 black Mercedes Benz S550 at issue.

This Amended Judgment and Reasons for Judgment is issued in substitution of the Judgment and Reasons for Judgment dated October 8th, 2014.

Signed at Ottawa, Canada, this **5th** day of **November** 2014.

"Campbell J. Miller"

C. Miller J.

Citation: 2014 TCC 302
Date: 2014**1105**
Docket: 2014-1(GST)I

BETWEEN:

1336440 ONTARIO LIMITED O/A CAR CLUB LONDON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

C. Miller J.

[1] 1336440 Ontario Limited carries on business as the Car Club London ("Car Club London") specializing in the purchase and sale of used luxury vehicles. This Appeal concerns one such vehicle, a Mercedes Benz, that the Minister of National Revenue (the "Minister") maintains was supplied by the Car Club London for consideration of $56,500 in 2010. The Minister consequently assessed Goods and Services Tax/Harmonized Sales Tax ("GST/HST") of 15% - $8,750. The Car Club London argues there was no sale and, therefore, no supply subject to GST/HST.

[2] Ms. Pardo, a manager at Car Club London, testified on behalf of the company. The Car Club London has had a longstanding relationship of over 30 years with one of its customers, Mr. Harris, who lives in Nova Scotia. Ms. Pardo described Mr. Harris (now in his 80's) as being something of a father figure to one of the owners of the Car Club London, Mr. El-Hindi.

[3] In a phone conversation in the summer of 2010, Mr. Harris asked Mr. El-Hindi to locate a black 2007 Mercedes Benz S550 with light interior and low kilometres. Mr. Harris sent $56,500 to the Car Club London though neither side knew exactly what the final price might be. Mr. Harris had, over the long relationship with Mr. El-Hindi, lent money to the Car Club London to assist in the business. According to Ms. Pardo, the $56,500 was recorded in the Car Club London's books as a loan.

[4] The Car Club London found online in Toronto what it believed to be the car Mr. Harris wanted - a 2007 Mercedez Benz S550 with registration number **WDDNG86X97A145925** ("the Mercedes Benz"). Through its wholesale arm, Executive Auto Sales, the Car Club London acquired "the Mercedes Benz" on August 26, 2010. The colour of "the Mercedes Benz" was described as black opal.

[5] "The Mercedes Benz" was shipped to Mr. Harris in Nova Scotia in September 2010. Upon its arrival, Mr. Harris advised the Car Club London that the car was not what he wanted as it was dark blue not black. Mr. Harris assisted the Car Club London in making arrangements to store the car in Nova Scotia at Bobby Allen Motors, with the hopes that the Car Club London could find a new buyer. In October 2010 the registration transferred from the wholesaler, Executive Auto Sales, to the Car Club London, as a retailer: an invoice between the two related companies showed a price of $47,600 plus HST of $6,188. There was never any written document, Bill of Sale or anything else between the Car Club London and Mr. Harris.

[6] In September, October and November 2010 Mr. Harris ordered three other cars from the Car Club London and the $56,500 held by the Car Club London was used for these purchases.

[7] The Minister assessed the Car Club London for HST on the $56,500 on the basis it was consideration for a supply by the Car Club London to Mr. Harris. The Appellant argues there was no sale and therefore no supply.

[8] The Respondent's starting point is section 168(1) of the *Excise Tax Act* (the "*Act*") which reads:

> 168(1) Tax under this Division in respect of a taxable supply is payable by the recipient on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due.

[9] The Respondent maintains the $56,500 was consideration for the supply of "the Mercedes Benz" and tax is therefore payable in September 2010. This begs the question of whether there was a supply**.** The Respondent argues there was a supply based on section 133 of the *Act* which reads:

> 133. For the purposes of this Part, where an agreement is entered into to provide property or a service,

> (*a*) the entering into of the agreement shall be deemed to be a supply of the property or service made at the time the agreement is entered into; and
>
> (*b*) the provision, if any, of property or a service under the agreement shall be deemed to be part of the supply referred to in paragraph (*a*) and not a separate supply.

[10] The Respondent argues the phone call between Mr. Harris and Mr. El-Hindi was the entering of an agreement to provide property.

[11] The first question to address is whether there was an agreement entered into to provide property, such that section 133 of the *Act* will deem there to be a supply. What was the nature of the so-called agreement between Mr. Harris and the Car Club London? It was not to buy "the Mercedes Benz" for $56,500. It was for the Car Club London to find a 2007 black Mercedes Benz S550 and acquire it for Mr. Harris for an amount in the $56,500 range. I find the arrangement was not to provide property but to find property and if the property met Mr. Harris' requirements only then to provide the property to him. That never happened. At best there was an informal understanding between longstanding friends, made during a phone conversation (details of which were not provided, but the results of which was for the Car Club London to attempt to find a 2007 black Mercedes Benz S550 and for Mr. Harris to provide funds to the Car Club London).

[12] Even if I concluded there was an agreement, for section 133 of the *Act* to apply there must be an agreement to provide property. This implies the property must be identifiable at the time of the entering into of the agreement. How can there be a supply, even a deemed supply, without the clear identification of the property. There was no evidence of how many 2007 black Mercedes Benz S550's were produced, but unlikely there was only one. No, there was no agreement between the Car Club London and Mr. Harris at the time of the phone conversation between Mr. El-Hindi and Mr. Harris for the Car Club London to provide Mr. Harris with "the Mercedes Benz", as, at that time, "the Mercedes Benz" had not been identified as the property: the Car Club London had no property to provide. I conclude no agreement had been entered into to provide property: there has been no deemed supply of "the Mercedes Benz".

[13] If no deemed supply, I feel it is necessary to determine whether there has been a supply, defined in the *Act* as:

> "supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

While the definition is broadly worded, I have no difficulty in finding there has been no sale, transfer, barter, exchange, licence, rental, lease, gift or disposition. The Car Club London simply did not sell or dispose of "the Mercedes Benz". I find as a fact that Mr. Harris never took possession of "the Mercedes Benz": it was just not the property he wanted. Under these circumstances, I find there was a non-event: nothing was provided.

[14] Had I found there was a deemed supply would tax be payable pursuant to section 168(1) of the *Act* at the time Mr. Harris transferred $56,500 to the Car Club London? Tax would only be payable if that amount is consideration for the supply.

[15] This is a unique situation where there is a longstanding relationship between the supplier and the recipient. Part of that relationship was the lending of money by Mr. Harris to the Car Club London, run by his friend, Mr. El-Hindi. The Car Club London had a loan account established for Mr. Harris. On receipt of the $56,500 that money was accounted for through the loan account. The funds were never used for "the Mercedes Benz". Indeed, the funds from the loan account went to the purchase of three different vehicles.

[16] There was some discussion at trial as to whether the $56,500 was a deposit or down payment. I conclude it was neither. There was no property against which the funds could be held as either a deposit or down payment. The most appropriate way, especially given the history of the relationship between the Parties, was to do exactly what the Parties did – treat it as a loan. It was not consideration for "the Mercedes Benz". No consideration ever even came due for "the Mercedes Benz".

[17] Respondent's counsel then took me to section 168(3) of the *Act* which reads:

> 168(3) Notwithstanding subsections (1) and (2), where all or any part of the consideration for a taxable supply has not been paid or become due on or before the last day of the calendar month immediately following the first calendar month in which
>
> (*a*) where the supply is of tangible personal property by way of sale, other than a supply described in paragraph (*b*) or (*c*), the ownership or possession of the property is transferred to the recipient,

> (*b*) where the supply is of tangible personal property by way of sale under which the supplier delivers the property to the recipient on approval, consignment, sale-or-return basis or other similar terms, the recipient acquires ownership of the property or makes a supply of it to any person, other than the supplier, or
>
> (*c*) where the supply is under an agreement in writing for the construction, renovation or alteration of, or repair to,
>
> (i) any real property, or
>
> (ii) any ship or other marine vessel, and it may reasonably be expected that the construction, renovation, alteration or repair will require more than three months to complete,
>
> the construction, renovation, alteration or repair is substantially completed,
>
> tax under this Division in respect of the supply, calculated on the value of that consideration or part, as the case may be, is payable on that day.

[18] I find this provision is not applicable as there has not been a supply by way of sale. There is no agreement for the sale of "the Mercedes Benz", no Bill of Sale, no invoice, no transfer of ownership by registration, no acceptance of delivery, no consideration for "the Mercedes Benz". Section 168(3) of the *Act* does not come into play.

[19] While I understand why representatives of the Canada Revenue Agency would consider applying section 133 and section 168 of the *Act* to find this purported transaction attracts GST, with respect, I find it is an overly technical, let's sweep everything into the net approach, that leaves a taxpayer, such as the Car Club London, shaking its head, crying plaintively – but I never sold the car. The GST is premised on there being a supply of goods or services. Put simply, I find that in these unique circumstances there has not been a supply, deemed or otherwise.

[20] I allow the Appeal and refer the matter back to the Minister for reconsideration and reassessment on the basis there is no tax liability in respect of "the Mercedes Benz".

Signed at Ottawa, Canada, this **5**th day of **November** 2014.

"Campbell J. Miller"

C. Miller J.

CITATION:	2014 TCC 302
COURT FILE NO.:	2014-1(GST)I
STYLE OF CAUSE:	1336440 ONTARIO LIMITED O/A CAR CLUB LONDON AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	October 1, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF **AMENDED** JUDGMENT:	**November 5**, 2014

APPEARANCES:

Agent for the Appellant:	Liliana Pardo
Counsel for the Respondent:	Tamara Watters

COUNSEL OF RECORD:

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Firm:

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