Date: 20080108

Docket: A-611-05

Citation: 2008 FCA 11

CORAM: DESJARDINS J.A.
SEXTON J.A.
PELLETIER J.A.

BETWEEN:

WEST WINDSOR URGENT CARE CENTRE INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 8, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on January 8, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: DESJARDINS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 8, 2008)

DESJARDINS J.A.

[1] We are all of the view that the Tax Court Judge made no reviewable error in concluding that the appellant had no standing to seek a rebate under section 261 of the *Excise Tax Act* (the Act) (see *West Windsor Urgent Care Inc. v. the Queen*, [2005] TCC 405, Hershfield J., at para. 65.)

[2] Section 261 of the Act in its relevant parts states:

Rebate of payment made in error	**Remboursement d'un montant payé par erreur**

261. (1) Where a person has paid an amount (a) as or on account of, or (b) that was taken into account as, tax, net tax, […] or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.	261. (1) Dans le cas où une personne paie un montant au titre de la taxe, de la taxe nette […] ou d'une autre obligation selon la présente partie alors qu'elle n'avait pas à le payer ou à le verser, ou paie un tel montant qui est pris en compte à ce titre, le ministre lui rembourse le montant, indépendamment du fait qu'il ait été payé par erreur ou autrement.

[3] The Tax Court Judge made a careful study of the agreements governing the relations between the appellant and the physicians. According to the facts he accepted, the appellant was to bill OHIP for the service rendered to its patients by the physicians and was authorized to receive the monies earned by the physicians. The physicians were to invoice the appellant for medical services rendered by them to the appellant's patients at an amount of 50% of the monies received. That percentage was later fixed at 60%. Of the monies received, the physicians, in turn, paid overhead for facilities such as office and workplace, equipment, support staff and a variety of other necessary and incidental supplies, at a rate of 40% of the monies received. The same percentage applied to the physicians retained under locum arrangements and to those shareholder-physicians working under a group number. They were all independent contractors.

[4] We are unsure of the effect to be given to the Tax Court Judge's comment at footnote 5 of his reasons that the unsigned agreement between the appellant and the physicians "accurately sets out the terms of the contract entered into between the physicians and the Centre." In our view, the evidence does not support such a conclusion. The agreement is unsigned and is marked "Draft". There was no evidence that any physician signed such an agreement. On the other hand, there was

evidence that physicians hired on a contract basis signed "locum" agreements in which they agreed to pay the appellant 40% of their billings in exchange for the provision of services to them by the appellant. Finally, the application for a rebate itself described the basis on which the GST had been collected, namely that the appellant provided a series of services to the physician, for which the physician allowed the appellant to retain 40% of his or her billings. Counsel for the appellant was invited to draw our attention to the evidence which would support the Tax Court Judge's conclusion on this point and was unable to do so. We therefore conclude that there was no evidence to support the Tax Court Judge's conclusion on this point.

[5] The Tax Court Judge summarized his findings at paragraph 17 of his reasons:

> During the period relevant to this appeal, May 1, 1999 through January 31, 2001, GST (calculated as seven percent of the Centre's net 40 percent entitlement), was deducted from the physicians' 60 percent entitlement and remitted to the Crown by the Appellant. Therefore, for each medical service performed at the Centre, the Appellant would retain 40% of OHIP payments, the physician performing the medical service would receive 57.2 percent of OHIP payments and the Crown would receive 2.8 percent as GST (i.e. seven percent of the Centre's net 40 percent entitlement).

[6] The Tax Court Judge was therefore entitled to make the finding that the physicians actually paid the GST. He wrote (at paragraph 49 of his reasons) that "[t]he persons paying the tax, suffering the burden of the tax, were clearly the physicians". This conclusion was supported by the evidence.

[7] The appellant, which collected the GST and was obliged to remit it, did not bear the burden of the payment of the tax. It is not the person described in section 261 as authorized to claim the rebate.

[8] This appeal will be dismissed with costs.

"Alice Desjardins"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-611-05

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HERSHFIELD DATED NOVEMBER 16, 2005 IN WINDSOR, ONTARIO, TAX COURT FILE NO. 2002-2851 (GST)G.)

STYLE OF CAUSE:	WEST WINDSOR URGENT CARE CENTRE INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 8, 2008
REASONS FOR JUDGMENT OF THE COURT BY:	(DESJARDINS, SEXTON & PELLETIER JJ.A.)
DELIVERED FROM THE BENCH BY:	DESJARDINS J.A.

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