

Date: 20090218

Docket: A-117-08

Citation: 2009 FCA 49

**CORAM: NOËL J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

TELUS COMMUNICATIONS (EDMONTON) INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on February 12, 2009.

Judgment delivered at Ottawa, Ontario, on February 18, 2009.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**NADON J.A.
PELLETIER J.A.**

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TELUS COMMUNICATIONS (EDMONTON) INC.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by Telus Communications (Edmonton) Inc. (the appellant or Telus) from a decision of Hershfield J. of the Tax Court of Canada (the Tax Court Judge), dismissing for the most part Telus' appeal from a reassessment made by the Minister of National Revenue (the Minister) under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act) for the period from March 1, 1995 to December 31, 1995. More specifically, the appellant takes issue with the Tax Court Judge's conclusion that the appellant is not entitled to a rebate and/or refund of its net tax in the amount of \$1,849,230.75 pursuant to subsection 261(1) of the Act.

RELEVANT FACTS

[2] The appellant entered into an agreement to purchase certain telecommunications assets of Edmonton Telephones Corporation (Ed Tel). Effective March 10, 1995, the appellant acquired all of the undertaking, property, assets and rights of Ed Tel, including the goodwill of the local telephone exchange business formerly carried on by Ed Tel by way of an arrangement under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the Arrangement).

[3] Joint elections were filed pursuant to subsection 167(1) of the Act resulting in no tax being payable with respect to the supply of the Ed Tel assets to the appellant.

[4] Prior to the acquisition, Ed Tel had contracted for supplies in the normal course of business. All the supplies relevant to this appeal (the Supplies) were contracted by Ed Tel and made by suppliers before March 10, 1995, the effective date of the acquisition. None of the Supplies had been paid for at the time of the acquisition.

[5] The purchase price for the business was payable on the effective date by the appellant by the issuance of shares and debt instruments of the appellant and by the assumption of liabilities of Ed Tel, including the liability of Ed Tel to pay for the Supplies.

[6] Ed Tel was not released of its contractual obligation vis-à-vis its suppliers and no contractual relationship was created between the suppliers and the appellant.

[7] Pursuant to its undertaking, the appellant paid for the Supplies after March 10, 1995 in the ordinary course of operating the business acquired from Ed Tel including GST invoiced in respect of the Supplies.

[8] The appellant claimed input tax credits (ITCs) in respect of such GST payments on the basis that it was the “recipient” of the Supplies and that it was not otherwise entitled to a rebate and/or refund of that amount. Ed Tel, on the other hand, did not claim ITCs in respect of the Supplies.

[9] The Minister denied the ITCs claimed by the appellant on the basis that the appellant was not the recipient of the Supplies and therefore was not entitled to the ITCs. The Minister further refused to recognize any entitlement of the appellant to a rebate and/or refund under the Act.

[10] The reassessment was later confirmed and the appellant brought the matter before the Tax Court of Canada.

RELEVANT STATUTORY PROVISIONS

[11] Section 165 of the Act provides that the “recipient” of a taxable supply must pay tax (GST). The general rule governing the entitlement to ITCs and their computation is set out in subsection 169(1):

169. (1) – Subject to this Part, where property or a service is supplied to or

169(1) – Sous réserve de la présente partie, le crédit de taxe sur les intrants

imported by a person and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply or importation becomes payable by the person or is paid by the person without having become payable, the input tax credit of the person in respect of the property or service for the period is the amount determined by the formula:

$$A \times B$$

Where

A is the total of all tax in respect of the supply or importation that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

(a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,

(b) where the property or service is acquired or imported by the person for use in improving capital property of the person, the extent

d'une personne, pour sa période de déclaration au cours de laquelle elle est un inscrit, relativement à un bien ou à un service qu'elle importe ou qui lui est fourni, correspond au résultat du calcul suivant si, au cours de cette période, la taxe relative à l'importation ou à la fourniture devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable :

$$A \times B$$

où :

A représente la taxe relative à l'importation ou à la fourniture qui, au cours de la période de déclaration, devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable;

B représente :

a) dans le cas où la taxe est réputée, par le paragraphe 202(4), avoir été payée relativement au bien le dernier jour d'une année d'imposition de la personne, le pourcentage que représente l'utilisation que la personne faisait du bien dans le cadre de ses activités commerciales au cours de cette année par rapport à l'utilisation totale qu'elle faisait alors dans le cadre de ses activités commerciales et de ses entreprises;

b) dans le cas où le bien ou le service est acquis ou importé par la personne pour

(expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service for consumption, use or supply in the course of commercial activities of the person.

l'utilisation dans le cadre d'améliorations apportées à une de ses immobilisations, le pourcentage qui représente la mesure dans laquelle la personne utilisait l'immobilisation dans le cadre de ses activités commerciales immédiatement après sa dernière acquisition ou importation de tout ou partie de l'immobilisation;

c) dans les autres cas, le pourcentage qui représente la mesure dans laquelle la personne a acquis ou importé le bien ou le service pour consommation, utilisation ou fourniture dans le cadre de ses activités commerciales.

[12] Section 123 of the Act defines the word "recipient" as follows:

"recipient" of a supply of property or a service means

(a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

(b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and

« acquéreur »

a) Personne qui est tenue, aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;

b) personne qui est tenue, autrement qu'aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;

c) si nulle contrepartie n'est payable pour une fourniture :

(c) where no consideration is payable for the supply,

(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,

(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(iii) in the case of a supply of a service, the person to whom the service is rendered,

(i) personne à qui un bien, fourni par vente, est livré ou à la disposition de qui le bien est mis,

(ii) personne à qui la possession ou l'utilisation d'un bien, fourni autrement que par vente, est transférée ou à la disposition de qui le bien est mis,

(iii) personne à qui un service est rendu.

Par ailleurs, la mention d'une personne au profit de laquelle une fourniture est effectuée vaut mention de l'acquéreur de la fourniture.

and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

[13] A rebate and/or refund to net tax is provided for in subsection 261(1):

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, penalty, interest or other obligation under this Part in

261. (1) Dans le cas où une personne paie un montant au titre de la taxe, de la taxe nette, des pénalités, des intérêts 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

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.

ce titre, le ministre lui rembourse le montant, indépendamment du fait qu'il ait été payé par erreur ou autrement.

[14] Where the Minister determines that the person is entitled to a rebate under subsection 261(1), but did not claim it, subsection 296(4.1), as it read at the relevant time (now subsection 296(2.1)), allows the Minister to apply the unclaimed rebate against any outstanding liabilities under Part IX of the Act:

296. (4.1) Where, in assessing the net tax of a person or the tax payable by a person, the Minister determines that the person included, in determining an input tax credit of the person, an amount that exceeds the amount that the person was entitled to so include (which excess is referred to in this subsection as the “excess amount”) and a rebate or refund provided for under this Part of all or part of the excess amount would have been payable to the person if the person had applied for the rebate or refund in accordance with this Part, the Minister may

- (a) apply the amount of the rebate or refund against the amount assessed on account of the excess amount as if the person had filed an application for the rebate or refund on the day on

296. (4.1) Si le ministre établit, en déterminant la taxe nette d'une personne ou la taxe payable par une personne, que celle-ci a inclus, dans le calcul de son crédit de taxe sur les intrants, un montant qui excède celui qu'elle pouvait ainsi inclure et qu'un montant aurait été payable en remboursement de tout ou partie de cet excédent à la personne en application de la présente partie si elle avait demandé le remboursement en conformité avec cette partie, il peut, selon le cas :

- a) déduire ce montant de la cotisation établie relativement à l'excédent comme si la personne avait demandé ce montant le jour où elle était tenue de produire la déclaration concernant cet excédent;

or before which the person was required to file the return in which the excess amount was claimed; or

(b) except where

(i) the rebate is payable under subsection 216(6) in respect of imported goods and the assessment is not made within two years after the goods were released, or

(ii) the assessment is made under subsection 298(4) after the time otherwise limited therefore by subsection 298(1),

pay the rebate or refund to the person or apply it against any net tax remittable or tax payable by the person for any reporting period of the person for which a return was filed before the day the assessment is made.

b) verser ce montant à la personne ou le déduire de la taxe payable ou de la taxe nette à verser par celle-ci pour une période de déclaration pour laquelle une déclaration a été produite avant l'établissement de la cotisation, sauf si :

(i) le montant est remboursable en application du paragraphe 216(6) relativement à des produits importés et la cotisation n'est pas établie dans les deux ans suivant le dédouanement des produits,

(ii) la cotisation est établie en application du paragraphe 298(4) après l'expiration du délai imparti au paragraphe 298(1).

[15] Subsection 296(2.1) which replaced subsection 296(4.1) as of July 1, 1996 is essentially to the same effect:

296(2.1) Where, in assessing the net tax of a person for a reporting

296(2.1) Le ministre, s'il constate les faits suivants relativement à un

period of the person or an amount (in this subsection referred to as the "overdue amount") that became payable by a person under this Part, the Minister determines that

(a) an amount (in this subsection referred to as the "allowable rebate") would have been payable to the person as a rebate if it had been claimed in an application under this Part filed on the particular day that is

(i) if the assessment is in respect of net tax for the reporting period, the day on or before which the return under Division V for the period was required to be filed, or

(ii) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,

and, where the rebate is in respect of an amount that is being assessed, if the person had paid or remitted that amount,

(b) the allowable rebate was not claimed by the person in an application filed before the day notice of the assessment is sent to the person, and

(c) the allowable rebate

montant (appelé « montant de remboursement déductible » au présent paragraphe) lors de l'établissement d'une cotisation concernant la taxe nette d'une personne pour une période de déclaration de celle-ci ou concernant un montant (appelé « montant impayé » au présent paragraphe) qui est devenu payable par une personne en vertu de la présente partie, applique, sauf demande contraire de la personne, tout ou partie du montant de remboursement déductible en réduction de la taxe nette ou du montant impayé comme si la personne avait payé ou versé, à la date visée aux sous-alinéas a)(i) ou (ii), le montant ainsi appliqué au titre de la taxe nette ou du montant impayé :

a) le montant de remboursement déductible aurait été payable à la personne à titre de remboursement s'il avait fait l'objet d'une demande produite aux termes de la présente partie à la date suivante et si, dans le cas où le remboursement vise un montant qui fait l'objet d'une cotisation, la personne avait payé ou versé ce montant ;;

(i) si la cotisation concerne la taxe nette pour la période de déclaration, la date limite de production de la déclaration aux termes de la section V pour la période.

(ii) si la cotisation concerne un montant impayé, la date à laquelle ce montant est devenu payable par la personne;

would be payable to the person, if it were claimed in an application under this Part filed on the day the notice of the assessment is sent to the person or would be disallowed if it were claimed in that application only because the period for claiming the allowable rebate expired before that day,

the Minister shall, unless otherwise requested by the person, apply all or part of the allowable rebate against that net tax or overdue amount as if the person had, on the particular day, paid or remitted the amount so applied on account of that net tax or overdue amount.

b) le montant de remboursement déductible n'a pas fait l'objet d'une demande produite par la personne avant le jour où l'avis de cotisation lui est envoyé;

c) le montant de remboursement déductible serait payable à la personne s'il faisait l'objet d'une demande produite aux termes de la présente partie le jour où l'avis de cotisation lui est envoyé, ou serait refusé s'il faisait l'objet d'une telle demande du seul fait que le délai dans lequel il peut être demandé a expiré avant ce jour.

[16] It is also useful to set out paragraph 263(*b*) which provides that the payment of a rebate pursuant to subsection 261(1) of the Act is subject to the following restriction:

263. A rebate of an amount under ... any of sections 252 to 261.31 ... shall not be paid or granted to a person to the extent that it can reasonably be regarded that:

...

(b) the person has claimed or is entitled to claim an input tax credit in respect of the amount;

263. Le remboursement d'un montant en application [...] de l'un des articles 252 à 261.31 [...] n'est pas effectué au profit d'une personne dans la mesure où il est raisonnable de considérer qu'une des situations suivantes existe :

[...]

b) elle a demandé, ou a le droit de demander, un crédit de taxe sur les intrants relativement au montant;

[...]

...

THE TAX COURT DECISION

[17] With respect to the initial ground of refusal, the Tax Court Judge held that only the “recipient” of the Supplies can claim an ITC. Even though subsection 169(1) makes no express reference to a “recipient”, the effect of the provision is to allow an ITC where “property or a service is supplied to or imported by a person”. The word “recipient” as defined includes “any reference to a person to whom a supply is made”. The Supplies in the case at bar were made to Ed Tel so the reference in subsection 169(1) to a person must be read as a reference to Ed Tel as the “recipient” (Reasons, paras. 7 to 24).

[18] After holding that the appellant was entitled to certain adjustments which are no longer in issue in this appeal (Reasons, paras. 25 to 37), the Tax Court Judge turned to the question whether the appellant was otherwise entitled to the claimed amount pursuant to subsection 261(1). He first acknowledged that the wording of this provision when read on its own could entitle the appellant to a rebate and/or refund. However, such a reading would lead to absurd results. More specifically, he noted that to permit a rebate where the liability of a “recipient” under the Act has been paid by a non-recipient of the supply, would require the Minister to scrutinize the source of every remittance to ensure that the amount remitted in respect of a supply would not have to be returned as a rebate before the “recipient” was assessed (Reasons, para. 43).

[19] The payment made by the appellant was intended to extinguish Ed Tel's liability under the Act. The ITC mechanism provided for under the Act (i.e. ss 169(1)) is the only route which permits such payments to be reconciled (Reasons, para. 44). The Tax Court Judge concluded that, all that happened was that Ed Tel did not cooperate with the appellant to give it the relief it should have secured under the Arrangement had it been properly structured (*ibidem*).

[20] The Tax Court Judge went on to hold that the person referred to in subsection 261(1) of the Act as the person who made the payment is not the person who makes the payment, but rather is the person on whose behalf the payment is made. In the case at bar, the payment was made on behalf of Ed Tel and as such, the appellant was not entitled to the rebate (Reasons, para. 45).

ALLEGED ERRORS

[21] The appellant no longer takes issue with that aspect of the Tax Court Judge's decision which holds that only Ed Tel, as the "recipient" of the Supplies, was entitled to claim the ITCs pursuant to subsection 169(1). The appeal is directed solely at the Tax Court Judge's conclusion that the appellant was not entitled to a rebate and/or refund of the amount claimed pursuant to subsection 261(1).

[22] The appellant submits that the relevant determination which the Tax court Judge was required to make pursuant to subsection 261(1) and former subsection 296(4.1) was whether the

appellant paid an amount on account of GST that was not an amount payable by it under the Act.

The circumstances under which the payment was made are not relevant as subsection 261(1) of the Act provides that such amount may be paid “by mistake or otherwise”.

[23] The clear focus of the examination for entitlement to a rebate under subsection 261(1) is on the “person who paid an amount” which in the case at bar is the appellant. Once this is established, the only remaining issue is whether the payment was: 1) as or on account of tax; and 2) not payable or remittable by the person. The appellant contends that no further inquiry needs to be made. This approach is said to be consistent with the recent decisions of this Court in *West Windsor Urgent Care Centre Inc. v. Canada*, 2008 FCA 11 (*West Windsor*), and *Canada v. United Parcel Service Canada Ltd.*, 2008 FCA 48 (*UPS*).

[24] The appellant challenges the Tax Court Judge’s conclusion that the ITC mechanism is the only one available to prevent the “windfall” which will accrue to the Minister if no rebate should be granted. This conclusion does not take into account the fact that the purpose of the rebate provisions is remedial in nature. The approach taken by the Tax Court Judge effectively narrows subsection 261(1) such that it can only apply to limited situations (i.e. where a person obligated to pay GST paid too much).

[25] The Tax Court Judge's conclusion that the person referred to in subsection 261(1) of the Act is not "the person who writes the cheque or transfers the funds to the Minister", but rather is "the person on whose behalf the payment is made", is not supported by a textual, contextual and purposive interpretation of subsection 261(1) of the Act.

ANALYSIS AND DECISION

[26] In appellate review, questions of law are reviewable on a standard of correctness, while findings of fact or mixed law and fact will be set aside only if it is determined that the trial judge has committed a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). In my view, the question whether ITCs recoverable by the "recipient" of the Supplies pursuant to subsection 169(1) can also be recovered by the person who paid the tax on behalf of the "recipient" pursuant to subsection 261(1), is one of pure statutory construction which stands to be reviewed on a standard of correctness.

[27] As noted by the Tax Court Judge, the context in which subsection 261(1) is to be applied includes subsection 169(1) and paragraph 263(b). Subsection 169(1) when read with the definition of the word "recipient" provides in effect that only the person to whom a supply is made can claim the related ITC. Paragraph 263(b) provides, that a rebate of an amount under subsection 261(1) shall not be paid to a person to the extent that it can reasonably be regarded that the person has claimed or is entitled to claim ITCs in respect of the amount. If the Minister determines that the person was entitled to a rebate pursuant to subsection 261(1) of the Act, but the person did not claim it, then

subsection 296(4.1) of the Act permits the Minister to apply the unclaimed rebate against any outstanding liabilities under Part IX of the Act.

[28] In the case at bar, the purchase price paid by the appellant pursuant to the Arrangement included the assumption of liabilities by the appellant for Supplies that had been contracted for by Ed Tel. As found by the Tax Court Judge, the payments were made on behalf of Ed Tel and the intent of the Arrangement was that Ed Tel would be released of its liability under the Act upon the appellant making the payments.

[29] The Tax Court Judge concluded that Ed Tel was the recipient of the Supplies, a finding that is not challenged on appeal. It follows that Ed Tel was the only person entitled to claim the ITCs for the GST paid to its suppliers under subsection 169(1) of the Act. The position advanced by the appellant is that subsection 261(1) should be construed so as to also allow it to claim relief for the same amount.

[30] According to this reasoning, two persons could claim relief for the same tax, the recipient by means of ITCs and a third party who made the payment on behalf of the recipient by way of a rebate and/or refund. In my view, the Tax Court Judge was on solid ground when he held that different persons cannot be entitled to make claims for the same amount under the scheme implemented by Parliament. The need for a streamlined approach is self-evident. As was stated by the Tax Court Judge (Reasons, para. 43):

... to permit rebates where the liability of recipients under the *Act* has been paid by a non-recipient of the supply who undertook to pay it, would require the Minister to scrutinize the source of every remittance to ensure that the amount remitted in respect of a supply would not have to be returned as a rebate before the recipient was assessed. Failing the exercise of such impossible scrutiny, GST could be avoided by all recipients of taxable supplies whether or not ITCs were claimable. ...

[31] Subsection 261(1) applies to a person who makes a payment “as or on account of, ... tax, net tax, penalty or other obligation under this Part ...”. It is common ground that the appellant had no obligation to pay tax under the Act when it paid the suppliers. Subsection 261(1) does not apply to a payment made on account of someone else’s tax.

[32] I do not give much weight to the appellant’s contention that subsection 261(1) should be construed to avoid the windfall to the fisc which results from this interpretation. Where a transaction, such as the one here in issue takes place, all that needs to be done in order to avoid the difficulty confronting the appellant, is to ensure that the person authorized to make the claim, does so. In the present case, the evidence indicates that the outstanding ITCs were not sufficiently material in the overall context of the transaction to attract attention so that the matter of the outstanding ITCs was left unattended (Transcript of examination of Mr. McGillicuddy, Appeal Book, Vol. 1, p. 189). This is not a reason to construe subsection 261(1) in a manner that was not intended.

[33] The decision of this Court in *UPS* and *West Windsor* both dealt with a very different set of facts. A more appropriate analogy is to the decision of this Court in *2955-4201 Québec Inc. v. Canada.*, [1997] F.C.J. No. 1536 (QL), [1997] G.S.T.C. 100 (*2955-4201 Québec*). The applicant in *2955-4201 Québec* purchased the assets of an automobile sales and distribution business, including the inventory of new vehicles. The parties made an election under section 167, so that no GST was payable with respect to the sale. The total amount paid included the inventory value of the new vehicles, which mistakenly included the GST paid for the vehicles by the vendor. Upon discovering this, the applicant claimed to be entitled to either ITCs or a rebate under subsection 261(1). The trial judge held that neither section 169 nor subsection 261(1) was applicable. Décary J.A. writing for the Court agreed with the trial judge, stating (at page 100-4):

[5] Judge Lamarre-Proulx of the Tax Court of Canada held that neither section 169 nor section 261 is applicable since both these sections presuppose that tax was paid or payable by the applicant, whereas no tax was paid or payable by the applicant in the case at bar. The Tax Court Judge stated that in her opinion the real issue in the case is not a payment of tax made by the applicant to the Minister but the actual value of the sale price the applicant should have paid the vendor; she concluded that this issue does not concern the Minister.

[My emphasis]

[34] In this case, as in *2955-4201 Québec*, the payment for the Supplies (and the related GST) formed part of the purchase price. The only difference is that in *2955-4201 Québec*, the Supplies

were paid for by the recipient directly whereas in this case, they were paid for by the purchaser on behalf of the recipient. This is not a distinction which warrants a different treatment.

[35] I would dismiss the appeal, with costs.

“Marc Noël”

J.A.

“I agree.
M. Nadon J.A.”

“I agree.
J.D. Denis Pelletier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-117-08

(APPEAL FROM A JUDGMENT OF THE HONOURABLE HERSHFIELD J. DATED MARCH 10, 2008, NO 2003-1066(GST)G.)

STYLE OF CAUSE: Telus Communications
(Edmonton) Inc. and Her Majesty
the Queen

PLACE OF HEARING: Edmonton, Alberta

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REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Nadon J.A.
Pelletier J.A.

DATED: February 18, 2009

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