

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120629

Dockets: A-148-11

A-149-11

A-150-11

Citation: 2012 FCA 200

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

A-148-11

BETWEEN:

LES PRO-POSEURS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-149-11

BETWEEN:

LES PRO-POSEURS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-150-11

BETWEEN:

CLAUDE SÉGUIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on June 18, 2012.

Judgment delivered at Ottawa, Ontario, on June 29, 2012.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

TRUDEL J.A.
MAINVILLE J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120629

Dockets: A-148-11

A-149-11

A-150-11

Citation: 2012 FCA 200

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

A-148-11

BETWEEN:

LES PRO-POSEURS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-149-11

BETWEEN:

LES PRO-POSEURS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-150-11

BETWEEN:

CLAUDE SÉGUIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

NOËL J.A.

[1] These are three appeals brought against decisions of Justice Paul Bédard of the Tax Court of Canada (the TCC judge) confirming, in one set of reasons, three series of assessments made regarding Les Pro-Poseurs Inc. (the Company) and its main shareholder, Claude Séguin (collectively, the appellants) under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), (the ITA) and the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA).

[2] The reasons that follow dispose of all three appeals. The original will be placed in the file of A-148-11, and a copy thereof will be placed in the other two files to stand as reasons in those cases.

[3] The three series of assessments arose from the same factual background, in which the appellants allegedly engaged in an invoice of convenience scheme in which the Company pretended to pay subcontractors (the accommodators) for supplies of goods or services when no such goods or services were supplied and the cash value of the cheques issued to pay these invoices was given back to the appellants. The Company would then deduct the sums indicated in these invoices when computing its income and claim the associated input tax credits.

[4] The first series of assessments disallowed the deduction made for the sum indicated in these invoices in computing the income of the Company for the relevant years under the ITA (A-148-11). The second series of assessments disallowed the input tax credits claimed by the Company on the strength of these invoices under the ETA (A-149-11). Pursuant to subsection 15(1) of the ITA, the third series of assessments added to the income of Claude Séguin, as a Company shareholder, the sum indicated in the false invoices, on the basis that he allegedly appropriated the cash sums given back by the accommodators (A-150-11). Each series of assessments imposes penalties for false or misleading statements, and some of the assessments were made beyond the normal assessment period.

[5] The TCC judge drew a negative inference from the fact that the appellants could have called numerous witnesses to validate their position but did not do so. Relying on the evidence and having found that the key witnesses called by the appellants were not credible, he accepted the theory of the Minister of National Revenue (the Minister) according to which the appellants had participated in a false billing scheme as laid out in the replies to the notices of appeal filed

by the respondent. The TCC judge therefore confirmed the Minister's refusal to grant the Company the expenditures and tax credits claimed in the false invoices.

[6] Given this finding, and in the absence of any explanations as to how the funds generated by the false invoices were used, the TCC judge also found that the series of assessments made regarding Claude Séguin on the basis that he had appropriated these funds for his own personal ends were justified.

[7] Given the nature of the actions taken against the appellants, the TCC judge had no difficulty finding that the Minister had met his burden of proof such that the imposition of penalties under the ITA and the ETA (see respectively subsection 163(2) of the ITA and section 285 of the ETA) and the issuance of assessments beyond the normal period (see subsection 152(4) of the ITA) were justified.

[8] Finally, independently of the preceding, the TCC judge found in docket A-149-11 that the input tax credits claimed by the Company had to be disallowed because the supporting invoices do not adequately describe the work done, as is required by subsection 169(4) of the ETA and, more specifically, subparagraph 3(c)(iv) of the *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45 (the Regulations).

[9] In support of their appeals, the appellants rely on the evidence they introduced before the TCC judge and argue that this evidence was sufficient to establish *prima facie* that the Company

was in fact supplied with goods and services. According to the appellants, this evidence shows that they have met their “initial burden of proof”, so it was then up to the respondent, on behalf of the Minister, to prove the existence of the alleged scheme, which the respondent failed to do. They add that the TCC judge could not draw a negative inference from the fact that certain individuals were not called as witnesses, since the evidence shows that they could not be located. The TCC judge therefore erred in finding that the appellants had not met their burden of proof.

[10] The appellants made several additional arguments which do not, however, have to be considered if the Court finds, as the TCC judge did, that they did not meet their initial burden of proof.

[11] First of all, I note that in their grounds for appeal, the appellants did not take into account the standard of review. It is settled law that the questions of law are reviewable on correctness, while findings of fact and findings of mixed fact and law are reviewable on a standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[12] The appellants are not arguing that the TCC judge incorrectly identified the applicable legal test concerning the burden of proof (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336; see also *Stewart v. Canada*, [2000] T.C.J. No. 53, as restated in *Amiante Spec Inc. v. Canada*, 2009 FCA 139 and *House v. Canada*, 2011 FCA 234). However, they do submit that the TCC judge set the bar too high because, in their view, the evidence they introduced was credible and sufficient to meet this burden.

[13] The TCC judge's assessment of the evidence and its sufficiency and his assessment of the credibility of the witnesses who appeared before him cannot be called into question unless it is shown that he made an overriding and palpable error.

[14] No such error was shown. On the contrary, the evidence introduced by the appellants contains contradictions, ambiguities and inaccuracies that justify the doubts expressed by the TCC judge regarding the weight and credibility of this evidence.

[15] Among this evidence, I note the following elements:

- the testimony of Hermel Lanteigne, Claude Séguin's brother-in-law, who supposedly performed work for the many of the alleged suppliers when in fact none of them declared the hours worked to the Commission de la construction du Québec (CCQ), such that Mr. Lanteigne did not earn any vacation pay or pension in the years at issue;
- the fact that during his meeting with the Minister, Claude Séguin was unable to say who had carried out the work for the alleged suppliers, whereas the evidence that he himself later introduced shows that it was his own brother-in-law, Mr. Lanteigne;
- the fact that Claude Séguin never had any contact with the senior management of the alleged suppliers because he only dealt with employees of these alleged suppliers, on the basis of verbal agreements;
- the fact that nearly all of the cheques issued by the Company in payment for services rendered by the alleged suppliers were cashed at foreign exchange offices and that some of the cheques issued to pay for the alleged work were made out to foreign exchange offices;

- the fact that the appellants' witnesses were generally vague and imprecise in describing the sites where the work was performed and the nature of the work, and that the invoices generally contained no details or descriptions;
- the fact that even though the 13 alleged suppliers are distinct entities, many of the invoices are identical in form;
- the fact that the numerical sequence of some of the invoices is inconsistent with the dates the invoices were issued.

[16] The TCC judge was also correct to draw a negative inference from the fact that many of the individuals who supposedly could have backed up the appellants' claims were not called as witnesses. Here, I am thinking of the staff of the hardware store where the Company recruited its workforce, as well as the appellants' accountant.

[17] As regards the senior management of the alleged suppliers, it is true that auditors were unable to contact them. However, this does not establish that the appellants were unable to do so, and they could offer no evidence that they had made any efforts in this regard. I would add that while it is true that these individuals could not be found, this fact is in itself revealing.

[18] I therefore find that that on the basis of the evidence before the TCC judge, it was open to him to conclude that the appellants did not discharge their burden of showing that the invoices reflected real supplies. Given this finding and the lack of any explanation as to how the money generated by this false invoicing scheme was used, the evidence also allowed the TCC judge to conclude that Claude Séguin had appropriated this money for his own personal purposes, as alleged by the Minister. Finally, given the nature of the actions taken with regard to the

appellants, it was open to the TCC judge to find that the Minister had met his burden in respect of the penalties and the assessments made beyond the normal period.

[19] In these circumstances, it is neither necessary nor appropriate for the Court to consider the alternative conclusion accepted by the TCC judge in A-149-11, according to which only the invoices meeting the requirements set out in paragraph 46 of his reasons could entitle the appellants to an input tax credit.

[20] For these reasons, I would dismiss the three appeals with costs in each case.

“Marc Noël”

J.A.

“I agree.

Johanne Trudel J.A.”

“I agree.

Robert M. Mainville J.A.”

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-148-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PAUL BÉDARD OF THE TAX COURT OF CANADA DATED MARCH 1, 2011, DOCKET NO. 2008-3955(IT)G.

STYLE OF CAUSE: LES PRO-POSEURS INC. and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 18, 2012

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Trudel J.A.
Mainville J.A.

DATED: June 29, 2012

APPEARANCES:

Martin Fortier FOR THE APPELLANT

Dany Leduc FOR THE RESPONDENT
Mounes Ayadi

SOLICITORS OF RECORD:

De Chantal, D'Amour, Fortier FOR THE APPELLANT
Longueuil, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-149-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PAUL BÉDARD OF THE TAX COURT OF CANADA DATED MARCH 1, 2011, DOCKET NO. 2008-2580(GST)G.

STYLE OF CAUSE: LES PRO-POSEURS INC. and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 18, 2012

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Trudel J.A.
Mainville J.A.

DATED: June 29, 2012

APPEARANCES:

Martin Fortier FOR THE APPELLANT

Dany Leduc FOR THE RESPONDENT
Mounes Ayadi

SOLICITORS OF RECORD:

De Chantal, D'Amour, Fortier FOR THE APPELLANT
Longueuil, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-150-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PAUL BÉDARD OF THE TAX COURT OF CANADA DATED MARCH 1, 2011, DOCKET NO. 2008-3954(IT)G.

STYLE OF CAUSE: LES PRO-POSEURS INC. and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 18, 2012

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Trudel J.A.
Mainville J.A.

DATED: June 29, 2012

APPEARANCES:

Martin Fortier FOR THE APPELLANT

Dany Leduc FOR THE RESPONDENT
Mounes Ayadi

SOLICITORS OF RECORD:

De Chantal, D'Amour, Fortier FOR THE APPELLANT
Longueuil, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada