

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130530

Docket: A-48-12

Citation: 2013 FCA 140

**CORAM: GAUTHIER J.A.
MAINVILLE J.A.
WEBB J.A.**

BETWEEN:

BOARDWALK EQUITIES INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on April 23, 2013.

Judgment delivered at Ottawa, Ontario, on May 30, 2013.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**GAUTHIER J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal is from the decision of Jorré J. (the Judge) of the Tax Court of Canada (2012 TCC 7). This appeal was heard at the same time as the appeal of the *Calgary Board of Education v. Her Majesty the Queen* (A-49-12).

[2] In 2001, energy costs had risen significantly. The Province of Alberta (Province) introduced a program to provide assistance to consumers with their high energy costs. The suppliers of electricity and natural gas received certain amounts from the Province in relation to bills that had been rendered to consumers. The appellant had been charged (and had paid) GST based on the total

amount that the suppliers had billed for the cost of natural gas and electricity that it had consumed, before taking into account the amount that the suppliers would be receiving from the Province. The appellant claims that it should not have paid GST on the amounts that the suppliers had received from the Province. The appellant claims, therefore, that this GST had been paid in error and is seeking a rebate of such GST under subsection 261(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the *Act*). The Judge dismissed the appellant's claim that it had paid GST in error. For the reasons that follow, I would dismiss this appeal.

[3] The program which was implemented by the Province provided assistance in relation to electricity, natural gas, propane or other heating fuel costs. The amount was fixed for residential customers. For non-residential customers, the amount of the assistance was based on the amount of energy consumed. This appeal only relates to the amount of assistance that was based on the electricity and natural gas consumed by the appellant as a non-residential customer.

[4] For the assistance related to natural gas costs, the ministerial orders (MO No. 6/01 and 17/01) provided that "[t]he natural gas rebate will be paid to Alberta users of natural gas". While these ministerial orders used the term "rebate", the *Transportation and Utilities Grants Regulation*, Alta. Reg. 355/1986, under which the ministerial orders were issued, authorized the Minister to make grants. The invoices issued by the suppliers also described the amounts as "rebates". Whether the amounts should be properly characterized as grants or rebates does not, in my opinion, affect the result in this case. The amounts that the suppliers received from the Province were simply assistance payments made by the Province, that when received by the suppliers, reduced the liability of the customers.

[5] In the agreed statement of facts submitted at the Tax Court hearing, the parties agreed that for administrative convenience, the suppliers of natural gas received the amounts directly from the Province after the suppliers notified the government of the amount of natural gas consumed by its customers in Alberta. The invoices that were issued by the suppliers reflected the amount that would be paid by the Province under this assistance program, which was generally paid either the day before or on the day that the payment by the customer was due.

[6] The amounts for electricity were paid from the balancing pool. The rules related to the distribution of balancing pool credits were made by the Power Pool Council (subsection 8(1) of the *Balancing Pool Allocation Regulation*, Alta. Reg. 330/2000). The definition of “monthly eligible consumption allocation” in the *Balancing Pool Rules*, revised October 1, 2001, provided that the amounts would be paid to the non-residential customer. The supplier of electricity issued a credit (which was identified as a rebate) for the amount that would be paid from the balancing pool. The invoice issued by the supplier to the customer reflected this credit. The Province paid the amounts for electricity from the balancing pool to the suppliers based on the credits identified by the suppliers on their invoices. As acknowledged by the parties, the amounts were paid directly to the suppliers because this was administratively easier and more efficient than making payments directly to each consumer of electricity in Alberta.

[7] Liability for GST is imposed by subsection 165(1) of the *Act*. This subsection, in 2001, provided that:

165. (1) Subject to this Part, every recipient of a taxable supply made in

165. (1) Sous réserve des autres dispositions de la présente partie,

Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 7% on the value of the consideration for the supply.

l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 7% sur la valeur de la contrepartie de la fourniture.

[8] The recipient of the supply is the person who is liable to pay GST based on the value of the consideration for the supply. "Consideration" and "recipient" are defined in subsection 123(1) of the Act as follows:

"consideration" includes any amount that is payable for a supply by operation of law;

« contrepartie » Est assimilé à une contrepartie tout montant qui, par effet de la loi, est payable pour une fourniture.

...

[...]

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

« acquéreur »

a) Personne qui est tenue, aux termes

(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,

d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;

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

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

[9] The amount of GST that is payable by any particular person for any property or service acquired under an agreement, is the applicable rate (7% in 2001) multiplied by the amount of the consideration payable by that person under that agreement. GST is based on the amount payable by that person, not on the amount actually paid by that person.

[10] As noted above, the appellant was charged GST based on the total amount payable for the consumption of natural gas and electricity, before any credit was applied for the amount that the suppliers would eventually receive from the Province. The issue in this appeal is whether the amount payable by the appellant under its agreements for the supply of natural gas and electricity was, as of the time that the liability for the GST arose, the full amount invoiced for such supply (before taking into account the credit shown on the invoice for the amount that the supplier would subsequently receive from the Province) or only the net amount after taking into account such credit.

[11] Subsection 168(1) of the *Act* provides that GST is payable by a recipient on the earlier of two days – the day the consideration for the supply is paid and the day that the consideration for the supply becomes due. Subsection 152(1) of the *Act* deems the consideration for a taxable supply to become due on the earliest of the days as set out in paragraphs (a) to (c) (one of which is the day that the invoice for the supply is issued). As a result of these provisions, in this case, GST was payable by the appellant on the date that the invoices for the supplies of natural gas and electricity were issued. While the credit for the amount that would be paid by the Province was shown on the invoice, the amount was not paid by the Province until sometime after the date of the invoice.

[12] The authorizing orders or rules provided that the Province would be paying the amount to the consumers (including the appellant). These amounts were indirectly paid to the appellant by the Province paying to the suppliers of natural gas and electricity a portion of the amounts payable by the appellant for such supplies. The liability of the appellant for the amount payable for natural gas and electricity was not reduced, as of the date of the invoice, by the amount of the credit shown on

the invoice. There was nothing to suggest that if, for any reason, the Province did not pay the amount indicated as the credit, that the suppliers would be unable to recover this amount from the consumers (including the appellant). It seems to me that the Province had not partially assumed the liability of the appellant to pay its suppliers for natural gas and electricity. The Province had simply implemented an assistance program to provide funds to customers of natural gas and electricity in Alberta. The funds were provided to such customers by the Province paying such amounts to their suppliers of natural gas and electricity.

[13] When the suppliers received the funds from the Province, the liability of the appellant was then reduced since such amount was accepted by the suppliers as partial payment of the amount that the appellant otherwise had to pay under its agreements with the suppliers. However, this was after the date of the invoices and after the liability arose to pay the GST. Therefore, the liability of the appellant for GST under the *Act* was correctly calculated as 7% of the amount payable for the supply of natural gas and electricity before the credit for the amount that the suppliers would subsequently receive from the Province is taken into account.

[14] I would, therefore, dismiss this appeal with one set of costs for both this appeal and for the appeal of the *Calgary Board of Education*, with each appellant to pay one-half of such costs.

"Wyman W. Webb"

J.A.

"I agree,
Johanne Gauthier J.A."

"I agree,
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-48-12

STYLE OF CAUSE: BOARDWALK EQUITIES INC. v QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: April 23, 2013

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CONCURRED IN BY: GAUTHIER, MAINVILLE J.J.A.

DATED: May 30, 2013

APPEARANCES:

Salvador Mirandola
Patrick Lindsay

FOR THE APPELLANT

Kathleen Lyons

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP

FOR THE APPELLANT

William F. Pentney
Deputy Attorney General of Canada

FOR THE RESPONDENT