Federal Court of Appeal | Cour d'appel fédérale

Date: 20220331

Docket: A-296-20

Citation: 2022 FCA 57

CORAM: **STRATAS J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

WESTCOAST ENERGY INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on March 31, 2022.
Judgment delivered from the Bench at Calgary, Alberta, on March 31, 2022.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Calgary, Alberta, on March 31, 2022).

STRATAS J.A.

[1] During the 2011-2015 tax years, the appellant reimbursed employees and their families for acupuncture, massage therapy, naturopathy, and homeopathy services. For the purposes of the goods and services tax, the appellant claimed input tax credits for these reimbursements under the *Excise Tax Act*, R.S.C. 1985, c. E-15. The Minister rejected the claim. The appellant appealed to the Tax Court of Canada.

[2] The Tax Court (*per* Sommerfeldt J.) held that the appellant did not "acquire" these services under subsection 169(1) of the Act, nor was the appellant a "recipient" of those services under subsection 123(1) of the Act. The Tax Court dismissed the appellant's appeal: 2020 TCC 116. The appellant appeals to this Court.

[3] In this Court, the appellant does not dispute these findings. Instead, the appellant says that subsection 175(1) of the Act applies in a way that allows it to claim input tax credits. Subsection 175(1) deems an employer to have acquired a property or service if an employee acquires a product or service "for consumption or use in relation to activities of the employer". In support of this position, the appellant also invokes subparagraph 170(1)(*b*)(ii) of the Act. Under certain conditions, subparagraph 170(1)(*b*)(ii) allows a taxpayer to claim input tax credits when a property or a service is supplied "exclusively for the personal consumption, use or enjoyment" of employees.

[4] This Court's decision in *ExxonMobil Canada Ltd. v. The Queen*, 2010 FCA 1, 397 N.R. 204 answers the appellant's submissions and dictates the outcome of this appeal.

[5] We must follow earlier decisions of this Court unless they can be distinguished or are "manifestly wrong" within the meaning of *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. While in oral argument, the appellant expresses concern with some aspects of the reasons in *ExxonMobil* at paras. 37-43, it does not suggest that *ExxonMobil* is manifestly wrong. To the extent that the reasons in *ExxonMobil* at paras. 37-43 require clarification, as the appellant suggests, this is best done in a case that calls for it on its facts. Thus, the only legal

question in this case is whether *ExxonMobil* applies to deny the appellant's claim for input tax credits.

[6] In *ExxonMobil*, this Court held (at para. 50), albeit under section 174 of the Act—not the relevant section here, section 175—that "property or services which are intended by the employer for the exclusive personal use of the employees and which lend themselves to such a use bear no relationship with the employer's activities". If a property or service "bear[s] no relationship with the employer's activities" it clearly cannot be "for consumption or use in relation to activities of the employer". The import of this is that if *ExxonMobil* applies to section 175 and an employer reimburses for a service or property that is for the exclusive personal use of employees, the employer will not enjoy the deeming effect of subsection 175(1) discussed in paragraph 3 above.

[7] As a legal matter, the Tax Court found (at paras. 33-44) that *ExxonMobil*, decided in the context of section 174, applied equally to section 175. It relied upon the similarity of the wording and, to some extent, the roles of sections 174 and 175. The Supreme Court has emphasized that in the interpretation of taxation provisions, the text can predominate: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. We agree with the Tax Court's legal finding and the analysis in support of it.

[8] As for subparagraph 170(1)(*b*)(ii) of the Act, this Court in *ExxonMobil* held (at para. 37) that "[s]ection 170 deals with input tax credits that may be claimed with respect to benefits *in kind* provided to employees" [emphasis added]. Paragraph 170(1)(*b*) only applies if an employer

first acquires a benefit for the exclusive enjoyment of its employees. On these points, the Tax Court followed the binding guidance of this Court in *ExxonMobil*. And given that the appellant did not acquire the services, it could not provide them as in kind benefits.

[9] Here again, the appellant does not suggest that *ExxonMobil* is manifestly wrong on this point. We consider the Tax Court's analysis in this regard to be unimpeachable.

[10] As a result, we see no error of law in the reasons of the Tax Court.

[11] The appellant's only possible recourse is to challenge the Tax Court's findings of fact and factually suffused findings of mixed law and fact on the ground of palpable and overriding error. However, in its memorandum of fact and law, the appellant does not make that submission. This is wise. That submission is not practically available to it in this case: the Tax Court's findings of fact and factually suffused findings of mixed law and fact that it relied upon to reach its judgment were all open to it on this record.

[12] The Tax Court found that the services by their nature were intended for the personal use of the individual receiving those services, and that even the appellant itself intended the services to be for the exclusive personal use of its employees and their family members. The Tax Court found that the employees did not acquire the services for consumption or use in the course of their employment activities. The Tax Court did not find that the employer acquired the benefit of the services in any way. Thus, the Tax Court determined that subsection 175(1) did not apply on the facts of this case. We see no reviewable error in this analysis.

[13] The appellant offered oral submissions on the meaning of "use" in section 173 of the Act which it did not make in its memorandum of fact and law. Even if these submissions were presented to the Tax Court, the Tax Court did not find it necessary to consider them: its findings of fact and its overall analysis were dispositive of the appeal before it. As well, the appellant has not drawn our attention to any findings of fact made by the Tax Court and the evidentiary record that would support this new argument.

[14] Therefore, we will dismiss this appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-296-20

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE SOMMERFELDT DATED OCTOBER 28, 2020, DOCKET NO. 2018-579(GST)I

STYLE OF CAUSE:	WESTCOAST ENERGY INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	MARCH 31, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. DE MONTIGNY J.A. LOCKE J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

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