Docket: 2001-3358(GST)G

BETWEEN:

RÉAL BEAULIEU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 5, 2005, at Montréal, Quebec.
Before: The Honourable Justice Pierre R. Dussault

Appearances:

Counsel for the Appellant: Yves Ouellette

Counsel for the Respondent: Gérald Danis

JUDGMENT

The appeal from assessment number 0319247 made under Part IX of the *Excise Tax Act* on December 15, 2000, for the period from January 1, 1997, to March 31, 2000, is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the adjustment of $30,509.43 made to the goods and services tax must be reduced to $15,318.88, with costs to the Respondent, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 24th day of October 2005.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 6th day of April, 2006.

J. Poirier

Citation: 2005CCI605
Date: 20051018
Docket: 2001-3358(GST)G

BETWEEN:

RÉAL BEAULIEU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Dussault J.

[1] This is an appeal from an assessment of goods and services tax ("GST") made on December 15, 2000, under Part IX of the *Excise Tax Act* ("Act") and relating to a business operated by the Appellant under the name Aubaines Plus R.B. Enr. ("Aubaines"). The assessment made an adjustment of $30,509.43 to the net tax for the period from January 1, 1997, to March 31, 2000. The assessment also includes $2,283.09 in interest and a penalty of $2,635.15.

[2] In order to understand the context of the issue in this case, I will reproduce the agreement as to the facts filed by counsel for the parties on October 29, 2004. The agreement and the documents appended to it were filed as Exhibit A-1. I will not reproduce the documents referred to in paragraph 8 of the agreement. I will refer to them later, where necessary.

AGREEMENT AS TO THE FACTS

PURSUANT TO THE ORDER OF THE TAX COURT OF CANADA DATED OCTOBER 19, 2004, THE APPELLANT AND THE RESPONDENT AGREE TO THE FOLLOWING FACTS FOR THE PURPOSES OF THE HEARING OF THE APPEAL PEREMPTORILY SET DOWN FOR FRIDAY, AUGUST 5, 2005, AT 9:30 A.M.

A. THE PROCEEDINGS

1. On or about September 17, 2001, a notice of appeal was filed by the Appellant by filing a notice of appeal at the registry of the Tax Court of Canada, as shown in the record of the Tax Court of Canada.

2. The Appellant's notice of appeal related to notice [of] (re)assessment number 0319247, issued by the Minister of National Revenue on December 15, 2000, under the *Excise Tax Act – Part IX – Goods and Services Tax*, R.S.C. 1985, c. E-15 (hereinafter the "E.T.A"), for the period from January 1, 1997, to March 31, 2000.

3. The details of the notice of (re)assessment were as follows:

Net tax assessed	$20,777.41
Net interest	$ 2,283.09
Penalty	$ 2,635.15
Amount due	$35,427.7

It also stated:

> [TRANSLATION] The amount shown in the "NET TAX" box corresponds to the total net tax reported for the period shown, plus adjustments of $30,509.43 dt [*sic*] made as a result of the audit.

A photocopy of the notice of (re)assessment is filed in support hereof, by consent, at **Tab 1**.

4. On or about December 6, 2001, the Respondent filed her reply to the notice of appeal and an amended reply was filed by consent on September 28, 2004, as shown in the record of the Court.

B. THE HEARING BEFORE THE COURT OF QUÉBEC

5. The Department of National Revenue auditor in respect of the notice [of] (re)assessment issued under the E.T.A. was Sylvie Lynch.

6. At the hearing before the Court of Québec, Civil Division, on February 12 and 13, 2004, Sylvie Lynch testified concerning her audit, which also resulted in a notice of assessment under the *Act respecting Québec sales tax*, R.S.Q., c. T-0.1, being issued.

7. On or about June 10, 2004, the Court of Québec, Civil Division, gave judgment for the Appellant, and for the purposes hereof the parties file the

judgment dated June 10, 2004, at **Tab 2**, by consent, subject to this case, in the Tax Court of Canada.

8. For the purposes hereof, the Appellant and the Respondent agree to file the following documents, by consent:

   (a) At **Tab 3**: Statement of adjustments from the GST/HST;

   (b) At **Tab 4**: Respondent's Exhibit I-2, entitled "RECONSTRUCTION OF INCOME";

   (c) At **Tab 5**: Exhibit I-3, entitled "SUMMARY";

   (d) At **Tab 6**: Transcript from February 12, 2002, and February 13, 2003, in abridged form;

   (e) At **Tab 7**: The report by Michel Hamelin, expert witness, Exhibit R-14.

C. <u>THE APPELLANT AND THE RESPONDENT STATE THAT THE ONLY ISSUE IS THE QUESTION OF THE $15,318.88 THAT APPEARS ON PAGE 10 OF THE REPORT BY THE EXPERT, FILED AT TAB 7 OF THIS AGREEMENT</u>

9. The Appellant submits that the $15,318.88 is not part of the amounts determined and assessed by the notice of (re)assessment, and the Respondent submits that this sum is included in the assessment in issue.

10. More specifically, the Appellant submits that the Tax Court of Canada does not have jurisdiction to decide in respect of the $15,318.88 and that under the E.T.A., the Minister of National Revenue may not issue a notice of assessment in respect of that $15,388.88, having regard to the four-year limitation.

11. The Respondent submits that because the issue is one of net tax, the $15,388.88 is included in the assessment in issue.

12. The Appellant does not agree with the Respondent's statement in paragraph 11, and points out that according to the notice of (re)assessment, a $30,509.43 adjustment was as a result of the audit and that this figure cannot include the $15,318.88.

13. The Appellant acknowledges that the amounts shown on page 10 of the report by the expert (Tab 7) are not contested.

D. CONCLUSIONS

ACCORDINGLY, the parties state that this is the only issue in this case and agree to proceed on the basis of the documents appended to this agreement.

[3] When Sylvie Lynch audited the Appellant's business for the purposes of the GST and the Quebec sales tax ("QST"), she found discrepancies between the tax reported and remitted (FPZ-500 forms) and those shown on the cash register tapes ("Z tapes") of the business. In her view, those discrepancies confirmed that there had been accounting errors and that not all of the tax collected had been reported and remitted. Although those discrepancies were set out on the work sheets, Ms. Lynch subsequently decided to follow a different method for determining the unremitted GST and QST. That method involved trying to reconstruct all of the sales by the business to determine the GST and QST that should have been collected and remitted, as compared to the amounts that had actually been reported and remitted. This is done by applying a percentage for gross profit margin to the purchases by the business. It is not important to go into the details. The result was the $30,509.43 adjustment made to the GST in the December 15, 2000, assessment (Exhibit A-1, Tab 2), referred to in paragraph 1 of these reasons for judgment.

[4] Ms. Lynch made an adjustment to the QST of $12,855 using the same method, based on the reconstructed sales.

[5] At the hearing of the appeal concerning the QST assessment held by the Court of Québec before Judge Armando Aznar, the expert whose services the Appellant had retained, Michel Hamelin, a chartered accountant and forensic accounting expert with the firm Demers Beaulne, challenged the method used and conclusions reached by Ms. Lynch. In his report, he stated that this indirect method was entirely inappropriate in the circumstances and that it had thus led to an assessment of QST being made that was unjustified and too high. Obviously, he states the same conclusions in his report regarding the GST, because the $30,509.43 adjustment resulted from using the same method (Exhibit A-1, Tab 7).

[6] However, Mr. Hamelin's analysis led to the conclusion that there were discrepancies between the taxes reported and remitted (FPZ-500 forms) and the taxes collected, according to the Z tapes. For the QST, the discrepancy was $3,671.30. For the GST, it was $15,318.88 (Exhibit A-1, Tab 7, page 10).

[7] In his judgment, Judge Aznar of the Court of Québec rejected the method used by Ms. Lynch and accepted Mr. Hamelin's conclusion, that $2,671.30 in QST

had not been paid by Mr. Beaulieu. Judge Aznar stated that it was his opinion that a reassessment could have been issued for that amount, but did not rule as to the legality or validity of any such assessment because it would be made out of time, as counsel for the Appellant argued.

[8] With respect to the GST, the parties agreed that only $15,318.88, representing unremitted GST, as determined in Mr. Hamelin's report, is now in issue before this Court.

[9] Mr. Hamelin and Ms. Lynch testified.

[10] Mr. Hamelin testified for the Appellant as an expert in forensic accounting. His qualifications as an expert were not contested by the Respondent.

[11] Mr. Hamelin filed a solemn declaration setting out the essential elements of his testimony (Exhibit A-2). At paragraphs 27 to 33 of that statement, we read:

> 27. [TRANSLATION] With regard to the GST and QST collected that appear in the Appellant's books of account and were not remitted to the Department of National Revenue, I know that those figures were not used by the Department's auditor for the purposes of assessment, and it is my opinion that the $15,318.88 is not included in the $20,777.41 net tax reported and is not included in the $30,509.43 in adjustments made after the audit by Sylvie Lynch, and accordingly is not included in the notice of (re)assessment dated December 15, 2000, that is currently being contested in the Tax Court of Canada.
>
> 28. I base my opinion that the unremitted taxes in the amount of $15,318.88 for GST and the amount of $3,671.30 for QST are not included in the notice of (re)assessment issued under the E.T.A. and the Q.S.T.A. on the testimony given by Sylvie Lynch in examination-in-chief, at page 266, Tab 6, of the AGREEMENT AS TO THE FACTS.
>
> 29. I also base my opinion on the report of the GST/QST audit adjustments at Tab 4 of the AGREEMENT AS TO THE FACTS.
>
> 30. I also base my opinion on the Respondent's Exhibit I-2 entitled "RECONSTRUCTION OF INCOME" and Exhibit I-3 entitled "SUMMARY", Tabs 4 and 5 of the AGREEMENT AS TO THE FACTS.
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> 31. In reference to the preceding paragraphs, the sales reconstructed by the Department of National Revenue auditor are as follows, and the taxes on those reconstructed sales are also reconstructed taxes:

YEAR	RECONSTRUCTED SALES	RECONSTRUCTED TAXES
1997	$ 459,270.45	$ 32.148.93
1998	$1,846,239.56	$129,236.77
1999	$1,559,951.05	$109,196.57
2000	$1,142,924.16	$ 80,004.69

32. In addition, regarding the reconstructed taxes, based on the reconstructed sales, for the purpose of determining the amount of the adjustment, $30,509.44, in the notice of (re)assessment issued under the E.T.A. on December 15, 2000, the Department of National Revenue auditor considered only taxes collected and remitted to the Department of National Revenue during the period from January 1, 1997, to March 31, 2000.

33. Consequently, the $15,318.88 representing tax collected and not remitted to the Department of National Revenue cannot in any way be part of the $30,509.44 adjustment, and according, as an expert, as Ms. Lynch said in her testimony, the $15,318.88 is not included in the notice of (re)assessment dated December 15, 2000, for the period from January 1, 1997, to March 31, 2000.

[12] In his testimony, Mr. Hamelin said that the discrepancies he had found between the taxes remitted and the Z tapes, for the GST, amounted to $15,318.88, that is, the total of the following amounts for each of the years in the period from January 1, 1997, to March 31, 2000:

1997: $ 1,565.70
1998: $ 4,288.42
1999: $ 5,116.46
2000: $ 4,348.30
Total: $15,318.88

[13] According to the calculations based on the reconstructed sales produced by Ms. Lynch, the discrepancies between the GST collected and the GST remitted was $30,509.43, that being the total of the following amounts for each of the years in that period (Exhibit A-1, Tabs 3, 4 and 5):

1997: $ 2,432.75
1998: $10,058.47
1999: $12,026.51

2000: $ 5,991.70
Total: $30,509,43

[14] Mr. Hamelin's conclusion was that the discrepancies between the GST remitted and the Z tapes were not considered for the purposes of the assessment. In his opinion, if they had been, the $15,318.88 would have had to be added to the $30,509.43 for the purposes of the assessment. I admit that I am having some difficulty in following that reasoning.

[15] Ms. Lynch also testified. Counsel for the Appellant objected to her testimony on the ground that the parties should have kept to the agreement as to the facts and the documents appended to it. I reject that objection because counsel for the Appellant himself called Mr. Hamelin as an expert witness and had him produce a solemn declaration in support of his testimony. This is a simple matter of fair play.

[16] In her testimony, Ms. Lynch stated that she had in fact produced a document that showed discrepancies on the order of $15,000, in respect of GST, between the taxes remitted and the taxes collected, according to the Z tapes, and that that document had been provided to Mr. Beaulieu. However, she said, it was not those discrepancies, as such, that were used for the purposes of the assessment; rather, it was the taxes calculated on the basis of the reconstructed sales, which gave rise to the $30,509.43 adjustment, taking into account the taxes remitted. Because she had determined the discrepancies based on the reconstructed sales, the $15,000 discrepancy was, in her opinion, included in the adjustment and could not be added to the $30,509.43, because that would then be double taxation.

Appellant's Position

[17] Counsel for the Appellant argued that the $15,318.88 was not part of the assessment made on September 15, 2000, because that figure does not represent discrepancies between the GST calculated on the basis of reconstructed sales and GST remitted; rather, it represents discrepancies between the GST collected, according to the Z tapes, and GST remitted, which discrepancies were not taken into account in the assessment.

[18] Counsel for the Appellant submitted that the fact that the Respondent wanted to maintain the assessment in the amount of $15,318.88 amounts in reality to an attempt to make a reassessment on a new basis, and not to raise a new argument in support of the assessment. In his submission, subsection 298(6.1) of the Act, which

is similar to subsection 152(9) of the *Income Tax Act*, does not apply in this case, because this would produce a different result from the assessment in issue.

[19] Counsel for the Appellant argued that the assessment must simply be vacated because a reassessment on a different basis cannot be made outside the four years allowed in subparagraph 298(1)(*a*)(i) of the Act.

[20] In support of his arguments, counsel for the Appellant referred to the following decisions:

- *Continental Bank of Canada v. Canada*, [1998] 2 S.C.R. 358;
- *Loewen v. Canada*, [2003] T.C.J. No. 282 (QL), 2003 DTC 686;
- *Canada v. Loewen (F.C.A.)*, [2004] 4 F.C.R. 3, 2004 DTC 6321;
- *Rogic v. Canada*, [2001] T.C.J. No. 583 (QL), 2001 DTC 855, [2001] G.S.T.C. 107;
- *Canada v. Hollinger Inc.*, [1999] F.C.J. No. 1164 (QL), 99 DTC 550, (F.C.A.);
- *Marina Homes Ltd. v. Canada*, [2000[F.C.J. No. 2107 (QL), 2001 DTC 5046, [2001] 1 C.T.C. 179 (F.C.T.D.);
- *Paper Mill Recycling Inc. v. Her Majesty the Queen*, T.C.C., 2003-4544(GST)I, September 21, 2004, [2004] T.C.J. No. 467 (QL);
- *Pedwell v. Canada* (C.A.), [2000] 4 F.C. 616, [2000] F.C.J. No. 858 (QL).

[21] Counsel for the Appellant also referred to an article by Christiane Maurice entitled “Le Pouvoir du ministre d'avancer un nouvel argument: L'arrêt *Banque Continentale* et le nouveau paragraphe 152(9) L.I.R.”, *Revue de planification fiscale et successorale* (2005), vol. 26, No. 1, page 113.

Respondent’s Position

[22] Counsel for the Respondent first noted paragraph 296(1)(*a*) of the Act, which sets out the power of the Minister to assess the net tax of a person under Division I for a reporting period. He pointed out that in this case the net tax established in the assessment consists of only one thing, the tax collected that should have been remitted, since there is no dispute regarding the input tax credit.

[23] In his submission, discrepancies between the GST submitted and the GST based on the Z tapes had been identified by Ms. Lynch and shown on a work sheet

provided to the Appellant. On that point, counsel for the Respondent also referred to subparagraphs (a) to (p) of paragraph 8 of the Respondent's amended reply [to the notice of appeal] ("Reply").

[24] While Ms. Lynch used a different method to establish the unremitted GST and that method has been held by the Court of Québec to be unreliable in the circumstances, nonetheless, in the submission of counsel for the Respondent, it has been shown that the unremitted GST was not $30,509.43, but rather $15,318.88. Accordingly, in his submission, the Court has jurisdiction to find that the unremitted GST was not $30,509.43, but rather $15,318.88. On this point, counsel for the Respondent relied on paragraph 9 of the Reply, which reads as follows:

> [TRANSLATION] If not, the Respondent submits in the alternative that the adjustment to the net tax should be $15,318.88, based on the Appellant's cash register tapes (or "Z" tapes), as will be shown at the hearing through the Appellant's documents to be introduced and his own testimony.

[25] I note that this paragraph was added to the Reply with the consent of counsel for the Appellant.

[26] Counsel for the Respondent submits that Ms. Lynch tried to establish the net tax, and thus the unremitted tax, using the reconstructed sales method. Accordingly, she could not have added the discrepancies previously identified between the GST remitted and the GST collected, according to the Z tapes – that is, the $15,318.88 – to the discrepancies determined using that method, amounting to a total of $30,509.43. In counsel's submission, the only logical conclusion is that the $15,318.88 is included in the assessment and is not the result of a change in the base used for the assessment. Counsel for the Respondent said that when Mr. Hamelin stated that the $15,318.88 was not included in the $30,509.43, he was assuming that the discrepancies between the GST remitted and the GST collected, according to the Z tapes, did not have to be considered. The evidence shows, however, that they were.

[27] Counsel for the Respondent argued that in this case, it is the net tax that must be assessed. In his submission, the auditor, using a method, determined the GST collected and not remitted, but there is additional evidence that there actually was GST collected and not remitted. He submits that the argument of counsel for the Appellant leads to the conclusion that notwithstanding that determination, the Court could not reduce the amount of net tax established in the assessment. In the submission of counsel for the Respondent, the Court may indeed do that, because

the discrepancies between the tax remitted and the tax collected, according to the Z tapes, are a factor that was considered, and so it is apparent that the $15,318.88 could not have been added to the $30,509.43 adjustment that is the subject of the assessment. Counsel for the Respondent based that argument, more specifically, on the facts set out in subparagraphs (h), (j) (n) and (o) of paragraph 8 of the Reply. Those subparagraphs read as follows:

> [TRANSLATION]
> (h) The auditor then **examined the accounting records, invoices, cash disbursements and cash receipts**, and bank statements for the periods covered by the audit (from 1997 to 2000);
>
> ...
>
> (j) Based on that determination and **numerous discrepancies in the documents presented by the Appellant** (e.g.: GST vs. QST; bank statements vs. cash register "Z" tapes; **taxes according to accounting records vs. taxes remitted to the Department**; etc.), the auditor decided to reconstruct the sales based on the purchase invoices and purchases recorded in the Appellant's accounting records, plus a gross profit margin, that method having been determined to be the one that offered the best guarantee of reliability for the purpose of establishing the Appellant's net tax;
>
> ...
>
> (n) The auditor then prepared **a summary table showing the difference between the net tax reported and remitted and the net tax that should have been remitted based on the reconstructed sales**, as set out in that summary table, attached and incorporated into this Reply;
>
> (o) The Appellant disputed the auditor's calculation method by submitting his own calculation sheets, but those sheets led to the same result: **that the tax reported and remitted was lower than the tax that should have been remitted to the Department**.

[28] In short, counsel for the Respondent submits that the basis of the assessment should simply not be changed, nor, in his submission, should any attempt be made to offer a new argument in support of the assessment, and so he did not even cite subsection 298(6.1) of the Act.

[29] He also noted subsection 299(2) of the Act, which provides: "Liability under this Part to pay or remit any tax, penalty, interest or other amount is not affected by

an incorrect or incomplete assessment or by the fact that no assessment has been made. He also relied on the taxpayer's various obligations relating to the collection of the tax and the calculation, reporting and payment of the net tax, which obligations are set out in subsections 221(1), 228(1) and (2) and 238(1) of the Act. Counsel for the Respondent based his arguments on the following cases in particular:

- *Edible What Candy Corporation v. Her Majesty the Queen*, T.C.C., 2001-2038(GST)I, March 25, 2002, [2002] G.S.T.C. 33 (T.C.C.);
- *Québec (Sous-ministre du Revenu) v. Dupuis*, [1996] R.D.F.Q. 70 (Que. C.A.);
- *Loewen v. Canada* (T.C.C.), *supra*;
- *Canada v. Loewen* (F.C.A.), *supra*;
- *Rogic v. Canada* (T.C.C.), *supra*;
- *Pedwell v. Canada* (F.C.A.), *supra*.

[30] In this case, the fundamental hypothesis on which the auditor, Ms. Lynch, based her assessment is that the Appellant, Mr. Beaulieu, had not reported and remitted all of the taxes collected on his sales during the period from January 1, 1997, to March 31, 2000. By examining the documents provided by the Appellant himself, and in particular the Z tapes, the auditor, first, identified discrepancies between the GST remitted and the GST collected over the various years in the period in question. She testified that the discrepancies identified were in fact set out on a work sheet that she provided to the Appellant. She then tried to establish the exact amount of the discrepancies by reconstructing the sales, using an indirect method. As I noted earlier, that method involved determining the value of the sales based on purchases plus a percentage for gross profit margin. Once the value of sales was thus established for each year in the period, she then determined the amount of GST applicable to the value of the sales and calculated the discrepancy, for each year, between that amount of GST and the GST reported and remitted, arriving at the adjustment of $30,509.43. It seems obvious, and only logical, that she could not have added the discrepancies previously identified, by analysing other documents or records, including the Z tapes, to the discrepancies identified based on all the reconstructed sales. The result of doing that would obviously have been double taxation, since some sales, and the GST applicable to those sales, would have been counted more than once.

[31] The method used by Ms. Lynch to arrive at the total adjustment of $30,509.43 set out in the assessment was disputed by the Appellant in this Court.

The Appellant's expert, Mr. Hamelin, showed that using that method was unjustified and inappropriate in the circumstances and that it resulted in too high an amount of QST being calculated. His conclusions were the same regarding the GST.

[32] However, Mr. Hamelin acknowledged that there were discrepancies between the taxes collected, according to the Z tapes, and the taxes reported and remitted. With respect to the GST, the discrepancies he identified for each year of the period in issue are set out in paragraph 12 of these reasons for judgment. According to his calculations, the total GST collected and not remitted is $15,318.88. Mr. Hamelin's report was entered into evidence (Exhibit A-1, tab 7). His testimony was to the same effect.

[33] Accordingly, the evidence presented by the Appellant himself is that in fact there was $15,318.88 in GST collected and not remitted for the period in question.

[34] In this Court, counsel for the Respondent defended not only the $30,509.43 adjustment in the assessment, but also the lower amount, $15,318.88 – proved by the Appellant himself – still arguing, however, that this was GST collected and not remitted. In reality, counsel for the Respondent conceded that he could not prove that any more than $15,318.88 in GST was collected and not remitted by the Appellant, and he asked the Court to refer the assessment back to the Minister for reassessment on that basis, since he admitted that the disputed assessment could not be justified in respect of the balance.

[35] In *Continental Bank of Canada*, *supra*, the Minister tried for the first time to argue a new theory in support of an assessment in the Supreme Court of Canada, concerning a series of transactions and based on the application of a different statutory provision. McLachlin J. (as she then was), writing for the majority, said, at paragraph 18:

> ... The Minister cannot argue that the Bank could not transfer its partnership interest at this stage. The Minister must accept that this transfer took place because his assessment of the Bank was based on the assumption that the Bank disposed of its partnership interest. I agree with Bastarache J. that the Minister's argument that the Bank sold depreciable leasing assets or was otherwise liable for recapture of capital cost allowance pursuant to s. 88(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, raised for the first time in this Court, cannot be entertained. The Minister should not be allowed to advance a new basis for a reassessment after the limitation period has expired.

[36] Bastarache J., writing for the minority, stated the reasons why he would not allow the Minister to argue this new theory as follows, at paragraphs 10 to 12 of the decision:

> 10 The applicable limitation period under the Act for assessing a taxpayer is four years from the date of issuance of Revenue Canada's Notice of Reassessment (ss. 152(3.1) and 152(4) of the Act). As a result, the latest that the Minister could have reassessed the Bank for the recapture of cost allowance was October 12, 1993. The Crown is not permitted to advance a new basis for reassessment after the limitation period has expired. The proper approach was expressed in *The Queen v. McLeod*, 90 D.T.C. 6281 (F.C.T.D.), at p. 6286. In that case, the court rejected the Crown's motion for leave to amend its pleadings to include a new statutory basis for Revenue Canada's assessment. The court refused leave on the basis that the Crown's attempt to plead a new section of the Act was, in effect, an attempt to change the basis of the assessment appealed from, and "tantamount to allowing the Minister to appeal his own assessment, a notion which has specifically been rejected by the courts". Similarly, the Federal Court of Appeal has described such attempts by the Crown as "a belated attempt to put the Appellant's case on a new footing" (*British Columbia Telephone Co. v. Minister of National Revenue* (1994), 167 N.R. 112, at p. 116).
>
> 11 It was open to the Appellant to assess the Respondent on the basis that it was liable for the recapture of cost allowance when it issued its Notice of Reassessment on October 12, 1989 or anytime prior to the expiration of the limitation period for reassessment. The Appellant did not choose to do so and cannot now be permitted to change its assessment eleven years later. The Appellant argued that the liability of the Respondent for the assessment pursuant to s. 13(1) is an alternative reason for its previous assessment, not a new assessment or reassessment. According to the Appellant, because the liability for recapture under s. 13(1) would arise solely as a consequence of a finding that Leasing, in the *Leasing* Appeal, was not the vendor of the assets in the sale to Central, a reassessment on this basis is merely a legal conclusion flowing from the proper application of the statute.
>
> 12 To accept this characterization by the Appellant would, in effect, create a situation where the Crown is permitted to raise new arguments simply because other arguments failed in the courts below. Unlike the Minister in *Minister of National Revenue v. Riendeau* (1991), 132 N.R. 157 (F.C.A.), the Minister in the present case has never sought to amend, correct or reissue the reassessment of the Bank to include a claim for recapture under s. 88(1)(*f*) of the Act. Moreover, the Appellant's characterization of the

> argument as an alternative one ignores the fact that Leasing and the Bank are two separate taxpayers. What the Minister is seeking to do is to substitute an assessment of one taxpayer for the assessment of another taxpayer because the first assessment did not succeed.

[37] It will be noted that McLachlin J. referred to the "assumption" on which the assessment was based, and the "basis" for reassessment. Bastarache J. referred to a "new statutory basis" for an assessment and "new arguments".

[38] It is also important to note that in *McLeod*, *supra*, to which Bastarache J. referred, Collier J. of the Federal Court – Trial Division had refused to allow the Minister to amend his pleading on the basis of a different statutory provision from the one that was used as the basis for the assessment, even though applying that provision would have resulted in a reduction rather than in increase in tax for the taxpayer.

[39] As we know, the *Income Tax Act* was amended as a result of the decision of the Supreme Court of Canada in that case, by the addition of subsection 152(9), and Part IX of the Act was amended by the addition of subsection 298(6.1), which has the same effect. Subsection 298(6.1) reads as follows:

> **(6.1) Alternative argument in support of assessment** –
>
> The Minister may advance an alternative argument in support of an assessment of a person at any time after the period otherwise limited by subsection (1) or (2) for making the assessment unless, on an appeal under this Part,
>
> (*a*) there is relevant evidence that the person is no longer able to adduce without leave of the court; and
>
> (*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[40] It is particularly difficult to reconcile the comments made by the Tax Court of Canada and the Federal Court of Appeal concerning the exact meaning of the new subsection 152(9) of the *Income Tax Act*, which comments apply, in my opinion, to the new subsection 298(6.1) of the Act, having regard to the restriction approved by the Supreme Court of Canada in *Continental Bank*, *supra*.

[41] In *Hollinger Inc.*, *supra*, Létourneau J.A. said the following concerning the new subsection 152(9) of the *Income Tax Act*, at paragraph 26 of the decision:

> 26 The amendment has no application in the present proceedings because it was not in force when the matter was argued before the Tax Court. [see note 12 below] But it is indicative of the philosophy that ought to prevail in these matters. It would introduce an unnecessary measure of formalism, unwarranted by the decision of the Supreme Court and the subsequent amendment to section 152, if we were to require that proper notification to the taxpayer of an alternative argument in support of an assessment can only be achieved by the ministerial issuance of a new reassessment. This is not to say that the Minister may change the amount of an assessment in pleadings, but only that arguments in support of an assessment can be made in pleadings, even if not included in a notice of reassessment. Changing the amount of an assessment in pleadings is tantamount to the Minister appealing his own assessment, an avenue which has been clearly rejected by the Courts. [see note 13 below].
>
> [Emphasis added.]

Note 12: The coming into force provision [s. 63.1(3)] states that the subsection is applicable to appeals disposed of after the day on which the Act is assented to:

> 63.1 . . .
>
> (3) Subsections (1) and (2) are applicable to appeals disposed of after the day on which this Act is assented to.
>
> S. 152(9) clearly establishes that the term "appeal" therein refers to an appeal made under the Income Tax Act that was pending before the Tax Court at the time of the Royal Assent. The subsection does not apply to an appeal launched under the Federal Court Act which, as this one, was still pending.

Note 13: *Continental Bank of Canada v. Canada*, [1998] 2 S.C.R. 358, at p. 366.

[42] However, in *Loewen*, *supra*, Sharlow J. made the following comments on the new subsection 152(9) of the *Income Tax Act*, at paragraphs 21 and 22 of the decision:

> 21 As I read subsection 152(9), the expiration of the normal reassessment period does not preclude the Crown from defending an assessment on any ground, subject only to paragraphs 152(9)(a) and (b). Paragraphs 152(9)(a) and (b) speak to the prejudice to the taxpayer that may arise if the Crown is permitted to make new factual allegations many years after the event.
>
> 22 A new argument asserted by the Crown pursuant to subsection 152(9) could include an argument that would justify an assessment that exceeds the

> amount assessed. However, subsection 152(9) does not relieve the Minister from subsection 152(4) [as am. by S.C. 1998, c. 19, s. 181], which imposes time limitations on reassessments. Therefore, the Minister cannot use a subsection 152(9) argument to reassess outside the time limitations in subsection 152(4), or to collect tax exceeding the amount in the assessment under appeal.
>
> [Emphasis added.]

[43] In *Chan v. Canada*, [1999] T.C.J. No. 661 (QL), Bonner J. of the Tax Court of Canada said, at paragraph 18 of the judgment:

> 18 Counsel argues in alternative that, if subsection 152(9) does apply, the subsection does not allow the Minister to advance a factual basis for reassessment different from the factual basis assumed by the Minister in making the original assessment (in this case disposition of 3,500 shares of NCTL). Counsel asserts that the amending legislation permits an alternative argument only if it can be supported by the facts assumed by the Minister when the original assessment was made. Reliance on a different view of the facts is not, on this theory, permitted. Again, I do not agree. I can find nothing in either the language or the purpose of the legislation which supports the restriction which the Appellant seeks to place on the language of subsection 152(9) "the Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period ...". It is difficult to imagine a rational basis for reading such a restriction into the subsection. Allowing the Minister to plead and to establish that the assessment of tax which he has made is supportable having regard to the law and to facts of which the Minister was unaware when he made the assessment does not, as counsel suggests, constitute allowing the Minister to appeal from his own assessment. Clearly the Act does not permit the Minister to appeal from his own assessment, but that is not an accurate description of what the Minister now seeks to do. He does not suggest that his assessment was wrong. Rather, he suggests that the assessment is right but for reasons of which he was previously unaware. The Appellant's argument confuses the reasons for making an assessment with the assessment itself. What is assessed is not a reason but rather is "the tax for the year". I refer to subsection 152(1) of the Act. The amendment to section 152 emphasizes the existence of the distinction between the assessment and the arguments which may support it and thus makes it clear that it can be said that the Minister is attempting to appeal his assessment only where the Minister is seeking to increase the amount of tax assessed. [See Note 4 below] It is therefore open to the Respondent to argue as, I note, the Appellant did also, that the property disposed of was something other than shares of NCTL.
>
> ---
>
> Note 4: Compare *Vineland Quarries and Crushed Stone Limited v. M.N.R.*, 70 DTC 6043.
>
> ---
>
> [Emphasis added.]

[44] The decision of Cattanach J. of the Exchequer Court in *Vineland Quarries and Crushed Stone Ltd. v. M.N.R., supra*, to which Bonner J. referred, was based on the earlier decisions made by that Court in determining what the basis of an appeal from an assessment was. On that point, Cattanach J. said, at pages 6045 and 6046 of the judgment:

[*Appeal from amount of assessment*]

> As I understand the basis of an appeal from an assessment by the Minister, it is an appeal against the amount of the assessment.
>
> In *Harris v. M.N.R.*, (1965) 2 Ex. C.R. 653 [64 DTC 5332], my brother Thurlow said at page 662:
>
> > . . . On a taxpayer's appeal to the Court the matter for determination is basically whether the assessment is too high. This may depend on what deductions are allowable in computing income and what are not but as I see it the determination of these questions is involved only for the purpose of reaching a conclusion on the basic question. . . .
>
> Here the Minister does not seek to increase the amount of the assessment. He seeks to maintain the assessment at the amount he assessed. However by his amendment to his Reply he seeks to ensure that, if the Court should find that the basis of his assessment was wrong, he might then, pursuant to reference back, assess a considerably lesser amount on what he forsees [*sic*] the Court might say is the correct basis of assessment.
>
> In *M.N.R. v. Beatrice Minden*, 62 DTC 1044, Thorson P., the former President of this Court, said at page 1050:
>
> > . . . In considering an appeal from an income tax assessment the Court is concerned with the validity of the assessment, not the correctness of the reasons assigned by the Minister for making it. An assessment may be valid although the reason assigned by the Minister for making it may be erroneous. This has been abundantly established.
>
> In effect the Minister says that for a reason he thinks to be correct he assessed the Appellant to income tax at "X" dollars. The Appellant says that the reason assigned by the Minister was incorrect. The Minister then says if the Court should hold the basis for his assessment of "X" dollars is erroneous, then for what the Court might find to be the correct reason, he would assess the Appellant at "X" minus "Y" dollars.

[*Minister's motion allowed*]

> This I think the Minister is entitled to do and accordingly I would allow the motion and permit the Minister to amend his Reply to the Notice of Appeal as requested. ...
>
> [Emphasis added.]

[45] Similar comments concerning the subject matter of an appeal may be found in other decisions, one of which is the decision of the Federal Court of Appeal in *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60, 87 DTC 5008, [1987] 1 C.T.C. 79. At page 67 of that judgment, Hugessen J.A. states:

> ... What is put in issue on an appeal to the courts under the *Income Tax Act* is the Minister's assessment. While the word "assessment" can bear two constructions, as being either the process by which tax is assessed or the product of that assessment, it seems to me clear, from a reading of sections 152 to 177 of the *Income Tax Act*, that the word is there employed in the second sense only. This conclusion flows in particular from subsection 165(1) and from the well established principle that a taxpayer can neither object to nor appeal from a nil assessment.

[46] The decision of Bonner J. in *Chan*, *supra*, was appealed to the Federal Court of Appeal, [2001] F.C.J. No. 1528 (QL). At paragraph 17 of his reasons for judgment, Sexton J.A. expressed the Court's approval of the analysis done by Bonner J. concerning the procedural issue raised by counsel for the Appellant regarding the effect of subsection 152(9) of the *Income Tax Act*.

[47] As well, in *Anchor Pointe Energy Ltd. v. Canada*, [2003] F.C.J. No. 1045 (QL), Rothstein J.A. of the Federal Court of Appeal stated, at paragraphs 38 and 39 of his the decision:

> 38 Anchor Pointe tries to distinguish between a new basis of assessment and a new argument in support of an assessment. I do not find that semantical argument productive. The question is whether the Minister is purporting, through reliance on the *Global* decision, to increase the amount of Anchor Pointe's income that was not included in an assessment or reassessment made within the normal reassessment period.
>
> 39 In my opinion, he was not. This case is unlike cases such as *Pedwell v. The Queen*, 2000 D.T.C. 6050 (F.C.A.), where the Minister sought to take into account different transactions than the ones that formed the basis of the reassessments that were made within the normal reassessment period. I do not say that taking into account other transactions is the only thing the Minister cannot do after expiry of the normal reassessment period. Anything that increases tax payable from what would have been the case prior to expiry of the normal reassessment period would be objectionable.

[Emphasis added.]

[48] In *Petro-Canada v. Canada*, [2004] F.C.J. No. 734 (QL), 2004 DTC 6329, at paragraph 68, Sharlow J.A. of the Federal Court of Appeal, relying on the decision of the Exchequer Court in *Harris v. M.N.R.*, *supra*, confirmed that the Tax Court of Canada judge could not have reduced a deduction allowed by the Minister, where the consequence would have been an increase in the amount of the assessment, "because, in effect, that would allow the Crown to appeal the assessment".

[49] I also note that in the recent decision in *Gould v. Canada*, [2005] T.C.J. No. 403 (QL), Bowman C.J. interpreted the decision of the Federal Court of Appeal in *Loewen*, *supra*, as follows, at paragraph 16 of the decision:

> ... As I understand the decision of the Federal Court of Appeal in *Her Majesty the Queen v. Charles B. Loewen*, 2004 D.T.C. 6321, there is virtually no restriction on what the Crown can plead in a reply and there is no distinction between a new basis of assessment (*Continental Bank Leasing Corporation v. The Queen*, 98 D.T.C. 6505) and a new argument in support of the assessment (ss. 152(9) of the *Income Tax Act*).

[50] As may be seen, the distinction between something that is a change in the basis of an assessment and something that may be regarded as new arguments in support of an assessment can be very difficult to make, and the distinction is imprecise. However, it is impossible to avoid the fact that the courts have traditionally acknowledged that an assessment is essentially the result of a process, and that that result expresses the amount of tax, interest and penalties for which a taxpayer is liable, and that it is that result that is fundamentally what is at issue in an appeal from an assessment.

[51] The decision of the Supreme Court of Canada in *Continental Bank*, *supra*, established the principle that after the time limit has expired, the Minister may not advance an argument that amounts to changing the basic assumption on which the assessment is based, or, as it were, "its basis", so that the subject matter of an appeal would then be a fundamentally different assessment from the assessment that was made. However, if we consider an assessment as essentially representing "an amount", as the courts have so often said, I think that subsection 298(6.1) of the Act — like subsection 152(9) of the *Income Tax Act* — allows the Minister,

subject to the restrictions they state, to advance any argument after the time limit has expired that is based on the facts or the law, to defend all or part of the assessment. Obviously, the restriction is that the Minister may not try in any way to increase the assessment after the time limit has expired, because this would amount to allowing the Minister to appeal his own assessment.

[52] Where, for whatever reason, for example because of an error or because the evidence he can present is inadequate, the Minister makes any concession to a taxpayer in a pleading regarding an assessment, and the result of the concession is to reduce the amount of the assessment, I do not believe that it can be said that this is the Minister attempting to appeal his own assessment.

[53] In this case, the basic assumption on which the assessment is based is that the GST collected by the Appellant on all of his sales was not reported and remitted. The method used for determining the amount is what it is: a simple method of calculation, which may or may not be valid, depending on the circumstances, and which does not preclude other methods of calculation.

[54] Counsel for the Respondent admitted that the assessment made by the auditor, Ms. Lynch, for the GST collected and not remitted cannot be upheld in its entirety, having regard to the evidence presented concerning the method of calculation used, and so that the assessment is incorrect in part. He asked, however, that it be confirmed in part, again having regard to the evidence presented which was based on a different calculation method. In my opinion, this is at most a new argument in support of the assessment made on December 15, 2000 (in part), regarding the GST collected and not remitted for the period from January 1, 1997, to March 31, 2000, which is permitted by subsection 298(6.1) of the Act.

[55] Accordingly, the appeal is allowed and the assessment is referred back to the Minister for reconsideration and reassessment, on the basis that the $30,509.43 adjustment made to the GST must be reduced to $15,318.88 and the penalties and interest must be determined on that basis, with costs to the Respondent.

Signed at Ottawa, Canada, this 18th day of October 2005.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 6th day of April, 2006.

J. Poirier

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