

Citation: 2007TCC407
Date: 20070803
Docket: 2003-2120(GST)G

BETWEEN:

2870258 CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

(Delivered orally from the bench on May 1, 2007, at Montréal, Quebec,
and amended for clarification and precision.)

Archambault J.

[1] 2870258 Canada Inc. ("Manco") is appealing from an assessment made by the Ministère du Revenu du Québec ("the MRQ") as an agent of the Minister of National Revenue ("the Minister") under the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("the Act" or "the ETA"). The Minister disallowed an input tax credit (ITC) of \$70,000, claimed by Manco for the period from June 1 to August 31, 1988, in respect of property that belonged, at a certain time, to Solma Electroplating Ltd. ("Solma") or Empire Electroplating Works Ltd. ("Empire"). In addition, the Minister imposed a penalty of \$17,500 under section 285 of the ETA.

[2] The assessment was made by the Minister on the basis of the following factual assumptions:

[TRANSLATION]

- (a) The facts admitted to above.
- (b) The Appellant is a registrant for the purposes of Part IX of the ETA. (admitted)
- (c) The Appellant operates a metal plating business. (admitted)
- (d) Mr. Ron Di Pasquale was the Appellant's president at all times relevant to this dispute. (admitted)
- (e) Mr. Michele Mangione was the Appellant's director of production at all times relevant to this dispute. (admitted)
- (f) Mr. Michele Mangione was also the president of 9044-2435 Québec Inc. at all times relevant to this dispute. (admitted)
- (g) Mr. Maurice Faille, Michel Faille's father, was a director of 9044-2435 Québec Inc. at all times relevant to this dispute. (admitted)
- (h) Mr. Michel Faille was an officer of Seahawk Financial Services Ltd. and of Seahawk Investments Ltd. at all times relevant to this dispute. (admitted)
- (i) The Appellant was the recipient of the supply, by way of sale, of the assets of the bankruptcy of Solma Electroplating Ltd. on or about January 8, 1997, from Friedman & Friedman Inc., trustees in bankruptcy, in consideration of \$15,000, plus GST in the amount of \$1,050 (7% of \$15,000) and QST in the amount of \$1,043.25 ($\$15,000 \times 1.07 \times 6.5\%$). (denied)
- (j) Mr. Ron Di Pasquale, on behalf of the Appellant and in his capacity as president thereof, signed the contract reflecting the supply, received by the Appellant, of the said assets of the bankruptcy of Solma Electroplating Ltd. (admitted)
- (k) The Appellant was the owner of the said assets from the time that this supply was received from the trustee in bankruptcy on or about January 8, 1997, until and including the period in issue. (denied)
- (l) 9044-2435 Québec Inc. received a supply, by way of sale, of the assets of the bankruptcy of Empire Electroplating Works Ltd. on March 7, 1997, from Schwartz Levitsky Feldman Inc., trustees in bankruptcy, in consideration of \$35,000, plus GST in the amount of \$2,450 (7% of \$35,000) and QST in the amount of \$2,434.25 ($\$35,000 \times 1.07 \times 6.5\%$). (admitted)

- (m) This supply was pursuant to an offer to purchase the said assets for \$35,000 plus GST and QST. 9044-2435 Québec Inc. submitted that offer to the trustee in bankruptcy on January 31, 1997, along with a deposit consisting of 20% of the total amount, that is to say, \$7,976.85 (20% of \$35,000 x 1.07 x 1.065). (admitted)
- (n) Mr. Michele Mangione, on behalf of 9044-2435 Québec Inc. and in his capacity as president thereof, signed the offer of purchase and the contract reflecting the supply of the said assets of the bankruptcy of Empire Electroplating Works Ltd. (admitted)
- (o) The Appellant paid the deposit by means of a cheque co-signed by Mr. Michele Mangione as drawer.¹
- (p) In its accounting books, the Appellant stated that it acquired the assets of the bankruptcy of Empire Electroplating Works Ltd. for \$7,976.85. (admitted)
- (q) From the time that the said assets were supplied by the trustee in bankruptcy until and including the period in issue, the Appellant's own books stated that it was the owner of the assets. (denied)
- (r) Among the total ITCs that it claimed in computing its net tax for the period in issue, the Appellant claimed \$70,000 in respect of its receipt of the supply of the two aforementioned bankruptcies in issue in consideration of \$1,000,000 from a supplier named Seahawk Financial Services Ltd. (admitted)
- (s) The Minister refused to allow this ITC claimed by the Appellant in computing the Appellant's net tax for the period in issue. (admitted)
- (t) The voucher that the Appellant submitted to the Minister in support of its \$70,000 ITC claim while the Appellant's net tax return was being considered was issued by Seahawk Investments Ltd., not Seahawk Financial Services Ltd., the alleged supplier referred to in the Notice of Appeal. (denied)
- (u) Seahawk Investments Ltd. did not directly or indirectly receive from the trustees in bankruptcy the supply, by way of sale, of the assets of the bankruptcies of Solma Electroplating Ltd. and Empire Electroplating Works Ltd. (denied)
- (v) Seahawk Investments Ltd. did not supply to the Appellant, by way of sale, the assets of the two bankruptcies in issue in consideration of \$1,000,000. (denied)

¹ The Appellant admitted to this paragraph, except that it contended that Ms. Assunta Mangione was the co-signer.

- (w) Seahawk Investments Ltd. ceased all commercial activities in 1995. (no knowledge)
- (x) On July 17, 1997, the registration of Seahawk Investments Ltd. for the purposes of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, R.S.Q., c. P-45, was struck off *ex officio* by the Inspecteur général des institutions financières pursuant to section 50 of that Act, and that striking-off entailed the dissolution of the corporation under that section. (admitted)
- (y) As for Seahawk Financial Services Ltd., it did not directly or indirectly receive from the trustees in bankruptcy the supply, by way of sale, of the assets of the bankruptcies of Solma Electroplating Ltd. and Empire Electroplating Works Ltd. (denied)
- (z) Seahawk Financial Services Ltd. did [not] supply to the Appellant, by way of sale, the assets of the two bankruptcies in issue in consideration of \$1,000,000. (denied)
- (aa) There is no voucher from Seahawk Financial Services Ltd. in support of the \$70,000 ITC claim, even though that corporation is the one from which the Appellant claims, in its Notice of Appeal, to have received the supply of the assets in issue in consideration of \$1,000,000. (denied)
- (bb) The voucher which the Appellant submitted to the Minister in support of the \$70,000 ITC claim when its net tax return was being considered, and which was issued by Seahawk Investments Ltd., is a fraudulent or false document. (denied)
- (cc) All documents related to this purported supply of the assets in issue, of which the Appellant is the recipient, whether from Seahawk Financial Services Ltd. or Seahawk Investments Ltd., are false or fraudulent documents obtained as a result of a fraud committed by one of those corporations or by the Appellant. (denied)
- (dd) The Appellant participated in a scheme one of the purposes of which was to unduly add a \$70,000 ITC in computing its net tax for the period in issue. (denied).
- (ee) The voucher for the \$70,000 ITC claim is an invoice of convenience, intended, among other things, to artificially create a negative net tax balance and seek a refund thereof for the period in issue, as opposed to the positive balance that would have been payable to the Receiver General (read "the Minister"). (denied).

- (ff) Thus, the Appellant is liable to the Minister for the amount of the adjustment to the net tax that it reported for the period in issue, and for the net interest and the penalties. (denied)

Factual background

[3] Manco was incorporated in November 1992 and began operating its plating business in December 1992. It acquired its assets following the bankruptcy of Manco TGV, a corporation belonging to Mr. Mangione and formed in 1988. Mr. Mangione was Manco's director of production throughout the period in issue. Since Mr. Mangione had 18 years of experience in the metal plating business, Ron Di Pasquale apparently wanted to attract his family's interest in Manco. Three of Mr. Mangione's children are the equal shareholders of 2961-9525 Québec Inc., which holds 50% of Manco, and Mr. Di Pasquale, through 3178331 Canada Inc., holds the other 50% of Manco (Exhibit A-1, tab 15, page 11). Before founding Manco TGV, Mr. Mangione held 50% of the shares of Solma, another metal plating company, from 1974 to 1988.

[4] Solma had financial troubles in 1996, as shown by the application for an extension of the deadline for filing a proposal with the official receiver, submitted pursuant to the *Bankruptcy and Insolvency Act* (Exhibit A-1, tab 5, page 1). The application states that Solma wanted to get such an extension because it was in discussions with a potential investor that would inject new funds into Solma; the investor in question was Seahawk Financial Services Ltd. ("Seahawk"). Seahawk was incorporated on July 19, 1993 (Exhibit A-1, tab 23). Its articles of incorporation state that it was founded by Seahawk Investments Ltd. ("Seahawk Investments") and that the president of Seahawk Investments is Michel Faille. Seahawk Investments was incorporated on August 14, 1992. According to the notice concerning the membership of the board of directors, a notice received by the Inspecteur général des institutions financières on August 14, 1992, Michel Faille was its director. According to the testimony of Sylvain Vinet, the MRQ's investigator, Seahawk Investments was struck off *ex officio* by the Inspecteur général des institutions financières in July 1997 and its GST number has been revoked since July 31, 1995. As for Seahawk, it was never assigned a GST number, and, what is more, there is no trace of that corporation in CIDREQ.

[5] In 1997, Frank Di Pasquale, one of Mr. Di Pasquale's brothers, was the president of Empire, another metal plating business, which was also in financial difficulty. Before going bankrupt, it had labour relations problems with its

On the date that the option expires, **SEAHAWK** shall reserve the right to sell all the **SOLMA** assets to the highest bidder should **MANCO** not exercise its option. In addition, **MANCO** shall defray all costs necessary for the restoration of the **SOLMA** equipment to perfect condition, and carry out the necessary repairs and defray all costs related to the transaction.

...

[7] Two days later, that is to say, on January 8, 1997, the trustee of the Solma bankruptcy transferred the Solma assets to Manco, including inventory and equipment, for a total of \$15,000, plus taxes, for a total of \$17,093.25. This amount of \$17,093.25 was entered entirely under [TRANSLATION] "Machinery and Equipment" in Manco's accounting records.

[8] On January 31, 1997, 2435 made an offer to the trustee in the Empire bankruptcy to purchase Empire's equipment for \$35,000, plus taxes, for a total of \$39,884.25. Attached to that offer was a cheque in the amount of \$7,976.85, which consisted of 20% of the offer amount, and the balance was to be payable on February 7, 1997. This cheque was made by Manco on January 31, 1997, and another cheque, in the amount of \$31,907.40, was made by Michel Faille, likely on behalf of one of his corporations, on February 13, 1997 (Exhibit A-1, tab 11, second sheet). On February 3, 1997, three days after this offer was submitted, Manco and Seahawk entered into the following agreement:

[TRANSLATION]

...

PREAMBLE

Whereas *Manco Domplex* is engaged in the business of plating metals of all kinds;

Whereas *Seahawk* acquired all the capital assets of the *Solma* and *Empire* companies, which had been engaged in the business of plating metals of all kinds;

Whereas *Manco* wishes to obtain an option to acquire the capital assets that once belonged to *Solma* and *Empire* and are now owned by *Seahawk*;

And whereas *Seahawk* wishes to grant an option to *Manco Domplex*,

IT IS AGREED THAT:

[25] However, in order to be entitled to an ITC in respect of these assets, certain conditions must be met, including these set out in paragraph 169(4)(a) of the Act, which provides:

169(4) A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,

(a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and

...

[26] Subparagraph 3(b)(i) of the Input Tax Credit Information (GST/HST) Regulations ("the Regulations") provides:

3. For the purposes of paragraph 169(4)(a) of the Act, the following information is prescribed information:

...

(b) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is \$30 or more . . . :

(i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business, and the registration number assigned under subsection 241(1) of the Act to the supplier or the intermediary, as the case may be,

[Emphasis added.]

[27] The evidence in the case at bar has shown that the invoice submitted in support of the ITC claim contained a GST registration number, but that the number had been revoked one year before the transfer of the bankruptcy assets by Seahawk Investments. In *Systematix Technology Consultants Inc. v. The Queen*, 2006 TCC 277, I had to decide a case similar to the case at bar. At paragraph 5 of that decision, I wrote:

In the second category, the invoices do provide a registration number but the number was not valid at the relevant time. This category can be divided into three subcategories. In the first of these, a valid registration number appears but only for a period prior to the relevant period. . .

[28] Following my analysis, at paragraph 15 of my decision, of the meaning of the words in subparagraph 3(b)(i) of the Regulations, that is to say, the question whether the invoice has to provide a registration number attributed in accordance with subsection 241(1) of the Act, I held that the absence of a valid registration number at the relevant time precludes a business from being entitled to an ITC.

[29] I am aware that *Systematix* is being appealed from before the Federal Court of Appeal, but, unfortunately, at the time that I rendered my decision in the case at bar, the Federal Court of Appeal had not yet decided the merits of that appeal. Thus, for the time being, I adopt the same interpretation that I adopted there.⁴

[30] Naturally, the other basis upon which the ITC could be disallowed was that, at the relevant time, Seahawk Investments had been dissolved and had no legal existence. After the parties' oral submissions, I suspended the hearing of this appeal, which took place from October 16 to October 20, 2006, in order to enable the parties to settle not only this dispute, but also the disputes in the related taxation files. Unfortunately, the parties were unable to achieve such a settlement. However, the suspension enabled Manco to obtain a ruling that revoked the striking of Seahawk Investment's corporate registration. Since I also allowed new evidence to be submitted, a facsimile of that ruling (Exhibit A-8) was tendered in evidence by counsel for Manco at the hearing on May 1, 2007. But counsel for the Respondent submits that, in view of section 57 of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, reproduced below, that retroactive ruling cannot be set up against the Respondent:

57. *Subject to the rights acquired by any person or group*, the registration of a registrant is deemed to have never been struck off and the legal person constituted in Québec is deemed to have never been dissolved.

[Emphasis added.]

[31] Indeed, counsel for the Respondent submits that the Minister had "acquired rights" because more than four years had elapsed since the acquisition of the bankruptcy assets, and the Minister could invoke the expiration of the limitation period. Thus, at the relevant time, namely the time that the GST return was filed, the supplier (Seahawk Investments) no longer existed. Under these circumstances, he submits, Manco could not obtain the ITC. In my opinion, it is unnecessary to decide

⁴ After I decided this appeal, the Federal Court of Appeal confirmed my decision in *Systematix*, 2007 FCA 226.

this issue given my finding that a GST registration number is required in order to be entitled to an ITC.

[32] The Minister imposed a penalty under section 285 of the Act, which provides:

285. False statements or omissions – Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which is in this section referred to as a "return") made in respect of a reporting period or transaction is liable to a penalty of the greater of \$250 and 25% of the total of

...

[Emphasis added.]

[33] The onus was on the Minister to show that Manco knowingly, or in circumstances amounting to gross negligence, made a false statement in its net tax return for the relevant period. Naturally, if I had been satisfied that the acquisition of the bankruptcy assets for \$1,000,000 was merely a sham and had no economic substance, the Minister's burden would have been lighter. However, since I have determined, based on the evidence as a whole, that the equipment was genuinely acquired for \$1,000,000 (though one cannot be certain who the true seller of that equipment was) and since I have no reason to believe that Manco was aware that Seahawk had no valid GST registration number, I rule that it would be entirely unwarranted to impose a penalty on Manco under the circumstances.

[34] In addition, Mr. Faille testified that he decided not to remit the \$70,000 in GST to the MRQ without consulting with or notifying anyone. Consequently, there is no evidence that Manco and its representatives were involved in the failure to remit. He also confirmed that there was no reason to believe that Manco was aware of his plan to avoid remitting, to the MRQ, the GST that Manco had paid upon acquiring the bankruptcy assets.

[35] For all these reasons, Manco's appeal is allowed, and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that the penalty imposed under section 285 of the Act must be cancelled, without costs in view of the circumstances.

Signed at Vancouver, British Columbia, this 3rd day of August 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 20th day of February 2008.

François Brunet, Revisor

CITATION: 2007TCC407

COURT FILE NO.: 2003-2120(GST)G

STYLE OF CAUSE: 2870258 CANADA INC. v. THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 16 to October 20, 2006, and
May 1, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Pierre Archambault

DATE OF JUDGMENT: August 3, 2007

APPEARANCES:

Counsel for the Appellant:	Franco Iezzoni
Counsel for the Respondent:	Benoît Denis Jean-Philippe Dumas

COUNSEL OF RECORD:

For the Appellant:	
Name:	Franco Iezzoni
Firm:	Pateras & Iezzoni Montréal, Quebec
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada