Docket: 2004-3012(GST)G

BETWEEN:

SCHOOL DISTRICT NO. 44 (NORTH VANCOUVER),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 23, 24 and 25, 2008 at Vancouver, British Columbia

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	David E. Graham
Counsel for the Respondent:	Susan Wong Selena Sit

JUDGMENT

The appeal, with respect to an assessment made under the *Excise Tax Act* by notice dated March 31, 2003, is dismissed.

Signed at Ottawa, Canada this 25th day of August 2008.

"J. Woods"

Woods J.

Docket: 2004-3079(GST)G

BETWEEN:

TORONTO DISTRICT SCHOOL BOARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 23, 24 and 25, 2008 at Vancouver, British Columbia

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	David E. Graham
Counsel for the Respondent:	Susan Wong Selena Sit

JUDGMENT

The appeal, with respect to an assessment made under the *Excise Tax Act* by notice dated April 7, 2003, is dismissed.

Signed at Ottawa, Canada this 25th day of August 2008.

"J. Woods"

Woods J.

Dockets: 2004-3582(GST)G
2004-3583(GST)G

BETWEEN:

SCHOOL DISTRICT NO. 39 (VANCOUVER),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 23, 24 and 25, 2008 at Vancouver, British Columbia

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	David E. Graham
Counsel for the Respondent:	Susan Wong Selena Sit

JUDGMENT

The appeal, with respect to assessments made under the *Excise Tax Act* by notices dated April 1, 2003 and July 24, 2003, is dismissed.

Signed at Ottawa, Canada this 25th day of August 2008.

"J. Woods"

Woods J.

Citation: 2008TCC475
Date: 20080825
Dockets: 2004-3012(GST)G
2004-3079(GST)G
2004-3582(GST)G
2004-3583(GST)G

BETWEEN:

SCHOOL DISTRICT NO. 44 (NORTH VANCOUVER),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

TORONTO DISTRICT SCHOOL BOARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

SCHOOL DISTRICT NO. 39 (VANCOUVER),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

SCHOOL DISTRICT NO. 39 (VANCOUVER),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] By these appeals, school boards for the districts of Vancouver, North Vancouver and Toronto seek rebates of goods and services tax (GST) that they submit was paid in error with respect to course registration fees for adult continuing education courses. The appeals of the three school boards were heard together but on separate evidence.

[2] There are two discrete issues:

1. Are the course registration fees exempt from GST by virtue of section 10 of Part VI to Schedule V of the *Excise Tax Act*? This provision exempts a supply of a property or service provided by a public sector body if all or substantially all of the supplies of the property or service are made for no consideration.

2. Was the GST borne by the school boards or the registrants? The appellants concede that they are not entitled to the rebates unless they have borne the tax: *West Windsor Urgent Care Centre Inc. v. The Queen*, 2008 FCA 11, [2008] GSTC 6.

General Background

[3] Each of the appellant school boards operates elementary and secondary schools in their respective territories. As such, they are each a "school authority" and a "public sector body" as those terms are defined in s. 123(1) of the *Act*.

[4] In addition to providing schooling at the elementary and secondary level, which is provided for no consideration, the appellants provide continuing education courses for adults for which fees are charged.

[5] All of the appellants' continuing education programs offer a wide variety of general interest courses on a fee per course basis. Some of the courses offered are similar in content to those provided in secondary schools (e.g. Spanish) and others are more recreational in nature (e.g. bridge).

[6] During the relevant periods, the appellants treated registration fees for continuing education courses as subject to GST, and the tax was remitted to the government in the usual manner. No GST was remitted with respect to courses on

English and French as a second language, however, because of a specific statutory exemption for this type of course (s. 11, Part III, Schedule V of the *Act*).

[7] Early in 2003, the appellants concluded that their handling of the GST with respect to continuing education courses had been incorrect and that the tax had been remitted in error. Steps were then taken to recover the GST previously remitted within the relevant statutory limitation periods.

[8] Applications for rebates were filed by all the appellants pursuant to section 261 of the *Act*, relating to the period from January 1, 2001 to January 31, 2003. In addition, the Vancouver school board made a further request in respect of GST remitted for the period from December 1, 1999 to December 31, 2000. This request was made in a notice of objection for the July 2002 reporting period.

[9] The Minister of National Revenue disallowed all the claims, with the result being the amounts at issue set out below.

School Board	Rebate Claimed
School District No. 44 (North Vancouver)	$60,440
Toronto District School Board	$333,921
School District No. 39 (Vancouver)	$430,357

Issue 1 – Are course registration fees exempt?

[10] The appellants submit that the registration fees earned on continuing education courses are eligible for the exemption applicable to public sector bodies in section 10, Part VI, Schedule V of the *Act*.

[11] In general, section 10 provides an exemption from GST for a supply of a property or service by a public sector body if it is usually provided for no consideration. The provision reads:

> **10. [Supplies for nil consideration]** – A supply made by a public sector body of any property or service where all or substantially all of the supplies of the property or service by the body are made for no consideration, but not including a supply of blood or blood derivatives.

[12] The factual underpinning for the appellants' position is that the vast majority of their courses are provided to elementary and secondary school students without consideration. They therefore submit that the relatively few courses for which fees are charged qualify for the section 10 exemption.

[13] The respondent does not take issue with the fact that substantially all of the courses offered by the appellants are given for no consideration. However, the respondent disputes the applicability of section 10 on the basis that the continuing education courses are of a different "kind and class" as the courses provided to elementary and secondary school students.

[14] In the submission of the respondent, section 10 should not be interpreted to exempt adult continuing education courses because this would offend the object and spirit of the legislation, which is to impose GST on courses that are not provided primarily to elementary and secondary students. Counsel suggests that the exemption should accordingly be more narrowly defined to include only courses of the same kind and class as those provided for no consideration.

Statutory interpretation

[15] The principles of statutory interpretation that should be applied in a case such as this are set out in *Minister of Finance (Ontario) v. Placer Dome Canada Ltd.*, 2006 SCC 20, 2006 DTC 6532. The relevant paragraphs are reproduced below.

> [21] In *Stubart Investments Ltd. v. The Queen*, [84 DTC 6305] [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see *65302 British Columbia Ltd. v. Canada*, [99 DTC 5799] [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005 DTC 5523] [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.
>
> [22] On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada*

> *Trustco*, at para. 10. Morever, as McLachlin, C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities". The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".
>
> [23] The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J.E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [99 DTC 5669] [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.
>
> [24] Although there is a residual presumption in favour of the taxpayer, it is residual only and applies in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue: *Notre-Dame de Bon-Secours*, at p. 19. Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue. In my view, the residual presumption does not assist PDC in the present case because the ambiguity in the *Mining Tax Act* can be resolved through the application of the ordinary principles of statutory interpretation. I will say more on this below.

Legislative scheme

[16] At the time of the introduction of the GST in 1989, the Minister of Finance, the Honourable Michael H. Wilson, issued an explanatory paper that included a description of the general policy objectives for public sector bodies such as the appellants: *Goods and Services Tax – An Overview*, Government of Canada, August 1989. According to this paper, the new legislation aimed to exempt non-commercial services provided by public sector bodies, and it also tried to ensure that services were given the same treatment regardless of whether they originated in the public or private sector.

[17] This is outlined in the following excerpt from the paper:

> **9. The Public Sector**

> In Canada, the public sector is composed of the federal and provincial governments, and a variety of other public bodies – such as municipalities, schools, colleges, universities and hospitals – which are engaged in a wide range of activities. In the context of the GST, the public sector represents a unique challenge. On the one hand, consistent with the principle of a broad-based consumption tax, the federal government must ensure that the GST is applied in a fair and uniform manner to commercial supplies made by both the private and public sectors. This will ensure competitive equity and minimize tax-based distortions. At the same time, in designing the GST, the government recognizes the special role that public bodies play in our society and, therefore, will ensure that the tax system does not impede their non-commercial activities.
>
> **9.1 Public Sector Sales**
>
> **(a) General Approach**
>
> To the extent that governments and their emanations engage in commercial activities, they should be subject to the same general rules as private sector organizations. As in the private sector, with the exception of those supplies that will be zero-rated (e.g., basic groceries) and tax-exempt (e.g., day care), supplies by governments will, in general, be subject to GST if they are made in the course of a commercial activity.
>
> This approach will preserve competitive equity by ensuring that one type of supply receives the same tax treatment regardless of its origin within the private or public sector. In other words, it is the nature of the supply itself which will generally be the central determinant of tax status, not the nature of the organization that makes the supply.

[18] Schedule V of the *Act* contains a number of parts, each of which lists specific goods and services that are exempt from the GST. Two of these are relevant here, Part III (Educational Services) and Part VI (Public Sector Bodies). Goods and services provided by the appellants may be exempt under either of these parts.

[19] As for exemptions that specifically relate to teaching provided by the appellants, a basic exemption is provided in section 2, Part III for course instruction provided to elementary and secondary school students. The exemption reads as follows:

> 2. **[Schooling]** – A supply made by a school authority in a province of a service of instructing individuals in a course that is provided primarily for elementary or secondary school students.

[20] Since this exemption is restricted to courses provided primarily to elementary and secondary school students, it does not apply to adult continuing education courses, which have age restrictions.

[21] There are very few other exemptions for course instruction provided by the appellants. As mentioned earlier, another exemption is provided for course instruction in English or French as a second language (section 11, Part III).

[22] Part VI (Public Sector Bodies) provides exemptions for public sector bodies, which include entities such as school authorities, governments and hospitals. This part potentially provides other exemptions for properties and services of the appellants in addition to specific exemptions for educational services in Part III.

Analysis

[23] These appeals concern the application of section 10, Part VI (Public Sector Bodies). In general, section 10 exempts a supply of a property or service by a public sector body if the body normally provides the property or service for no consideration.

[24] Section 10 is reproduced again, with emphasis on the parts that are especially relevant here.

> **10. [Supplies for nil consideration]** – A supply made by a public sector body of any property or service where all or substantially all of the supplies of the property or service by the body are made for no consideration, but not including a supply of blood or blood derivatives.

[25] The question to be decided turns on the meaning of the phrase “the property or service” above.

[26] Although the appellants’ submissions focus on the word “supply” and not the word “service,” their argument implies that the word “service” in the phrase “the property or service” should be interpreted as “instruction in courses.”

[27] I do not agree with this interpretation.

[28] In general, I find section 10 to be difficult to interpret because the word "service," by itself, is ambiguous. As applied to course instruction, it could be interpreted as broadly as "teaching courses," or as narrowly as "teaching a specific class at a specific time and location."

[29] Because of the ambiguity, it is tempting to apply the residual presumption in favour of the taxpayer in these appeals. However, in my opinion this would contravene the interpretation principles set out in the *Placer Dome* decision, and in particular paragraph 24 of that decision that is reproduced above.

[30] What a court must do is to consider whether the phrase "the property or service" in section 10 can fairly be given the broad meaning suggested by the appellants under a textual, contextual and purposive interpretation.

[31] An important consideration in the interpretation of section 10, in my view, is the language used in the section, which implies that the exemption is to have narrow scope. This is inferred from both the words "the" and "property" in the phrase "the property or service." These words suggest that the properties or services that qualify for the exemption must be the very same properties or services that are provided for no consideration.

[32] This interpretation is also consistent with a purposive interpretation. As suggested by the government at the time of enactment of the GST, the *Act* aims to subject some properties and services provided by public sector bodies to the GST and exempt others, depending on their type. If the word "service" in section 10 were given a very broad interpretation, the legislative scheme would be frustrated because services provided by the private sector would be at a competitive disadvantage. In the context of these appeals, if the phrase "the property or services" were interpreted to include all courses provided by the appellants, then general interest courses provided by the private sector would be disadvantaged. This was the respondent's main argument, and I agree with it.

[33] For these reasons, I conclude that Parliament did not intend by section 10 to provide an exemption for properties or services that are normally provided for consideration. None of the adult continuing education courses provided by the appellants are given for no consideration and the section 10 exemption should not, therefore, apply to them.

[34] The appellants made the following submissions in support of their position:

(i) teaching is teaching;

(ii) the *Act* considers “instructing individuals in a course” to be a supply;

(iii) the Minister has focused on irrelevant peripheral factors; and

(iv) interpreting section 10 in the manner suggested by the Minister would make the section unworkable.

[35] In respect of the first argument, the appellants submit that there is no difference between teaching continuing education courses and teaching at the elementary and secondary school level.

[36] I disagree with this. Although it is correct to say that “teaching is teaching,” and that “teaching courses is teaching courses,” it is also true that teaching any two courses is not the very same thing. Differences between two courses could be minor, such as being presented on different dates, or differences could be substantial, such as having different subject matters. Regardless, it is certainly not correct to say that there are no differences between courses.

[37] The appellants also submit that adult continuing education courses and courses at the elementary and secondary school level are not so different that they can logically be put into separate classifications. In this regard, they suggest that the differences suggested by the respondent (age of students, location and time, experience of teachers, whether there is a grading system, oversight of teachers, regulation by government) are not meaningful.

[38] I disagree with this as well. All of the differences mentioned by the respondent are relevant in the circumstances of these appeals.

[39] The appellants also argue that the language used in Part III (Educational Services) supports their position because it contemplates “teaching” as a supply.

[40] I also reject this argument. Part III does not generally define teaching as a service. Some sections in Part III define a service as being instruction in a particular course (section 2) and others define a service as being instruction in courses of a particular type (section 6). In no case, however, is a service defined so broadly as “teaching.”

[41] The appellants also argue that the test proposed by the respondent makes the section unworkable. Although I agree that the language used in section 10 is imprecise and may lead to uncertainty in a particular case, this is not such a case in my view. The exemption only applies if the public sector body normally provides a particular property or service for no consideration. That simply is not the case here.

[42] This conclusion is sufficient to dispose of these appeals. However, I will briefly comment on the second issue which I believe is also fatal to the appeals.

Issue 2 – Are the appellants or the registrants entitled to the rebate?

[43] The appellants submit that they, rather than the registrants, paid the GST and are entitled to recover amounts remitted in error.

[44] The respondent disagrees with this. Counsel submits that the registrants paid the tax and they are the only ones entitled to recover any overpayment.

[45] The relevant facts may be summarized briefly.

[46] Each of the appellants communicated to prospective registrants, either in brochures or in course registration forms, that the registration fees included GST "where applicable."

[47] In some cases, receipts were subsequently provided to registrants stating that the GST was included. In other cases, registrants were not informed as to whether GST was included or not. In such cases, though, registrants could have asked the school for this information as contemplated by subsection 223(2) of the *Act*. Subsection 223(2) provides:

> 223(2) A person who makes a taxable supply to another person shall, on the request of the other person, forthwith furnish to the other person in writing such particulars of the supply as may be required for the purposes of this Part to substantiate a claim by the other person for an input tax credit or rebate in respect of the supply.

[48] In the usual case under the *Act*, any GST that has been remitted by a vendor has been collected from a purchaser and the purchaser is entitled to apply to the tax authority for a refund if the tax has been paid in error. The vendor is not also entitled to the refund: *West Windsor Urgent Care Centre Inc., supra.*

[49] Counsel for the appellants referred to two decisions of this Court in support of their position. Both decisions were heard under the informal procedure and concluded that tax remitted in error could be recovered by a vendor who had borne the tax: *Simard v. The Queen*, [2006] GSTC 172; *R. Mullen Construction Ltd. v. The Queen,* [1997] GSTC 106.

[50] Counsel also referred to another decision, also under the informal procedure, where the Court addressed this issue in *obiter* and seemed to reach the same conclusion on a tentative basis. In *McDonell v. The Queen,* 2005 TCC 301, [2005] GSTC 134, Bowman C.J. stated:

> [35] I do not think that it is necessary in this case to decide whether there can never be circumstances in which a supplier could successfully assert a claim for a refund of tax under section 261. It is sufficient to say that in my view where a supplier collects an amount as GST from a recipient of a supply in circumstances in which GST was not exigible and remits it to the government (as it must: see *ITA Travel Agency Ltd. v. R* (2000), [2001] G.S.T.C. 5 (T.C.C. [General Procedure])) it is the recipient, not the supplier who is entitled to claim the refund under section 261. I do not intend these reasons to be taken as saying that a supplier can never claim a refund under section 261. At least two situations occur to me where a claim by a supplier might be considered:
>
> (a) where a supplier does not collect GST from a recipient in respect of an exempt or zero-rated supply and then, erroneously, remits from its own funds an amount as GST to the government.
>
> (b) where a supplier collects, rightly or wrongly, GST from a recipient and then by mistake remits to the government more than was collected.
>
> [36] I need not answer the questions raised by these two hypothetical situations but I do not think that for the supplier to be entitled to claim a refund of the amount paid under example (a) or the excess over the amount collected under example (b) does violence to either the scheme of the *Act* or the wording of section 261.

[51] The problem that I have with the appellants' position on this issue is that I am not satisfied that the appellants bore the tax. In my view, the registrants would have a better argument than the appellants that they paid the GST, regardless of whether or not the registrants were informed that the GST was collected.

[52] Moreover, if a vendor is to be entitled to a refund on the basis that it paid the tax, I am of the view that it should be clear that the vendor has not collected the tax from the purchaser. Otherwise, the tax authority is in the difficult position of

interpreting contracts between vendors and purchasers and determining which party is entitled to the GST refund.

[53] Finally, I wish to make a brief comment about *The Queen v. United Parcel Service Canada Ltd.*, 2008 FCA 48, [2008] GSTC 34 where the issue was whether someone other than purchasers were entitled to rebates of GST paid in error. Although the issue in that case is similar to the one in these appeals, the circumstances in *United Parcel Service* are considerably different and I have not found the decision to be of much assistance. At the time of writing, the Supreme Court of Canada recently granted leave to appeal that decision.

Conclusion

[54] For these reasons, the appeals will be dismissed. If the parties are not able to agree on costs, they may file written submissions within three weeks.

Signed at Ottawa, Canada this 25th day of August 2008.

"J. Woods"

Woods J.

CITATION:	2008TCC475
COURT FILE NOS.:	2004-3012(GST)G, 2004-3079(GST)G 2004-3582(GST)G, 2004-3583(GST)G
STYLE OF CAUSE:	School District No. 44 (North Vancouver) v. Her Majesty the Queen, and Toronto District School Board v. Her Majesty the Queen, and School District No. 39 (Vancouver) v. Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
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DATE OF JUDGMENT:	August 25, 2008

APPEARANCES:

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