

Dockets: 2005-2906(GST)G
2005-2908(GST)G

BETWEEN:

DUNDURN STREET LOFFTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

ALEXANDER STREET LOFTS
DEVELOPMENT CORPORATION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 11, 2009 at Hamilton, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellants: Adam Stelmaszynski

Counsel for the Respondent: Gatien Fournier

ORDER

Upon application by the appellants for the following:

- (a) An Order interpreting the relevant provisions of Sections 285, 285(1), 285(16), 327(1)(d), 327(2)(a), 327(2)(b), 327(3), 327(4), 330, and 331 of the Excise Tax Act, Part IX, in a Prosecution by Indictment;
- (b) An Order directing Correction Services Canada to issue travel passes to permit the appellant's officer and director, Stelmaszynski, to travel to Brantford, Welland, St. Catharines and Toronto to interview witnesses, to obtain written materials and to properly prepare the defense of the appellants as per the Order of Justice Valerie Miller dated October, 2008;
- (c) A determination of alleged palpable and over-riding errors, if any, encountered throughout the course of this action; and
- (d) An order vacating the entire amount of the Notices of Re-assessment or in the alternative, an order sending the Notices of Re-assessment to CRA for re-calculation of the correct amounts;

It is ordered:

- 1) the application is dismissed;
- 2) any examinations for discovery shall be completed no later than June 1, 2009;
- 3) undertakings given at examinations for discovery shall be satisfied no later than July 31, 2009;
- 4) the parties shall communicate with the Hearings Coordinator, in writing, on or before August 31, 2009 to advise the Court whether or not the case will settle, whether a pre-hearing conference would be beneficial or whether a hearing date should be set. In the latter event, the parties may file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)*; and
- 5) all parties shall bear their own costs in respect of this application.

Signed at Toronto, Ontario this 25th day of February 2009.

“J. Woods”

Woods J.

Citation: 2009 TCC 122
Date: 20090225
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DEVELOPMENT CORPORATION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] Dundurn Street Loffts Inc. and Alexander Street Lofts Development Inc. have applied to the Court for the following relief:

- (a) An Order interpreting the relevant provisions of Sections 285, 285(1), 285(16), 327(1)(d), 327(2)(a), 327(2)(b), 327(3), 327(4), 330, and 331 of the Excise Tax Act, Part IX, in a Prosecution by Indictment;
- (b) An Order directing Correction Services Canada to issue travel passes to permit the appellant's officer and director, Stelmaszynski, to travel to Brantford, Welland, St. Catharines and Toronto to interview witnesses, to obtain written materials and to properly prepare the defence of the appellants as per the Order of Justice Valerie Miller dated October , 2008;

- (c) A determination of alleged palpable and over-riding errors, if any, encountered throughout the course of this action; and,
- (d) An order vacating the entire amount of the Notices of Re-assessment or in the alternative, an order sending the Notices of Re-assessment to CRA for re-calculation of the correct amounts.

[2] In 2005, the appellants instituted appeals in this Court in respect of assessments made under the *Excise Tax Act*. The assessments, which were issued on December 7, 2000, essentially related to GST refund claims that the Minister alleges were improper.

[3] One week after the assessments were issued, criminal proceedings against the appellants and their shareholder, Adam Stelmaszynski, were instituted in respect of the same refund claims.

[4] All three were eventually convicted in the Ontario Superior Court of Justice. Mr. Stelmaszynski was sentenced to 30 months in jail and fined \$702,646, which was equal to the refunds paid to the appellants.

[5] Mr. Stelmaszynski's conviction and sentence were upheld by the Ontario Court of Appeal and leave to appeal to the Supreme Court of Canada was denied.

[6] In the Court of Appeal, Doherty J.A. stated that it had been accepted at trial that there was no realistic possibility that Mr. Stelmaszynski could pay the fine (*R. v. Alexander Street Lofts Development Corporation Inc. v. R.*, 2007 ONCA 309, at para. 32).

[7] Until the Supreme Court's decision on the leave application, the appeals instituted in this Court were stayed pursuant to s. 327(4) of the *Excise Tax Act*. The appeals were activated again early in 2008.

[8] The material filed by the appellants with this application is over 100 pages long. In it, they request a large number of rulings from the Court.

[9] Some of the rulings requested have nothing to do with the appeals in this Court but involve only the criminal proceedings.

[10] This Court does not have the jurisdiction to make these rulings, and for that reason it is not appropriate for me to comment on them.

[11] At the hearing, Mr. Stelmaszynski submitted that this Court had the appropriate jurisdiction because it had the authority to interpret the *Excise Tax Act*.

[12] The jurisdiction of the Tax Court of Canada is not as broad as this. In general, the jurisdiction is limited to making determinations with respect to assessments.

[13] Some of the relevant statutory provisions are reproduced below.

Tax Court of Canada Act

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.

[Emphasis added.]

Excise Tax Act

309. (1) Disposition of appeal - The Tax Court may dispose of an appeal from an assessment by

- (a) dismissing it; or
- (b) allowing it and
 - (i) vacating the assessment, or
 - (ii) referring the assessment back to the Minister for reconsideration and reassessment.

[14] In hearing appeals from assessments under the *Excise Tax Act*, the Court routinely interprets the statutory provisions of the *Act* in order to determine if the assessments are correct. Generally there is no jurisdiction to interpret the *Excise Tax Act* outside of that context.

[15] This application as it applies to rulings relating only to the criminal proceedings must therefore be dismissed.

[16] Certain other rulings requested would appear to relate to the assessments. Many of these are matters on which this Court could potentially rule prior to trial pursuant to section 58 of the Rules.

[17] In my view, however, it would not be desirable to decide any of these matters at this stage of the litigation process. I am very reluctant to tie the trial judge's hands by making preliminary determinations at this early stage of the proceedings. It would be preferable for these to be considered by the judge who will be hearing the appeals on their merits.

[18] I would comment specifically about one request. The appellants seek an order that directs Correction Services Canada to issue travel passes to Mr. Stelmaszynski in order to prepare his case. I understand that Mr. Stelmaszynski is currently on parole and is subject to travel restrictions.

[19] The appellants are essentially asking this Court to interfere in matters of criminal justice in order to make it easier for their representative to prepare their appeals. It is not appropriate to do so, in my opinion. Further, even if it were appropriate, there is not a sufficient evidentiary foundation for me to conclude that travel passes are necessary in order for Mr. Stelmaszynski to prepare the case.

[20] In light of these conclusions, the application will be dismissed in its entirety.

[21] Finally, I would comment that these appeals have been outstanding for a long period of time. It is therefore desirable for all concerned that this litigation now proceed as efficiently as possible.

[22] To assist with this process, I will include in the order accompanying these reasons deadlines for the remaining pre-trial steps.

[23] As for costs in respect of this application, I have considered the parties' submissions at the hearing, and have concluded that all parties should bear their own costs.

Signed at Toronto, Ontario this 25th day of February 2009.

“J. Woods”

Woods J.

CITATION: 2009 TCC 122

COURT FILE NOs.: 2005-2906(GST)G
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STYLES OF CAUSE: Dundurn Street Loffts Inc. v.
Her Majesty The Queen, and
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Her Majesty The Queen

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: February 11, 2009

REASONS FOR ORDER BY: The Honourable Justice J. Woods

DATE OF ORDER: February 25, 2009

APPEARANCES:

Agent for the Appellants: Adam Stelmaszynski

Counsel for the Respondent: Gatien Fournier

COUNSEL OF RECORD:

For the Appellants:

Name: n/a

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada