

Docket: 2007-2762(GST)G

BETWEEN:

MARITIME-ONTARIO FREIGHT LINES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on December 15, 16, 2008, February 5, 2009  
at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant: David Douglas Robertson  
Paul Casuccio

Counsel for the Respondent: Margaret Nott  
Harry Erlichman

---

**JUDGMENT**

The appeal with respect to an assessment made under the *Excise Tax Act* by notice number 05DP0326327 and dated February 15, 2007 is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that: (1) net tax should be reduced by \$1,792,157.50, and (2) the penalty in the amount of \$71,739 should be vacated.

The appellant is entitled to costs.

Signed at Toronto, Ontario this 18<sup>th</sup> day of September 2009.

“J. M. Woods”

---

Woods J.

BETWEEN:

MARITIME-ONTARIO FREIGHT LINES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Woods J.**

[1] This appeal concerns an assessment issued to Maritime-Ontario Freight Lines Limited (“Maritime-Ontario”) pursuant to the *Excise Tax Act* for the period from June 29, 2003 to June 24, 2006.

[2] The circumstances that led to the assessment involve the failure of Maritime-Ontario to collect goods and services tax (GST) from independent contractors who performed services for it in relation to the transportation of goods. There are two amounts at issue: \$1,792,157 as net tax and \$71,739 as a four percent penalty.

#### **Background**

[3] Maritime-Ontario is a licensed carrier that is engaged in the transportation of general freight and mail. It is based in Brampton, Ontario.

[4] Maritime-Ontario contracts with third-party customers to move goods for consideration, plus GST.

[5] The services of independent contractors (“Contractors”) are often used by Maritime-Ontario to haul goods. The fee that is paid to the Contractors is exempt from GST.

[6] This appeal concerns an option that Contractors were given to use a credit card for fuel supplied by Maritime-Ontario through an arrangement with a fuel supplier.

[7] If a Contractor uses the credit card to purchase fuel, Maritime-Ontario pays the invoice from the fuel supplier and this outlay is effectively reimbursed by the Contractor.

[8] The GST in respect of these fuel purchases is collected by the fuel supplier from Maritime-Ontario, and Maritime-Ontario claims an input tax credit in respect of the expense.

[9] Maritime-Ontario takes the position that it does not need to collect GST from the Contractors in respect of the credit card arrangement because the fuel was being acquired for Maritime-Ontario's own use.

[10] Although it is not directly relevant to the appeal, I would mention that if Maritime-Ontario had collected GST from the Contractors, the Contractors would be entitled to claim input tax credits to fully recoup the GST expense.

[11] The Minister of National Revenue (the "Minister") submits that GST should have been collected from the Contractors on the basis that Maritime-Ontario acquired fuel from the fuel suppliers and resupplied it to the Contractors.

[12] In the assessment at issue, the Minister has included the amount of such GST in the computation of Maritime-Ontario's "net tax."

[13] Although Maritime-Ontario submits that it did not resupply fuel to Contractors, it submits in the alternative that certain provisions of the *Act* deem there not to be a taxable supply to the Contractors in these circumstances. The provisions that are relied on are s. 133 (single supply), s. 136.1 (ongoing services), and Part VII of Schedule VI to the *Act* (interline settlement rules).

[14] In the further alternative, Maritime-Ontario submits that the penalty should be vacated on the basis that due diligence was exercised.

### Analysis

[15] The assessment at issue adjusts the "net tax" of Maritime-Ontario by the amount of GST that the Minister submits should have been collected from the Contractors in respect of fuel purchased with the credit cards.

[16] There is no dispute that the assessment is correct if Maritime-Ontario should have collected GST from the Contractors.

[17] It is useful to refer to the definition of “net tax” in s. 225(1) of the *Act*. The emphasized phrase below makes it clear that “net tax” includes tax that is collectible even if it is not collected. Subsection 225(1) provides:

**225. (1) Net tax** — Subject to this Subdivision, the net tax for a particular reporting period of a person is the positive or negative amount determined by the formula

$$A - B$$

where

A is the total of

(a) all amounts that became collectible and all other amounts collected by the person in the particular reporting period as or on account of tax under Division II, and

(b) all amounts that are required under this Part to be added in determining the net tax of the person for the particular reporting period; and

B is the total of

(a) all amounts each of which is an input tax credit for the particular reporting period or a preceding reporting period of the person claimed by the person in the return under this Division filed by the person for the particular reporting period, and

(b) all amounts each of which is an amount that may be deducted by the person under this Part in determining the net tax of the person for the particular reporting period and that is claimed by the person in the return under this Division filed by the person for the particular reporting period.

[Emphasis added.]

[18] The relevant issue, then, is whether the GST was collectible from the Contractors.

[19] In general, GST is required to be collected on the value of consideration for a taxable supply (s. 221(1), s. 165(1)).

[20] The term “supply” is defined in s. 123(1) of the *Act*. It provides:

“**supply**” means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition

[21] This definition is broad, and it has been held that a transfer of title is not necessary: *Vanex Truck Service Ltd. v. The Queen*, [2001] GSTC 70 (FCA), para. 12.

[22] The issue is whether Maritime-Ontario resupplied fuel to Contractors when the credit cards were used. For this purpose, it is necessary to consider the nature of the relationship between Maritime-Ontario and the Contractors.

[23] I would mention at the outset that neither party argued that Maritime-Ontario purchased fuel as agent for the Contractors. I will therefore assume that the relationship was not one of agency.

[24] I would also mention that this is not the first time that an issue of this type has come before the courts. Counsel referred me to the following other decisions involving transportation companies and independent contractors: *Vanex*, above; *Libra Transport (B.C.) Ltd. v. The Queen*, [2002] GSTC 112 (FCA); *Fedderly Transportation Ltd. v. The Queen*, [2000] GSTC 83 (FCA).

[25] The decisions in each of these cases turned on their facts, and in particular on the nature of the relationship between the transportation company and the contractor.

[26] The facts in *Vanex* are probably closest to those in this appeal. Maritime-Ontario suggests that there are important differences, however. Not only are the contractual terms different, but in *Vanex* the Contractors actually paid the GST to Vanex and Vanex failed to remit it ([1999] GSTC 101 (TCC), para. 209).

[27] I now turn to the facts of this case. I will begin by describing the background that led to the arrangement that Maritime-Ontario had with the Contractors.

[28] When the GST initially came into force in the early 1990s, Maritime-Ontario sought advice from Ernst & Young as to how it should handle its obligations under the *Act*.

[29] Based on this advice, Maritime-Ontario decided to alter the agreements that it had with Contractors so that it, and not the Contractors, would pay the GST on fuel purchased with these credit cards.

[30] Unfortunately, the standard form agreement that was used to effect this result appears to have been rather badly drafted. There are a number of internal

inconsistencies in the document and the nature of the relationship between Maritime-Ontario and the Contractors is not clearly set out.

[31] Nevertheless, it appears that it was intended that the fuel purchased with credit cards be purchased by Maritime-Ontario on its own behalf and not on behalf of the Contractors. The plan was that the Contractors would not have to pay GST because they were not acquiring the fuel.

[32] The reason for adopting such an arrangement, according to Doug Munro, the president of Maritime-Ontario, was to minimize GST cash flow difficulties for Maritime-Ontario and its small business Contractors. It was a matter of timing differences in reference to a large expenditure. The arrangement did not affect the amount of tax that would ultimately be collected after input tax credits were taken into account.

[33] The essential question in this appeal is whether the plan as conceived by Maritime-Ontario was legally effective.

[34] This turns on whether the plan was properly effected by the standard form agreement that governed the relationship.

[35] It is useful to set out some of the relevant terms from one of the agreements that was entered into evidence<sup>1</sup> (Ex. A-1, Tab 1):

WHEREAS Independent Contractor is the owner of the vehicle more particularly described in Schedule "A" annexed hereto, and forming part hereof, and the Independent Contractor desires to contract with M-O for use of such vehicle on terms and conditions as hereinafter set forth;

...  
AND WHEREAS M-O desires to use and operate the motor vehicle equipment with the Independent Contractor, [...]

...  
1. **Use and Description**

The Independent Contractor hereby contracts for service the vehicle, for operation in M-O's motor carrier pool. Particulars of said vehicle are set forth in Schedule "A" hereto attached, and by this reference made a part hereof, as the same may be from time to time, supplemented by way of deletions or additions thereto.

...  
3. **Payment**

- 3.1 As payment for the contract for services to be rendered hereunder, M-O agrees to pay the Independent Contractor, the amounts agreed upon and set forth in Schedule "B" hereto attached and by this reference made part hereof, or as may from time to time be supplemented by the parties hereto via supplement to Schedule "B".

5. **Independent Contractor Equipment**

Independent Contractor shall furnish to M-O the equipment described in Schedule "A" and all necessary labour to perform this contract for service, including loading and unloading. [...]

16. **Other Expenses**

- 16.1 Independent Contractor agrees to bear all expenses not otherwise provided for in this Agreement, including, but not limited to cost of maintenance, fuel, tires, repairs, wages of third parties, fuel taxes, empty mileage, permits of all types, tolls, base plates and licenses and any unused portions of such items. Independent Contractor also agrees to pay those deductions set forth in Schedule "B".

[36] It is clear that this agreement was drafted with the intention of implementing the GST planning proposed by Ernst & Young.

[37] The recitals to the agreement state an intention that Maritime-Ontario will operate the Contractor's vehicle with the Contractor. Section 5 is consistent with this because it provides that the Contractor will furnish equipment, meaning the vehicle, to Maritime-Ontario.

[38] The intended nature of the relationship is not set out in the agreement nearly as clearly as it should have been. Nevertheless, it appears that Maritime-Ontario intended either to assume responsibility for the use of the vehicle, with driving services being provided by the Contractors, or it was intended that there be a joint venture. The latter characterization seems to more closely reflect reality.

[39] As for expenses, the agreement seems to contemplate that expenses could be incurred by either party, and that they would be incurred on that party's own behalf unless the agreement provided otherwise for a particular expense.

[40] Further, the agreement provides that many expenses incurred by Maritime-Ontario would effectively be reimbursed by the Contractors. This included the cost of fuel purchased with the credit cards.

[41] In general, the mechanism that was employed to achieve this “reimbursement” was a reduction in the fees that were payable to the Contractors for their services. The fee is provided for in section 3.1 and the adjustment for expenses is detailed in a formula set out in Schedule B to the agreement.

[42] Counsel for the Minister points to section 16.1 as being inconsistent with the appellant’s position. It provides that Contractors “bear” the expense of fuel and also that the Contractors will “pay” the deductions set out in Schedule B.

[43] The wording of section 16.1 muddies the waters, but I do not think that the section is inconsistent with the fee scheme contemplated by section 3.1. The term “bear” is broad enough to encompass an effective reimbursement through a reduction in a fee. The use of the phrase “pay the deductions” appears to be bad drafting but the intent is clear. The mechanism employed with respect to fuel paid for by Maritime-Ontario is a deduction in the fee.

[44] I would conclude that the agreement as a whole is consistent with the intent that fuel paid for by Maritime-Ontario is acquired on its own behalf.

[45] Notwithstanding obvious drafting deficiencies with the agreement, I am of the view that its terms are clear enough to achieve Maritime-Ontario’s intent.

[46] I suspect that an expert in commercial law could come up with arguments to support the view that the fuel in this case was acquired by the Contractors. In my view, however, an overly-technical approach would not be appropriate in these circumstances.

[47] The objective of the arrangement was a modest one – to avoid the mismatching of payments and credits under the *Act*. It was believed that the arrangement would be for the benefit of both Maritime-Ontario and the Contractors.

[48] Before concluding, I would mention that a concern was raised at the hearing about tax leakage. Apparently one of the Contractors had been audited by the Minister and it was determined that he had claimed input tax credits with respect to the GST paid by Maritime-Ontario.

[49] I can appreciate the Minister’s concern in this regard, especially since the agreement is not well drafted. I would also note that Maritime-Ontario in a sense



facilitated the claim by the Contractor by providing to him information as to the amount of GST that Maritime-Ontario had paid.

[50] Nevertheless, I do not think that this is a sufficient basis to find that GST was collectible from the Contractors. Notwithstanding that the Minister determined that at least one Contractor claimed input tax credits, the Contractors had no reasonable basis to do so. The intent of the agreement is relatively clear, and the pay summaries provided to the Contractors by Maritime-Ontario clearly showed that the Contractors were not paying GST.

### Conclusion

[51] In light of this conclusion, it is not necessary for me to consider any of the other arguments raised by counsel for the appellant.

[52] The appeal will be allowed, and the assessment will be referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that net tax should be reduced by \$1,792,157.50, and the penalty of \$71,739 should be vacated.

[53] Maritime-Ontario is entitled to costs.

Signed at Toronto, Ontario this 18<sup>th</sup> day of September 2009.

“J. M. Woods”

---

Woods J.

---

<sup>1</sup> I would mention that this agreement is quite different from an agreement entered into evidence by the Minister (Ex. R-1, Tab 17). The agreement introduced by the Minister pre-dates the enactment of the GST.

CITATION: 2009 TCC 474

COURT FILE NO.: 2007-2762(GST)G

STYLE OF CAUSE: Maritime-Ontario Freight Lines  
Limited and Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: December 15, 16, 2008, February 5,  
2009

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: September 18, 2009

APPEARANCES:

Counsel for the Appellant: David Douglas Robertson  
Paul Casuccio

Counsel for the Respondent: Margaret Nott  
Harry Erlichman

COUNSEL OF RECORD:

For the Appellant:

Name: David Douglas Robertson

Firm: Fasken Martineau DuMoulin LLP  
Toronto, Ontario

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