

Docket: 2009-3640(GST)I

BETWEEN:

A OK PAYDAY LOANS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on August 18, 2010, at Victoria, British Columbia

By: The Honourable Justice Brent Paris

Appearances:

Agent for the Appellant: Charlotte Rosene

Counsel for the Respondent: Whitney Dunn

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**JUDGMENT**

The appeal from an assessment made under the *Excise Tax Act*, notice of which is dated April 15, 2008 is dismissed.

Signed at Ottawa, Canada, this 14th day of September, 2010.

“Brent Paris”

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Paris J.

Citation: 2010 TCC 469  
Date: 20100914  
Docket: 2009-3640(GST)I

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Appellant,

and

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Respondent.

### **REASONS FOR JUDGMENT**

#### **Paris, J.**

[1] This is an appeal from an assessment by which the Minister of National Revenue denied the Appellant's claim under subsection 261(1) of the *Excise Tax Act* for a rebate in respect of GST of \$90,200.32 paid in error. Subsection 261(1) reads as follows:

261(1) Where a person has paid an amount

- (a) as or on account of, or
- (b) that was taken into account as,

tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.

[2] The Minister accepted that the Appellant had paid GST in error but rejected the application for the rebate on the basis that it was made beyond the time limit set out in subsection 261(3) of the *Act*. Subsection 261(3) reads as follows:

261(3) A rebate in respect of an amount shall not be paid under subsection (1) to a person unless the person files an application for the rebate within two years after the day the amount was paid or remitted by the person.

[3] The facts in this case are not in dispute. The Appellant is in the business of making short-term loans. It became a registrant under the *Act* in 1998 and filed quarterly GST returns. The services provided by the Appellant were exempt from GST, but the Appellant mistakenly remitted GST on the fees it received. It did not collect GST from its customers, but remitted it out of the fees collected.

[4] In June 2007, the Appellant became aware that its services were exempt from GST and received a ruling to that effect from the Minister in August 2007.

[5] On August 27, 2007, the Appellant applied for a rebate of the GST paid in error for the periods between April 1, 2005 and June 30, 2007 (the Later Period). The president of the Appellant, Ms. Charlene Rosene, testified that she had been told by a Canada Revenue Agency (CRA) official that she should apply for a rebate for the Later Period only, because of the limitation in subsection 261(3).

[6] The Minister granted a rebate of \$17,809.56 for the Later Period in January 2008.

[7] In February 2008, the Appellant applied for a rebate of the GST of \$90,200.32 paid in error for the periods between December 17, 1998 and March 31, 2005 (the Earlier Period).

[8] By Notice of Assessment dated April 15, 2008, the Minister refused the application because it was made beyond two years from the time the payments were made in the Earlier Period. The Appellant objected to the assessment, and the assessment was confirmed by the Minister on April 27, 2009. This appeal was filed on November 18, 2009.

[9] The Respondent admits that the Appellant paid GST of \$90,200.32 in error for the Earlier Period but says that subsection 261(3) prevents a rebate from being paid.

[10] The Appellant admits that the rebate application for the Earlier Period was made more than two years from the time any of the erroneous GST payments were made in the Earlier Period, but says that it is entitled to a repayment of the GST by virtue of subsections 296(2.1) and 296(3.1) of the *Act*. Subsection 296(2.1) requires that the Minister, when assessing net tax for a reporting period or assessing for an amount due under Part IX of the *Act*, to take into account a rebate to which a person is entitled under Part IX but which has not yet been claimed by the person, and to apply the amount of the rebate against net tax or against the amount owing. Paragraph 296(2.1)(c) provides that the Minister shall apply the amount of the rebate against the net tax or amount owing even if the period for applying for the rebate has expired. Subsection 296(2.1) reads:

296(2.1) Where, in assessing the net tax of a person for a reporting period of the person or an amount (in this subsection referred to as the “overdue amount”) that became payable by a person under this Part, the Minister determines that

- (a) an amount (in this subsection referred to as the “allowable rebate”) would have been payable to the person as a rebate if it had been claimed in an application under this Part filed on the particular day that is
  - (i) if the assessment is in respect of net tax for the reporting period, the day on or before which the return under division V for the period was required to be filed, or
  - (ii) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,

and, where the rebate is in respect of an amount that is being assessed, if the person had paid or remitted that amount,

- (b) the allowable rebate was not claimed by the person in an application filed before the day notice of the assessment is sent to the person or was so claimed but was disallowed by the Minister, and,
- (c) the allowable rebate would be payable to the person if it were claimed in an application under this Part filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that application only because

the period for claiming the allowable rebate expired before that day,

the Minister shall apply all or part of the allowable rebate against that net tax or overdue amount as if the person had, on the particular day, paid or remitted the amount so applied on account of that net tax or overdue amount.

[11] The Appellant relies on the decision of the Supreme Court of Canada in *United Parcel Service Canada Ltd. v. Canada*,<sup>1</sup> where the Court confirmed that a person who has paid GST in error has the option of claiming a rebate under subsection 261(1) or of offsetting the rebate against net tax owing by it for a reporting period. In the latter case, the expiry of the time limit in subsection 261(3) is not a bar to offsetting the GST paid in error against net tax. The same conclusion had been reached in two earlier cases decided by this Court: *Peach Hill Management Ltd. v. Canada*<sup>2</sup> and *SAS Restaurants Ltd. v. Canada*<sup>3</sup>.

[12] In addition, the Appellant says that by taking into account the rebate to which it was entitled, the resulting net tax of the Appellant for the Earlier Period would be negative in the amount of \$90,200.32 and that this would be refundable under paragraph 296(3.1)(c). Subsection 296(3.1) sets out the order in which the rebate is applied against net tax or overdue amounts, and provides for a refund of any remaining amount of the rebate, plus interest. Subsection 296(3.1) reads:

296(3.1) If, in assessing the net tax of a person for a particular reporting period of the person or an amount (in this subsection referred to as the “overdue amount”) that became payable by a person under this Part, all or part of an allowable rebate referred to in subsection (2.1) is not applied under that subsection against that net tax or overdue amount, except where the assessment is made in the circumstances described in paragraph 298(4)(a) or (b) after the time otherwise limited for the assessment by paragraph 298(1)(a), the Minister shall

(a) apply

(i) all or part of the allowable rebate that was not applied under subsection (2.1)

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<sup>1</sup> 2009 SCC 20.

<sup>2</sup> [1999] G.S.T.C. 11.

<sup>3</sup> 2005 TCC 649, [2005] G.S.T.C. 159.

against

- (ii) any other amount (in this paragraph referred to as the “outstanding amount”) that, on or before the particular day that is
  - (A) if the assessment is in respect of net tax for the particular reporting period, the day on or before which the return under Division V for the particular period was required to be filed, or
  - (B) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,

the person defaulted in paying or remitting under this Part and that remains unpaid or unremitted on the day notice of the assessment is sent to the person, as if the person had, on the particular day, paid or remitted the amount so applied on account of the outstanding amount;

(b) apply

- (i) all or part of the allowable rebate that was not applied under subsection (2.1) or paragraph (a) together with interest at the prescribed rate on all or that part of the allowable rebate, computed for the period beginning on the day that is 30 days after the later of
  - (A) the particular day, and
  - (B) where the assessment is in respect of net tax for the particular reporting period, the day on which the return for the particular reporting period was filed,

and ending on the day on which the person defaulted in paying or remitting the outstanding amount referred to in subparagraph (ii)

against

- (ii) any amount (in this paragraph referred to as the “outstanding amount”) that, on a day (in this paragraph referred to as the “later day”) after the particular day, the person defaulted in paying or remitting under this Part and that remains unpaid or unremitted on the day notice of the assessment is sent to the person,

as if the person had, on the later day, paid the amount and interest so applied on account of the outstanding amount; and

- (c) refund to the person that part of the allowable rebate that was not applied under any of subsection (2.1) and paragraphs (a) and (b) together with interest at the prescribed rate on that part of the allowable rebate, computed for the period beginning on the day that is 30 days after the later of
  - (i) the particular day, and
  - (ii) where the assessment is in respect of net tax for the particular reporting period, the day on which the return for the particular period was filed,

and ending on the day the refund is paid to the person.

[13] Counsel for the Respondent submitted that subsection 296(2.1) is not applicable in this case because the assessment under appeal is an assessment of the Appellant's rebate application and not an assessment of net tax for a reporting period of the Appellant or for any amount owing under Part IX. An assessment of a rebate application is made under subsection 297(1) of the *Act* whereas an assessment of net tax is made under paragraph 296(1)(a). Therefore, counsel argued, the only issue before the Court is whether the Appellant's rebate application met the conditions set out in section 261.

[14] I agree with counsel for the Respondent that subsection 296(2.1) can have no application in this case. That provision requires the Minister to take into account an allowable rebate "in assessing the net tax of a person for a reporting period of the person or an amount ... that became payable by a person under Part IX of the *Act* ...".

[15] An assessment of net tax is normally made under paragraph 296(1)(a) of the *Act*. That paragraph reads:

296(1) The Minister may assess

- (a) the net tax of a person under Division V for a reporting period of the person,

The assessment under appeal does not deal with net tax of the Appellant for a reporting period or with an amount payable by the Appellant under Part IX. Rather, it was made under subsection 297(1) of the *Act* which requires the Minister to consider

an application for a rebate and to assess the amount of the rebate, if any. Subsection 297(1) reads:

297(1) On receipt of an application made by a person for a rebate under section 215.1 or Division VI, the Minister shall, with all due dispatch, consider the application and assess the amount of the rebate, if any, payable to the person.<sup>4</sup>

[16] The heading on the notice of assessment in issue reads:

Notice of (Re) Assessment  
Goods and Services Tax (Harmonized Sales Tax (GST/HST))  
Rebate Application

and the body of the notice reads:

This notice explains the results of our (re) assessment of the GST/HST rebate application(s) received February 25, 2008.

The notice does not include any reference to net tax of the Appellant for a reporting period or to an amount owing under Part IX of the *Act*.

[17] Finally, although there was no evidence of when the Appellant was last assessed or reassessed net tax for any of the periods in which it mistakenly paid the GST, Ms. Rosene confirmed that the Appellant had not objected to any of those assessments.

[18] The decision of the Supreme Court in *United Parcel Service Canada Ltd.* does not assist the Appellant. It is distinguishable on the basis that the assessments in dispute there were assessments of net tax. In filing its GST returns for the reporting periods covered by the assessments, the Appellant had claimed an input tax credit for the GST paid in error. The Appellants in the *Peach Hill Management Ltd.* and *SAS Restaurants Ltd.* had done likewise, and their appeals were also from assessments of net tax.

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<sup>4</sup> Subsection 261(1) which provides for rebates of GST paid in error is found in Division VI of the *Act*.



[19] In my view, on an appeal from a reassessment under subsection 297(1) of an application for a rebate, this Court may only consider whether the Minister's decision concerning the rebate was correct, and whether the conditions for obtaining the rebate set in section 261 of the *Act* have been met. Given that, by the Appellant's own admission, the application for the rebate was beyond the time limit set out in subsection 261(3), it is clear that the Minister's refusal to grant the rebate was correct, and the appeal must be dismissed.

Signed at Ottawa, Canada, this 14th day of September, 2010.

“Brent Paris”

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Paris J.

CITATION: 2010 TCC 469

COURT FILE NO.: 2009-3640(GST)I

STYLE OF CAUSE: A OK PAYDAY LOANS INC. and  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Victoria, British Columbia

DATE OF HEARING: August 18, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Brent Paris

DATE OF JUDGMENT: September 14, 2010

APPEARANCES:

Agent for the Appellant: Charlotte Rosene  
Counsel for the Respondent: Whitney Dunn

COUNSEL OF RECORD:

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Name: N/A

Firm: N/A

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