Docket: 2016-3319(GST)G

BETWEEN:

MONTECRISTO JEWELLERS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on May 8 and 9, 2018, at Toronto, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Neil E. Bass and Angelo Gentile |
| Counsel for the Respondent: | Frédéric Morand and<br>Cédric Renaud-Lafrance |

---

## JUDGMENT

The appeal from reassessments made under Part IX of the *Excise Tax Act*, for the reporting periods from April 1, 2010 to March 31, 2013, is allowed, in part, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment to the extent only of the concession made by the respondent that the amount totalling $19,020 pertain to goods that were delivered outside of Canada and are not subject to GST/HST. In all other respects, the appeal is dismissed.

Costs are awarded to the respondent. The respondent has 30 days from the date of the Judgment to either secure the appellant's agreement on costs or to make written submissions.

Signed at Ottawa, Canada, this 31st day of January 2019.

"K. Lyons"

Lyons J.

Citation: 2019 TCC 31
Date: 20190131
Docket: 2016-3319(GST)G

BETWEEN:

MONTECRISTO JEWELLERS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Lyons J.

[1] Montecristo Jewellers Inc., the appellant ("the appellant"), appeals from reassessments made by the Minister of National Revenue ("the Minister") under the *Excise Tax Act* ("*ETA*") for the monthly reporting periods from April 1, 2010 to March 31, 2013 (collectively the "Relevant Period").[1]

[2] The appellant sold luxury jewellery and watches at its three retail locations in Vancouver, British Columbia to Canadian and non-resident retail customers. Some customers purchased and paid for jewellery and/or watches (collectively the "Jewellery") at one of the locations and the appellant retained physical possession of the Jewellery until the day the customer was to depart from Canada by air ("Customer"). Once the Customer obtained a boarding pass, a senior sales employee of the appellant ("Staff") went to the Vancouver International Airport with a partially completed customs form and the Jewellery to meet the Customer before they proceeded to the customs office. A customs officer then reviewed the form to ensure the description on it matched the Jewellery. If acceptable, the officer completed the form and then signed and stamped it and provided a copy to the appellant. After that, the Customer obtained the Jewellery either before or after the security gate.

[3] The Minister determined that the Jewellery sold by the appellant to its Customers were "delivered or made available in Canada" pursuant to paragraph 142(1)(a) of the *ETA,* nor were these zero-rated supplies pursuant to section 12 of Part V of Schedule VI of the *ETA.* Consequently, the Minister reassessed Goods and Services Tax and Harmonized Sales Tax (collectively "GST") in the amount of $2,298,898.13 allocable to the Jewellery sold in the Relevant Period.[2]

[4] During the hearing, the respondent conceded the amount of GST totalling $19,020 involved goods that were delivered outside Canada and are not subject to GST.[3]

[5] The appellant asserts that using such procedure, supplies of Jewellery sold were either shipped to destinations outside Canada specified in the contracts for carriage, thus zero-rated exports within the meaning of paragraph 12(a) of Part V of Schedule VI. Alternatively, the supplies were "delivered or made available outside Canada" within the meaning of paragraph 142(2)(a) of the *ETA.* Consequently, the appellant was not required to collect and remit GST.

[6] All references to provisions that follow are to the *ETA* unless otherwise stated.

I. Facts

[7] Pasquale Cusano and Huan (Jean) Chen, senior Staff since 2005, testified on behalf of the appellant. Tracy Thornton, Ronald Baldasso and Joda Green Barlow testified on behalf of the respondent. All witnesses were credible and were called for additional context and clarification.

[8] In 1967, Mr. Cusano immigrated to Canada. Later he worked with a watchmaker and also learned how to make jewellery. In 1978, he established the appellant. Initially, it sold items such as baptismal medals and some watches to the European community. Subsequently, a niche market developed in high-end luxury brands of jewellery and a dozen high-end watch brands; it became the exclusive distributor of such watches in and around Vancouver.[4] An important feature of its business is to provide its clientele with the full scope of quality service as one of the top jewellery companies in North America.

[9] Most of its loyal clientele are members of the Chinese community who live in and around Vancouver and have extensive businesses and/or family ties in China and visit four times annually. It is customary in its clients' culture to bring gifts to China. Over the last five to ten years, the larger purchases made by its clientele mostly consist of watches (with 1,000 to 1,500 sold annually ranging from $30,000 to $1 million each) as the "big ticket" items and Japanese Mikimoto pearls sold to savvy clientele. When the Customer purchased a watch from the appellant, the Customer knew it and its parts were authentic. Clientele not only asked for a discount but questioned the tax treatment having travelled in jurisdictions where value added tax does not apply to exports.[5]

[10] Because of possible tampering, Customers did not want to send the Jewellery by a third party carrier or courier. The appellant's customs broker's solution was to obtain the stamped form, as part of a procedure, to serve as proof of export that the goods left Canada tax free. The procedure was only engaged at the Customer's request and if the Customer was also flying from Canada. Where a customer insisted taking possession of goods after purchasing in-store, GST was charged even if they were departing from Canada.

[11] In the Partial Agreed Statement of Facts ("PASF"), the parties agreed as follows:

> ***Background: The Appellant and the Business***
>
> 1. The Appellant is a corporation resident in Canada and is registered for goods and services tax/harmonized sales tax (**"GST/HST"**) under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the **"ETA"**).
>
> 2. The Appellant's head office address is 3055 Kingsway, Vancouver, British Columbia, V5R 5J8.
>
> 3. The Appellant has a monthly GST/HST reporting period.
>
> 4. At all material times, Mr. Pasquale Cusano controlled the Appellant.
>
> 5. Throughout the period April 1, 2010 through March 31, 2013 (the **"Relevant Period"**), the Appellant sold high-end, brand name, luxury jewellery and watches and other custom-designed jewellery (the **"Jewellery"**) from three retail locations in British Columbia to both Canadian and non-resident retail customers (the **"Business"**).

***Sales to Departing Customers***

6. In carrying on the Business throughout the Relevant Period, the Appellant charged GST/HST on the sale of Jewellery to both Canadian and non-resident retail customers that acquired physical possession of the Jewellery at one of its retail locations in Canada.

7. In circumstances where a customer notified the Appellant at the time of purchase that he or she would be departing Canada by air and wished to have the Jewellery delivered or made available outside Canada (such customers will be referred to as **"Departing Customers"**), the Appellant followed the following procedures (such sales will be referred to as the **"Export Sales"**, and the following procedure will be referred to as the **"Export Sales Procedure"**):

   (a) The Appellant generated a hand-written invoice for the sale and took note of the Departing Customer's flight departure information on the sales invoice for the Jewellery;

   (b) The Appellant charged the Departing Customer the applicable purchase price for the Jewellery, but did not charge GST/HST;

   (c) The Appellant did not hand over possession of the Jewellery to the Departing Customer at the retail location;

   (d) Rather, the Appellant retained physical possession of the Jewellery after the Departing Customer paid for the Jewellery and agreed to meet the Departing Customer at the Canada Border Services Agency ("CBSA") front office at Vancouver International Airport ("VIA") prior to the Departing Customer's scheduled flight time;

   (e) Prior to attending the CBSA front office at VIA with the Jewellery, an employee of the Appellant prepared fields 1 through 12 of CBSA Form E15, *Certificate of Destruction/Exportation* in respect of the Jewellery (the **"Form E15");**

   (f) The Appellant was listed as the "Applicant" on each Form E15, and the Appellant's name and business number was entered in Field 1 of each Form E15;

   (g) An employee of the Appellant physically attended at the CBSA front office at VIA with the Jewellery, the invoice and the partially-completed Form E15 and met the Departing Customer at that location;

(h) Both the employee of the Appellant (who still retained the Jewellery) and the Departing Customer attended at the CBSA front office at VIA and presented themselves before a CBSA Officer for examination;

(i) The employee of the Appellant provided the Jewellery and the partially-completed Form E15 to the CBSA Officer for inspection;

(j) The CBSA Officer reviewed the Departing Customer's passport and boarding pass and asked questions (if any) in respect of the request for certification of export of the Jewellery;

(k) If satisfied with the inspection of the Jewellery and the responses to any questions, the CBSA Officer completed the balance of Form E15, stamped the Form E15 and provided a copy of the Form E15 to the employee of the Appellant;

(l) The Appellant maintained the copy of Form E15 as certification of export of the Jewellery from Canada;

(m) In some instances, the CBSA Officer handed over the Jewellery to the Departing Customer after he or she cleared airport security (e.g., at the boarding gate);

(n) In other instances, when the CBSA lacked the staff to walk over the Jewellery to the Departing Customer past airport security, the CBSA Officer handed over the Jewellery at the CBSA front office before the Departing Customer cleared airport security;

(o) In all cases, prior to the CBSA Officer handing over the Jewellery, the Departing Customer had checked in for his/her flight, had a boarding pass and passport and was scheduled to imminently depart from Canada by air.

8. Copies of representative sample invoices and Forms E15 (and, where available, redacted copies of passports and boarding passes) are included at Tabs 1 through 21 of the Agreed Book of Documents.

9. For GST/HST purposes, the Appellant treated sales of Jewellery made to Departing Customers using the Export Sales Procedure as sales made outside of Canada or, in the alternative, as zero-rated exports pursuant to section 12 of Part V of Schedule VI of the ETA.

10. Throughout the Relevant Period, the Appellant did not charge or collect GST/HST in respect of the Export Sales, and the Appellant kept the sales invoices and the Forms E15 in respect of all such sales.

11. All of the Jewellery sold to Departing Customers using the Export Sales Procedure left Canada on the flight indicated on the Departing Customer's boarding pass.

***The Audit and Assessments***

12. The Minister of National Revenue (the **"Minister")** conducted an audit of the Appellant for the Relevant Period.

13. By Notices of Assessment dated December 4, 2013 (the **"Original Assessments"),** the Minister reassessed the Appellant on the basis that the Export Sales throughout the Relevant Period were subject to GST/HST totaling $2,298,891.13.

14. The Appellant objected to the Minister's Original Assessments.

15. By letter dated May 18, 2016 (the "**Confirmation**") and Notices of Reassessment dated May 18, 2016 (the "**Revised Assessments**"), copies of which are included at Tabs 22 through 25 of the Agreed Book of Documents, the Minister confirmed its assessment of GST/HST in respect of the Export Sales, which is broken down as follows:

    (a) For the period 2010-04-01 through 2011-03-31: $217,831.76;

    (b) For the period 2011-04-01 through 2012-03-31: $799,302.71; and

    (c) For the period 2012-04-01 through 2013-03-31: $1,281,756.46.

[12] In these reasons, I will refer to the Export Sales Procedure as the "Procedure", the Export Sales as the "Jewellery sales" or "Jewellery sold", Form E15 as the "Form", the Departing Customers as the "Customers" and the CBSA front office located on the ground level of the VIA as the "CBSAO".

[13] Mr. Cusano confirmed the Procedure, set out at paragraph 7 of the PASF, was implemented, followed and he had explained it to all senior Staff. Typically, the Staff whom sold the Jewellery made the arrangements to meet the Customer at VIA a few hours before their flight departed and attended at the CBSAO and used the Procedure. There were 200 to 300 sales annually using the Procedure; Staff were not paid commissions. Ms. Chen alone met in excess of 100 customers at the CBSAO over her career and said the Jewellery sold are permanent exports. Ms. Chen viewed the Procedure as an inconvenience as it required her to attend VIA.

*Invoicing*

[14] Information was obtained from the Customer at the appellant's store as to the departure date, time and number of the flight. Mr. Cusano also said the handwritten sales invoice ("invoice") is dated, shows the Customer's contact information, serial number of the item, the price and how the merchandise is to be sent. The Jewellery remained at the store. This was largely corroborated by Ms. Chen. She elaborated that when a sale was consummated, payment was made before exportation and the cheque, invoice and boarding pass were placed in the Customer's file.

*Form E15*

[15] The Form and the parts of it that were completed by Staff were identified by Mr. Cusano as well as the actual Forms used as part of the Procedure.[6] In re-examination, he confirmed that box 4(b) of the Forms at Tabs 1, 2, 3, 5 and 6 to 9 inclusive, involving the duty deferral program, were not checked off but were in other tabs; he was unfamiliar as to the purpose of that box. Ms. Chen only filled out boxes 8, 9, 11 and 12 of the Form and she said the CBSA Officer checked box 4; her testimony contradicts paragraph 7(e) of the PASF.

*CBSAO*

[16] After the Customer had checked in and obtained a boarding pass, Staff met the Customer at VIA and took a copy of the boarding pass. Mr. Cusano said the Form, invoice and travel documentation were presented to the CBSA Officer who inspected the Jewellery, signed and stamped the Form, retained the original Form and provided a copy of it to Staff. The Officer then either handed the Jewellery to the Customer at the CBSAO or provided it after security clearance. At no time, did the CBSAO inform him or Ms. Chen that utilizing the Form was inappropriate or told them to stop. Unless a customs officer stamped the Form, Mr. Cusano said the sale would not be concluded. The appellant stopped using the Procedure in 2017.

[17] The CBSA Officer never gave the Jewellery back to Ms. Chen after the Form was stamped. Sometimes the Officer , such as Ronald Baldasso, would take the Jewellery and escort the Customers inside the security gate, in other instances the Jewellery was given to the Customer at the CBSAO and the Officer said "ready to go". Occasionally, when the Officer refused to stamp the Form, Customers became upset and Staff angry as Staff had to return to the store with the goods. There may have been three instances involving Ms. Chen where the Officer refused to stamp the Form.

[18] When Ronald Baldasso, an experienced CBSA Officer, was presented with Jewellery, Staff accompanied the Customer travelling.[7] He said left the Jewellery on the counter, compared it to the description in the documentation, looked at the Customer's identification and completed the remaining boxes before signing and stamping the Form then photocopied documentation.[8] The stamped Form was given back to Staff and the invoice and identification were returned to the Customer. Staff sometimes took the Jewellery and exited the CBSAO with the Customer and they walked with him to security where the Customer would go through security with the Jewellery or he sometimes took Jewellery past security and handed it to the Customer. There were no instances where he was concerned as to whether goods did not leave Canada and the Form was not stamped. If a Customer returned through security, he confirmed the customer was required to return through Canadian customs, declare the jewellery and pay the applicable duties and taxes.

*Export regime*

[19] Joda Green Barlow, a CBSA criminal investigator and a liaison officer in 2012 to 2014, is primarily responsible for examining cases involving potential fraud under the *Customs Act*, RSC 1985, c.1 (2nd supp.) and testified about her involvement and certain features of the export regime. The *Customs Act* is not a taxing statute but authorizes the CBSA to administer and enforce the collection of duties under tariffs and taxes imposed under separate taxing legislation but is not authorized with respect to taxes imposed under Part IX of the *ETA*.[9]

[20] She became aware of Staff and Customers bringing in the Forms for verification at the CBSAO. Her concerns were: Customers who initially identified themselves as non-residents, were "permanent residents" and were taking goods out when travelling with the Form, invoice and boarding pass (she later checked to see if the tax-free goods re-entered Canada upon the Customers' return); whether goods were actually being exported by the Customers; and as the applicant on the Form, the appellant could apply for refunds/drawbacks of duties already paid.[10] For enforcement of *Customs Act* purposes, she obtained information to see if duty refunds were sought by the appellant on imported goods and ultimately concluded there was no contravention of the *Customs Act*.[11]

[21] Under the *Customs Act*, all goods being exported are required to be reported to the CBSA by submitting an "Export Declaration" unless these are "Restricted Goods", "Special Goods" or fall within the "Exceptions to Reporting by the Exporter" category.[12] Ms. Green Barlow identified CBSA's Memorandum D20-1-1

–Exporter Reporting ("Memorandum D20-1-1") which outlines export procedures plus goods that do not need to be reported on an Export Declaration.[13] She explained if the traveller is not bringing the goods back to Canada, these are exported and the Form could be completed. A temporary export was described by her as a plan to bring the goods back into Canada and is usually covered by Form Y38.

[22] Some doubt and debate surfaced during the hearing as to whether the appellant should have completed the Form as the exporter. Ms. Green Barlow was unaware if the term "Exporter" is defined in the *Customs Act* and said the applicant is usually the exporter or could be the owner of the goods; she then noted that the instructions for the completion of the Form in Appendix B of Memorandum D20-1-4, states the "importer/exporter or his agent" (sometimes a broker) is responsible for completion of the Form. In this instance, she said the Customer would be the applicant/exporter. An "Exporter" of goods exported is defined under the *Reporting of Exported Goods Regulations*, SOR/2005-23, as the holder of a business number for the purposes of the *Customs Act* who exports/causes commercial goods to be exported but is not the person involved in the transportation arrangements (such as carriers or customs service providers).

*Proof of Export*

[23] CBSA'S Memorandum D20-1-4 Proof of Export, Canadian Ownership, and Destruction of Commercial Goods ("Memorandum D20-1-4") explains options to businesses required to prove for customs purposes either that goods entering Canada are of Canadian origin, or that temporarily imported goods have been exported or destroyed.[14] A claim for relief of duty and/or excise taxes or drawbacks of duty already paid ("relief") on goods that originated from Canada, were exported or destroyed is to be substantiated by "Acceptable Documentation" allocable to each type of relief particularized in Appendix A.[15] Appendix A notes the Form might serve as proof depending on the type of relief sought or could be accepted as an alternative where specified documentation is unavailable.[16] Documentation must enable CBSA Officers to verify that goods exported or destroyed were the same as goods temporarily imported or that goods returning to Canada are of Canadian origin.[17] Ms. Green Barlow described applications for such relief as one of three key concepts under the customs regime and testified the Form is mainly used for such duty relief or drawback purposes.[18]

[24] CBSA witnesses described a stamped Form as an identification document used to describe goods for commercial exportation from Canada or for destruction

under CBSA supervision and certified by a CBSA Officer who might ask questions. If the Form was not used for duty relief, it was used merely as proof of export which Mr. Baldasso confirmed was one of the reasons and agreed that Memorandum D20-1-4 states "When no documentation exists to prove export or destruction, the CBSA will examine a shipment prior to its export or destruction and certify the Form." The portion below the black line is completed by the CBSA Officer, whereas the portion above is completed by the applicant/exporter.

[25] After discussion with CBSA colleagues, Mr. Baldasso said it was determined that the Form should have the exporter's name (i.e., the traveller who is taking the goods outside Canada) as the applicant. In cross-examination, he agreed that Appendix B of Memorandum D20-1-4 indicates, with respect to the applicant, that could be "for example, importer of record, owner, exporter or consigner." He was unaware if the determination that the appellant was not the exporter was communicated to the appellant.

[26] Other than knowing that the CBSA collects GST on duties owed, Ms. Green Barlow was unfamiliar with the tax aspect. However, since no tax was charged by the appellant and handwritten invoices were unusual, she referred the matter to her director who in turn notified the Canada Revenue Agency ("CRA").

*Reassessments*

[27] In 2013, the CRA notified the appellant that there would be a GST audit. The audit report described a procedure that the appellant was using to zero-rate part of its sales. The auditor had never asked Mr. Cusano about the Procedure; the auditor was unsure if the Jewellery had left Canada and said the Jewellery sales may or may not be zero-rated.

[28] Tracy Thornton, the GST CRA appeals officer assigned to work on the appellant's objection initially involving 13 issues, agreed she had reviewed the audit report, had initially relied on facts assumed by the auditor and said the issue was unclear as to when goods were given to the Customer and by whom. The Form, she said, was the only document produced, was not acceptable to the CRA for zero-rating purposes under section 12 as the Jewellery must be traced from the port of exit to the destinations and a carrier was absent from the Procedure. She concluded supplies of Jewellery were made in Canada as these were given to Customers at VIA and were not zero-rated supplies under sections 1 nor 12 of Part V of Schedule VI because the appellant did not "ship" the Jewellery.

[29] As it relates to section 1, the CRA's *GST/HST Memorandum 4.5.2: Exports – Tangible Personal Property* ("GST Memorandum") and its *Appendix: Evidence of exportation* lists the Form as acceptable, if accepted by the CRA, as proof of exportation by the recipient for section 1 purposes. Acceptable evidence depends on whether "the shipment of the tangible personal property can be traced from its origin in Canada to the point where it leaves Canada on its way to a foreign destination." Appendix I to these reasons is an excerpt of the Appendix of the GST Memorandum which provides additional information as to evidence satisfactory to the CRA, if accepted, and lists the Form. Satisfactory documentation varies depending on the mode of transportation to export the property and the nature of the property and documentation may include:

> a) sales invoice or purchase contract that identifies the property and the recipient, matched with the respective shipping or delivery instructions on the purchase order;
>
> b) transportation document that describes the delivery service, such as a bill of lading issued by or on behalf of a carrier, which is evidence of a contract of carriage as well as proof of delivery of the property on board a vessel;
>
> c) customs brokers' or freight forwarders' invoice that relates to the exported property;
>
> d) import documentation required by the country to which the property is exported;
>
> e) in the case of motor vehicles, boats, ships, and aircraft, registration from the foreign regulatory authority where the property has been licensed; or
>
> f) any other evidence (that is not generated internally by the recipient) satisfactory to the Canada Revenue Agency that the property has been exported;
>
> g) *Form E15, Certificate of Destruction/Exportation* is listed as a document that the Canada Revenue Agency will accept as satisfactory evidence of the exportation of tangible personal property if validated by an authorized officer of the Canada Border Services Agency (CBSA).

[30] As to section 12, in cross-examination Ms. Thornton agreed that even though the GST Memorandum states that "Suppliers must maintain satisfactory evidence that the tangible personal property has been sent outside Canada. Satisfactory evidence parallels the evidence required under Section 1 of Part V of Schedule VI (see paragraphs 15 to 17 of this memorandum)," she reaffirmed the

Form was not acceptable to the CRA as satisfactory evidence for section 12 purposes as other conditions needed to be satisfied with more information.[19]

[31] Whilst she agreed all the Jewellery sold to Customers using the Procedure left Canada on the flight indicated on the Customer's boarding pass, in re-examination she said the Customer received the Jewellery, before or after security, and then took the Jewellery out of Canada.

[32] Ultimately, the facts were not materially in dispute.

II. Issues

[33] At issue is whether the appellant was required to collect and remit GST on the Jewellery sold to Customers using the Procedure. To determine that, it is necessary to decide whether the supplies:

(a) were shipped to a destination outside Canada specified in the contract for carriage of the Jewellery pursuant to paragraph 12(a) of Part V of Schedule VI?

(b) were delivered or made available in or outside Canada pursuant to paragraphs 142(1)(a) or 142(2)(a)?

III. Legislative scheme

[34] Subsection 221(1) imposes an obligation on a supplier to collect GST when making a taxable supply. Subsection 228(2) requires a supplier to remit the net tax, determined under section 225, to the Receiver General.

[35] Subsection 165(1) provides that every recipient of a taxable supply made in Canada shall pay GST, in respect of the supply, calculated at the statutory rate on the value of the consideration for the supply.

[36] Section 142 sets out separate place of supply rules that may apply, depending on the nature of the supply, and deem supplies made in Canada and others made outside Canada.

[37] Paragraphs 142(1)(a) and 142(2)(a) deem supplies of tangible personal property by way of sale to be made in or outside Canada, respectively, if the property is, or is to be, delivered or made available in or outside Canada to the

recipient of the supply, respectively. If the latter, the recipient is not liable to pay GST, therefore the supplier is not obliged to collect it.[20] If the former (deemed made in Canada), GST is exigible unless the supply is exempt or zero-rated.

[38] Zero-rated supplies are set out in Schedule VI. Section 12 of Part V of Schedule VI zero rates from taxation a supply of tangible personal property where the supplier either ships such property specified in the contract for carriage, or sends it by mail or courier, to a destination outside Canada, or transfers possession of it to a common carrier or consignee retained, by either the supplier on behalf of the recipient or by the recipient's employer, to ship it outside Canada. If these conditions are met, under subsection 165(3) the tax rate of a "zero-rated supply, a taxable supply, is 0%.[21]

IV. Analysis

(a) Zero-rated supply

[39] Turning first to whether Jewellery sold to Customers under the Procedure were zero-rated supplies shipped to destinations outside Canada specified in the contracts for carriage pursuant to paragraph 12(a) of Part V of Schedule VI.

[40] Section 12 reads:

> 12 A supply of tangible personal property (other than a continuous transmission commodity that is being transported by means of a wire, pipeline or other conduit) if the supplier
>
> > (a) ships the property to a destination outside Canada that is specified in the contract for carriage of the property;
> >
> > (b) transfers possession of the property to a common carrier or consignee that has been retained, to ship the property to a destination outside Canada, by
> >
> > > (i) the supplier on behalf of the recipient, or
> > >
> > > (ii) the recipient's employer; or
> >
> > (c) sends the property by mail or courier to an address outside Canada.

[41] The appellant argued that the term "ships" in paragraph 12(a) can be given a broad interpretation to mean to send or cause to be sent goods by any means.

Pursuant to its Procedure, the appellant caused the Jewellery to be sent to destinations outside Canada, shipped by air, transported with the Customer and their personal baggage and effects to their destinations. Each contract for carriage between it and its Customer - as certified by the CBSA on the stamped Form - consisted of an agreement to take the Jewellery to a destination outside Canada shown on the airline ticket and boarding pass (collectively "ticket") which matched the destination on the invoice; such contract constitutes an extension of the Customer's ticket. Since the Jewellery left on the flight with the Customer, it was shipped to a destination outside Canada.

[42] The respondent disputes that the appellant satisfied the conditions in paragraph 12(a).

*Principles of statutory interpretation*

[43] In tax legislation, if the text of a statute is clear it must be applied. Where, however, the text admits of more than one reasonable interpretation, greater emphasis on and recourse to context, purpose and the scheme of the legislation may be necessary and may reveal or resolve latent ambiguities which may not have initially been apparent.[22] If latent or explicit ambiguities exist, courts must also look at the context and the purpose of the provision to determine the most plausible interpretation. In rare instances, where a textual, contextual and purposive approach to statutory interpretation does not resolve the interpretative issue, there is a residual presumption, to be applied exceptionally, in favour of the taxpayer.

*Text*

[44] The language of paragraph 12(a) zero-rates a supply of tangible personal property made by a supplier to a recipient if the supplier ships the property to a destination outside Canada specified in the contract for carriage of the property.

*Ships*

[45] Since the term "ships" is not defined in the *ETA*, the Court must resort to the ordinary meaning to discern its meaning. Similar dictionary definitions can illustrate the language bears a given meaning.[23]

[46] Dictionary definitions define the verb to "ship" as:

a) "**1** *transitive* transport, deliver, or convey (goods, passengers, sailors, etc.) by or on a ship. **2** *transitive* (also foll. by *off, out) esp. N Amer.* **a** transport (goods) by truck, rail or other means. **b** *informal* send (a person) away; dispatch (*we shipped the kids off to school).*"

b) "Send or transport by ship; (chiefly *N. Amer.)* transport by rail or other means."

c) "**1 a**: to place or receive on board a ship for transportation by water **b:** to cause to be transported."

d) "To send (goods, documents, etc.) from one place to another, esp. by delivery to a carrier for transportation."

*Canadian Oxford Dictionary*, 2nd ed.; *Shorter Oxford English Dictionary*, 6th ed.; *Merriam Webster's Collegiate Dictionary*, 11th ed.; *Black's Law Dictionary*, 10th ed. *sub verbo* "ship".[24]

[47] The appellant argued that the common thread in the definitions to "ship" merely means, at minimum, to send goods, or cause goods to be sent, somewhere by some means and the definitions do not mandate the use of a third party common carrier or courier based on the ordinary meaning.

[48] Admittedly the dictionary definitions of "ship" or "shipped" do not mandate such a third party, nevertheless I note the definition in *Black's Law Dictionary* refers to sending goods from one place to another especially by delivery to a carrier for transportation. A third party seems to be implicit from the other definitions.

[49] Further, says the appellant, had Parliament intended the term "ship" to be interpreted as requiring the use of "common carrier" or sending by "courier", it would have drafted the text of paragraph 12(a) to include these third parties similar to paragraphs 12(b) and 12(c). Instead, Parliament chose to omit these.

[50] The suggestion as to the omission of "carrier" and "courier" from paragraph 12(a) as indicative of Parliament's intent, seems to disregard the inclusion of contract for "carriage" in that paragraph.

*Contract for carriage of the property*

[51] The appellant submitted that the noun "carriage" in the phrase "contract for carriage", is defined as the "[t]ransport of freight or passengers"; as "the conveying of goods"; as "[t]he action of carrying" and "[c]onveying, transport, esp. of merchandise"; and as "the act of carrying."[25]

[52] It said the CBSA stamped Form proved, amongst other things, exportation of the Jewellery from Canada and certification the supplies were shipped outside Canada. The Form, the invoice and the ticket evidenced the contract for carriage of the Jewellery and it only sold Jewellery using the Procedure where the Customer was scheduled to depart Canada by air and it retained the Jewellery until the departure date at which point Staff met the Customer at the VIA to complete the Procedure.

[53] Taken together, the appellant contends that this means that a contract for carriage is a contract to transport property from one place to another, and nothing in paragraph 12(a) or these definitions limits who must be a party nor requires a carrier, simple or otherwise. It does not, therefore, preclude the Customer, as here, from being a party to such contract with the appellant to take Jewellery outside Canada which can be inferred from the parties conduct and documentation (the Form, the invoice and the ticket).

*Context*

[54] A contextual analysis examines other provisions of the *ETA* related to the one at issue to aid in understanding the context of the provision at issue.

[55] The appellant submitted that since paragraphs 12(b) and 12(c) encompass situations where a supplier has contracted with a common carrier to deliver the goods and where the supplier sends goods by mail or courier, respectively, paragraph 12(a) must be given an independent meaning otherwise paragraph 12(a) would be redundant and would run counter to Parliament's intent.[26] The inclusion of paragraph 12(a), the appellant suggested, indicates that the legislation contemplates a supplier's ability to ship goods by means other than common carrier or mail/courier.

[56] According to the appellant, context for section 12 arises when read in light of section 1 of Part V of Schedule VI which also zero-rates a supply of tangible personal property made by a person to a recipient who is not a consumer whom intends to export property in certain circumstances. Although not relying on

section 1, the appellant noted that the breadth of section 1 does not narrow the scope of section 12 beyond what otherwise falls within the wording of section 12.

[57] Common carrier is not defined in the *ETA*. The GST Memorandum, at paragraph 19, defines the term "common carrier" as a person engaged in the business of transporting property from place to place and who offers services to the public for compensation. Other than the reference to business and offering services to the public for compensation, this descriptor seems to align with the appellant's position.

*Purpose*

[58] This part of the analysis seeks to ascertain what Parliament intended a provision to achieve.

[59] In paragraph 89 of its written submissions, the appellant explains that one of the guiding principles when the *ETA* was enacted is that GST was not meant to apply on exported goods as noted in the *Goods and Services Tax Technical Paper* (Department of Finance, August 1989). In referring to the treatment of exports of tangible personal property it states at page 72 that:

> Since the GST is meant to apply only to consumption of goods and services in Canada, supplies made in Canada that are exports will be categorized as zero-rated supplies, and will not be subject to the tax.
>
> …
>
> **(a) Goods**
>
> Tax will not apply to any commercial export of goods. Where goods are delivered in Canada for direct shipment to a place outside Canada, they will be zero-rated. The transaction will have to meet prescribed rules to ensure that the goods are in fact exported to qualify as a zero-rated supply.

[60] Initially, section 12 zero-rated goods supplied to the recipient if the supplier delivers the property to a common carrier, or mails the property, for export and delivery to the recipient at a place outside Canada.

[61] The May 1990 Financial Technical Notes produced by the Department of Finance provides further insight with respect to section 12 in noting:

> Goods delivered or made available to an individual in Canada generally are subject to GST, even if the individual intends to export the goods. However, this provision zero-rates goods supplied to an individual if the supplier mails the goods or has a common carrier deliver the goods to an address outside Canada.

[62] In 1997, section 12 was amended to read:

> [a] supply of tangible personal property where the supplier delivers the property to a common carrier, or mails the property, for export.

[63] This amendment broadened the scope of section 12 by eliminating the requirement that the goods be delivered to the recipient, as opposed to any other person, at a place outside Canada. As amended, it allowed for zero-rating of goods where the supplier delivers the property to a common carrier, or mails the property, either to the recipient of the supply or another, such as a non-resident relative of the recipient.[27]

[64] Section 12 was further amended to zero-rate a supply of tangible personal property where the supplier either ships such property specified in the contract for carriage, or sends it by mail or courier, to a destination outside Canada or transfers possession of it to a common carrier or consignee retained, by either the supplier on behalf of the recipient or by the recipient's employer, to ship it outside Canada.

[65] The December 1999 Financial Technical Notes state:

> Section 12 is further amended, with respect to supplies made after April 1999, to provide that, in order to qualify for the zero-rating under that section, one of two circumstances must be met. One is that the supplier ships the property, or sends it by mail or courier, to a destination outside Canada. The alternative circumstance is that the supplier transfers the property to a common carrier that has been retained, by either the supplier on behalf of the recipient or by the recipient's employer, to ship the property out of the country.

[66] The first circumstance refers to paragraphs 12(a) and 12(c), the alternative circumstance refers to paragraph 12(b).

[67] By including paragraph 12(a), the appellant said it denotes an intention to include instances where the supplier "ships" the property without retention of a third party common (or simple) carrier on behalf of the recipient.

[68] The term common carrier is not expressly referred to in paragraph 12(a) but is in paragraph 12(b). Both paragraphs use the phrase "the property to a destination

outside Canada" except the former paragraph is preceded by the term "ships" and the latter by the term "to ship".

[69] Former iterations of the section required the supplier to deliver "the property to a common carrier … for export", or the supplier had the option of mailing, in order to qualify for zero-rating. Of note, the amendments to section 12 replaced the term "delivers" with "ships" or "to ship" and retained the terms "common carrier" and "mail".

[70] The purpose of paragraph 12(a), therefore, is to zero-rate goods, not subject to GST, that are actually exported. This is to make Canadian exports more competitive and to reflect the fact that exported goods are available for use only outside Canada.[28] To qualify for zero-rated status, the supplier must ship the goods to a destination outside Canada specified in a contract for carriage.

[71] Noting the evolution of the provision, the use of the exact phrase in both paragraphs 12(a) and (b) alongside the terms "ships" and "to ship", respectively, and that paragraph 12(a) refers to a "contract for carriage", in my view the most plausible interpretation of paragraph 12(a), applying the unified approach, denotes an intention that a third party carrier would need to be engaged where the supplier "ships" the property to a destination outside Canada. This construction aligns with Parliament's intent that exported goods are available for use (by the recipient or its designate) only outside Canada.

[72] I must now determine if the appellant shipped the Jewellery to a destination outside Canada within the meaning of paragraph 12(a).

[73] The stamped Form was pivotal to the appellant's Procedure. The appellant submitted the stamped Form was certification by the CBSA of the agreement between the appellant and its Customer to take the Jewellery outside Canada, it was also proof of export and it was part of the evidence of that contract for carriage to transport the Jewellery. Further, it said, the effect of the certification means that the Jewellery was "shipped" to a destination outside Canada (on board the plane or the destination on the invoice or ticket) because the Jewellery left with the Customer and their baggage/personal effects on their flight and satisfied the conditions in paragraph 12(a) to qualify as zero-rated supplies.

[74] It is undisputed that all Jewellery left Canada on flights with the Customers. CBSA's mandate, in part, is to provide border services to control movement of people and goods across Canada's borders. Mr. Baldasso testified that in

completing, signing and stamping the Form, a CBSA Officer's role was merely to confirm that Jewellery specified on the Form was leaving Canada. Ms. Green Barlow said although the CBSA collects GST on duties owed, it has no authority to administer and assess tax under the *ETA* and specifically excludes taxes imposed under Part IX of the *ETA*. Rather, it is the duty of the Minister of National Revenue to administer and enforce the *ETA* and make the determinations including those involving the issues in this appeal.[29]

[75] Clearly, the CBSA accepted the stamped Form as mere proof of export for its limited purpose. However, I disagree with the appellant that that can also be construed as certification by the CSBA of the contract for carriage or that it constitutes evidence of such contract or means the Jewellery was shipped. The evidence does not support those aspects were part of the CBSA's mandate. Nor does the testimony provided by the CBSA officials, which I accept, who gave detailed explanations regarding their responsibilities, their involvement and the Form's various functions. Furthermore, the appellant's assertion regarding certification and its purported effect runs counter to the evidence that the CBSA expressed concerns to the CRA about the Procedure and a possible contravention of the *ETA*.[30]

[76] Although the stamped Form can be accepted as proof of export by the CRA for its purposes, that differs from satisfying the conditions in section 12 to establish zero-rating. Ms. Thornton said the stamped Form alone was insufficient; more was needed to satisfy the tracing of goods from their port of exit to their destination evidenced by a carrier. This is referenced in the GST Memorandum and Appendix.

[77] Essentially, the appellant claims the conditions in paragraph 12(a) were satisfied by virtue of its agreement (contract for carriage) with the Customer to take the Jewellery to the destination outside Canada on the ticket which matched the destination on the invoice, certified by the Form, without the need to retain a third party courier. Such contract serves as an extension of the Customer's ticket to transport them and their baggage. I disagree.

[78] Again, paragraph 12(a) calls for a third party carrier under a contract for carriage. I note the definition of "carrier" in *Black's Law Dictionary* is "an individual or organization engaged in transporting passengers or goods for hire".[31] As no third party carrier was engaged under a contract for carriage, I find that the appellant did not ship the Jewellery within the meaning of paragraph 12(a).

[79] Mr. Cusano's testimony that it was customary for clientele to buy gifts for relatives, and others, to take to China and some asked that purchases be tax free, plus Ms. Green Barlow's explanation about the export regime when a person is leaving Canada with bags and gifts, suggests to me that the Jewellery constitutes non-restrictive personal effects or personal gifts of the Customers which need not be reported on the Export Declaration (had Customers paid the GST at the store) when they departed from Canada.[32]

[80] It is unfortunate that when the broker provided the solution to the appellant regarding the stamped Form, as part of its Procedure, that the appellant did not obtain legal advice nor consult an accountant as established in cross-examination.

[81] For the foregoing reasons, I find and conclude that supplies of Jewellery sold were not shipped by the appellant to a destination outside Canada specified in a contract for carriage of the Jewellery, within the meaning of paragraph 12(a) of Part V of Schedule VI of the *ETA*, therefore the supplies were not zero-rated.

(b) Place of Supply

[82] Now turning to whether the Jewellery sold to Customers, using the Procedure, were delivered or made available to them in or outside Canada.

[83] The appellant's position is that the parties had an implied agreement, through their conduct evidenced by all steps in the Procedure, with the intent that delivery of the Jewellery take place outside Canada either onboard the aircraft or at the destination on the ticket. Accordingly, the parties' agreement supports its view that Jewellery sold to Customers using the Procedure were delivered or made available outside Canada within the meaning of paragraph 142(2)(a) despite the Customer having obtained physical possession of the Jewellery at VIA before the Customer's flight left Canada.

[84] The respondent's position is that there was a full voluntary transfer of possession of the Jewellery when the Customer was handed physical possession of it at VIA even before boarding the plane. Consequently, supplies of Jewellery were delivered or made available in Canada to its Customers and constitute taxable supplies deemed to be made in Canada pursuant to paragraph 142(1)(a).

[85] Paragraphs 142(1)(a) and 142(2)(a) provide:

> **General rule – in Canada**

> 142(1) For the purposes of this Part, subject to sections 143, 144 and 179, a supply shall be deemed to be made in Canada if
>
> (a) in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available in Canada to the recipient of the supply;
>
> …
>
> **General rule – outside Canada**
>
> (2) For the purposes of this Part, a supply shall be deemed to be made outside Canada if
>
> **(a)** in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available outside Canada to the recipient of the supply; …

[86] Essentially, paragraphs 142(1)(a) and 142(2)(a) determine whether a supply of tangible personal property by way of sale shall be deemed to be made in or outside Canada, respectively, if the property is, or is to be, "delivered or made available" in or outside Canada, respectively, to the recipient of the supply.

[87] In *Jayco, Inc. v Canada*, 2018 TCC 34, [2018] TCJ no 22 (QL) [*Jayco*], D'Auray J. distilled the approach to be taken in the application of the place of supply rules.[33] It was noted that whilst the phrase "delivered or made available in Canada" is not defined in the *ETA*, the jurisprudence establishes that the phrase is to be interpreted in the same manner as the concept of "delivery" in the applicable sale of goods legislation.

[88] It was further noted that the CRA adopted that jurisprudence in its publication GST/HST Memorandum 3.3 that states:

> 7. For purposes of paragraph 142(1)(a) and 142(2)(a) which deem supplies of tangible personal property by way of sale to be made in Canada or outside Canada, the phrase "delivered or made available" has the same meaning as that assigned to the concept of "delivery" under the law of the sale of goods, as follows:
>
> > "Delivered" refers to those situations where delivery of the tangible personal property under the applicable law of the sale of goods is effected by actual delivery.

> "Made available" refers to those situations where delivery of the tangible personal property under the applicable law of the sale of goods is effected by constructive delivery (i.e., actual physical possession of the tangible personal property is not transferred to the recipient of the supply yet is recognized as having been intended by the parties and as sufficient in law). For example, situations arise where a person sells tangible personal property to another person and agrees to hold the property as bailee for the buyer.
>
> 8. In any given case, the place where the tangible personal property is delivered or made available may be determined by reference to the place where the tangible personal property is considered to have been delivered under the law of the sale of goods applicable in that case.
>
> 9. Generally, the place where tangible personal property is delivered or made available can be determined by reference to the terms of the contract.
>
> [Emphasis added]

[89] The decision of *Marshall and Van Allen v Crown Assets Disposal Corporation*, [1956] OR 930 (Ont CA), cited by the Court in *Jayco* regarding proof of delivery, established the principle that:

> The agreement to sell and the actual sale are two distinct things. The act of delivery completes the sale. Delivery is accomplished by the purchaser obtaining the actual physical possession of the goods or, if certain conditions are present, there may be a symbolical delivery which divests the seller's possession … The transfer to the buyer of a bill of lading, as representing the goods, forms a good delivery in performance of the contract. Other mercantile documents, such as a delivery order from the seller to a warehouseman to deliver the goods to the purchaser, do not represent the goods, so far as delivery by the seller in performance is concerned, and in the case of such a document some further act or acts must be done.[34]

[90] In *Jayco*, the Court agreed that the supplies were delivered or made available outside Canada at Jayco's U.S. business premises and stated at paragraphs 108 and 120 that:

> 108. Proof of delivery can be evidenced by documents of title, including a bill of lading. In this appeal, the common carrier was the agent for the consignee on the bill of lading, namely the Canadian dealer. This is another indication that title had passed to the Canadian Dealer and the delivery occurred in the USA.
>
> …

> 120. … JET as a common carrier became by law the agent of the Canadian dealers when the RVs were imported to Canada.[35]

[91] In the present case, the British Columbia *Sale of Goods Act*, [RSBC 1996] chapter 410 applies. It defines "delivery" as a "voluntary transfer of possession from one person to another" ("*SGA*").[36]

[92] The term "possession" is defined in section 5 of the *SGA* as:

> A person is deemed to be in possession of goods, or of the documents of title to goods, if the goods or documents are in the person's actual custody or are held by another who is subject to the person's control or for the person or on the person's behalf.

[93] The "delivery of possession" of a chattel is the physical handing over of the chattel by the deliverer to the deliveree.[37]

[94] I observe that the French version of section 142 of the *ETA*, uses the term "livraison" and not "délivrance". Both terms are described somewhat differently for the purposes of the *Quebec Civil Code*.[38] The term "livraison" is interpreted as the seller taking physical steps to remit the property to the buyer; transportation. The term "délivrance" is interpreted as inversion of title.[39] As such, the use of the French term "livraison" for delivery in section 142 would imply that transfer of ownership (without hindrances to the owner deriving benefits of a good) is not required to satisfy section 142 and that a simple physical exchange of goods is sufficient, such that the place of delivery is where the latter takes place.

[95] Delivery can be conceptualized as an obligation that is complete when the seller has done everything that needs to be done to enable the buyer to use the thing and derive benefits from the thing that the owner can expect to derive, as characterized in *Paré c. Francoeur*.[40]

[96] Generally, sales of goods Acts permit parties to specify contractually the place of delivery. Absent that, the place of delivery is the seller's place of business.

[97] Section 33 of *SGA* states that:

> 33(1) Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties.

> (2) Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if the seller has one, and if not, the seller's residence.
>
> (3) If the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then despite subsection (2) that place is the place of delivery.
>
> …
>
> (5) If the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until that third person acknowledges to the buyer that the third person holds the goods on the buyer's behalf.

[98] In the present case, if no such specification exists pursuant to section 33, the appellant's place of business would be its retail locations in Canada, such that delivery occurs in Canada.[41]

[99] The foregoing principles reveal the focus in section 142 is on "delivered". Generally, that equates to delivery of a full voluntary transfer of possession of the property to the buyer immediately upon physical possession by the buyer without restriction.

[100] According to the appellant, by virtue of the parties' conduct, there was an implied agreement with the Customers in which the parties intended that Jewellery sold would be transferred and/or delivered to Customers outside Canada, on board the aircraft or at the destination on the ticket.[42] Section 22 of the *SGA* provides that under a contract for sale of goods "the property in them is transferred to the buyer at the time the parties to the contract intend it to be transferred".

[101] Intention is to be ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case. There is no statement on the invoices that indicate a specific location where Jewellery is to be delivered other than the name of the country or city/town and country. The appellant also pointed to the CBSA stamped Form as supporting the stated intent.

[102] As to the parties' conduct and circumstances, again after the Customer paid for the Jewellery at the appellant's retail location, the Jewellery remained at the location until the day the Customer was to depart from Canada. Staff met the Customer at VIA only after the Customer obtained the boarding pass.[43] According to the appellant, Staff gave physical possession of the Jewellery to the CBSA Officer who in turn handed it to the Customer after the Form was signed and

stamped. Mr. Baldasso's testimony varied slightly from that. He said that after he stamped the Form, he sometimes handed the Jewellery directly to the Customer before or after airport security. On other occasions, he handed it to the appellant's Staff who then handed it to the Customer before the Customer went through security. Handing off the Jewellery depended on how busy the Officer was but he agreed it was the CBSA's decision where to hand over the Jewellery. The appellant said if there was no stamped Form certifying export, there was no sale and Staff returned the Jewellery to the store.

[103] Respectfully, the position advanced by the appellant as to its stated intent is difficult to reconcile. That is, having agreed that Jewellery would be transferred or delivered outside Canada, before boarding the plane the Customer/recipient obtained physical and full unrestricted possession of the Jewellery and the Customer then takes it on the plane and delivers (or re-delivers) the Jewellery to him/herself per the agreement. If the appellant was suggesting that there was some restriction or reservation of ownership, that is not borne out by the evidence. In my view, the transfer of ownership and physical handing over (of possession) of the Jewellery occurred concurrently.

[104] Clearly, Customers were given full possession of the Jewellery at the time these were hand delivered, before or after airport security. Full possession enabled Customers to derive the full benefit of the Jewellery immediately upon physical delivery of the Jewellery. The appellant had done everything that needed to be done to enable the Customers to use the Jewellery and derive the benefits without any restrictions on use or possession. Customers then also assumed risks inherent in the Jewellery; for example, if Jewellery was lost the risk was the Customers'. Customers then took the Jewellery with them on the flight. I find the stated intent to be implausible in the circumstances.

[105] In any event, the rule of acquisition in *Wardean Drilling Ltd v Minister of National Revenue* has been consistently applied in common law provinces.[44] Namely, property may be acquired from the time ownership is transferred to the purchaser or when a purchaser has possession or use and assumes the risks inherent in the property even though legal title might remain with the seller. The Court stated at paragraph 24: "In my opinion the proper test as to when property is acquired must relate to the title to the property in question or to the normal incidents of title, either actual or constructive, such as possession, use and risk." At the time the Customers were physically handed the Jewellery at VIA, they had full possession, use and assumed the risks inherent in the Jewellery thereby acquired it regardless of their intent. I am not satisfied that the Jewellery was delivered outside

Canada as contended by the appellant especially since Customers obtained unrestricted full physical voluntary transfer of possession of the Jewellery, assumed risk and had the ability to use the Jewellery in Canada.

[106] In *Gagné-Lessard Sports Inc. v. Canada*, the taxpayer used a customs brokerage company to facilitate sale of off-road vehicles to United States customers and had certain procedures in place.[45] The taxpayer argued that "handing of the vehicles to the American consumers at its place of business was not delivery in the legal sense".[46] The vehicles were not registered in and could not be used in Canada nor the United States until cleared by Canadian customs. Given these were encumbrances and hindrances to their use, the vehicles were not within the full possession of the customers when they took physical possession at Gagné-Lessard's place of business.

[107] In other case law referred to and *Gagné-Lessard*, the taxpayers succeeded in proving delivery or making available goods outside of Canada for two reasons.[47] First, taxpayers presented evidence of a contract of sale which more clearly recognized a consignee who agreed to act as such to facilitate the supply. Second, the goods had hindrances and/or encumbrances to its use or possession which prevented the goods being made available when physically transferred such as in *Gagné-Lessard* where the vehicles were not made fully available.

[108] In the present case, and for the foregoing reasons, I find that there was a full voluntary transfer of possession, without restriction, when supplies of Jewellery were physically handed to Customers who accepted possession of the Jewellery. As such, the supplies were "delivered or made available in Canada".

[109] I conclude that the Jewellery sales were taxable supplies deemed to be made in Canada pursuant to paragraph 142(1)(a) and were not zero-rated supplies thus the appellant was required to collect and remit GST/HST in respect of the Jewellery sold pursuant to subsections 221(1), 225(1) and 228(1) of the *ETA* for the Relevant Period.

[110] The appeal is allowed, in part, to the extent only of the concession made by the respondent that the amount totalling $19,020 pertain to goods that were delivered outside of Canada and are not subject to GST/HST. In all other respects, the appeal is dismissed.

[111] Costs are awarded to the respondent. The respondent has 30 days from the date of the Judgment to either secure the appellant's agreement on costs or to make written submissions.

Signed at Ottawa, Canada, this 31st day of January 2019.

"K. Lyons"

Lyons J.

---

[1] Notices of Reassessment dated May 18, 2016.

[2] Comprised of $217,831.76 from April 1, 2010 to March 31, 2011, $799,302.71 from April 1, 2011 to March 31, 2012 and $1,281,756.46 from April 1, 2012 to March 31, 2013.

[3] Agreed Book of Documents ("ABOD"), Exhibit A1, Tabs 7 and 15.

[4] Wellendorff, Bulgari and Mikimoto Japanese pearls. Watches: Audemars Piguet, Rolex, Conran IWC, Breguet, Harry Winston, Blancpain, Hublot, A. Lange & Söhne etc.

[5] Ms. Chen said that most customers are from China and was queried by them about the tax treatments. Relatives in China sometimes ask customers to bring items to China.

[6] Staff completed the appellant's address, inventory number, serial number of the item and product brand and boxes 13 to 20 refer to "CBSA use only". Forms used are at Exhibit A-1, Tabs 1 to 14 and 16 to 21 with the exception at Tab 15 which indicates in box 13 "exported on MU582"; Mr. Cusano stated that was done by the CBSA.

[7] He processes people, checks documents and bags, answers questions from the public and spent periods at the CBSAO. His duties differ when dealing with importers.

[8] Boxes 13, 17, 18 and 20. CBSA Officers were asked to photocopy documentation from the appellant as early as 2012. His initials appear on various documents and his badge number on one of the Forms; he did not complete box 4(b) and noted the upper portion was the applicant's responsibility. Other colleagues carried out these tasks per Tabs 1, 3, 19 and 20.

[9] CBSA, established by the *Canada Border Services Agency Act* on December 12, 2003, administers 90 plus Acts, Regulations and international agreements on behalf of federal departments and agencies, provincial governments and the territories. "Duties" means any duties or taxes levied or imposed on imported goods under the *Customs Tariff*, the *Excise Tax Act*, the *Excise Act*, 2001, the *Special Import Measures Act* or any other Act of Parliament, but for the purposes of subsection 3(1), paragraphs 59(3)(b) and 65(1)(b), sections 69 and 73 and subsections 74(1), 75(2) and 76(1) of the *Customs Act*, it does not extend to taxes imposed under Part IX of the *Excise Tax Act*.

[10] Under the first scenario, if goods came back into Canada with the owner, a penalty is paid.

[11] Exhibit A1, Tabs 1 and 33.

[12] Part V, sections 95 to 97.2 of the *Customs Act.* "Export Declaration" means information prescribed to report goods under sections 3 and 4 of the *Reporting of Exported Goods Regulations* ("*Regulations*") and partly ensures compliance with Canadian export control legislation.

[13] Memorandum D20-1-1, ABOD, Tab 28, paragraphs 21(c) and (e) refers to personal goods and gifts, respectively. Restricted Goods are generally prohibited, controlled or regulated, and is also defined in the *Regulations*, which is said to include goods exported under the *Export and Import Permits Act*. Special Goods comprise non-restricted goods that will return to Canada after exportation; non-restricted goods previously imported for additions, repairs or previous processing that are leaving Canada; permanently exported conveyances; currency and monetary instruments in circulation ; and fishing catch.

[14] Memorandum D20-1-4: (December 9, 2008), ABOD, Exhibit 1, Tab 29.

[15] Relief available per CBSA Memoranda, include D6-2-2: Refund of Duties, a claim for refund of duties and taxes for defective/incorrect goods; D7-2-3: Obsolete or surplus goods, to obtain a drawback of duties for obsolete/surplus goods; D8-1-1: Temporary Importation Regulations, to qualify for partial relief of duties and/or taxes for temporary import goods; D8-1-2: International Events and Conventions Services Program, for display goods temporarily imported under a specific tariff item number for international events and conventions services program; D8-1-4: Temporary Admission and D8-1-7: Use of ATA Carnets for the Temporary Admission of Goods, for the temporary admission of goods entered on ATA carnets or form E29B where the document is lost, respectively; and D10-14-11: Canadian Goods and Goods Once Accounted for, Exported and Returned when Canadian goods are returned to Canada after a temporary exportation.

[16] Appendix B.

[17] Memorandum D20-1-4, Paragraphs 1 to 3.

[18] Duty relief could be waived if imported goods are used in manufacturing in Canada and re-exported in the same condition or consumed; duty is not paid in the first place and is designed for a regular importer of goods who registers for the program. Duty deferral, is where goods are imported and kept in a secure in-bond facility; duty is only payable upon release of the goods to a Canadian marketplace. Duties paid on commercial goods can be a refund for the duties paid.

[19] ABOD, Exhibit A1, Tab 30, GST Memorandum (August 2014), paragraph 21.

[20] The supply is not subject to tax under Division II but could be taxed under Divisions III or IV.

[21] Subsection 123(1) defines a zero-rated supply as a supply included in Schedule VI.

[22] Summarized by the Supreme Court of Canada in *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715, paragraphs 21 to 24.

[23] *R v Krymowksi* [2005] 1 SCR, 101 at para 22.

[24] Appellant's Book of Authorities, Tab 18, pages 485, 487, 489 and 483, respectively.

[25] Appellant's Book of Authorities, Tab 19, page 492 *Black's Law Dictionary*; page 494 *Canadian Oxford Dictionary*; page 496 *Shorter Oxford English Dictionary*; and 498 *Merriam-Webster's Collegiate Dictionary*, respectively.

[26] *Nestle Canada v The Queen*, 2017, TCC 33, [2017] TCJ no 32 (QL).

[27] Technical Notes July 1997 - applicable to supplies after April 23, 1996. Another amendment to section 12 ensues which excludes from its application supplies of continuous transmission commodities transported by a pipeline (oil and gas) or power-line (electricity) applicable to supplies after August 7, 1998.

[28] *Évasion Hors Piste Inc. v Canada*, 2006 TCC 477, [2006] TCJ no 370 (QL) at para 21 [*Évasion Hors*].

[29] Subsection 275(1).

[30] CBSA letter to CRA dated July 30, 2012.

[31] The term "carrier" is defined in subsection 123(1) as "a person who supplies a freight transportation service within the meaning assigned by subsection 1(1) of Part VII of Schedule VI;" and such definition is restricted to that Part and Schedule IX, Part VI place of supply rules.

[32] Definition of Canada, subsection 123(2) of the *ETA*.

[33] *Jayco*, a U.S. manufacturer and vendor of various types of RVs and parts in the United States and Canada, argued (and the Court agreed) that it had an implicit agreement with the Canadian RV dealers that the delivery of the RVs/parts took place outside Canada at Jayco's U.S. business premises; delivery occurred at the time the RVs/parts were handed over to a common carrier (JET) which shipped Jayco's products to dealers in the United States and Canada. Once the RVs were turned over to JET, the dealer became the owner of the RV after which "the ownership of the RV was transferred to the owner" (2018 TCC 34 at para 36).

[34] *Jayco* at para 108.

[35] *Jayco* at paras 108 and 120.

[36] SGA defines the term property as the "general property in goods, and not merely a special property".

[37] British Columbia Court of Appeal in *Hawker Siddeley Canada Ltd*. v *Sigurdson*, 1974 CarswellBC 5 BCCA.

[38] In *Gagné-Lessard Sports Inc. v Canada*, 2007 CCI 300, [2007] TCJ no 258 (QL) [*Gagné-Lessard*], the Court stated that reference to the Civil Code of Quebec is not necessary in interpreting section 142. I agree.

[39] See *Nicholas c. Doré, cited in Gagné Lessard.*

[40] 2000 CarswellQue 1251.

[41] In *Jayco*, the Court found that it acted on behalf of the Canadian dealers in arranging the shipment with the common carrier and applied Indiana's sale of goods legislation, similar to section 33 of the *SGA*, in deeming the supplies were delivered outside Canada.

[42] Subsection 8(1) of *SGA*.

[43] The appellant pointed to section 180.1 of the *ETA* and suggested it implies that all Jewellery sold should be treated as made outside Canada on the basis they were delivered or made available outside Canada because the provision provides that any supply of property that is made directly on board an aircraft that either originates or terminates outside Canada is deemed to be made outside Canada.

[44] 1969 DTC 5194, Exchequer Court. The Court had to determine under the Sale of Goods Act of Alberta when two drills were acquired by the taxpayer in order to ascertain the

time from which the taxpayer was entitled to claim capital cost allowance it had acquired during the taxation year.

[45] Procedures: customers came to *Gagné-Lessard* business premises to sign a contract to purchase off-road vehicles, took possession of the vehicle and transported it either with his or her own tow truck or that of a friend. The customer also signed an invoice form which listed the customer as the "consignee" in one location and the "owner" at another. The form also included a "Carrier's Certificate" which listed the customs brokerage company as the "owner or consignee".

[46] The respondent had countered that this was simply evidence of lack of transfer of ownership, and that there was still sufficient delivery under section 142.

[47] *Gagné-Lessard* at para 18. See also *Evasion Hors* where the consignee is listed on the Carrier's certificate. The witness testified that the consignee never had physical possession.

# APPENDIX I

## Appendix of *GST/HST Memorandum 4.5.2 Exports – Tangible Personal Property*

Excerpt:

**A. Standard documentation**

- a commercial invoice;
- purchase agreement or billing between the supplier and the customer;
- a copy of the transportation document that describes the delivery service. This could be in the form of a bill of lading issued by or on behalf of a carrier. A bill of lading can also be replaced by non-negotiable documents such as a pro-bill, way-bill, consist sheet, sea waybill, liner waybill, freight receipt, combined or multimodal transport documents. When bills of lading are not used in the relevant trade, the parties should either use the terms "Free Carrier (name point)" or "Freight/Carriage paid to (name point)" or alternatively, stipulate in the F.O.B., C & F. and C.I.F. terms that the seller should provide the buyer with the usual documents or other evidence of the delivery of the goods to the carrier;
- customs broker's or freight forwarder's invoice relating to the supply;

**…**

**B. Documentation for shipments of goods, by ship, rail, aircraft or truck:**

- Shipments via vessel

  …

  - form E15, *Certificate of Destruction/Exportation*, validated by an authorized officer of the Canada Border Services Agency (CBSA).

| | |
|---|---|
| CITATION: | 2018 TCC 31 |
| COURT FILE NO.: | 2016-3319(GST)G |
| STYLE OF CAUSE: | MONTECRISTO JEWELLERS INC. AND HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | May 8 and 9, 2018 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice K. Lyons |
| DATE OF JUDGMENT: | January 31, 2019 |

APPEARANCES:

| | |
|---|---|
| Counsel for the Appellant: | Neil E. Bass and Angelo Gentile |
| Counsel for the Respondent: | Frédéric Morand and<br>Cédric Renaud-Lafrance |

COUNSEL OF RECORD:

For the Appellant:

| | |
|---|---|
| Name: | Neil E. Bass and Angelo Gentile |
| Firm: | Aird & Berlis LLP<br>Toronto, Ontario |

| | |
|---|---|
| For the Respondent: | Nathalie G. Drouin<br>Deputy Attorney General of Canada<br>Ottawa, Canada |