Federal Court of Appeal | Cour d'appel fédérale

Date: 20150505

Docket: A-212-14

Citation: 2015 FCA 118

CORAM: **GAUTHIER J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

CAITHKIN, INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on April 28, 2015.

Judgment delivered at Ottawa, Ontario, on May 5, 2015.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GAUTHIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

RENNIE J.A

[1] This is an appeal from a decision of Justice Graham (the trial judge) of the Tax Court of Canada (2014 TCC 80). At issue before the trial judge was whether the supply of services by the appellant to various Children's Aid Societies in Ontario (the CAS) qualified as an exempt supply under Schedule V, Part IV, section 2 of the *Excise Tax Act*, RSC 1985, c E-15 (the *ETA*).

[2] The narrow question on appeal is whether the trial judge was correct in his interpretation of section 2 and to restrict it to the supply of services in the actual, physical location or home where foster children resided.

I. Background

[3] The CAS administer the foster care system in Ontario. Under the *Child and Family Services Act*, RSO 1990, c C-11 (*Child and Family Services Act*), the CAS are the legal guardians of the foster children in their care. They, in turn, contract with suppliers for related services, including the location and training of foster parents, and the inspection of foster care homes.

[4] The appellant is one such supplier. The appellant finds and trains foster parents, places the child with foster parents, and supervises the foster parents and inspects foster homes on an ongoing basis. The appellant holds a licence under the *Child and Family Services Act* to provide residential care in foster homes, but does not hold a license to operate children's residences. The appellant is not an agent of the Children's Aid Society, but rather is an independent, for profit, intermediary between the CAS and the foster parent. The appellant negotiates with the CAS to determine a *per diem* amount that it will receive for each foster child staying with foster parents with whom the appellant has a relationship. The appellant, in turn, pays a *per diem* amount to foster parents for each child in the foster parents' care.

[5] The appellant did not report any goods and services tax (GST) collectible in respect of the *per diem* payments received from the CAS. However, the appellant claimed input tax credits (ITCs) in respect of GST paid on expenses incurred to provide services to the CAS.

[6] The Minister of National Revenue (the Minister) subsequently reassessed the appellant for the reporting periods under appeal to increase the GST collectible by the appellant by $368,569.79. Justice Graham reduced the assessment to take into account that the earliest taxation period was statute barred at the time of reassessment. The Minister had also disallowed ITCs amounting to $77,496.73. Justice Graham allowed the appeal in relation to the ITCs. Before the trial judge, the respondent agreed that the appellant would be entitled to these ITCs if the appellant's supplies to the CAS were indeed taxable supplies.

II. The decision under appeal

[7] In his reasons for judgment, the trial judge concluded that, while the appellant met the first and second tests required by the provision, that is, that (1) the supply made must be of "a service of providing care, supervision and a place of residence" and, (2) the supply must be made "to children", the appellant had failed to meet the third element of the provision, namely that the supply must be provided in "an establishment operated by" the appellant.

[8] The trial judge interpreted "establishment" to mean the physical place or residence where care and supervision was provided, specifically, the home of the foster parents. The trial judge concluded that the "establishment" was the place where the children found care, supervision and residence; put more simply, the bricks and mortar of a home. The trial judge also noted that even

if he interpreted the word "operate" in as broad a way as he believed possible, the appellant was not operating the foster parents' homes. The trial judge accepted that the appellant could be said to be managing the foster care service that is provided in the homes, but could not accept that the appellant was managing the homes themselves, as the foster parents are the "kings and queens of their own castles."

III. Issue on appeal

[9] No issue is taken with the trial judge's assessment of the evidence, nor with his application of the evidence to the provision as he construed it. Rather, as noted the issue on appeal distils to a narrow question of statutory interpretation; specifically, whether the judge was correct in concluding that "establishment" must be the actual, physical structure or home in which the foster children reside.

[10] The appellant contends that establishment can have a broader meaning than that accorded to it by the trial judge. It points to the *Canadian Oxford Dictionary*, which defines "establishment" as:

> 1. The act or an instance of establishing; the process of being established. 2a. a business organization or public institution. 2b. a place of business. 3a. the staff or equipment of an organization. 3b. a household. 4. any organized body permanently maintained for purpose. 5. a church system organized by law. 6a. the group in a society exercising authority or influence, and seen as resisting change. 6b. any influential or controlling group.

[11] The appellant argues that therefore "establishment" is capable of more than one meaning, one of which includes a business organization. Accordingly, a taxpayer may carry on its business and "operate" its "establishment" without a physical place. The appellant borrows an analogy

from paragraph 26 of *R v Twoyoungmen*, [1979] 5 WWR 712, as to a fleet of taxi vehicles, which can be considered to be "operated" by its owner or by the dispatcher without the owner or dispatcher necessarily being "in" the taxi. Here, the appellant submits that the "establishment" is "the bundle of services" that the appellant provides to the CAS. Put otherwise, the establishment is the "licenced function" that the appellant is authorized to provide.

[12] Further, the appellant submits that, as "establishment" has multiple meanings, it should be interpreted purposively to include service providers, such as the appellant. This is supported by the trial judge's finding that the overall purpose of the provision is presumably to exempt various basic services provided to certain potentially vulnerable individuals (i.e., children) from GST (Tax Court Decision, at para 32). In further support, the appellant points to *Québec (Communauté urbaine) v Corp. Notre-Dame de Bon-Secours*, [1994] 3 SCR 3 at para 18, for recognition that tax legislation has social as well as fiscal purposes and that "there is nothing to prevent a general policy of raising funds from being subject to a secondary policy of exempting social works. Both are legitimate purposes […] and it is thus hard to see why one should take precedence over the other."

[13] For the reasons that follow, I would dismiss the appeal. The trial judge's interpretation of the plain and ordinary meaning of the word "establishment" to mean the foster parents' homes was correct.

IV. Analysis

[14] The appeal can be disposed on the basis of first principles of statutory interpretation: Driedger's modern principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983).

[15] The Supreme Court in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 (*Canada Trustco*), at para 10 instructs that the interpretation of a statutory provision "must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole." In addition, when the words of a provision are "precise and unequivocal the ordinary meaning of the words play a dominant role in the interpretive process": *Canada Trustco* at para 10; *Bakorp Management Ltd v Canada*, 2014 FCA 104, at para 25.

[16] Section 2 of Schedule V, Part IV includes as an exempt supply:

2. A supply of a service of providing care, supervision and a place of residence to children, underprivileged individuals or individuals with a disability in an establishment operated by the supplier for the purpose of providing such service.	2. La fourniture de services qui consistent à assurer la garde et la surveillance d'enfants ou de personnes handicapées ou défavorisées, et à leur offrir un lieu de résidence, dans un établissement exploité à cette fin par le fournisseur.

[17] Section 3 also provides:

3. A supply of a service of providing care and supervision to an individual with limited physical or mental capacity for self-supervision and self-	3. La fourniture d'un service de soins et de surveillance d'une personne dont l'aptitude physique ou mentale sur le plan de l'autonomie et de

care due to an infirmity or disability, if the service is rendered principally at an establishment of the supplier.	l'autocontrôle est limitée en raison d'une infirmité ou d'une invalidité, si le service est rendu principalement dans un établissement du fournisseur.

[18] The word "establishment" cannot be extracted from the statute and read in isolation. To do so would offend the direction given by the Supreme Court that statutes must be read as a whole. In this case, the provision is triggered only where the services are supplied "in an establishment operated by the supplier." In other words, the services must be rendered both "in" an establishment, and in one that is "operated by" the supplier. The meaning of the word "establishment" is informed by these words.

[19] Given its ordinary meaning, the word "in", which informs the word "establishment", denotes a physical place, and not a figurative construct, as contended by the appellant. A bundle of services is not a physical place. One cannot provide care, supervision and a place of residence in a bundle of services. Further, the French version of the provision utilizes the word "dans", reinforcing the plain and ordinary meaning of the word "establishment" to be a home or physical residence. The appellant's argument that the "establishment" may be a bundle of services does not sit with the plain and ordinary meaning of the word.

[20] Further, the plain and ordinary reading of "establishment" in section 3, and as informed by the words "at an" or "dans", contemplates a physical place, not a group of services. Interpreting "establishment" in the provision to mean the actual home of the foster parents is reinforced by the use of that same word in section 3. Interpreting "establishment" to be the physical location in which care and supervision is given to children achieves consistency in the

use of identical words. There is, in the face of the plain and ordinary meaning of the term, read in its context, no room for the broader interpretation contended by the appellant.

[21] Third, statutes are to be interpreted so as to give meaning to every term and to avoid redundancy: *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 45, [2006] 1 SCR 715 at 739, citing *Hill v William Hill (Park Lane) Ltd*, [1949] AC 530 (HL). If, as contended, an establishment were to be more than the bricks and mortar of the physical building, the third criterion of the test would have been unnecessary - mere surplus language of no consequence. The provision would have ended with the word "disability." The appellant's interpretation of the word "establishment" offends the presumption against tautology and the requirement that meaning be given to each term.

[22] While it is sufficient to dispose of this appeal on the basis of the plain and ordinary meaning of the provision, the validity of this analysis is reinforced if regard is had to two other aspects of the interpretation exercise.

[23] Resort to Hansard or legislative facts is necessary only in the case of ambiguity or to provide context otherwise lacking, neither of which is engaged in this case. However, in the course of oral argument, reference was made to Explanatory Notes issued by the Minister of Finance (Department of Finance Canada, Explanatory Notes to Legislation Relating to the Goods and Services Tax (Ottawa: Department of Finance Canada, February 1993) at 298). The Explanatory Notes state that in order to be exempt:

> …the service must both:
>
> - include care and supervision in a place of residence; and
> - be provided directly to the person receiving it (i.e., the supply must be made by the operator of the facility or home).

[24] Again, while not necessary to the analysis, the Explanatory Notes confirm that the ordinary and textual interpretation of "establishment" employed above is correct. That is, "establishment" in the context of the provision means a place of residence or home.

[25] Reference was also made to the legislative history of this provision and the amendment of section 2 in 1993 (see SC 1993, c 27, s 162(2)). "Institution" in the former English version became "establishment". While the appellant notes that this might denote a legislative intent to broaden the scope of the provision, the respondent replied that the relevant French term in the statute had been "établissement" before the amendment and continued to be so after the amendment. Apart from suggesting that the amendment's objective was achieving greater consistency between the English and French terms in use, I do not believe that this particular argument would have supported the appellant's position, even if I had found it necessary to look to the legislative history.

[26] Accordingly, I would dismiss the appeal with costs.

"Donald Rennie"

J.A.

"I agree"
Johanne Gauthier

"I agree"
Wyman W. Webb

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE GRAHAM DATED 24-MAR-2014 IN THE TAX COURT OF CANADA DOCKET NO. 2011-1556(GST)G)

DOCKET:	A-212-14
STYLE OF CAUSE:	CAITHKIN, INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 28, 2014
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GAUTHIER J.A. WEBB J.A.
DATED:	MAY 5, 2015

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