Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20091005

Docket: A-477-08

Citation: 2009 FCA 285

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

STANTEC INC.

Respondent

Heard at Edmonton, Alberta, on October 5, 2009.

Judgment delivered from the Bench at Edmonton, Alberta, on October 5, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Edmonton, Alberta, on October 5, 2009)

LAYDEN-STEVENSON J.A.

[1] The Tax Court of Canada allowed an appeal by Stantec Inc. (Stantec). The issue was Stantec's eligibility to claim input tax credits (ITCs) for GST paid in relation to incurred expenses. Campbell Miller J. concluded, under three separate provisions of the *Excise Tax Act*, R.S., 1985, c. E-15 (the Act) that Stantec qualified for ITCs. The Crown appeals.

[2] Stantec, a Canadian public corporation, functions as a holding company. It has a network of subsidiary companies in Canada and the United States employing approximately 9,000 people. Stantec's shares have been listed for trading on the Toronto Stock Exchange for a number of years.

[3] In 2005, Stantec incurred costs in Canada to obtain a listing of its shares on the New York Stock Exchange. The listing was a condition precedent to a merger between one of Stantec's wholly-owned subsidiaries, Stantec California, and an American Company, Keith Companies Inc. (Keith). The condition precedent was stipulated in section 7.03 of the Agreement and Plan of Merger and Reorganization (the Acquisition Agreement). Stantec paid GST on the legal, accounting and consulting services related to the listing on the New York Stock Exchange and claimed ITCs. The Minister denied the request.

[4] On appeal to the Tax Court of Canada, Miller J. concluded that Stantec was entitled to the ITCs under both subsections 186(1) and 186(2) of the Act. He further determined that Stantec was entitled to ITCs under section 169 of the Act, the general provision. Applying a purposive definition to section 169, the Tax Court judge concluded that Stantec had engaged in commercial activities.

[5] To succeed, the appellant must establish that the Tax Court judge erred on each of the bases upon which he allowed Stantec's appeal. That is, if Miller J. did not err in relation to at least one of his determinations, the appeal must fail.

[6] The standard of review is that established by *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. The standard for questions of law is correctness and for all other questions is palpable and overriding error.

[7] Even if the appellant is correct regarding the Tax Court judge's findings pursuant to subsection 186(1) and section 169 of the Act (and we make no such determination), the appellant has not established either an error of law or a palpable and overriding error with respect to the judge's finding of mixed fact and law under subsection 186(2).

[8] The text of subsection 186(2) of the Act is as follows:

Excise Tax Act, R.S., 1985, c. E-15	*Loi sur la taxe d'accise*, L.R., 1985, ch. E-15
186.(2) For the purposes of this Part, if	186.(2) Pour l'application de la présente partie, le bien ou le service qu'un inscrit — personne morale résidant au Canada — (appelé « acheteur » au présent paragraphe) acquiert, importe, ou transfère dans une province participante est réputé avoir été acquis, importé, ou transféré dans la province participante, selon le cas, pour utilisation exclusive dans le cadre de ses activités commerciales, si les conditions suivantes sont réunies :
(a) a registrant that is a corporation resident in Canada (in this subsection referred to as the "purchaser") acquires, imports or brings into a participating province a particular property or service relating to the acquisition or proposed acquisition by it of all or	a) le bien ou le service est lié à l'acquisition réelle ou projetée par l'acheteur de la totalité ou de la presque totalité des actions, émises et en circulation et comportant plein droit de vote en toutes circonstances, du capital-actions d'une autre personne morale;

substantially all of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of another corporation, and

b) tout au long de la période commençant soit au début de l'exécution du service, soit au moment où l'acheteur, selon le cas, a acquis ou importé le bien, ou l'a transféré dans la province participante, et se terminant au dernier en date des jours visés à l'alinéa c), la totalité ou la presque totalité des biens de l'autre personne morale sont des biens acquis ou importés pour consommation, utilisation ou fourniture exclusive dans le cadre d'activités commerciales.

(b) throughout the period beginning when the performance of the particular service began or when the purchaser acquired, imported or brought into the participating province, as the case may be, the particular property and ending at the later of the times referred to in paragraph (c), all or substantially all of the property of the other corporation was property that was acquired or imported for consumption, use or supply exclusively in the course of commercial activities,

Aux fins du crédit de taxe sur les intrants, la taxe relative à la fourniture du bien ou du service à l'acheteur, ou à l'importation ou au transfert du bien par lui, est réputée être devenue payable et avoir été payée par lui au dernier en date des jours suivants :

the particular property or service is deemed to have been acquired, imported or brought into the participating province for use exclusively in the course of commercial activities of the purchaser and, for the purpose of claiming an input tax credit, any tax in respect of the supply of the particular property or service to the purchaser, or the importation or bringing in of the particular property by the purchaser, is deemed to have become payable and been paid by the purchaser on the later of

c) le jour où l'acheteur a acquis la totalité ou la presque totalité des actions ou, s'il est postérieur, le jour où il a renoncé à les acquérir;

(c) the later of the day the purchaser acquired all or substantially all of the shares and the day the intention to acquire the shares was abandoned, and

d) le jour où la taxe est devenue payable ou a été payée par lui.

(d) the day the tax became payable or was paid by the purchaser.

[9] There is no dispute that Miller J. set out the relevant prerequisites for Stantec to claim ITCs under subsection 186(2). Specifically, Stantec had to demonstrate that:

(i) Stantec is a registrant corporation resident in Canada;

(ii) Stantec must propose to acquire or acquire substantially all of the voting shares of the target company, Keith Companies;

(iii) Substantially all of Keith Companies' property must be used exclusively in commercial activities;

(iv) The listing services must relate to the acquisition of substantially all of Keith Companies' shares.

[10] The debate centered on the second and fourth prerequisites. The Crown argued before the Tax Court and before this Court that there was no acquisition. In the court below, it relied upon *Shell v. Canada*, [1999] 3 S.C.R. 622 (*Shell*) and *Singleton v. Canada*, [2001] 2 S.C.R. 1046 (*Singleton*) to support its position.

[11] In addressing this argument, the Tax Court Judge had regard to the December 1999 Technical Notes where the purpose of the provision is described as follows:

> Subsection 186(2) applies in situations where a corporation acquires or proposes to acquire all or substantially all of the voting shares of the capital stock of another corporation that engaged exclusively in commercial activities. In this case, the purchasing corporation is allowed to claim input tax credits for property and services it acquires in relation to the takeover or proposed takeover.

He also referred to the Government Memoranda Series, Chapter 8.1 regarding the term "acquire". It reads:

> The word "acquire" is not defined in the Act. The ordinary dictionary definition of the term "acquire" is to get, obtain, have control over or possess. With respect to property, relevant case law indicates that property is acquired by obtaining ownership or such normal aspects of ownership as possession, use or risk.

[12] After examining the circumstances, Miller J. found, at paragraph 24 of his reasons, that Stantec effectively "gets full ownership of Keith Companies. It does so by contractually having control of the disposition of those shares in the form of their cancellation. As Stantec already owned all of the shares of one predecessor company, it is obtaining, by this transaction, 100% of the right to control the other predecessor, now continued as the newly merged company." He further found that Stantec, in contracting for the cancellation of Keith's shares and in owning all of the shares of the merged company, has for the purposes of subsection 186(2) effectively acquired all of Keith's shares.

[13] The *Shell* and *Singleton* authorities, in the context of this matter, stand for the proposition that, in looking to the purpose and substance of a transaction, the true economic purpose cannot be used to ignore the statutory language. Here, the Act uses the word "acquisition" but does not define it. Administrative interpretations are not binding on courts, but are entitled to consideration and may constitute an important factor in the interpretation of statutes: *Silicon Graphics Limited v. Canada*, [2003] 1 F.C. 447 (F.C.A.). Jurisprudential interpretations are regularly utilized.

[14] The Tax Court judge examined all of the circumstances surrounding the transaction having regard to the purpose of the subsection in the context of the provisions as a whole. His

determination, at its highest, constitutes a question of mixed fact and law. No palpable and overriding error has been demonstrated with respect to his conclusion that "Stantec has acquired Keith Companies, on any interpretation of the word 'acquired'."

[15] The fourth prerequisite is satisfied if the listing services (those obtained by Stantec to list and trade its own shares on the New York Stock Exchange) are related to the acquisition. The appellant claims, at the relevant time, the services were not in relation to Keith's or Stantec's subsidiary's shares.

[16] The Tax Court judge had regard to *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430 where the Supreme Court of Canada interpreted the phrase "in relation to". Applying the Supreme Court's construction, he reasoned that the nexus between acquiring the listing services and the shares of either Keith or Stantec California need not be one of prominence, let alone exclusivity. He concluded that the listing services were acquired so that Stantec could complete its deal to own all the shares of the company resulting from the merger of Keith and Stantec California. This was a context-driven inquiry.

[17] Miller J. found, as a fact, that the services "can readily and reasonably be regarded as being in relation to the shares of either Keith Companies or Stantec California or the shares of the merged company, that is, the investment by Stantec in its new acquisition." We can detect no palpable and overriding error in this factual conclusion.

[18] The appeal will be dismissed with costs.

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-477-08
(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED JUNE 30, 2008, NO. 2007-2555 (GST)I)	
STYLE OF CAUSE:	Her Majesty The Queen v. Stantec Inc.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	October 5, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	Evans, Layden-Stevenson and Trudel J.J.A.
DELIVERED FROM THE BENCH BY:	Layden-Stevenson J.A.
DATED:	October 5, 2009

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