

BETWEEN:

ANTHONY COMPARELLI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 24, 2007 at Toronto, Ontario
By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: Sonja Williams

Counsel for the Respondent: Jenny P. Mboutsiadis

ORDER

Upon motion by the appellant for an Order amending the Notice of Appeal herein;

And upon reading the Motion Record and other materials filed;

And upon hearing counsel for the parties;

IT IS ORDERED that:

1. the appellant shall have leave to amend the Notice of Appeal by adding paragraphs 51(a) and 52(a), as revised at the hearing.
2. costs to the Respondent in the cause.

Signed at Ottawa, Canada, this 8th day of May 2007.

“E.A. Bowie”

Bowie J.

Citation: 2007TCC277
Date: 20070508
Docket: 2005-193(IT)G

BETWEEN:

ANTHONY COMPARELLI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowie J.

[1] This appeal is brought from an assessment made under section 227.1 of the *Income Tax Act* against Mr. Comparelli as a director of Mindthystore.com Inc. (the “corporation”) in respect of the failure of the corporation to withhold and remit what are referred to loosely as source deductions.

[2] The motion of the appellant before me is for leave to amend the Notice of Appeal to add thereto paragraphs 51(a) and 52(a). Although originally broader, the appellant now seeks to add only this allegation:

51(a) Mindthystore.com is entitled to GST refunds in the total amount of \$66,467.90 together with interest accrued thereon, which have never been credited to the liability of the Corporation for which liability the Appellant as a director (*sic*) has been assessed pursuant to the following GST returns:

(iv) GST return for the period June 1, 2001 to August 31, 2001 filed with CRA on an unknown date, evidencing a refund due and payable in the amount of \$66,467.90;

52(a) Has the Minister failed to apply to reduce the liability of the Corporation, GST refunds totalling \$66,467.90 together with accrued interest thereon, for which liability the appellant has been assessed as a director?

Originally the motion sought to allege four separate refunds to be owing; it has now been confined to this one.

[3] The motion is opposed by the Respondent on the basis that the question whether the corporation was entitled to ITCs giving rise to an entitlement to a refund is not a question that can be decided in this appeal under the *Income Tax Act*.

[4] As I understand Ms. Mboutsiadis' position, it is that the corporation could only assert its right to a refund (a right which she says the Respondent contests) by proceedings under the *Excise Tax Act* – either by way of an application for a refund, or if there was an assessment covering the period June 1, 2001 to August 31, 2001, then by an appeal from that assessment. Neither of these things has happened, and the corporation's right to a refund cannot now be asserted in an appeal brought under the *Income Tax Act*, even as a collateral matter.

[5] The appellant's position simply is this. There is some evidence (Motion Record. Affidavit of Douglas Langley, Exhibit "F") that suggests that the Respondent's auditor recognized an entitlement of the corporation to a gst net refund of \$66,467.90. The corporation debt for unpaid withholdings should be reduced by that amount, and the subsection 227.1(1) assessment against the appellant should therefore be reduced by that amount, together with interest.

[6] Ms. Mboutsiadis argues that even if such a refund could be established, it would not reduce the amount of unremitted withholding tax under the *Income Tax Act*. She goes on to say that in order to have the gst refund applied to the debt for unremitted withholdings the corporation would have had to make a specific request for such a setoff. Without such a request, she argues, there could be no setoff. Counsel did not refer me to any specific provision in either the *Income Tax Act* or the *Excise Tax Act* to support that proposition. She did, however, rely on Mogan J's decision in *Roper v R*.¹

[7] That decision arose out of a motion to strike out a Notice of Appeal. The appeal was brought by a sole proprietor from an assessment under the *Income Tax Act*. In paragraph 16 of the Notice of Appeal, it was pleaded:

¹ 2000 DTC 2213.

16. The Appellant submits that the Respondent has erred both in fact and in law in failing to properly credit GST refunds to Source Deduction arrears for the 1996 taxation year.

The Respondent moved to strike this (*inter alia*) as being beyond jurisdiction of the Court in the income tax appeal. Mogan J. held that although the Court had jurisdiction to decide collateral matters necessary to the decision of the issue under the *Income Tax Act* it could not, in an income tax appeal, where the issue was liability for unremitted withholdings, decide a contested claim for itcs under the *Excise Tax Act*. He said at paragraph 11 of his Reasons:

... The Appellant does not purport to appeal under the GST legislation and so he is not permitted to dispute whether he is entitled to specific input tax credits. If the Respondent admits, however, that the Appellant is entitled to specific input tax credits, then the Appellant is entitled to argue whether those input tax credits may be set off against an amount which the Appellant would otherwise owe under the *Income Tax Act*.

This decision, the Respondent argues, is on all fours with the present case. She goes on to say that there is no such agreement in this case. The Appellant has filed affidavit material tending to show a right to a refund. The respondent has filed material tending to show no right to a refund. The Court cannot adjudicate that issue in an appeal under the *Income Tax Act*.

[8] The important distinction between *Roper* and the present case is that in *Roper* the assessment was for the primary liability of Mr. Roper to withhold and remit, and the refund for itcs that he sought to set off was his as well. In the present case, the liability of Mr. Comparelli is a derivative or vicarious liability for the primary liability of the corporation. Mr. Comparelli seeks to attack the assessment on the basis that the amount of the debt certified by the Minister and registered in the Federal Court should have taken the claimed gst refund into account, and the amount that could be assessed against him would therefore have been reduced by that amount.

[9] In *Gaucher v. The Queen*,² the appellant was assessed vicariously under section 160 of the *Income Tax Act* in respect of property transferred from her spouse to her at a time when he was liable for unpaid tax. The Federal Court of Appeal held that Mrs. Gaucher, the derivatively assessed taxpayer, was free in her

² 2000 DTC 6678.

appeal to attack the underlying assessment of her spouse, even though he had exhausted his rights of appeal unsuccessfully.

[10] In my view, Mogan J. was correct to say that the appellant before him could argue that there was a right to have a gst refund applied as a setoff against his income tax liability, if that right to that refund was not a matter in dispute.

[11] In the present case, the appellant seeks to bring an attack that the principal tax debtor could not bring against the underlying assessment and the reasoning in *Gaucher* suggests that that is permissible. If he is able to establish that refund as an entitlement of the corporation then he is free, on the reasoning of *Roper*, to argue that the corporation's debt was overstated by that amount in the Certificate, and that the amount of his derivative assessment is overstated by the same amount.

[12] I will accept, for the sake of argument, that the corporation would be barred from asserting the right to the gst refund otherwise than through proceedings that have not taken place in this case. Mr. Gaucher was in exactly the same position: he had no right at the relevant time (that is when his wife was assessed), to contest the assessment against himself: subsection 152(8) precluded that. The matter was *res judicata* against him.

[13] If subsection 152(8) did not prevent Mrs. Gaucher as a derivative assessee from asserting that the assessment against her husband was incorrect, then it is difficult to see why Mr. Comparelli should be barred from asserting that there is an amount owing to the corporation by the Crown that should have been applied to reduce the amount of the Certificate referred to in paragraph 227.1(2)(a) of the *Act*.

[14] Is the appellant's proposed assertion in paragraphs 51(a)(iv) and 52(a) so forlorn that if pleaded in the first instance, it would have been susceptible of being struck out? I do not believe so. It is not for me either to decide the factual issue, or to gauge the strength of the appellant's argument. There is some evidence of the additional fact the appellant wishes to plead, and the appellant's position based on that factual assertion is an arguable one.

[15] The appellant will have leave to amend the Notice of Appeal by adding the proposed paragraphs 51(a) and 52(a), amended to take into account the withdrawal at the hearing of the motion of subparagraphs i), ii) and iii) of paragraph 51(a).

[16] Costs of the motion will be to the Respondent in the cause.

Signed at Ottawa, Canada, this 8th day of May 2007.

“E.A. Bowie”

Bowie J.

CITATION: 2007TCC277
COURT FILE NO.: 2005-193(IT)G
STYLE OF CAUSE: ANTHONY COMPARELLI and
HER MAJESTY THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: April 24, 2007
REASONS FOR ORDER BY: The Honourable Justice E.A. Bowie
DATE OF ORDER: May 8, 2007

APPEARANCES:

Counsel for the Appellant: Sonja Williams
Counsel for the Respondent: Jenny P. Mboutsiadis

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