

Docket: 2009-342(GST)I

BETWEEN:

G.E. HEALTHCARE BIO-SCIENCES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 4, 2009, at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: Jeff Warwick
Counsel for the Respondent: Michael Ezri

JUDGMENT

The appeal from the reassessment made under Part IX of the *Excise Tax Act* (the “*ETA*”) for the period October 1, 2000 to January 31, 2001 (that was part of the reassessment dated October 2, 2008), is dismissed, without costs.

Signed at Ottawa, Canada, this 20th day of October, 2009.

“Wyman W. Webb”

Webb J.

Citation: 2009TCC510
Date: 20091020
Docket: 2009-342(GST)I

BETWEEN:

G.E. HEALTHCARE BIO-SCIENCES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was a specified person in respect of the assessments made by the Canada Revenue Agency in 2006 and 2008, as determined for the purposes of the *Excise Tax Act* (the “*ETA*”). The Appellant was reassessed under the *ETA* for additional net tax for the monthly reporting periods from October 1, 2000 to July 31, 2004 in the amount of \$1,186,342 by Notice of Assessment dated October 27, 2006, based only on information that Revenu Québec had received from the Appellant with respect to additional amounts of GST/HST that the Appellant had collected but not remitted. This amount was subsequently reduced by \$129,635 by a Notice of Assessment dated October 2, 2008, which was issued following the filing of a Notice of Objection by the Appellant.

[2] The period under appeal is from October 1, 2000 to January 31, 2001. The Appellant, by the Notice of Assessment dated October 27, 2006, was assessed an increase in net tax for this period in the amount of \$126,109.04. The Notice of Assessment dated October 2, 2008 reduced the net tax for this period by \$6,118.24 (which all related to the month of January 2001) and therefore the net tax assessed for the period under appeal is \$119,991. The only issue in this appeal is whether the

reassessment of the Appellant was properly made under subsection 298(4) of the *ETA*.

[3] Subsection 298(4) of the *ETA* provides in part as follows:

(4) An assessment in respect of any matter may be made at any time where the person to be assessed has, in respect of that matter,

(a) made a misrepresentation that is attributable to the person's neglect, carelessness or wilful default;...

[4] The Respondent did not argue that there was any misrepresentation that was attributable to wilful default and therefore the question in this case is whether there was a misrepresentation that was attributable to the Appellant's neglect or carelessness.

[5] The Appellant filed GST/HST returns for each month during the period under appeal in which the Appellant reported the following:

<u>Reporting Period</u>	<u>Date on Return</u>	<u>Net Tax As Reported</u>
October 2000	November 7, 2000	(\$9,391.86)
November 2000	December 7, 2000	\$16,257.31
December 2000	January 10, 2001	\$109,798.21
January 2001	February 14, 2001	\$56,717.91

[6] In July 2004, an auditor for Revenu Québec contacted the Appellant to commence an audit. The auditor had asked for information for the reporting periods starting in January 2001. The auditor did not receive any information until the spring of 2005. The information disclosed by the Appellant in the spring of 2005 showed that the Appellant had collected GST/HST in excess of the amount that it had used in determining its net tax for the reporting periods from October 1, 2000 to July 31, 2004 and the Appellant submitted a significant payment (\$830,000) with the information. As noted, the Appellant does not dispute that the amounts are correct, and therefore the Appellant does not dispute that it had collected \$119,991 more in GST/HST during the period from October 1, 2000 to January 31, 2001 than it had reported as collected (or collectible) for this period. The only issue raised by the Appellant in this Appeal is whether the Respondent has failed to establish that the Appellant made any misrepresentation that was attributable to the Appellant's neglect or carelessness.

[7] Each of the parties called one witness. The Respondent called the auditor for Revenu Québec and the Appellant called a consultant who was retained by the Appellant after the Appellant had been reassessed. Unfortunately the testimony of a person who was only retained after the Appellant had been reassessed is of no assistance in determining the circumstances related to the failure to remit the GST/HST when it ought to have been remitted or to explain why the Appellant underreported the amount of GST/HST that it had collected.

[8] One of the documents that the auditor had received from the Appellant was a schedule which listed the tax collected from sales journal, the tax collected from account 2310,10, the total tax collected, the tax remittance and the difference. The following table shows the amount of GST/HST that was collected in excess of the amount reported as collected (or collectible) and not remitted for the months under appeal as taken from this schedule that was prepared by the Appellant (and hence acknowledged by the Appellant as owing as additional net tax) and the amount of additional net tax that was assessed by the Notice of Assessment dated October 27, 2006 for these months:

<u>Reporting Period</u>	<u>Unremitted Tax from the Schedule</u>	<u>Additional Net Tax Assessed</u>
October 2000	(\$1,246.04)	(\$1,246.04)
November 2000	\$28,233.14	\$28,233.14
December 2000	\$54,143.57	\$54,143.57
January 2001	\$44,978.37	\$44,978.37
Total:	\$126,109.04	\$126,109.04

[9] As noted above, the net tax for January 2001 was subsequently reduced by \$6,118.24. It is obvious that the Appellant was reassessed based on its own schedule showing the amount of net tax that had not been remitted.

[10] The Appellant relied on the decision of Justice Campbell in *Bondfield Construction Company (1983) Limited v. The Queen*, 2005 TCC 78, 2005 G.T.C. 999-4, [2005] G.S.T.C. 110. In paragraph 100 of this decision, Justice Campbell stated as follows:

100 So, in the final result, do I have any evidence before me establishing that the Appellant made a misrepresentation to the Minister? There was no such evidence provided to me. Although the Appellant's approach, I believe, was incorrect, I do not

believe it amounted to a misrepresentation to the Minister. I appreciate that this Appellant has been put in a difficult position, not only because of the passage of time, but also because the principal players that have so affected this outcome have either been found criminally liable for fraud and jailed (the Appellant's comptroller, Mr. Kar) or are being sued by the Appellant (the external accountants, Martyn, Dooley & Partners). The Respondent did not specifically refer to a single GST return that contained a misrepresentation. When Ms. MacNeil was questioned respecting her determination to assess beyond the statutory limitation period, she stated that one of her reasons was "... because the amount was significant for GST purposes ..." (Transcript page 658). Quantum is certainly not sufficient for the Minister to find a misrepresentation; and even if by some stretch I could find that it was, the amount was relatively miniscule when viewed in the context of the overall business revenue of the Appellant, where hundreds of millions of dollars in transactions took place over a five-year period....

101 Now, with respect to the GST on PST adjustments, as they relate to the statute barred issue, the Appellant utilized the 2.7407% formula to calculate the GST on a reduced contract price, and as a result it under-remitted GST. Since the introduction of GST, it has become a recognized principle that general retail sales tax is to be excluded from GST calculations. I do not believe it is such a giant leap to expect that the Appellant would accept that it was reasonable to not charge GST on PST. Devising a formula to accomplish this, however, does not amount to a misrepresentation. Certainly the Appellant under remitted GST and should have dealt with it differently. It was the responsibility of Martyn, Dooley to detect this error and inform the Appellant. The Appellant did not take the position that the correct procedures were instituted in respect to the GST on PST issue but that the evidence does not support a conclusion that the Appellant made a misrepresentation to the Minister. If the Appellant concluded that it was correct to back out the GST on the PST, is it a misrepresentation to the Minister to include it in income where the internal chartered accountant devised the formula and the external accounting firm sanctioned it but never advised the Appellant to change its procedures? In addition can there be a misrepresentation when the records were open and obvious for anyone viewing them, with the worksheets attached to the GST filings and returns? I do not believe so, particularly when one looks at the period under appeal. It was during the inception of the GST tax, when confusion existed respecting its implementation. The Appellant made no attempt to conceal the GST it under-remitted either in books, records or accounts. It was simply viewed as not owing to the Minister and therefore it was included in income and taxes paid on it. I do not believe this means the Appellant was negligent or careless and certainly it is not evidence of wilful default....

[11] However, it seems to me that the *Bondfield Construction Company (1983) Limited* case can be distinguished from the present case. In *Bondfield Construction Company (1983) Limited*, the additional assessment for GST appears to have arisen in relation to a GST on PST issue and how the Appellant was treating the GST when

both taxes were applicable. In this case not only is the amount significant but the basis of the discrepancy and the circumstances related to the discovery of the unremitted amounts are important. The discrepancy was based on the difference between amounts actually collected and the amounts reported as collected and was disclosed by the Appellant when the first information was submitted to the auditor following his request for information. It is obvious that the additional net tax as assessed was determined from the schedule disclosed by the Appellant.

[12] It seems clear to me that a misrepresentation was made by the Appellant in filing its returns for November 2000, December 2000 and January 2001. The following table shows the net tax as reported for each month, the additional net tax that was assessed for each month and the percentage that the additional net tax is of the net tax as reported:

<u>Reporting Period</u>	<u>Net Tax As Reported</u>	<u>Additional Net Tax</u>	<u>Percentage of Reported Amount</u>
October 2000	(\$9,391.86)	(\$1,246.04)	n/a
November 2000	\$16,257.31	\$28,233.14	174%
December 2000	\$109,798.21	\$54,143.57	49%
January 2001	\$56,717.91	\$38,860.13 ¹	69%

[13] The amount shown on the returns for these reporting periods (except for the return for October 2000) as the net tax amount was significantly less than the actual net tax amount for these reporting periods (except for the month of October 2000). To determine the actual net tax amount for each month, the reported amount would be added to the additional net tax assessed and the following table shows the total net tax amount for each month and the net tax amount as reported as a percentage of the total net tax for that month:

<u>Reporting Period</u>	<u>Net Tax As Reported</u>	<u>Additional Net Tax</u>	<u>Total Net Tax</u>	<u>Reported Amount as % of Total</u>
October 2000	(\$9,391.86)	(\$1,246.04)	(\$10,637.90)	n/a
November 2000	\$16,257.31	\$28,233.14	\$44,490.45	37%

¹ The additional net tax amount assessed for January 2001 of \$44,978.37 by Notice of Assessment dated October 27, 2006 was reduced by \$6,118.24 by the Notice of Assessment dated October 2, 2008.

December 2000	\$109,798.21	\$54,143.57	\$163,941.78	67%
January 2001	\$56,717.91	\$38,860.13 ²	\$95,578.04	59%

[14] It seems clear that in reporting the net tax amount for the months of November 2000, December 2000 and January 2001 that the Appellant made a misrepresentation in each of these returns. The amount reported as net tax for each of these months ranged from 37% to 67% of the actual net tax for each of these months. Since the error made in the return for October 2000 resulted in the Appellant receiving less of a refund for that month than it was entitled to receive, I am assuming that the Appellant does not object to the reassessment of the net tax for that month.

[15] The discrepancy between the GST/HST actually collected and the amount that was reported as collected was disclosed by the Appellant in the first response to an inquiry from the auditor for Revenu Québec and therefore acknowledged by the Appellant in this document.

[16] Without hearing any evidence from the Appellant to explain why the Appellant discovered this error following the request for information but did not discover the error before the returns were filed, it seems more likely than not that the Appellant was careless in preparing the GST/HST returns for the months of November 2000, December 2000 and January 2001 and in making the representation that the amount of GST/HST that it had collected for these months was less than the amount that it had actually collected. In this case it seems that this is a logical inference to be drawn from the facts as presented since the schedules prepared by the Appellant clearly show that the Appellant had collected more GST/HST for the periods under appeal (except the month of October) than it had disclosed in its GST/HST returns filed for these months.

[17] As a result, the appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 20th day of October, 2009.

“Wyman W. Webb”

² The additional net tax amount assessed for January 2001 of \$44,978.37 by Notice of Assessment dated October 27, 2006 was reduced by \$6,118.24 by the Notice of Assessment dated October 2, 2008.

CITATION: 2009TCC510
COURT FILE NO.: 2009-342(GST)I
STYLE OF CAUSE: G.E. HEALTHCARE BIO-SCIENCES INC.
AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 4, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb

DATE OF JUDGMENT: October 20, 2009

APPEARANCES:

Counsel for the Appellant: Jeff Warwick
Counsel for the Respondent: Michael Ezri

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