Docket: 2011-3774(GST)G

BETWEEN:

FOREST FIBERS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion to amend the Notice of Appeal pursuant to section 54 of the Rules of the *Tax Court of Canada Rules (General Procedure)* disposed without appearance of counsel, in accordance with section 69 of the *Tax Court of Canada Rules (General Procedure)*

Counsel for the Appellant:	Caroline Desrosiers
Counsel for the Respondent:	Jocelyn Mailloux Martin

ORDER

UPON motion by the appellant requesting leave to file an Amended Notice of Appeal (the "motion"), pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules");

AND UPON reading the motion record filed by the appellant;

AND UPON reading the respondent's written submission opposing the appellant's motion;

The appellant's motion is granted and it is hereby ordered that:

– The Amended Notice of Appeal will be deemed to be filed on the day of this Order;

- The respondent will have 60 days from the date of this Order to file and serve a Reply to Amended Notice of Appeal;

- The respondent will have the right to conduct further out of Court examinations of the appellant's representatives with respect to the amendments;

- The appellant shall bear the costs of the present motion and if further examinations for discovery are held, the appellant shall bear the costs of such examinations for discovery. The costs are to be awarded in accordance with *Tariff B- Amounts to be Allowed on Taxation of Party and Party Costs;*

- The appeal is adjourned *sine die*. The parties will communicate with the Court to schedule a new hearing date.

Signed at Ottawa, Canada, this 19th day of December 2013.

"Johanne D'Auray"

D'Auray J.

Citation: 2013 TCC 402
Date: 20131219
Docket: 2011-3774(GST)G

BETWEEN:

FOREST FIBERS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Auray J.

1. Introduction

[1] The appellant, Forest Fibers Inc., filed a motion before this Court under section 54 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") for leave to file an Amended Notice of Appeal (the "motion").

[2] The appellant also requested that the motion be disposed of without the appearance of counsel, pursuant to section 69 of the Rules. The appellant's written representations were attached to the Notice of Motion.

[3] The respondent filed written representations opposing the appellant's motion.

2. Timelines

[4] On December 1, 2011, the appellant filed with this Court a Notice of Appeal.

[5] On February 16, 2012, the respondent filed with this Court a Reply to the Notice of Appeal.

[6] On January 8, 2013, Ms. Nadine Labrecque, the judicial administrator of this Court, signed an Order whereby the appeal was to be heard on Wednesday, November 13, 2013 in Montreal at 9:30 a.m., for an estimated duration of one day.

[7] On October 28, 2013, after the pleadings were closed, the appellant filed an Amended Notice of Appeal.

[8] By a letter dated October 31, 2013, the respondent informed this Court that she did not consent to the filing of the Amended Notice of Appeal.

[9] On November 5, 2013, the appellant filed with this Court a Notice of Motion for leave to file an Amended Notice of Appeal. The appellant requested that the motion be disposed by the Court upon consideration of written representations and without appearance by the parties, pursuant to section 69 of the Rules.

[10] On November 8, 2013, the respondent filed with this Court written representations opposing the appellant's motion, pursuant to subsection 69(3) of the Rules.

3. Context of the assessment

[11] The appellant is a GST registrant and a monthly filer.

[12] The appellant specializes in the sale and resale of paper and cardboard.

[13] During the periods under appeal, the appellant acquired taxable supplies in the course of its commercial activities.

[14] Some of the appellant's input tax credits ("ITCs") were allowed by the Minister of the Quebec Revenue Agency, acting on behalf of the Minister of National Revenue (the "minister"). However, the minister disallowed some ITCs claimed in connection with two suppliers, namely P.F.G. Management ("P.F.G.") and Operatech 2000 ("Operatech").

[15] In reassessing the appellant, the minister:

- denied ITCs in the amount of $27,585.75, due to a disparity between the company books and tax returns. This amount is no longer in issue in this appeal as the appellant conceded this amount in the Amended Notice of Appeal; [1]

- denied ITCs in the amount of $22,567.53 because the appellant's documentation lacked the requisite information. The appellant no longer contests $10,260.07 of the $22,567.53 claimed as ITCs. Accordingly, an amount of $12,307.46 of ITCs remains in dispute. This amount is related to ITCs claimed in connection with supplies purportedly received from P.F.G.; [2]

- denied an amount of $325,248.89 of ITCs in connection with supplies purportedly received from Operatech.[3] This amount remains in dispute.

4. Applicable law and jurisprudence

[16] Under section 54 of the Rules, the Court has broad discretion to allow an amendment, and in doing so "may impose such terms as are just". More specifically, section 54 of the Rules provides that:

> A pleading may be amended by the party filing it, at any time before the close of pleadings, and thereafter either on filing the consent of all other parties, or with leave of the Court, and the Court in granting leave may impose such terms as are just.

[17] The rules concerning amendments must be interpreted in light of subsection 4(1) of the Rules, which states that:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[18] Writing for a unanimous Federal Court of Appeal in *Canderel*,[4] Justice Décary outlined the general rule in determining whether to allow an amendment, at paragraph 10, he states as follows:

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[1] Amended Notice of Appeal at paragraph 7.1.
[2] Amended Notice of Appeal at paragraph 7.1.
[3] Reply to the Notice of Appeal at paragraph 39.
[4] *Canderel v The Queen*, [1993] 2 CTC 213 (FCA).

> . . . the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties. Provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[19] At paragraph 13 of *Canderel*, the Federal Court of Appeal also confirmed Justice Bowman's comments in *Continental Bank*, namely that in determining whether it is in the interests of justice to allow an amendment courts should consider the following factors:

> . . . the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which would be difficult or impossible to alter and whether the amendment will facilitate the Court's consideration of the true substance of the dispute on its merits.[5]

[20] Leave to amend can be sought at any stage of a trial; however, as Justice Décary of the Federal Court of Appeal noted in *Canderel* at paragraph 14:

> . . . the nearer the end of the trial a motion to amend is made, the more difficult it will be for the applicant to get through both the hurdles of injustice to the other party and interests of justice.

[21] With respect to introducing new arguments through amendments, Justice Noël, writing on behalf of a unanimous Federal Court of Appeal in *Elliot*, held that a novel issue could be introduced at any stage in the proceedings, provided that allowing the amendment would not cause non-compensable prejudice to the opposing party.[6] Similarly, in *Scavuzzo*, Associate Chief Justice Bowman of this Court permitted pleadings to be amended to raise a new argument after the trial had commenced, finding no prejudice to the opposing party that could not be compensated with costs.[7] Associate Chief Justice Bowman also noted that the possibility that the moving party

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[5] *Canderel v The Queen*, [1993] 2 CTC 213 (FCA) at paragraph 13 citing *Continental Bank Leasing Corp. v Canada*, [1993] 1 CTC 2306 (TCC).

[6] *Elliot v The Queen*, 2012 FCA 154 at paragraph 11 which states "*it is always open to a trial judge to authorize a novel issue to be pled even after the close of the evidence subject however to insuring that no prejudice is thereby caused to the other side...*".

[7] *Scavuzzo v The Queen*, 2004 TCC 806 at paragraph 8.

could succeed on a new point raised in an amendment did not itself constitute prejudice.[8]

[22] Furthermore, courts have held that a lengthy delay in bringing a motion is not fatal unless it results in prejudice to the opposing party. This was illustrated in *Loewen* where Justice Bowie of this Court held that a two-year delay from the time information was discovered to filing a motion to amend was not fatal because it did not prejudice the opposing party.[9] However, courts have held that prejudice may result from a lengthy delay where witnesses or documentary evidence becomes unavailable. [10]

[23] In *Dello*, Justice Bédard of this Court held that the fact that a moving party could have done a better job by seeking an amendment sooner, even where the delay is due to his or her own carelessness or negligence, was not determinative unless it caused the opposing party non-compensable prejudice.[11]

5. Analysis

[24] It is clear from the jurisprudence dealing with amendments, that the general rule is that an amendment should be allowed at any stage of a tax appeal for the purpose of determining the real questions in controversy between the parties, provided that it will serve the interests of justice and allowing the amendment does not result in prejudice to the opposing party that cannot be compensated with costs.

[25] The requested amendments in this appeal are as follows:

i) The Amended Notice of Appeal introduces a new contact person for P.F.G.

[26] The Amended Notice of Appeal introduces a new contact person for P.F.G. More specifically, Mr. Pierre-François Gervais, is identified as the owner of and a contact person for P.F.G.[12]

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[8] *Scavuzzo v The Queen*, 2004 TCC 806 at paragraph 10.
[9] *Loewen v R,* 2007 TCC 703 (TCC) at paragraph 26.
[10] See for example Justice Bédard's comments in *Dello v The Queen*, 2004 TCC 754 at paragraph 13.
[11] *Dello v The Queen*, 2004 TCC 754 at paragraph 13.
[12] Amended Notice of Appeal at paragraphs 14.1 and 16.1.

[27] The respondent in her Reply to Notice of Appeal alleges that Mr. Gervais is a contact person for P.F.G. At subparagraph 33(l), one of the minister's assumptions is that:

> [t]he President of [*sic*] Appellant stated to the officers of the Respondent that the resource person of P.F.G. was a certain Pierre Gervais;

[28] Therefore, Mr. Gervais' identification as a contact person for P.F.G. is not a new fact; the respondent was already informed that Mr. Gervais was also a contact person for P.F.G. Accordingly, I find that this amendment does not cause a prejudice to the respondent.

ii) The Amended Notice of Appeal clarifies the relationship between the appellant and the suppliers

[29] The Notice of Appeal does not clearly describe the relationship between the appellant and Operatech and P.F.G. I have reproduced the relevant portions of the Notice of Appeal in full below to demonstrate this lack of clarity.

> 13. The Appellant claimed ITCs linked to the invoices issued by three of its suppliers, being Operatech 2000 ("Operatech"), Distribution de Papier J.M. ("J.M.") and Gestions P.F.G. ("P.F.G.").
>
> 14. The contract person of the Appellant for those three suppliers was primarily Jacques Jarry.
>
> 15. Jacques Jarry was a representative of Operatech and P.F.G., and he owned J.M.
>
> 16. Mr. Jarry had multiple contacts in the paper industry; he would find paper products that could be sold to the Appellant.
>
> 17. Mr. Jarry, as the representative of Operatech and P.F.G., was always acting as an intermediary between the Appellant and the sellers.
>
> 18. Mr. Jarry, as the representative of Operatech and P.F.G., was dealing the sale of paper products to Operatech's and P.F.G.'s clients such as the Appellant.
>
> 19. The Appellant was paying Operatech, P.F.G. or J.M. for the services rendered by Jarry, their representative.[13]

[30] I find it difficult, upon reading the above paragraphs of the Notice of Appeal, to understand the role of the parties involved in the transactions. Did the appellant

[13] Notice of Appeal at paragraphs 13-19.

purchase paper products directly from sellers that were located by Mr. Jarry, acting as a representative of Operatech and P.F.G.? Or, did the appellant purchase paper products directly from Operatech and P.F.G.?

[31] The Amended Notice of Appeal states:

> 14. The contact person of the Appellant for Operatech was primarily Jacques Jarry.
>
> 14.1 The contract person for P.F.G. was either Mr. Jarry or Pierre-Francois Gervais.
>
> 15. Jacques Jarry presented himself as a representative of Operatech.
>
> 16.1 Mr. Gervais was the owner of P.F.G.
>
> 16. Mr. Jarry and Gervais had multiple contacts in the paper industry; they would find paper products that could be sold to the Appellant through the two suppliers.
>
> 17. All two suppliers (Operatech and P.F.G.) are brokers of paper products and as such, have several suppliers from which they buy products to be resold with profit to their own clients, such as the Appellant.
>
> 18. All two brokers discussed with the Appellant through its representative Mr. Jarry to understand its needs, and provided him paper products that suited those needs.
>
> 18.1 Operatech, and P.F.G. were providing the paper products to the Appellant through their representative Mr. Jarry or through Mr. Gervais.
>
> 19. The Appellant was paying Operatech, P.F.G. or J.M. for the paper products obtained.

[32] I find that the Amended Notice of Appeal clarifies the relationship between the appellant and Operatech and P.F.G. and, therefore, assists the Court in better understanding the facts. The Amended Notice of Appeal asserts that Operatech and P.F.G. were brokers that purchased paper products from other suppliers and resold them to the appellant. The Amended Notice of Appeal also asserts that the payments made by the appellant to Operatech and P.F.G. were for the paper products obtained and not, as pleaded in the Notice of Appeal, for the services rendered by Mr. Jarry.

[33] In my view, the respondent is not prejudiced by the amendments clarifying the relationship between the appellant and Operatech and P.F.G. In any event, the

respondent will be able to conduct further examinations for discovery which will allow her to better determine the factual background of the transactions amongst the parties involved.

[34] I also note that paragraph 19 of the Amended Notice of Appeal mistakenly identifies J.M. as one of the relevant suppliers. All other references to J.M. that appeared in the Notice of Appeal have since been removed from the Amended Notice of Appeal. I accept that the inclusion is likely an inadvertent error. Additionally, paragraph 16 and 16.1 are mistakenly inverted in the Amended Notice of Appeal.

iii) The Amended Notice of Appeal adds the factual allegation that the appellant was diligent

[35] The appellant has been assessed for gross negligence penalties for false statements or omissions under section 285 of the *Excise Tax Act* ("ETA").

[36] The Respondent claims that "a new allegation of fact is introduced in paragraph 27.1 of the "STATEMENT OF FACTS" [of the Amended Notice of Appeal] to the effect that [*sic*] Appellant was diligent."[14] While it is true that the original Notice of Appeal did not assert, under the "STATEMENT OF FACTS", that the appellant was diligent, the Notice of Appeal does state in the "REASONS THE APPELLANT INTENDS TO ADVANCE" that:

> The Appellant maintains that it has been diligent in claiming the above mentioned ITCs, and for the reason it should not have been assessed penalties pursuant to section 285 TAA [*sic*].[15]

[37] The respondent was already aware of the due diligence defense and therefore is not prejudiced by this amendment.

iv) The Amended Notice of Appeal adds the argument that the minister did not have the authority to reassess the appellant after the normal time limits under ETA

[14] Written Representations to Oppose the Motion of Appellant to Amend the Motion to Appeal at paragraph 13(c).
[15] Notice of Appeal at paragraph 37.

[38] The Amended Notice of Appeal adds as an "ISSUE TO BE DECIDED" that the minister lacked the authority to reassess the appellant outside of the normal time period, specifically for the period of June 1st, 2002 to April 30th, 2004.[16]

[39] While it is true that the original Notice of Appeal did not include as an "ISSUE TO BE DECIDED," the minister authority to reassess after the normal reassessment period, under the "REASONS THE APPELLANT INTENDS TO ADVANCE", the appellant states that:

> The Appellant filed its returns on the basis of an honestly held belief after a careful and thoughtful consideration of the statutory requirements surrounding the above mentioned refunds and for this reason it should not have been assessed pursuant to 298 of the *Act*.[17]

[40] The respondent was aware that the appellant was raising the authority of the minister to reassess after the normal reassessment period. Moreover, the respondent's Reply to Notice of Appeal states as an "ISSUE TO BE DECIDED" whether "the Minister was justified in assessing Appellant's [*sic*] reporting periods between June 1st, 2002 and March 31st, 2004 beyond the normal reassessment period".[18] The respondent is therefore, not prejudiced by this amendment.

v) The Amended Notice of Appeal raises the argument that the appellant's burden of proof to claim ITCs is satisfied once it establishes that the requirements of section 3 of the Input Tax Credit Information Regulations are met

[41] The amended Notice of Appeal adds as an "ISSUE TO BE DECIDED" and under the "REASONS THE APPELLANT INTENDS TO ADVANCE" the argument that once a registrant provides invoices that meet the requirements of section 3 of the regulations and proves the existence of the service, the registrant is entitled to claim an ITC. This argument appears to be based on invoices already submitted by the appellant. Therefore, I do not find that the respondent would be prejudiced if this argument is added.

6. Conclusion

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[16] Amended Notice of Appeal at paragraph 28(d).
[17] Notice of Appeal at paragraph 36.
[18] Reply to the Notice of Appeal at paragraph 35. According to the appellant, the period outside the normal reassessment period is June 1st, 2002 to April 30th, 2004, while the respondent alleges the period to be June 1st, 2002 to March 31st, 2004.

[42] Overall, I find that most of the amendments do not affect the position of the respondent and, accordingly, do not cause a prejudice to the respondent.

[43] Moreover, it is to be noted that in her written representations opposing the motion, the respondent did not argue that she would suffer non-compensable prejudice if the amendments were granted by this Court.

[44] While I find that the facts underlying the amendments were or should have been within the appellant's knowledge at the time of filing the Notice of Appeal, this delay, however, even if due to the carelessness of the appellant, is not determinative unless it results in prejudice to the respondent. This is not the case in this proceeding.

[45] I also note that in some paragraphs of Ms. Desrosiers' affidavit filed in support of the motion to amend, she referred to facts that have not been yet proven in Court or facts of which she did not have personal knowledge of. I have not taken these facts into consideration in rendering my Order.

[46] In my view, the amendments in the Amended Notice of Appeal do not result in prejudice to the respondent that cannot be compensated with costs. It is in the interests of justice to allow the appellant to file the Amended Notice of Appeal.

[47] In granting leave to the appellant to file the Amended Notice of Appeal under section 54 of the Rules, I may impose such terms as are just.

[48] I impose the following terms:

- The Amended Notice of Appeal will be deemed to be filed on the day of this Order;

- The respondent will have 60 days from the date of this Order to file and serve a Reply to Amended Notice of Appeal;

- The respondent will have the right to conduct further examinations for discovery on representatives of the appellant with respect to these amendments;

- The appellant shall bear the costs of the present motion and if further examinations for discovery are held, the appellant shall bear the costs of

such discovery. The costs are awarded in accordance with *Tariff B-Amounts to be Allowed on Taxation of Party and Party Costs;*

– The appeal is adjourned *sine die*. The parties will communicate with the Court to schedule a new hearing date.

Signed at Ottawa, Canada, this 19th day of December 2013.

"Johanne D'Auray"

D'Auray J.

CITATION:	2013 TCC 402
COURT FILE NO.:	2011-3774(GST)G
STYLE OF CAUSE:	FOREST FIBERS INC. v THE QUEEN
PLACE OF HEARING:	
DATE OF HEARING:	
REASONS FOR ORDER BY:	The Honourable Justice Johanne D' Auray
DATE OF ORDER:	December 19, 2013

APPEARANCES:

Counsel for the Appellant:	Caroline Desrosiers
Counsel for the Respondent:	Jocelyn Mailloux Martin

COUNSEL OF RECORD:

For the Appellant:

Name:	Caroline Desrosiers
Firm:	Spiegel Sohmer Inc. Montreal (Quebec)

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada