Docket: 2012-3283(GST)APP

BETWEEN:

PATTERSON DENTAL CANADA INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on January 25, 2013 at Montréal, Québec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the Applicant:	Dominic C. Belley Vincent Dionne
Counsel for the Respondent:	Brigitte Landry

ORDER

UPON reading the application for an Order extending the time within which to file a Notice of Objection to an assessment made under Part IX of the *Excise Tax Act* notice of which is dated March 16, 2010 in respect of reporting periods from May 1, 2005 to May 31, 2009;

AND UPON hearing from the parties in Court in Montréal, Québec on January 25, 2013;

AND UPON reading the written arguments filed with the Court by both parties;

NOW THEREFORE this Court orders that the Application is granted and the time within which a Notice of Objection may be filed is extended to the date of this

Order and the Notice of Objection, received with the Application, is deemed to be a valid Notice of Objection instituted on the date of this Order.

There will be no order as to costs.

The attached Amended Reasons for Order are issued in substitution to the Reasons for Order issued on June 6, 2013, for the purpose of issuance of a citation number for publication.

Signed at Montréal, Québec, this 4th day of March 2014.

"Rommel G. Masse"

Masse D.J.

CITATION: 2014 TCC 62
Date: 20140304
Docket: 2012-3283(GST)APP

BETWEEN:

PATTERSON DENTAL CANADA INC.,

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and

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AMENDED REASONS FOR ORDER

Masse D.J.

[1] This is an Application for an Order extending the time within which to file a Notice of Objection to an Assessment made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "*Act*"), which Assessment is dated March 16, 2010, for the reporting periods from May 1, 2005 to May 31, 2009. The Notice of Objection was filed on April 27, 2011, within the statutorily mandated period of one year after the expiration of the original 90 day period allowed to file a Notice of Objection as provided in paragraph 303(7)(*a*) of the *Act*. This Application was rejected by the Canada Revenue Agency ("CRA") on July 19, 2012. Hence, the Application to this Court.

Factual Context

[2] The Applicant is a corporation whose business is the selling and distribution of dental products and equipment to dentists across Canada. The Applicant carries on business in Montréal.

[3] The products sold by the Applicant include products marketed as anaesthetic solutions, some of which contain a drug called epinephrine. According to subsection 165(1) of the *Act*, every purchaser of a supply must pay GST in the amount of 5% of the price of that supply. However, according to subsection 165(3),

there are some supplies for which no GST is payable and these are called "zero-rated supplies". According to subsection 123(1), these zero-rated supplies are set out in section 2 of Part I of Schedule VI of the *Act*. Epinephrine and its salts are substances listed in section 2 of Part I of Schedule VI of the *Act* and are therefore zero-rated. Apparently however, epinephrine is not sold in its pure state.

[4] From 2005 until December 1, 2008, the Applicant considered its anaesthetic solutions containing epinephrine to be zero-rated supplies for purposes of GST and therefore the Applicant did not seek any payment of GST when it sold these products to its clients. However, in the later part of 2008, the Applicant became aware that a competitor had been unfavourably assessed by the CRA for not having collected any GST on anaesthetic solutions containing epinephrine. As well, according to Mr. Pierre Carfantan, Comptroller for the Applicant, and Mr. Dennis Gosselin, National Director of Finance and Operations for the Applicant, the Applicant became aware of a Letter of Interpretation number 07-01033130 dated July 9, 2007, issued by the Ministère du revenu du Québec (now the "Agence du revenu du Québec" or simply "Revenu Québec"). This Letter of Interpretation, reproduced in Exhibit A-1, Tab 2, reads in part as follows:

> Les solutions anesthésiques faisant l'objet de la présente demande ne sont pas visées par cette disposition. De plus, bien que certaines de ces solutions contiennent une quantité minime d'épinéphrine, qui, si elle était vendue seule pourrait être détaxée, le produit final acheté par les dentistes n'est pas de l'épinéphrine, mais une solution anesthésique.
>
> En conséquence, comme aucune autre disposition de la LTA ne permet de détaxer la fourniture par un distributeur à un dentiste de ces solutions anesthésiques, il s'agit donc d'une fourniture taxable.

[5] On reviewing this Letter of Interpretation, the Applicant came to the conclusion that it had no choice but to change the tax codes for its anaesthetic solutions from zero-rated to taxable in its computer accounting systems. According to Mr. Carfantan and Mr. Gosselin, the Letter of Interpretation was clear and unequivocal — anaesthetic solutions containing epinephrine were taxable even though epinephrine sold in pure state was zero-rated. Mr. Carfantan and Mr. Gosselin testified that they at all times wanted to be in compliance with the tax laws and therefore they unilaterally decided to change their tax treatment of these anaesthetic solutions from zero-rated to taxable. The Applicant then began to charge its clients GST and QST on those anaesthetic solutions containing epinephrine.

[6] Around October 2009, the Applicant was subjected to an audit by l'Agence du revenu du Québec. The auditor, Mr. Serge Baril, noted during this audit that the tax code for anaesthetic solutions had changed and he inquired as to the reasons for the change. Mr. Carfantan explained to Mr. Baril that the Applicant had changed the tax treatment for its anaesthetic solutions because of the Letter of Interpretation of which he became aware in late 2008 (although he was not in possession yet of a copy of the letter). Mr. Baril in fact later obtained a copy of this Letter of Interpretation.

[7] On January 22, 2010, Mr. Baril submitted a draft audit report to Mr. Carfantan that contained adjustments proposing the application of GST to anaesthetic solutions with epinephrine for the 2005 to 2009 period. There were also other adjustments that are not relevant to the case at hand. This draft audit further confirmed in the mind of Mr. Carfantan and Mr. Gosselin that they had been correct in their decision in 2008 to change the tax code for their anaesthetic solutions from non-taxable to taxable. On February 23, 2010, Mr. Baril submitted his final audit report wherein he maintained his position that anaesthetic solutions, even though they contained epinephrine, were subject to GST. In relation to the Letter of Interpretation, he states in his report reproduced in part as follows (Exhibit A-1, Tab 3, p. 15):

> L'interprétation donnée dans cette lettre d'interprétation (N/Réf.: 07-01033130) est exactement la même c'est-à-dire que les solutions anesthésiques faisant l'objet de la demande d'interprétation ne sont pas visée par les dispositions de l'article 2 de la partie I de l'annexe VI de la LTA et le paragraphe 1 de l'article 174 de la LTVQ. De plus, dans cette lettre d'interprétation on mentionne aussi le fait que bien que certaines de ces solutions contiennent une quantité minime d'épinéphrine qui, s'il était vendu seul pourrait être détaxé (en vertu de LTA VI-I-2*e*)x)), le produit final acheté par les dentistes n'est pas de l'épinéphrine, mais une solution anesthésique. L'opinion donnée dans cette lettre d'interprétation est à l'effet que la fourniture par un distributeur à un dentiste de ces solutions anesthésiques, constitue une fourniture taxable car aucune autre disposition de la LTA ou de la LTVQ ne permet de détaxer la fourniture de tels produits.
>
> Donc, l'opinion donnée dans cette lettre d'interprétation vient supporter et confirmer notre position et en conséquence, comme aucune autre disposition de la LTA or de la LTVQ ne permet de détaxer la fourniture par un distributeur à ses clients de ces solutions anesthésiques, il s'agit donc d'une fourniture taxable.

[8] This portion of Mr. Baril's Final Audit Report also confirmed in the minds of Mr. Carfantan and Mr. Gosselin that they had made the right decision back in 2008 and that they had no choice but to charge GST to their clients to whom the Applicant sold anaesthetic solutions.

[9] On March 16, 2010, an assessment was issued claiming in excess of $1,100,000 in GST, penalties and interest. Most of this assessment was in relation to anaesthetic solutions. No objection was made to this assessment since the Applicant was of the view that it had no choice but to accept it. The Applicant arrived at this conclusion based upon the fact that a competitor had been similarly assessed, the wording of the Letter of Interpretation and Mr. Serge Baril's Audit Report. All of this seemed to leave no room for any other interpretation or conclusion. The assessment was paid by the Applicant.

[10] By the end of 2010, the Applicant hired an outside consultant, Ryan LLC, to conduct a comprehensive review of its accounting procedures and practices, including tax compliance. The Applicant was quite concerned about making sure that it was complying with all tax laws and so part of the consultant's mandate was to identify any other products sold by the Applicant that may have been incorrectly categorized for the purposes of GST.

[11] In March 2011, Ryan LLC provided the Applicant with a copy of the decision of *Centre Hospitalier Le Gardeur c. Canada*, 2007 CCI 425, [2007] G.S.T.C. 21 ("*Le Gardeur*"), a decision of Justice Lamarre of this Court. Ryan LCC and the Applicant studied Justice Lamarre's reasons for decision and interpreted it to mean that where a drug in pure state is zero-rated, then the supply of that zero-rated drug when mixed with other products may also be zero-rated. The test, as stated by Justice Lamarre, is not whether the drug is supplied in pure state, but whether what was supplied was a mixture of substances whose main or essential element is a zero-rated drug. Justice Lamarre stated this test as follows:

> [60] Ce que nous comprenons de l'alinéa 2*a*) lorsqu'on entend le mot «drogue» de la manière que le définit la *LAD*, c'est qu'est détaxée la fourniture d'une substance ou d'un mélange de substances si ces dernières servent au diagnostic et si elles sont de l'annexe D de la *LAD*. Aux fins de notre analyse, nous jugeons plus prudent de parler d'un mélange de substances puisque le Dr Lepage a confirmé qu'on ne pouvait retrouver une drogue de l'annexe D à l'état pur dans un contenant. La drogue pure de l'annexe D avec les autres substances devant l'accompagner résulte donc en un mélange de substances. Il ne fait d'ailleurs pas de doute que tous les mélanges de substances présents dans les produits présentés par les appelants servent au diagnostic, qu'ils soient de l'annexe D ou non. La question est donc de déterminer si l'on a un mélange de substances de l'annexe D. À notre avis, si la substance principale d'un mélange constitue une substance de l'annexe D de la *LAD*, alors ledit mélange de substances sera considéré comme un tout, et par conséquent comme une fourniture détaxée. Comme il fut dit dans *O.A. Brown*, précité ([1995] A.C.I. No. 678 (QL)), en son paragraphe 29, si les présumées fournitures séparées sont liées à la fourniture détaxée à un point tel qu'elles font partie intégrante de

> l'ensemble au complet, on peut parler de fourniture unique détaxée. Ainsi, à moins de dispositions législatives à l'effet contraire, un mélange de substances sera caractérisé selon sa substance principale aux fins de l'alinéa 2*a*). Par conséquent, est détaxée la fourniture d'un mélange de substances dont la substance principale est de l'annexe D de la *LAD*.
>
> […]
>
> [62] Pour les produits de la catégorie 1 et 2 ayant un seul contenant, nous avons en tout et pour tout un mélange de substances à l'intérieur du produit. Le Dr Lepage est venu indiquer que chacun des produits présentés avait une drogue de l'annexe D comme drogue essentielle. Ainsi, nous pouvons affirmer avec certitude que si un produit ayant un seul mélange de substances a pour drogue essentielle une drogue de l'annexe D, la substance principale du mélange de substances sera nécessairement cette drogue de l'annexe D. Nous aurions pu en arriver au même résultat en regardant la description des catégories de produits. Les autres substances accompagnent la drogue pure de l'annexe D ou y sont attachées. Par ailleurs, on a indiqué que la valeur et l'importance de ces autres substances étaient minimes par rapport à la drogue de l'annexe D. La seule conclusion logique est donc que les produits de la catégorie 1 et 2 ayant un seul contenant sont détaxées puisqu'ils sont un mélange de substances dont la substance principale est de l'annexe D de la *LAD*.
> [Emphasis added]

[12] The Applicant is of the view that this dicta of Madame Justice Lamarre significantly changes the interpretation set forth in the Letter of Interpretation and gives rise to the argument that its anaesthetic solutions containing epinephrine may very well be zero-rated. If this argument is accepted, then the Applicant was incorrectly assessed and ought not to have paid the $1,100,000 it was assessed. At the time of the audit performed by Mr. Baril, neither Mr. Carfantan nor Mr. Gosselin were aware of the *Le Gardeur* decision. It would also seem that Mr. Baril was himself also not aware of the *Le Gardeur* decision since he did not bring it to the attention of the Applicant and the *Le Gardeur* decision was also not considered in arriving at his assessment.

[13] The Applicant realized the possible impact that the *Le Gardeur* decision could have on its tax responsibilities and so it set out to determine whether its anaesthetic solutions containing epinephrine met the *Le Gardeur* test. The issue that had to be determined was whether epinephrine could be considered to be an essential ingredient of the anaesthetic solutions that were sold during the period under review. This required scientific and medical evidence and the Applicant simply did not have the in-house resources to provide such evidence. To this end, the Applicant consulted experts in the medical and dental fields. On April 21, 2011, the Applicant received an opinion from Dr. Daniel Haas, a dentistry expert, to the effect that the choice by a

dentist of an anaesthetic solution containing epinephrine is mandated by the nature of the medical procedure and the patient's condition and therefore, should a dentist choose an anaesthetic solution containing epinephrine rather than one without epinephrine, then epinephrine could be considered to be an essential ingredient of the solution.

[14] Armed with this opinion, the Applicant immediately (six days later, on April 27, 2011) filed an application to the Minister of National Revenue (the " Minister") to extend the period of time for filing a Notice of Objection. The Minister refused the Applicant's request on July 19, 2012. This is more than a year after the Applicant filed its application to extend the time for filing a Notice of Objection. It certainly cannot be said that the Minister considered the Application with all due dispatch as required by subsection 303(5) of the *Act*. In its decision refusing the Applicant's request, the Minister gave the following reasons:

> Considérant la ou les raisons que vous nous avez données, nous ne pouvons pas vous accorder de prorogation de délai puisque la raison invoquée dans votre demande n'était pas de nature à vous empêcher de produire votre avis d'opposition dans le délai prévu par la loi ou de demander à quelqu'un d'agir en votre nom. En effet, ce n'est qu'après l'expiration du délai d'opposition que vous avez entrepris des démarches auprès de votre représentant.
>
> Par conséquent, nous considérons que vous n'avez pas démontré, tel que l'exige le paragraphe 303(7) de la *Loi sur la taxe d'accise*, que :
>
> - vous ne pouviez pas produire votre avis d'opposition ou demander à quelqu'un de le faire pour vous dans le délai prévu par la loi, ou que vous aviez l'intention véritable de faire opposition à la cotisation,
>
> - il serait juste et équitable de vous accorder la prorogation de délai en tenant compte des raisons indiquées dans votre demande et des circonstances de l'espèce.

[15] The Applicant brought this Application before this Court. In the meantime, the Applicant had retained another expert, Dr. Gino Gizarelli, a specialist in dental anaesthesia, who is willing to provide and defend an expert opinion in support of the Applicant's position as presented in its Notice of Objection.

[16] I found the testimony given by Mr. Carfantan and Mr. Gosselin to be straightforward and honest. Their evidence was not seriously challenged by the Respondent. I accept the fact that at all times they were very concerned that the Applicant comply with all of its tax responsibilities. I am also satisfied that had they

known of the potential ramifications of the *Le Gardeur* decision, the Applicant would most certainly have filed a Notice of Objection within the time period prescribed by the *Act*.

[17] It is interesting to note that as a result of the *Le Gardeur* decision; the CRA has amended its policy at least in so far as in-vitro diagnostic kits are concerned (see CRA GST/HST Notice No. 248). The Applicant submits that Notice No. 248 is also applicable to anaesthetic solutions containing epinephrine. However, as is made clear from the testimony of Ève-Marie Fortin, the CRA does not share this opinion and the CRA is of the view that *Le Gardeur* and Notice No. 248 are not applicable to anaesthetic solutions containing epinephrine.

Legislative Provisions

[18] The following provisions of the *Act* are applicable in the case at bar:

> 301 (1.1) Any person who has been assessed and who objects to the assessment may, within ninety days after the day notice of the assessment is sent to the person, file with the Minister a notice of objection in the prescribed form and manner setting out the reasons for the objection and all relevant facts.
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> […]
>
> 303(1) Where no objection to an assessment is filed under section 301, … within the time limit otherwise provided, a person may make an application to the Minister to extend the time for filing a notice of objection … and the Minister may grant the application.
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> 303(2) An application made under subsection (1) shall set out the reasons why the notice of objection … was not filed within the time otherwise limited by this Part for doing so.
>
> […]
>
> 303(5) On receipt of an application made under subsection (1), the Minister shall, with all due dispatch, consider the application and grant or refuse it, and shall thereupon notify the person of the decision by registered or certified mail.
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> […]
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> 304(1) A person who has made an application under section 303 may apply to the Tax Court to have the application granted after either
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> (a) the Minister has refused the application,

[…]

304(4) The Tax Court may dispose of an application made under subsection (1) by

(a) dismissing it, or

(b) granting it,

and in granting an application, it may impose such terms as it deems just or order that the notice of objection or the request be deemed to be a valid objection or request as of the date of the order.

304(5) No application shall be granted under this section unless

(a) the application was made under subsection 303(1) within one year after the expiration of the time otherwise limited by this Part for objecting or making a request under subsection 274(6), as the case may be; and

(b) the person demonstrates that

(i) within the time otherwise limited by this Act for objecting,

(A) the person was unable to act or to give a mandate to act in the person's name, or

(B) the person had a *bona fide* intention to object to the assessment or make the request,

(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and

(iii) the application was made under subsection 303(1) as soon as circumstances permitted it to be made.

Analysis

[19] Pursuant to subsection 301(1.1) of the *Act*, any person who has been assessed and who objects to that assessment may, within 90 days after the assessment is sent, file with the Minister a Notice of Objection in the prescribed form. Missing the 90 day deadline however is not fatal. The legislation provides a great deal of lee-way when it comes to filing a Notice of Objection. The taxpayer may take up to a year following the expiration of the initial 90 day period within which to file a Notice of Objection so long as the statutory conditions for doing so have been met.

[20] When no Notice of Objection has been served within these 90 days, the taxpayer may apply to the Minister pursuant to section 303 of the *Act* for an extension of time to file the Notice of Objection. Where the Minister refuses the application for the extension of time, then the taxpayer may apply to this Court pursuant to section 304 of the *Act* for an order permitting the filing of a Notice of Objection. For such an application to be successful, the Applicant must show that:

a) An application was made to the Minister within one year after the expiration of the 90 day time period allowed by subsection 303(1) for filing a Notice of Objection;

b) The Applicant must demonstrate that within that 90 day period;

i. The Applicant was unable to act or to mandate another to act on behalf of the Applicant, **or** the Applicant had a *bona fide* intention to object to the assessment or make the request;

ii. It would be just and equitable to allow the application given the reasons set out in the application and the circumstances of the case, and;

iii. The application to the Minister for an extension of time to file a Notice of Objection was made as soon as circumstances permitted.

[21] There is no dispute that the one year deadline has been met. The issues therefore to be determined by the Court are:

a) Was the Applicant unable to act or to mandate someone to act on its behalf within the 90 day period allowed for filing a Notice of Objection ***OR*** did the Applicant have a *bona fide* intention to object to the Assessment;

b) Would it be just and equitable to grant the Application given the reasons set out in the Application and the circumstances of the case; and

c) Was the Application made as soon as circumstances permitted it to be made.

Was the Applicant unable to act?

[22] The main issue is whether or not the Applicant has demonstrated that it was unable to act or to mandate someone else to act on its behalf within the 90 day period set out in subsection 301(1.1) of the *Act*. The Applicant takes the position that it has demonstrated that it was unable to act or to give a mandate to someone else to act on its behalf in accordance with clause 304(5)(*b*)(i)(A) of the *Act* due to circumstances attributable to Revenu Québec. It is suggested that the auditor, Mr. Serge Baril, misled the Applicant by confirming that the Letter of Interpretation was cast in stone whereas it had supposedly been put in doubt by this Court in *Le Gardeur*. I cannot and do not ascribe to Mr. Baril any intention to mislead the Applicant, since it is clear that Mr. Baril was himself not aware of *Le Gardeur*. However, it is arguable that Mr. Baril should have been aware of, and should have advised the Applicant of the possible application of *Le Gardeur* as well as of Notice No. 248.

[23] In deciding whether or not it was impossible for the Applicant to act, one must take a contextual approach to the issue. Indeed this is the wisdom imparted to us by the Supreme Court of Canada whenever a court has to interpret a statutory scheme: see *Canada Trustco Mortgage Co. v. Canada,* [2005] 2 S.C.R. 601 at para. 10.

[24] The Supreme Court of Canada provides some guidance in interpreting what is meant by "impossible for a person to act". In the case of *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516 at pp. 526-527, observed as follows:

> […] By referring to impossibility "in fact," which implies that the impossibility is relative, the legislator has chosen a test that is certainly less demanding that the criteria of absolute impossibility of force majeure.
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> […]
>
> For the Superior Court to allow a motion in revocation of judgment to be filed late pursuant to art. 484 C.C.P., it is therefore not necessary for the party to show that he was prevented from acting by an insurmountable obstacle totally beyond his control; the party need only show that the action was impossible in fact, that there was a relative impossibility. The rule laid down in the last part of art. 523 C.C.P. is the same. The wording is identical and there is no indication that the legislator intended it to have a different meaning. It must therefore be said that the litigant who applies for special leave to appeal under this article does not have to prove that the action was absolutely impossible, only that it was relatively impossible.

> It is impossible to specify in advance every situation that might constitute a relative impossibility. Each case must be decided according to its own particular circumstances, since the impossibility in question is really one of fact.

[25] Although the Court in *Cité de Pont Viau* was considering provisions of the *Québec Code of Civil Procedure*, it stands to reason that the test for "impossibility to act" in the context of the *Act* should be similar since, in *Cité de Pont Viau* as in the present case, the Court was dealing with an application to extend the time for filing an appeal.

[26] The Applicant urges this Court to conclude that it was impossible for the Applicant to act because:

a) The CRA did not advise the Applicant of the possible application of *Le Gardeur* and Notice No. 248 to the case of mixtures of substances that contain epinephrine (ie. the Applicant's anaesthetic solutions).

b) The Applicant has always intended and has demonstrated its intention to be in compliance with the law as shown by the fact that it voluntarily and unilaterally changed its own accounting treatment for tax purposes of its anaesthetic solutions in December 2008. Had it known of *Le Gardeur* and Notice No. 248, it would not have changed its accounting treatment and would have continued to treat its anaesthetic solutions containing epinephrine as zero-rated.

c) The Applicant now believes that its prior tax treatment of its anaesthetic solutions was in error and it has a reasonable chance of success in varying the assessment.

d) The Applicant could not act within the 90 day time limit prescribed by subsection 301(1.1) of the *Act* because it was not possessed of the knowledge necessary to enable it to make an intelligent and informed decision whether or not to challenge the assessment. The circumstances were such that they suppressed any intention it may have had to object let alone respect the formality of filing a Notice of Objection in prescribed form.

e) The Applicant could not file a Notice of Objection since during the period of time allowed to do so, it did not have available to it any expert opinion of whether or not epinephrine was an essential ingredient of its anaesthetic solutions.

f) Had the Applicant been fully informed, and if it in fact had had knowledge of the possible impact of *Le Gardeur* and Notice No. 248, it would have immediately challenged the assessment and it would have filed a Notice of Objection within the prescribed 90 day time limit.

[27] Was the Applicant, under the circumstances, unable to act? I am of the view that the Applicant was unable to act, and unable to file a Notice of Objection because the entire circumstances combined to suppress any intention that the Applicant may have had to object. The decision by the Applicant to take no further action at the time that it was assessed was not a fully informed one. Had the Applicant known of the possible impact of *Le Gardeur* and Notice No. 248, then it is clear that it would have acted with due dispatch and it would have retained expert witnesses to provide an opinion as to whether or not epinephrine was an essential ingredient of its anaesthetic solutions and thus whether or not a Notice of Objection would have any likelihood of success.

[28] In *2950-5914 Québec Inc. v. Sous Ministre du Revenu du Québec*, 2003 CanLII 38721 (QC CQ) the Honourable Judge Bousquet was of the view that mistaken information provided by the tax authorities in good faith justifies an extension of time since it was impossible for the taxpayer to act as a consequence of the defective information. In *Industries Bonneville v. The Queen*, 2002 CanLII 849 (CCI), [2002] T.C.J. No. 426 (QL), it was held that when the nature of an assessment is not entirely understood by the taxpayer, then an extension of time is appropriate. In *Charles v. M.N.R.*, 81 DTC 744, the Tax Review Board came to a similar conclusion in the case of an individual who wrongly believed that an assessment was for the disallowance of the dividend tax credit, and therefore any objection would be in vain. The taxpayer subsequently learned after the 90 day deadline, that the basis of the assessment was the disallowance of a business investment loss, in which case an objection was possible. An extension of time to challenge the assessment was granted.

[29] In conclusion, I find that the Applicant was not able to act under the circumstances.

Would it be just and equitable to grant the application?

[30] The Applicant takes the position that it would be just and equitable in all of the circumstances to grant the Application (clause 304(5)(*b*)(ii) of the *Act*).

[31] I agree. I am of the view that it would be just and equitable to allow the Application in the circumstances of this particular case for the following reasons:

a) The Applicant was at all times completely transparent with the CRA during the audit process;

b) The Applicant has demonstrated a history of willingness to voluntarily comply with its tax obligations;

c) Since the assessment has already been paid in full, the CRA will not suffer any prejudice as a result of the extension of time;

d) The extension of time will permit a complete, open, frank and fully informed debate on the validity of the assessment;

e) The Applicant has demonstrated that it has an arguable position to defend and therefore it is in the interest of justice to allow it to do so;

f) A full debate on the merits will clarify the state of the law;

g) The total amount of GST and provincial sales taxes at stake are significant and amount to more than 1.6 million dollars including interest and penalties. The Applicant should not be deprived of this significant amount of money nor should CRA be enriched by this amount if in fact the assessment is based upon erroneous principles of law; and

h) The Applicant submits that both the benefit of the doubt and the balance of convenience favours the Applicant.

[32] With respect to this last point, it is to be noted that if there is any doubt, the Court should find in favor of the means of safeguarding the rights of the parties: see *Québec* (*Communauté urbaine*) *v. Services de santé du Québec*, [1992] 1 S.C.R. 426, pp. 442-443. The rights of the parties can only be safeguarded if we allow a full debate on the merits to take place.

[33] I am therefore of the view that it would be just and equitable to allow the Application.

Was the application made as soon as the circumstances permitted?

[34] Pursuant to subparagraph 304(5)(*b*)(iii), the Application must be made as soon as circumstances permit it to be made. In this regard, the timeline of events is an important consideration. As pointed out in the Applicant's written argument, the chronology of events is as follows:

a) March 16, 2010: Notice of Assessment;

b) June 14, 2010: Deadline for Objection;

c) December 2010: mandate given to Ryan LLC;

d) March 2011: Applicant advised by Ryan LLC of the existence of the Tax Court of Canada decision in *Le Gardeur*. The Applicant then refers the matter to a dental expert for a scientific opinion on the issue of whether epinephrine is the essential element in its anaesthetic solutions;

e) April 21, 2011: affirmative opinion received from dental expert;

f) April 27, 2011: application for extension of time made to the Minister; and

g) June 14, 2011: deadline for application to the Minister.

[35] The total period of time that has elapsed is admittedly quite long. However, context and circumstances are everything. It is clear that, pursuant to subsection 303(3), the Application to the Minister must be accompanied by a copy of the Notice of Objection. The Notice of Objection must set out the reasons for the objection and all relevant facts in support of the objection. Consequently in order to prepare a Notice of Objection the Applicant must be possessed not only of the intention to file a Notice of Objection, but also should put forth cogent reasons in support of its challenge to the Assessment. In the case at bar, the Applicant was not possessed of sufficient information upon which to base a Notice of Objection until it became aware of the decision of the Tax Court of Canada in *Le Gardeur*; this was early in 2011. It was then necessary to obtain an expert opinion to determine whether or not epinephrine was an essential ingredient of its anaesthetic solutions. It was only after it obtained such an opinion that the Applicant could make an informed decision of whether or not it could be argued that the test set out in *Le Gardeur* was applicable to the Applicant's anaesthetic solutions containing epinephrine. This expert opinion only became available on April 21, 2011. After that date, the Applicant acted with due dispatch and presented its Application to the Minister only six days later.

[36] Upon the consideration of the full chronology of events I come to the conclusion that the Application to the Minister was made as soon as circumstances permitted it to be made within the meaning of subparagraph 303(5)(*b*)(iii).

Officially induced error

[37] During the course of this hearing, I asked counsel to provide me with their arguments as to whether or not the doctrine of "Officially Induced Error" was applicable in the circumstances. The Respondent argues that the doctrine of Officially Induced Error is not applicable to cases of appeals of tax assessments. I agree. In the case of *Brenda G. Klassen c. Sa Majesté La Reine*, 2007 CAF 339, Justice Noël of the Federal of Appeal definitively stated that such is in fact the case. Justice Noël stated at paragraph 27:

> [27] Enfin, la prétention de l'appelante selon laquelle il y a lieu de modifier la cotisation en raison d'une erreur provoquée par un fonctionnaire m'apparaît dénuée de fondement. Il est bien établi en droit que la réparation accordée par un tribunal dans le cadre d'un appel interjeté à l'encontre d'une nouvelle cotisation en vertu de la LIR doit être prévue par la loi. S'il s'avère qu'un acte de négligence a induit l'appelante en erreur, d'autres recours s'offrent à elle. Aucun redressement ne peut cependant être accordé pour ce motif dans le contexte d'un appel en matière d'impôt.

[38] In addition, the learned author David Sherman in his work *Canada GST Service – Sherman, Carswell, Toronto*, arrives at the same conclusion. The author states:

> In a criminal law context (such as a trial on charges for evasion of GST), one could likely rely on "officially induced error of law" as a defence. See *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (S.C.C.). This does not apply to appeals of tax assessments, however.

[39] Therefore, the doctrine of Officially Induced Error is not applicable in the instant case.

The principle of judicial comity

[40] I have been informed by counsel that on March 20, 2013, the Honourable Judge Sylvain Coutlée of the Cour du Québec rendered his decision regarding the Applicant's Application for an extension of time to file a Notice of Objection against

the assessment issued pursuant to the *Act* respecting the Québec Sales Tax: see *Patterson Dental Canada Inc. c. Agence du Revenu du Québec,* No 500-80-023039-127, [2013] J.Q. n^{o} 2606 (QL), 20 mars 2013, Montréal, Chambre civile. This was a parallel Application involving essentially the same principles as in the case at bar. Judge Coutlée granted the Application. I have read with great interest the reasons for decision of Judge Coutlée. The essence of Judge Coutlée's judgment is contained in the following paragraphs:

> [33] Dans les faits les deux parties ignoraient la décision *Le Gardeur*. Le rapport du vérificateur, monsieur Serge Baril, confirme que l'Agence ignorait non seulement le jugement *Le Gardeur*, mais aussi le Bulletin d'interprétation de l'Agence sur le statut taxable des produits d'épinéphrine utlilisés par les dentistes.
>
> [34] Il est vrai que *Le Gardeur* porte sur certaines trousses de diagnostic *in vitro*. Cependant, ce qui importe est de déterminer l'applicabilité de la décision de *Le Gardeur* dans le cas qui nous occupe.
>
> [35] Le Tribunal n'a pas a décider du fond du litige, mais bien si Patterson rencontre les critères de l'article 93.1.4 *L.A.F.*.
>
> […] …
>
> [39] Il ne fait aucun doute dans l'esprit du Tribunal que Patterson n'a pas essayé d'éluder le paiement de la cotisation, au contraire. Lorsque Patterson prend connaissance du bulletin d'interprétation (P-2), elle taxe immédiatement ses produits. Suite à la réception de l'avis de cotisation, elle l'acquitte. Patterson s'est comportée en citoyen corporatif responsable. Patterson ne pouvait s'opposer à la cotisation de l'Agence basée sur la décision *Le Gardeur*. L'Agence elle-même l'ignorait. Comment peut-on exiger plus du contribuable alors que l'Agence, dont le mandat est d'appliquer les lois fiscales, ne connaît pas, dans le cas qui nous occupe, le droit applicable?
>
> [40] La séquence des événements, l'ignorance par l'Agence, d'une part, des différents bulletins d'interprétation et, d'autre part, de la décision *Le Gardeur*, fait en sorte que la demanderesse a été dans l'impossibilité de fait d'agir. Conclure autrement signifierait que l'Agence exigerait du contribuable qu'il ait une meilleure connaissance qu'elle des dispositions fiscales applicables. Il est entendu que le contribuable ne peut plaider l'ignorance de la loi. En l'espèce, c'est le contribuable qui a mis l'Agence sur la piste. On ne peut donc reprocher à la demanderesse son défaut d'agir.
>
> [41] Dans les circonstances, le Tribunal conclut que la demanderesse, Patterson, était dans l'impossibilité de fait d'agir.

> [42] Qui de plus est, il est du devoir des tribunaux de sauvegarder les droits des parties. Sans se prononcer sur le fond de cette affaire, il appert *prima facie*, que Patterson a une position à faire valoir. Quant à l'agence, elle ne subit aucun préjudice puisqu'elle a déjà encaissé la cotisation dans ses coffres.
>
> [43] En conséquence, Patterson s'étant acquittée de son fardeau de preuve, le Tribunal donne droit à sa requête.

[41] The reasons given by Judge Coutlée are more or less the same as the ones that I have given in the matter that is before me. Even if I did not agree with Judge Coutlée, then I would have to give serious consideration to the principle of judicial comity.

[42] In *Houda International Inc. c. Sa Majesté la Reine*, 2010 CCI 622, [2011] G.S.T.C. 8, Justice Boyle of this Court had to consider whether to grant an extension of time to file an appeal of an assessment made against the Appellant pursuant to section 305 of the *Act*. The Cour du Québec had already granted an extension of time in the same case regarding the Québec Sales Tax assessment. Justice Boyle had the following to say about the principle of judicial comity:

> [4] En premier lieu, la Cour doit rechercher si elle est liée par la décision de la Cour du Québec en raison de la règle de la préclusion fondée sur la chose jugée et de la règle d'abus de procédure; c'est la principale question. Si la réponse est négative, elle doit alors rechercher dans quelle mesure elle doit faire preuve de déférence à l'égard de la décision de la Cour du Québec par courtoisie judiciaire.

[43] With regard to the doctrine of abuse of process and *res judicata*, Justice Boyle observed as follows:

> [21] Cependant, la doctrine de l'abus de procédure n'exige pas qu'il y ait identité des parties lorsqu'elle s'applique pour empêcher la remise en cause d'une question déjà tranchée. Je conclus que la question dont je suis saisi a déjà été tranchée par la Cour du Québec et que je ne dois pas la réexaminer, car cela pourrait donner lieu à une issue différente en l'espèce. Je ne dois pas rouvrir cette question parce que cela donnerait lieu à une utilisation inefficace des ressources publiques et privées, pourrait aboutir à des décisions contradictoires qui ne pourraient pas être raisonnablement expliquées aux contribuables au Québec et ailleurs au Canada, et porterait inutilement atteinte aux principes d'irrévocabilité, d'uniformité, de prévisibilité et d'équité dont dépend la bonne administration de la justice.

[44] He also had the following to say about the principle of judicial comity:

> [28] Je n'ai nul doute que permettre à l'intimée d'agir donnerait lieu à un abus de procédure. Cela dit, subsidiairement, je conclus que, compte tenu des circonstances, il est dans l'intérêt de la justice que la requête soit accueillie par déférence pour la Cour du Québec. Si la requête n'était pas accueillie, l'administration de la justice pour les appels en matière fiscale serait exposée à une inutile confusion, le droit deviendrait incertain et la confiance du public serait minée. L'effet serait le même, que la Cour se prononce en faveur de la requérante ou non pour ce qui est du bien-fondé de l'appel.
>
> V. Conclusion
>
> [29] La demande présentée par la contribuable tendant au dépôt tardif de son appel en matière de TPS devant la Cour est accueillie. La Cour du Québec s'est déjà prononcée, en substance, sur la même question pour l'application de la taxe de vente du Québec. Compte tenu des circonstances, je conclus qu'il serait inapproprié d'examiner le bien-fondé de la thèse de l'intimée: cela donnerait lieu à un abus de procédure. Subsidiairement, à mon avis, la requête doit être accueillie parce que, selon le principe de la courtoisie judiciaire, je dois faire preuve de déférence à l'égard de la décision de la Cour du Québec. Je ne vois pas pourquoi des ressources judiciaires rares devraient être consacrées à l'examen d'une telle requête sur le fond puisque la demande provinciale correspondante a déjà fait l'objet d'une décision.
>
> [30] Lorsque des requêtes de dépôt tardif d'avis d'appel sont présentées dans la période d'un an suivant l'expiration du délai normal par des contribuables qui avaient demandé à leur avocat ou à leur comptable de déposer une opposition ou un appel en vertu de la *Loi de l'impôt sur le revenu* ou de la loi relative à la TPS, la Cour est généralement appelée à rechercher si le contribuable avait véritablement l'intention de s'opposer à la cotisation ou d'interjeter appel et s'il est juste et équitable de faire droit à la demande. Mon analyse et mes conclusions n'y changent rien. Cependant, lorsque la Cour du Québec a conclu que, compte tenu des circonstances particulières de la contribuable, les exigences correspondantes de la *LMR* étaient remplies, la Cour, qui contrôle sa procédure, devrait généralement faire preuve de déférence envers cette décision; il ne faut pas s'attendre à ce que celle-ci réexamine la question sur le fond. Il ne faut pas considérer que cela constitue l'adoption par la Cour d'une approche moins stricte quant à l'examen des demandes de dépôt tardif dans les cas où le dépôt tardif en raison du manquement de l'avocat ou du comptable du contribuable en l'absence d'une demande provinciale correspondante qui a déjà fait l'objet d'une décision.

[45] I am in total agreement with Justice Boyle. For this Court to now render a decision that is contrary to that arrived at by the Cour du Québec involving essentially the same parties and the same facts would, in my opinion, bring the administration of justice into disrepute in the eyes of the informed citizen.

Conclusion

[46] It is not for me to decide the merits of the arguments of the Applicant. After a full hearing, the Applicant's arguments may well be rejected with the result that anaesthetic solutions containing a small percentage of epinephrine will continue to be taxable. On the other hand, it may be held that the test as stated in *Le Gardeur* holds sway with the result that anaesthetic solutions containing epinephrine are to be zero-rated. That is for another forum to decide in due course. However, I am of the view that the Applicant ought to be provided with the opportunity to make its argument and have it determined on the merits.

[47] In conclusion I find that:

a) the Applicant has shown that its objection against the Notice of Assessment is one that can reasonably be argued and ought to be determined after a full, frank and well-informed debate;
b) the Applicant has shown that it was unable to act or to mandate someone else to act on its behalf, within the time otherwise limited by the *Act* to file a Notice of Objection in accordance with clause 304(5)(*b*)(i)(A) of the *Act*;
c) it is just and equitable to grant the Application in accordance with subparagraph 304(5)(ii) of the *Act*; and
d) the Application was made as soon as the circumstances permitted it to be made in accordance with subparagraph 304(5)(iii) of the *Act*.

[48] Therefore, it is ordered that:

a) The application is granted.
b) The Notice of Objection appended to the Applicant's Application is deemed to be a valid Notice of Objection as of the date of this Order.
c) There is no order as to costs.

[49] These Amended Reasons for Order are issued in substitution to the Reasons for Order issued on June 6, 2013, for the purpose of issuance of a citation number for publication.

Signed at Montréal, Québec, this 4th day of March 2014.

"Rommel G. Masse"

Masse D.J.

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