Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [2011] AATA 281

ADMINISTRATIVE APPEALS TRIBUNAL	)	
	)	**No 2009/3404**
TAXATION APPEALS DIVISION	)	

Re **CLOTHING IMPORTER**

Applicant

And **COMMISSIONER OF TAXATION**

Respondent

DECISION

Tribunal Senior Member S E Frost

Date 29 April 2011

Place Sydney

Decision If the parties do not consider that the formal decision of the Tribunal, in the light of these reasons, should be to affirm the objection decision under review, then they should indicate that to the Tribunal within seven days of publication of these reasons. In the absence of any such indication, the decision of the Tribunal will be to affirm the objection decision under review.

..... [SGD].....
S E Frost
Senior Member

CATCHWORDS

TAXATION AND REVENUE – GST – supplies made to Australian customers on a "delivered duty paid" basis – whether supplies are connected with Australia

A New Tax System (Goods and Services Tax) Act 1999 ss 9-5, 9-25 and 13-5

REASONS FOR DECISION

29 April 2011 Senior Member S E Frost

INTRODUCTION

1. GST is payable on "taxable supplies". To be a "taxable supply" a supply must be, among other things, "connected with Australia".

2. The applicant in this case carries on business in North America and elsewhere, but not in Australia. It has no premises in Australia. It has no employees in Australia. It has no bank accounts in Australia. It has no business infrastructure of any kind in Australia. Nevertheless, the Commissioner of Taxation claims that the applicant has made supplies that are "connected with Australia".

3. The supplies in question are supplies of goods. The goods have been manufactured, overseas, by the applicant. The Commissioner says that when the applicant supplies the manufactured goods to its Australian customers, it is making a supply that "involves the goods being brought to Australia". That, together with the fact that the applicant imports the goods, is enough (according to the Commissioner) to make the supplies "connected with Australia".

4. If the Commissioner is right, then because the other elements of a "taxable supply" are satisfied, the supplies will be subject to GST.

THE RELEVANT LAW

5. According to s 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999*:

> You make a **taxable supply** if:
>
> (a) you make the supply for *consideration; and
>
> (b) the supply is made in the course or furtherance of an *enterprise that you *carry on; and
>
> (c) the supply is *connected with Australia; and
>
> (d) you are *registered, or *required to be registered.
>
> However, the supply is not a *taxable supply to the extent that it is *GST-free or *input taxed.
>
> (Original emphasis.)

6. The proviso at the end of s 9-5, relating to supplies that are GST-free or input taxed, has no relevance here.

7. It is not disputed that paragraphs (a), (b) and (d) are satisfied. The case turns on paragraph (c).

8. Section 9-25 of the Act, dealing with the "connected with Australia" criterion, provides relevantly:

> *Supplies of goods to Australia*
>
> (3) A supply of goods that involves the goods being brought to Australia is **connected with Australia** if the supplier either:
>
> (a) imports the goods into Australia; or
>
> (b) installs or assembles the goods in Australia.
>
> (Original emphasis.)

9. It is important to note at this point that GST is also payable on "taxable importations". Section 13-5 of the Act explains that you make a "taxable importation" if goods are imported into Australia and "you enter the goods for home consumption (within the meaning of the *Customs Act 1901*)".

10. The Commissioner's case is that, in respect of any particular shipment of goods to Australia, the applicant has made both a taxable importation and a taxable supply. (The taxable importation is also a "creditable importation" – see Division 15 of the Act – because the applicant, being registered for GST purposes, imported the

goods "in carrying on its enterprise", which is a "creditable purpose"[1]). The result, according to the Commissioner, is that GST is payable on the taxable importation when the goods are entered for home consumption; that amount of GST is then credited (refunded) to the applicant, leaving the goods effectively tax-free in the applicant's hands; and then GST is payable once more by the applicant when the goods are supplied by the applicant to its customer.

THE APPLICANT'S SUPPLIES OF GOODS TO AUSTRALIA

11. In a letter to the Australian Taxation Office (ATO) in 2009[2], the applicant explained the background to its GST problems:

> During the initial phase of our business in Australia (2000 to mid-2002) we were shipping using [an international freight and logistics company ("FreightCo")] on a DDP[3] basis. FreightCo was acting as our freight forwarder and our customs broker and paying GST and duty on [our] behalf upon importation and charging [us] in return.

12. Up to this point, mid-2002, the applicant was paying GST on the taxable importation but could not claim a credit on the importation because it was not registered for GST purposes and for that reason, it could not be making creditable importations. It also did not pay GST on the supplies it made to its Australian customers because, not being registered (and, presumably, not being *required to be registered*), it could not be making taxable supplies because paragraph (d) of s 9-5 of the Act[4] was not satisfied.

13. The "DDP basis" referred to in the letter to the ATO is a reference to "Delivered Duty Paid", one of the Incoterms® rules[5] devised by the International Chamber of Commerce (ICC), and described by the ICC as "an internationally recognized standard ... used worldwide in international and domestic contracts for the sale of goods"[6]. The responsibilities of the seller under a DDP contract include

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[1] s 15-10(1) of the Act
[2] A document lodged under s 37 of *Administrative Appeals Tribunal act 1975* labelled "T8"
[3] See [13] of these reasons
[4] See [5] of these reasons
[5] "Incoterms" is a trademark of the International Chamber of Commerce
[6] International Chamber of Commerce, *Incoterms®* <http://www.iccwbo.org/incoterms/id3040/index.html> at 14 April 2011

payment of import duties and taxes, so that, as the name suggests, the goods can be "delivered duty paid" to the buyer.

14. The letter to the ATO continues:

> In February of 2002, during his annual business trip to Australia, [my son] had a meeting with [...], a commercial officer with [our country's] consulate, to discuss how to improve our business opportunities in Australia. One of the conclusions they came to in their discussions, related to logistic difficulties we were experiencing in servicing our Australian clients in a timely fashion. [The commercial officer] suggested that perhaps [a different company ("BrokerCo")] could help us resolve some of these issues. ... [When my son returned home] he continued to communicate both verbally and through email with [the principal of BrokerCo ("Mr Broker")] who became his regular contact with BrokerCo. During this period we continued using FreightCo as our freight forwarder and customs broker, but through ongoing consultations between [my son] and Mr Broker, it was determined that it would be best that we obtain a GST registration and seek a GST deferral.

15. GST registration is available to any entity that carries on an enterprise: Division 23 of the Act. The applicant chose at this point to apply for registration, and also for "GST deferral" – an arrangement under which an entity may be permitted to account for its import GST liability on its Business Activity Statements (BASs) rather than to the Australian Customs Service at the time of entry of the goods for home consumption. An entity importing goods for a creditable purpose, and approved for the deferral scheme, will generally have offsetting input tax credits (because it is making creditable importations) so that the net liability on the BAS, in relation to the importations, will be zero.

16. The letter to the ATO continues:

> *In April 2002, we applied for our GST number and deferral and stopped charging our clients GST on our invoices as instructed by Mr Broker. We were accepted in August 2002 into the program... At that point Mr Broker applied for a retroactive refund, going back to April 2002 which was the date of our application for our GST number, for the GST that we had been paying upon importation. Apparently this is where our non-compliance began. It should be pointed out that in March 2003, BrokerCo replaced FreightCo as our freight forwarder and customs broker.*

17. This is the critical point in the chronology. The application for the "retroactive refund" (for the period from April, when the applicant's GST registration took effect, until August, when it received approval to participate in the deferral scheme) appears

in order, since the applicant had by then started making creditable importations. But the applicant also "stopped charging [its] clients GST on [its] invoices as instructed by Mr Broker". The result is that, after the payment of the refund (and also on an ongoing basis, once the import GST and the input tax credits are accounted for on the BASs), the goods are tax-free in the applicant's hands; but because no GST is charged to the customers, the goods are also tax-free *in the customers' hands.*

18. The Commissioner says this is not the right outcome. He says that GST should have been charged on the supply to the customers. He acknowledges that if the customers are registered for GST, and buying the goods for a creditable purpose, then they will be making a "creditable acquisition" and will be able to claim input tax credits. Of course, that will make the goods effectively tax-free in their hands as well (which is, after all, one of the fundamental design features of a value added tax such as the Australian GST). But, he says, that is no reason to disregard the taxable supply which, on the Commissioner's case, the applicant has made. Put simply, the applicant owes GST on its supplies. If input tax credits are available to the customers, that is a different matter entirely. Presumably the Commissioner's thinking is that if he were to disregard transactions of this nature, then the GST would become a single-stage retail tax rather than the multi-stage credit-offset value-added tax that it is.

HAS THE APPLICANT MADE TAXABLE SUPPLIES?

19. There is no doubt that the applicant has made taxable supplies to its Australian customers. Each supply "involves the goods being brought to Australia", and in each case the applicant is the entity importing the goods. That means that the supplies are "connected with Australia" and, all other elements of a "taxable supply" being satisfied, the applicant must pay GST.

OTHER MATTERS

20. The applicant says that the ATO should bear some, if not all, of the responsibility for any GST shortfall that has arisen. Its application to the Tribunal states:

> They [the ATO] failed to properly address our written explanation of our interpretation of the GST regime when we applied for our GST refund in 2002. ... We also believe that in view of the known confusion with respect to the GST implementation that they were negligent in not auditing our file for 6 years. It was apparently known that foreign companies, especially small foreign companies were prone to misinterpreting the requirements of the recently implemented GST regime.

21. The applicant separately complains that the ATO "mishandled" the information contained in the letter that Mr Broker sent to the ATO in August 2002. This letter accompanied the applicant's BASs for the period June 2001 to July 2002 and sought to explain the applicant's past and future GST procedures. The applicant claims that this letter is an "actionable communication" and suggests that if there is anything in it that is unclear, confusing or wrong, then the ATO should have done something about it.

22. This Tribunal is not the forum for examining whether the Commissioner's officers did or did not adequately deal with Mr Broker's correspondence on behalf of the applicant. The Tribunal's role is to consider whether the Commissioner's assessment of the applicant's "net amount" for the relevant periods is excessive. Any broader issues in relation to the ATO's handling of the applicant's affairs will need to be taken up separately with the ATO if that is what the applicant wishes to do.

CONCLUSION

23. The applicant's supplies to Australian customers during the month of November 2004 and during the period January 2005 to September 2008 (the periods subject to review) are taxable supplies.

24. It seems from the papers that the appropriate decision for the Tribunal to make is to affirm the decision under review. However, to guard against possible error, I will delay making a formal decision to that effect. If the parties do not consider that the formal decision of the Tribunal should be to affirm the objection decision under review, then they should indicate that to the Tribunal within seven days of publication of these reasons. In the absence of any such indication, the decision of the Tribunal will be to affirm the objection decision under review.

I certify that the 24 preceding paragraphs are a true copy of the reasons for the decision herein of Senior Member S E Frost

Signed .....[SGD].....

Nicholas Olson, Associate

Hearing on the papers

Date of Decision 29 April 2011

Case Name	Date	Summary
Re Pacific Resources International and Chief Executive Officer of Customs [2011] ATAA 285	2 May 2011	Determined the tariff classification of Fish Oil Powder for the purposes of the Customs Tariff Act 1995. Customs argued that the powder should be classified as an "edible...preparations of animal or vegetable...oils" whilst Pacific Resources contended it should be classified as either "oils...or fish" or "inedible... preparations of animal or vegetable...oils". It was held by the Tribunal that the correct classification was an "edible...preparations of animal or vegetable...oils". Identification of goods was found to be a practical 'wharfside task', made by reference to the characteristics of the goods present, and not by reference to intentions of the importer or supplier (this follows earlier cases). In determining classification reference was made to using overseas classifications as it is desirable for trading companies to harmonise their classifications (although in this case they were found helpful as the US and UK used two different classificiations).
Re Phillip Morris Ltd and British American Tobacco Ltd and Department of Health and Ageing [2011] AATA 215 and 216	30 March 2011	Case concerned an FOI request to produce legal advice referenced in Senate regarding the decision of government to enforce plain packaging on tobacco products. The FOI request denial was affirmed. Relevance of case may arise due to references to Australia's international obligations (in particular General Agreement on Trade and Tariffs) – suggestion that because of lack of evidence regarding the effect of generic packaging on consumer behaviour it may be difficult to establish that consistent with international Conventions. I note that a recent release states that the action being brought by Phillip Morris against the Commonwealth is on the basis that the Commonwealth is effectively trying to 'steal' the company's brand (trademark/property) in contravention of a bilateral investment treaty signed with Hong Kong 20 years ago.
Sogo Duty Free Pty Ltd v Commissioner of Taxation [2011] FCAFC 36		Concerns section 60 of the Excise Act and a demand made by the Commissioner of Taxation for failing to keep excisable goods safely. ATO has released its comments on the Sogo Duty Free case (deals with section 60 of the

		Excise Act - which was the section we dealt with in Brunella). Stating that the Full Federal Court has reinforced the principles previously articulated in *Sidebottom v Giuliano* (2000) 98 FCR 579 and *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279. The decision is consistent with the Commissioner's submission that section 60 of the Excise Act operates independent of any other provision of that Act for the collateral protection of the revenue and is a separate and collateral liability to Excise duty. http://law.ato.gov.au/atolaw/view.htm?docid=%22LIT%2FICD%2FVID827of2010%2F00001%22
Clothing Importer v Cmr of Taxation	29 April 2011	Case dealt with question of whether goods manufactured overseas and then supplied to Australian Customer is 'connected with Australia' for the purpose of determining whether it is a taxable supply (and thus subject to GST). The applicant carried on a business in North America and elsewhere, but not in Australia. It had no premises, no bank accounts or business infrastructure of any kind in Australia. It was held that it was a taxable supply as it involved goods being brought into Australia and the applicant was the entity importing the goods (thereby making the supply connected with Australia).
Livestock Transport (Sydney) v Commonwealth of Australia [2001] NSWSC 283	11 April 2011	Case concerns action against Commonwealth for damages caused by the restrictions placed on horse transport due to the outbreak of equine influenza arguing that introduction of the virus was due to negligence on the part of the Commonwealth in the management of the nation's quarantine system. This application was in relation to Livestock Transport seeking to have the proceedings moved to Queensland. The application was rejected.
Kimberly-Clark Australia Pty Ltd v Minister for Home Affairs [2011] FCA 225	24 March 2011	Case concerns a dumping duty notice in respect of toilet paper from China and Indonesia. The applicant alleged that Customs reasoned its conclusion that injury to Australian industry caused by dumping of toilet paper was not material because that injury was caused more by other factors than dumping. This argument was rejected.