COURT OF APPEAL FOR ONTARIO

CITATION: National Money Mart Company v. 24 Gold Group Ltd., 2018 ONCA 812
DATE: 20181010
DOCKET: C64588

2018 ONCA 812 (CanLII)

Hoy A.C.J.O., Brown and Trotter JJ.A.

BETWEEN

National Money Mart Company, carrying on business under the firm name and style of Money Mart

Plaintiff (Respondent)

and

24 Gold Group Ltd. and Kamel W.L. Hanna

Defendants (Appellants)

John Adair and Sean Husband, for the appellants

Marvin J. Huberman, for the respondent

Heard: May 18, 2018

On appeal from the order of Justice James F. Diamond of the Superior Court of Justice, dated October 27, 2017, with reasons reported at 2017 ONSC 6373, [2017] G.S.T.C. 81.

Brown J.A.:

I. OVERVIEW

[1] The central issue on this appeal concerns the entitlement of the respondent, National Money Mart Company ("Money Mart"), to bring an action against the appellant, 24 Gold Group Ltd. ("24 Gold"), for unpaid Goods and

Services Tax/Harmonized Sales Tax ("HST") pursuant to s. 224 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[2] Over a two-year period, 24 Gold purchased from Money Mart approximately $12.16 million in unrefined gold. 24 Gold did not pay, and Money Mart did not collect or remit, HST on those transactions. Several years later, Canada Revenue Agency ("CRA") issued reassessments to Money Mart requiring the payment of $1,573,903.94 in HST. CRA used part of Money Mart's corporate tax payments to satisfy the HST due.

[3] Money Mart thereupon demanded that 24 Gold reimburse it for the HST. 24 Gold refused. Money Mart commenced this action against 24 Gold and its principal, Kamel W.L. Hanna, seeking payment of the HST.

[4] Money Mart moved for summary judgment. 24 Gold resisted the motion, arguing that the action was time-barred. The motion judge granted summary judgment against 24 Gold for $1,573,903.94.

[5] 24 Gold appeals. For the reasons set out below, I would dismiss 24 Gold's appeal.

II. FACTS

[6] The material facts are not in dispute.

[7] Between July 1, 2010 and June 30, 2012, Money Mart sold unrefined gold to 24 Gold pursuant to an oral agreement of purchase and sale. Money Mart

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charged and 24 Gold paid approximately $12.16 million for the goods supplied. Money Mart did not deliver invoices at the time of the various sales.

[8] The sale of the unrefined gold was a “taxable supply” within the meaning of the *ETA*.

[9] Sections 165(1) and (2) of the *ETA* require every recipient of a taxable supply made in Canada to pay tax in respect of the supply calculated at the rate of 5% on the value of the consideration of the supply and, in participating provinces, additional tax representing the provincial component of HST at the prescribed rate. HST is 13% for a taxable supply in Ontario (the federal rate of 5%, plus the Ontario provincial sales tax rate of 8%): *ETA,* Schedule VIII. The tax is payable by the recipient on the earlier of the day the consideration for the supply is paid or the day the consideration for the supply becomes due: *ETA,* s. 168(1).

[10] 24 Gold did not pay the tax at the time of the transactions. The record does not explain why it did not.

[11] Nor did Money Mart pay the HST.

[12] In 2015, the CRA audited Money Mart’s HST returns for the period from July 1, 2010 to June 30, 2012. By June 2015 the CRA had issued HST reassessments to Money Mart on its sale of unrefined gold to 24 Gold requiring the payment of $1,573,903.94 in HST.

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[13] That tax obligation was satisfied by the CRA applying part of Money Mart's 2016 corporate tax payments against the reassessed amounts.

[14] On May 31, 2015 Money Mart issued two invoices to 24 Gold requiring payment of the $1,573,903.94 in HST. Each invoice identified the consideration for the gold sales, as well as the HST payable on the transactions. Each invoice noted that the "(GST/HST) at 13% was not charged in error" and "[t]he GST/HST is being billed to [24 Gold] as a result of Minister issuing an audit assessment to National Money Mart for the failure to charge and remit GST/HST on the consideration for the taxable supplies of jewellery".

[15] Some discussions ensued in July 2015 and October 2016 between Money Mart and 24 Gold regarding a means by which 24 Gold could pay Money Mart the tax. The discussions broke down over the issue of 24 Gold's ability to claim an input tax credit against such tax.

[16] Money Mart commenced this action in December 2016. In May 2017, it moved for summary judgment in the amount of the HST collected by the CRA.

[17] The motion judge granted summary judgment in favour of Money Mart.

[18] 24 Gold advances a single ground of appeal, which involves the interpretation of *ETA*, ss. 223(1) and 224. Section 224 specifies several conditions a supplier must meet in order to bring an action against a recipient to recover HST paid by the supplier. One condition, set out in s. 223(1), requires the

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supplier to provide the recipient with written disclosure of the tax payable. 24 Gold submits the motion judge erred by failing to find that s. 223(1) requires such disclosure to be given at the time of the supply transaction. Since Money Mart gave notice by the two May 2015 invoices issued well after the transactions, 24 Gold contends Money Mart failed to satisfy the pre-condition to suit in s. 223(1). As a result, 24 Gold contends the order granting summary judgment must be set aside.

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[19] Money Mart argues that it is not open to 24 Gold to raise that issue on appeal because it was not made before the motion judge.

[20] Accordingly, the appeal raises two main issues. First, is 24 Gold raising a new issue? If it is, should this court entertain it? Second, if this court considers the new issue, did Money Mart fail to comply with *ETA*, ss. 223(1) and 224, thereby barring its action? Before addressing those issues, I shall describe the role of ss. 223 and 224 of the *ETA* in the overall statutory scheme for the payment, collection, and remittance of HST.

III. THE STATUTORY SCHEME

[21] The *ETA* defines a “taxable supply” as one that is made in the course of a commercial activity. A “supplier” is the person making the supply; the “recipient” includes a person who is liable under an agreement to pay consideration for the supply: s. 123(1).

[22] As mentioned, ss. 165(1)-(2) and 168(1) of the *ETA* require every recipient of a taxable supply to pay HST in respect of the supply on the earlier of when the consideration is paid or becomes due.

[23] The person who makes a taxable supply must collect, as agent for the Crown, the HST payable by the recipient in respect of the supply: *ETA,* s. 221(1). Section 225 contains the rules for calculating the amount of net tax a person must pay during a particular reporting period.

[24] Section 224 authorizes a supplier to sue a recipient for tax the supplier remitted but did or could not collect from the recipient, if it meets certain conditions. The section states:

> 224. Where a supplier has made a taxable supply to a recipient, is required under this Part to collect tax from the recipient in respect of the supply, *has complied with subsection 223(1) in respect of the supply* and has accounted for or remitted the tax payable by the recipient in respect of the supply to the Receiver General but has not collected the tax from the recipient, the supplier may bring an action in a court of competent jurisdiction to recover the tax from the recipient as though it were a debt due by the recipient to the supplier. [Emphasis added.]

[25] Compliance with s. 223(1) is one of the conditions a supplier must satisfy before starting a collection action against a recipient pursuant to s. 224. Section 223 concerns the "disclosure of tax" by a registrant supplier to the recipient. Section 223(1) states:

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> 223 (1) If a registrant makes a taxable supply, other than a zero-rated supply, the registrant shall indicate to the recipient, either in prescribed manner or in the invoice or receipt issued to, or in an agreement in writing entered into with, the recipient in respect of the supply,
>
> (a) the consideration paid or payable by the recipient for the supply and the tax payable in respect of the supply in a manner that clearly indicates the amount of the tax; or
>
> (b) that the amount paid or payable by the recipient for the supply includes the tax payable in respect of the supply.

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[26] Money Mart did not invoice 24 Gold at the time of each sale. Only after the CRA audited Money Mart's HST returns did Money Mart send the two May 31, 2015 invoices to 24 Gold. Each of those invoices indicated the consideration paid by 24 Gold for the supply and the "tax payable in respect of the supply."

[27] 24 Gold contends that s. 223(1) requires a supplier to give the notice disclosing the tax payable at the time of the supply transaction. If the supplier does not, it cannot sue the recipient for the tax pursuant to s. 224.

IV. FIRST ISSUE: IS 24 GOLD RAISING A NEW ISSUE ON THIS APPEAL? IF IT IS, SHOULD THIS COURT ENTERTAIN IT?

(a) Is 24 Gold raising a new issue on this appeal?

[28] Money Mart submits the sole ground of appeal 24 Gold advances in its new factum is an issue that it did not raise below. 24 Gold disagrees. It takes the

position that the issue was in play below, although it acknowledges that "in fairness to His Honour, the issue was not well briefed or argued below."

[29] I do not accept 24 Gold's submission. A review of its statement of defence, its factum before the motion judge, the reasons of the motion judge, its notice of appeal, and its first appeal factum reveals that it now seeks to raise a new issue.

[30] In its statement of defence, 24 Gold pleaded two main defences: (i) Money Mart's claim was barred by a two-year limitation period that 24 Gold contended was created by *ETA,* s. 225 (the "Section 225 Defence"); and (ii) the claim also was barred by the two-year limitation period in s. 4 of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B (the "Limitations Act Defence"). Although in para. 5 of its statement of defence 24 Gold pleaded that before May 2015 Money Mart had not provided it with any invoices containing the information required by *ETA,* s. 223(1), it did not go on to plead that Money Mart's non-compliance with s. 223(1) barred it from bringing the action.

[31] In its factum on the summary judgment motion, 24 Gold addressed three legal issues: (i) its Section 225 Defence; (ii) the Limitations Act Defence; and (iii) an unjust enrichment argument. Its factum did not submit that Money Mart's action was barred because the supplier had not issued invoices disclosing the tax at the time of the transactions.

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[32] The motion judge rejected 24 Gold's submissions that Money Mart's claim was barred on the basis of the Section 225 and Limitations Act Defences: at paras. 13, 14 and 23. The motion judge did not deal with 24 Gold's unjust enrichment argument.

[33] In its notice of appeal, 24 Gold states that the motion judge misunderstood its Section 225 Defence and erred in rejecting its Limitations Act Defence. Those two grounds of appeal formed the subject-matter of its first appeal factum.

[34] At some point after filing its first factum, 24 Gold changed counsel. On April 17, 2018, it obtained a consent order permitting it "to file a new factum and book of authorities to replace the factum and book of authorities previously filed by the Appellant's former counsel."

[35] In its new factum, 24 Gold advances the single ground of appeal described earlier: Did the motion judge err in his interpretation of s. 224 and the incorporated provisions of s. 223(1) by holding that a supplier can retroactively satisfy the obligation to comply with s. 223(1)?" As well, the new factum confirms that the Limitations Act Defence is not an issue on the appeal. Nor does the new factum deal with the Section 225 Defence or the unjust enrichment argument advanced below.

[36] This brief procedural history shows that before changing counsel, 24 Gold contended that Money Mart's s. 224 action was out of time. Now, it takes the

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position that Money Mart started the action without complying with a necessary pre-condition specified by s. 224 – compliance with s. 223(1). 24 Gold clearly is raising a new issue on appeal.

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(b) Should this court consider 24 Gold's new issue?

[37] The general principle regarding entertaining new issues on appeal was articulated by Weiler J.A. in *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18:

> The general rule is that appellate courts will not entertain entirely new issues on appeal. The rationale for the rule is that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal… The burden is on the appellant to persuade the appellate court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial"… This burden may be more easily discharged where the issue sought to be raised involves a question of pure law… In the end, however, the decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties… [citations omitted.]

[38] Several factors favour entertaining the new issue raised by 24 Gold: it involves a pure question of law, specifically the interpretation of *ETA*, ss. 223(1) and 224; Money Mart was permitted to file a supplementary factum and book of authorities, which enabled it to submit materials and commentary about the

history, interpretation and application of those sections; and the facts concerning the supply transactions are not in dispute.

[39] However, Money Mart argues it would be prejudiced if the court entertained 24 Gold's new issue. Doing so would allow 24 Gold to withdraw an admission that Money Mart submits it made in its first appeal factum where, at para. 5(a), 24 Gold stated that Money Mart "complied with Section 223 of the Excise Tax Act only on May 31, 2015 when it invoiced [24 Gold] as the recipient for the consideration paid and the amount payable for HST."

[40] To the extent that the statement in the first factum constitutes an admission, I regard it as an admission of law. The statement assumes that s. 223 does not require a supplier to issue an invoice containing the information stipulated in the section at the time of a supply transaction. That involves a question of law concerning the interpretation of s. 223. A party can withdraw an admission of law: *Re Baty*, [1959] O.R. 13 (C.A.), at p. 16; Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada,* 5th ed. (Toronto: LexisNexis, 2018), at p. 1388, §19.2.

[41] In those circumstances, entertaining 24 Gold's new issue will cause no prejudice to Money Mart that cannot be compensated for by costs.

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V. SECOND ISSUE: DO SECTIONS 223(1) AND 224 OF THE *ETA* REQUIRE THE DISCLOSURE OF THE TAX AT THE TIME OF A SUPPLY TRANSACTION?

(a) The issue stated

[42] In support of its submission that s. 223(1), properly interpreted, requires "the invoice or receipt" in respect of the supply to be issued to the recipient at the time of the supply, 24 Gold advances a long list of arguments:

(i) the case law is divided on the issue;

(ii) the use in s. 223(1) of the article "the" in the phrase "the invoice or receipt," in contrast to the use of "an" when referring to "an agreement in writing," signals, as a matter of logic, that for an invoice to comply with s. 223(1) it must be issued at the time of the transaction;

(iii) as a matter of common commercial practice, invoices are issued contemporaneously with a transaction, so s. 223(1) should be interpreted in that manner;

(iv) it would be more commercially reasonable to fix the supplier with the cost of HST where the parties erroneously believed that HST was not payable on a transaction because the supplier likely deals frequently in the type of supply and need only determine its taxable status once;

(v) notice provided after the transaction does not fulfill the purpose of s. 223(1), which is to give the purchaser an opportunity to consider the transaction's true cost, namely whether or not the price includes the tax;

(vi) to interpret s. 223(1) as allowing after-the-fact invoices would create a moral hazard by permitting vendors to avoid complying with s. 223(1), thereby changing the price for the transaction initially represented by the supplier;

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(vii) such an interpretation also would deny natural justice to recipients because they have no ability to participate in assessment proceedings brought against the supplier; and

(viii) uncertainty exists as to whether an input tax credit would be available to all recipients in a situation where a supplier issues an after-the-fact invoice, so the potential for a recipient to claim an input tax credit does not support interpreting s. 223(1) to permit non-contemporaneous invoices.

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[43] I propose to deal together with arguments (i) through (v). As I will explain, the case law no longer remains divided on the interpretation of s. 223(1), and the case law, together with CRA policy and professional commentary, address the first five arguments. I shall then consider arguments (vi) through (viii).

(b) The case law, CRA policy and professional commentary

The case law

[44] I do not accept 24 Gold's starting premise that the case law interpreting s. 223(1) remains divided. While conflicting lower court decisions emerged immediately following the introduction of the GST in 1991, a clear interpretation of ss. 223(1) and 224 has emerged that recognizes a supplier can invoice HST after the fact, subject to any contractual restrictions on doing so.

[45] The introduction of the GST in 1991 spawned a number of cases that considered the ability of a supplier to recover GST from a recipient on a contract that was signed before, but performed or closed after, the GST came into force.

Some of those cases considered whether giving notice of the tax payable after the initial supply contract satisfied s. 223(1).

[46] One of the earliest reported decisions was *390781 Alberta Ltd. v. Mensaghi*, [1992] G.S.T.C. 10 (Alta. Prov. Ct.). There, the court reached two conclusions. First, the court held that since it was not a term of the contract entered into before the GST regime came into force that that the purchaser would pay GST over and above the stated purchase price, rectification of the contract to make the purchaser responsible for the tax was not available. The court then went on to state that *ETA,* s. 223(1) requires a supplier to notify the recipient of the tax payable before entering into a transaction. However, that statement was made in respect of a contract entered into before the GST regime came into effect that was silent as to GST. *Mensaghi* did not involve an invoice or other form of notice issued following the supply transaction, which is the situation in the present case.

[47] Many of the subsequent cases referred to by the parties that dismissed a supplier's action under s. 224 turned not on the timing of the notice given by a supplier, but on whether the form of the notice document provided by the supplier met the requirements of s. 223(1): see, *Pellizzari v. 529095 Ontario Ltd.*, [1995] G.S.T.C. 51 (Ont. Sm. Cl. Ct.), at p. 51-3; *Deep Six Developments Inc. v. Kassam*, [1998] G.S.T.C. 36 (B.C.S.C.), at para. 22. Others turned on whether the agreement at the time of the supply transaction clearly allocated

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responsibility for GST between the parties: *Dworak v. Kimpton*, [1996] G.S.T.C. 97 (B.C.S.C.). In yet another, the supplier had not issued an invoice or receipt after the transaction: *Villa Nova Developments v. Hunter*, [1998] G.S.T.C. 74 (N.L. Prov. Ct.), at p. 74-2.

[48] Then came the 1996 decision of the New Brunswick Court of Appeal in *OCCO Developments Ltd. v. McCauley*, [1996] G.S.T.C. 16 (N.B.C.A.), to date the only appellate decision that has considered whether written notice of the tax payable given after a supply transaction complies with *ETA,* s. 223(1).

[49] The facts in *OCCO Developments* were typical of a pre/post-GST transition case. The recipient signed an agreement to purchase a condominium unit in 1989 before the GST was enacted. Title did not pass until May 1992, when the GST was in force.

[50] Before closing, the vendor asked the purchaser to pay an amount for GST. The purchaser did so. Two years later, in 1994, the vendor received a notice of assessment stating a further amount of GST was payable. In June 1994, the vendor wrote the purchaser asking for payment of the further amount. The purchaser refused. Nor did the vendor remit the amount to Revenue Canada, which obtained judgment against the vendor for the amount of GST due.

[51] The vendor sued the purchaser pursuant to *ETA*, s. 224 to recover the additional amount of GST. The trial judge dismissed the action. Although the trial

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judge held that the vendor's post-closing letter to the purchaser claiming further GST satisfied s. 223(1), she concluded that the vendor had not complied with the further condition in s. 224 that it had "accounted for or remitted the tax payable by the recipient."

[52] The New Brunswick Court of Appeal allowed the appeal. It dealt with two issues. First, the purchaser argued that the trial judge had erred in holding the vendor had complied with s. 223(1). The purchaser advanced an argument similar to that advanced by 24 Gold in this case: "It is [the purchaser's] position that the amount of GST claimed must be incorporated in the original invoice, receipt or agreement, and it cannot be changed subsequently": at p. 16-4. In rejecting that submission, Bastarache J.A., writing for the majority, stated at p. 16-4:

> I do not agree with the very restrictive interpretation given to the Act in the above mentioned cases. The Act must be considered as a whole and interpreted in a purposive manner in order to give effect to the intention of Parliament…. It imposes the tax on the recipient of the service, not on its supplier. It would therefore be an unreasonable interpretation of s.223(1) to limit the sending of a notice of the amount of GST due to documents issued at the time the supply was received. My view on this issue is reinforced by the fact that the formulation of the obligations in s.223(1) does not reveal any intention of Parliament to impose such a restriction. As noted by Alan Shragie in "Application of the G.S.T. to Damages and Related Matters", Canadian Tax Journal 38 (6) (November-December 1990) 1468 at 1492, it is also significant that s.223(1) applies to "registrants" and that this categorization cannot extend

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> to persons acting before the coming into effect of the GST

[53] In his dissent, Rice J.A. did not quarrel with that conclusion.

[54] The majority and minority parted company over the second issue: the meaning of the words “accounted for” the tax in *ETA,* s. 224. Recall that before starting its action, OCCO Developments had not paid the additional GST assessed, unlike Money Mart in the present case. Accordingly, there is no need to consider the majority’s specific analysis of the words “accounted for”.

[55] However, other comments made by Bastarache J.A. in the course of dealing with that issue assist in understanding the place of ss. 223(1) and 224 in the scheme of the *ETA*. At p. 16-5 he wrote, in part:

> Section 224 is designed to permit a supplier to obtain payment of the amounts of GST it has remitted or is required to remit to Revenue Canada as an agent (see: s.221(1)). It seems obvious that where the *Act* provides for assessments by Revenue Canada, it must be deemed to authorize the agents of Revenue Canada to collect the moneys they are required to remit as a result of the assessments. It would require clear terms to the contrary in s.224 to find that Occo is in fact made liable for the payment of the additional GST claimed by Revenue Canada because it is precluded from collecting the amount in question from the recipient of the supply. This would be contrary to s.165(1) and to the purpose of the Act…
>
> The effect of the assessment has been a revision of the amount owed, not an obligation on Occo to act as though a new supply had been made. I would agree with Shragie where he states, at p.1494 of his article, that a supplier is able to correct a disclosure deficiency

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> contained in his initial document by issuing an invoice or receipt that meets the requirements of s.223. This was done in the present case. Nothing in s.224 prevents a supplier from claiming additional GST owed following an assessment. The supplier, Occo, has made a supply and accounted for the GST. It's determination of the amount owed was inaccurate and judged to be too low by Revenue Canada. The result is that Dr. McCauley has only paid part of the amount to be remitted by Occo. Section 224 provides that a supplier can recover the amount of the tax payable, which is the total amount claimed by Revenue Canada, and not necessarily the amount estimated by the supplier in his first invoice. I therefore find that the requirements of s.224 have been met in the present instance and that Occo can recover the amount of GST outstanding.

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[56] Counsel referred to four cases decided not long after *OCCO Developments*. The first, *Deep Six Developments*, did not refer to *OCCO Developments.* The court held, at para. 22, that Revenue Canada correspondence forwarded to the purchaser subsequent to the transaction did not meet the requirements of s. 223(1) because it did not clearly disclose both the amount paid and the tax thereon. In contrast, in *Len's Construction Midland Ltd. v. Georgian Bay Native Friendship Centre Inc.*, [1998] G.S.T.C. 37 (Ont. Gen. Div.), the court held that a supplier's letter demanding payment of GST to a purchaser over a year after the transaction had closed satisfied the notice requirements of s. 223(1): at p. 37-3.

[57] *OCCO Developments* was followed in *Carman v. Jackson*, 1998 ABPC 143, [1999] G.S.T.C. 24, where the court found that the delivery of a post-closing

revised statement of adjustments showing the GST payable satisfied the requirements of s. 223(1): at para. 14.

[58] Then, in *Leong v. Princess Investments Ltd.*, [1999] G.S.T.C. 86 (B.C.S.C.), the British Columbia Supreme Court applied the reasoning in *OCCO Developments* to hold that a notice delivered after the supply transaction could satisfy s. 223(1). At para. 27, Dorgan J. wrote:

> The authorities appear to favour the view that ss. 223(1) exists to enable a purchaser to determine how much tax has been or is payable to Revenue Canada. Consequently, the notice provisions should be construed liberally. The provisions in ss. 223(1) contain no reference to notice "within a reasonable time". The cases do not turn on how much time has passed between the transaction in question and the notification, though they are influenced where GST is contemplated by the contract. Notice in the form of an invoice, which is defined very broadly, may be provided after the fact. The letter of Leong's lawyer dated May 2, 1996 constitutes notice and may be considered an invoice in these circumstances.

[59] Since the late 1990s, there have been few reported cases on whether a notice of the tax payable given following a supply transaction complies with s. 223(1). Counsel did refer to the 2017 decision of the Ontario Superior of Justice in *King Road Paving and Landscaping Inc. v. Plati*, 2017 ONSC 557, [2017] G.S.T.C. 82. The court held that where a contract for goods and services is silent in respect of HST, there is an inference that the price does not include HST. In the course of its analysis, the court stated, at para. 78:

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> The case law supports the position that where, through oversight or other error, the supplier omits or incorrectly states the HST on the contract the recipient of the goods or services remains responsible for the full amount of the tax. To conclude otherwise would make the tax collector personally liable for the payment of the tax with no right of recourse against the tax payor. In this regard I adopt the analysis of Dorgan J. in *Leong v. Princess Investments ltd*. and the several cases cited therein. [Citations omitted.]

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[60] The case law now appears settled, with the prevailing view that expressed by the New Brunswick Court of Appeal in *OCCO Developments* – namely, an invoice or receipt issued after the supply transaction can meet the requirements of *ETA,* s. 223(1).

CRA Policy

[61] That interpretation of s. 223(1) was adopted by the CRA as its policy in 1994, before the decision in *OCCO Developments*, and remains its policy today. CRA Policy Statement P-116, *Collection of GST, by a Supplier, Where the Invoice is Silent on the Tax Payable*, was issued in 1994 and updated in 1999. The Policy Statement states:

> Where there are no contractual or common law restrictions to prevent the issuance of amended or additional invoices, the Department will continue to accept that the disclosure requirements may be met after the fact. This position was adopted since subsection 223(1) of the Act is silent on the issue of timing and because many purchasers are agreeable to the extra charge.

[62] In regards to any contractual restrictions, 24 Gold has not taken the position that the oral agreements with Money Mart included the tax as part of the transaction price. Money Mart raised the issue of the terms of the oral agreements in its Statement of Claim by pleading that it was an implied term of the agreements that 24 Gold would pay the HST. 24 Gold denied those allegations as part of its general blanket denial, but it did not plead specifically that it was a term of the contract that HST was included in the transaction prices. Its pleaded affirmative defences were much narrower: (i) Money Mart had not proved it paid the HST; (ii) the Section 225 Defence; and (iii) the Limitations Act Defence. Nor did Mr. Hanna suggest in his affidavit that 24 Gold understood the transaction prices included HST.

Professional commentary

[63] The majority in *OCCO Developments* relied on the views expressed by Alan Shragie in an article published just prior to the coming into force of the GST, “Application of the Goods and Services Tax to Damages and Related Matters” (1990) 38:6 Can. Tax J. 1468. In that article, Mr. Shragie took the position that *ETA*, s. 223(1) permits a registrant to correct a disclosure deficiency for purposes of s. 224 by issuing an invoice or receipt that meets the disclosure requirements subsequent to the issuance of a deficient initial agreement. He offered several reasons for his view: (i) once the consideration for the supply becomes due, the recipient is liable for GST whether or not the initial contractual document met the

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s. 223(1) disclosure requirements; (ii) as a general rule, all supplies made by a registrant are taxable under the GST legislation unless, by way of exception, a supply is designated as exempt; (iii) in the case of an oral agreement, "there is clearly nothing in section 223(1) to prevent the supplier from subsequently issuing an invoice or receipt that reflects the … consideration payable as well as the … percent tax payable in respect of the supply"; and (iv) if the supplier is not able to correct a disclosure deficiency for purposes of bringing an action, the recipient may obtain a windfall: at pp. 1493-1494.

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[64] A similar view is expressed by David M. Sherman in *Canada GST Service,* loose-leaf (Toronto: Thomson Carswell, 1990) at p. 224-105: "Since the purpose of subsection 223(1) is merely to ensure that the recipient knows whether GST is 'extra' or 'included', the author's view, consistent with that of the CRA, is that the GST can be invoiced after the supply is made."

(c) Analysis

[65] Section 223(1) is silent on when a registrant must give disclosure of the tax payable to a recipient. The overwhelming weight of the jurisprudence, the CRA's Policy Statement P-116, and the professional commentary have interpreted that statutory silence to mean that a registrant supplier can comply with the s. 223(1) disclosure obligations by delivering an invoice or receipt containing the prescribed information after the supply transaction.

[66] I find that interpretation persuasive. I adopt it, accepting the reasoning of Bastarche J.A. in *OCCO Developments*, set out at paras. 52 and 55 above, together with that of Mr. Shragie and Mr. Sherman. They interpret *ETA*, s. 223(1) in a manner firmly grounded within the larger purpose, structure and workings of Part IX of the *ETA* concerning the Goods and Services Tax. Their reasoning answers arguments (i), (ii), (iv) and (v) advanced by 24 Gold. While 24 Gold makes additional submissions based on commercial practice, those submissions ignore the clear language of the *ETA* that fixes the recipient of a taxable supply with the obligation to pay HST in respect of the transaction.

[67] 24 Gold's submission that the article "the" preceding the words "invoice or receipt" in s. 223(1) mandates delivery of the tax disclosure notice at the time of the supply transaction strains the interpretative implications of a modest article. The article "the" relied on by 24 Gold sits in a temporally silent statutory provision which, in turn, is part of a tax scheme that charges the recipient with the obligation to pay the tax. Accordingly, I do not find the appellant's argument persuasive.

(d) The remaining arguments of 24 Gold

[68] As to 24 Gold's remaining arguments – nos. (vi) to (viii) described in para. 42 above – I would give them no effect.

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[69] First, I am not persuaded that interpreting s. 223(1) to allow after-the-transaction invoices would create a moral hazard by permitting vendors to avoid complying with s. 223(1), thereby changing the price for the transaction initially represented by the supplier.

[70] The parties to a supply transaction can contract to have a quoted price be tax-included or tax-extra. If the contract is silent, the contract normally is interpreted as treating GST/HST as an extra: *Governor's Hill Developments Ltd. v. Robert*, [1993] G.S.T.C. 35 (Ont. Gen. Div.), at p. 35-2, affirmed in relevant part, [1996] G.S.T.C. 43 (Ont. C.A.); *Lauber c. Reid*, 2016 QCCA 1587, [2016] G.S.T.C. 122, at para. 13; *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21, [2000] G.S.T.C. 106, at para. 34; David Sherman, ed., *Practitioner's Goods and Services Tax Annotated,* 37th ed. (Toronto: Thomson Reuters, 2018), at p. 486. In response to a collection action brought pursuant to s. 224, a recipient can attempt to prove that it was a term of the contract that the price included HST. However, 24 Gold did not assert such a defence.

[71] Nor am I persuaded that interpreting s. 223(1) as allowing subsequent invoices would deny natural justice to recipients because they have no ability to participate in assessment proceedings brought against the supplier. It is open to recipients to negotiate express terms in their contracts with suppliers that allocate the ultimate responsibility for the payment of tax, including reassessed tax, as between the parties.

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[72] Finally, whether or not any uncertainty exists about the ability of all recipients who receive from a supplier a post-transaction notice of tax payable to claim an input tax credit has no bearing on the interpretation of s. 223(1). The obligation of a recipient to pay HST does not depend upon whether it can claim an input tax credit. Section 165(1) imposes an unqualified obligation on a recipient to pay HST. While the calculation under *ETA*, s. 225 of the net tax payable by a person for a particular reporting period takes into account available input tax credits, it does not diminish a recipient's obligation under s. 165(1) to pay the HST on a taxable supply.

VI. SUMMARY AND DISPOSITION

[73] For the reasons set out above, I conclude that the two May 31, 2015 invoices issued by Money Mart to 24 Gold complied with *ETA*, s. 223(1). Money Mart therefore satisfied the conditions in s. 224 to bring this action.

[74] The motion judge rejected the Section 225 and Limitations Act Defences asserted by 24 Gold. In its second factum, 24 Gold did not challenge those findings. There is no dispute that 24 Gold was the recipient of unrefined gold under the series of transactions between July 1, 2010 and June 30, 2012. There is also no dispute that the HST payable on those transactions was $1,573,903.94, which the CRA has collected from Money Mart. In those

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circumstances, Money Mart is entitled to summary judgment against 24 Gold for $1,573,903.94.

[75] Accordingly, I would dismiss the appeal.

[76] In accordance with the agreement of the parties regarding the costs of the appeal, I would award Money Mart costs of $20,000, inclusive of disbursements and all applicable taxes.

Released: “AH” Oct 10 2018

“David Brown J.A.”
“I agree. Alexandra Hoy A.C.J.O.”
“I agree. G.T. Trotter J.A.”

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