All that Glisters is Not Tolled, but is the Story Fully Told?

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On October 10th, 2018 the Ontario Court of Appeal released its decision dismissing the appeal in the case of *National Money Mart Company v 24 Gold Group Ltd.*, 2018 ONCA 812 (hereafter, *Money Mart v. 24 Gold*).

Facts

This action concerned a series of sales by Money Mart to 24 Gold over a period of more than a year, totalling some $12.16 million dollars' worth of unrefined gold.

The weird aspects of the facts were that throughout this period, all the sales were oral agreements; not a single invoice was given to 24 Gold and no HST was charged on the sales, or paid by 24 Gold or subsequently remitted by Money Mart, a registrant under the *Excise Tax Act*, to the Canada Revenue Agency ("**CRA**").

Why?

The excuse given, as reflected in the reasons of the Court of Appeal by Justice Brown (concurred in by Hoy A.C.J.O. and Trotter J.A.), is one of mistake. Parenthetically, one may have questions about a mistake over a series of transaction lasting more than a year, adding up to $12.16 million dollars of purchases by 24 Gold supplied by Money Mart, and not a single invoice.

In any event, in 2015, after these transactions were long over, CRA caught up with Money Mart and reassessed it for unpaid HST in the eye-opening amount of $1,573,903.94 and, it seems, helped itself to this money by accessing Money Mart's corporate tax payments on account to satisfy the assessment.

Money Mart then turned around in 2015 and demanded that 24 Gold reimburse it for the HST amount assessed, which 24 Gold refused to do.

Money Mart then sued for it and, on a summary judgment motion, was given judgment which 24 Gold appealed to the Court of Appeal.

In the lower court, 24 Gold's argument focused on two allegations that the action was out of time based on: (1) a limitation period in section 225 of the *Excise Tax Act* itself; and (2) the general two-year limitation period in section 4 of the *Limitations Act, 2002*. It maintained these positions in the Court of Appeal initially, but when it changed counsel, before the appeal was heard, it instead brought forward a new theory of its case.

This new theory was that the action could not succeed because Money Mart had not complied with a condition precedent in section 224 of the *Excise Tax Act*, which authorizes a supplier to sue a purchaser if the supplier has complied with section 223(1). 24 Gold

argued that Money Mart had not complied with the requirement under section 223(1) to give 24 Gold an invoice setting out the HST at the time of the supply transaction itself, and that it could not bootstrap its position by now sending invoices several years later.

Main Issue

The main issue for the Court then was whether the invoice or written notice had to be given at the happening of the transactions in 2010-2012 or whether it could be given much later, in 2015.

24 Gold's chief argument was that section 223 of the *Excise Tax Act* required that the "invoice" for the HST component of the transaction be issued contemporaneously with the sale itself, and that it could not be done later, in this case years later, after the sales of gold took place.

Justice Brown, in dealing with 24 Gold's position, set out the wording of section 223, which is as follows:

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.

He then discussed a number of past trial-level decisions on the meaning of that section, and focused on a New Brunswick Court of Appeal decision in *OCCO Developments Ltd. v McCauley*, [1996] GSTC 16 (NB CA) ("***OCCO***") as the appellate-level decision that provides guidance as to the proper interpretation of section 223 regarding the timing of the invoicing. That case dealt with GST on a condo purchase that was partially invoiced at first, but in the wrong amount. Later on, after a CRA reassessment of the proper amount owing, the vendor invoiced the purchaser for the balance, but the purchaser refused on the basis, it appears, of the lateness of the invoice. The vendor was permitted to recover the balance from the purchaser by the New Brunswick Court of Appeal, despite it being years later.

Justice Brown, therefore, agreed with the finding of the majority of the New Brunswick Court of Appeal in *OCCO*, in reasons written by Bastarache J.A. (as he then was), that an invoice does not need to be delivered contemporaneously with the transaction, but can be provided later, as here. This, he further agreed with Bastarache J.A., was supported by the fact that it would take clear language in the section to make it time-sensitive, and section 223(1) does not reveal any intention of Parliament to impose such a restriction. Justice Brown also agreed with Bastarache J.A. that this interpretation was consistent with the scheme of the Act, where the registrant seller is merely the agent of the CRA. If the seller were not permitted to correct a disclosure deficiency, it could wind up, in circumstances where the purchaser (the real target of the Act) did not pay, having to absorb the loss as principal, which does not fit well with its role of agent.

There was a second issue in the *OCCO* case on which the New Brunswick Court of Appeal was divided. The issue was whether the fact that the vendor in *OCCO* had not paid CRA before it sued had an impact on the litigation. Since here the CRA had "helped itself" and was paid off before the suit by Money Mart, Justice Brown found that he did not need to consider that aspect of *OCCO* in the case before him.

Justice Brown drew further support for his interpretation of section 223(1) from a book written by a Mr. Sherman which espouses the same view of the intention of Parliament as to invoicing, and also from the stated interpretational policy of CRA itself, which

contemplates that it is permissible to invoice later on than the time of the actual transaction.

Justice Brown also discussed several cases decided after the *OCCO* case which essentially follow its lead and find acceptable under section 223(1) "invoicing" for HST long after the transaction has taken pace. Therefore, it appears that this interpretation of the section as not requiring a contemporaneous delivery of the invoice for the tax has become fairly settled law.

Secondary Issue

Apart from the main point of the case discussed above, the Court of Appeal also dealt with a secondary issue, of a practice nature. Money Mart alleged that 24 Gold was raising on the appeal an argument that it had not made at the motions court below. Remember that its fight previously had been based on limitation period arguments, not an interpretation argument suggesting that Money Mart had failed to comply with a condition precedent to its action. 24 Gold said that it had raised this point earlier, but Justice Brown disagreed and found it to be a new ground at the appellate level, which the court will seldom entertain. However, he reviewed the test for permitting new issues on appeal and found that, as it was really a question of pure law as to the proper interpretation of section 223(1) and an issue that would not cause Money Mart prejudice in the legal sense, the point could be dealt with even though it was freshly raised only on the appeal. As we have seen, Justice Brown decided this point against 24 Gold and ultimately dismissed its appeal.

Further appeal?

With about $1.574 million dollars at stake, there is certainly enough involved for 24 Gold to take a further shot at an application for leave to appeal to the Supreme Court of Canada and, because it involves the interpretation of a federal statute, that may give it a leg up to finding some national interest component to the case, but we will have to wait several months to find out if it tries to get leave.

Finally, for the writer, it is hard to envisage about 12.6 million dollars' worth of merchandise leaving the shop over two years without an invoice. What if anything are we missing here?

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