

tradeweek

Your Resource for Global Trade | May 31, 2009 | Vol. 120, No. 10

SCC Gives GST Rebate to UPS



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The following article was written by Jeff Galway and Greg Kanargelidis of Blake, Cassels & Graydon LLP.

On April 23, 2009, the Supreme Court of Canada released a precedent-setting decision in *United Parcel Service Canada Ltd. v. Her Majesty the Queen*. The decision is the first appeal of a Goods and Services Tax (GST) assessment heard by Canada's highest Court. The decision serves to broaden the number

of eligible claimants beyond the person with the "legal liability" to pay GST in the case of claims for rebate in respect of GST paid in error.

Introduction

The dispute arose in the context of UPS's customs brokerage activities in which UPS, between February 1, 1996, and December 31, 1997, overpaid some \$2.9 million in GST in error to the Minister of National

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Canada and the EU Launch Trade Talks

On May 6, 2009, Canada and the European Union (EU) announced the start of talks aimed at a comprehensive economic agreement.

The EU, which boasts a market of almost 500 million consumers, is Canada's second largest trade and investment partner. The joint study, *Assessing the Costs and Benefits of a*

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Advocacy Update

The following article was written by Carol Osmond, vice president, policy, I.E.Canada.

I.E.Canada made a submission to the House of Commons Standing Committee on Health earlier this week on Bill C-6, *An Act respecting the safety of consumer products*. Bill C-6 was introduced into Parliament on January 29, 2009. The proposed *Canada Consumer Product Safety Act* would replace Part I of the *Hazardous Products Act* and is intended to modernize Canada's regulatory regime for consumer products. The bill underwent second reading on April 29, 2009, and was referred to the Health Committee, which is currently holding hearings on the bill.

I.E.Canada has been participating in a coalition of 13 national business associations that represent companies engaged in the manufacture, importation and sale of consumer products. The coalition, which has been analyzing the implications of the proposed legislation for importers and manufacturers, made a separate joint submission to the Standing Committee. I.E.Canada and other members of the coalition have also been meeting with Health Canada officials and Members of Parliament to advocate for amendments to the bill. I.E.Canada will

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Revenue on shipments imported into and delivered within Canada on behalf of various customers. These overpayments of GST were due to an array of circumstances including incorrect value for duty declarations, returned shipments, Canadian goods returning to the U.S., and the fact that some goods were duty-free. In such circumstances, UPS credited its customers' accounts for any overpayment (so that its customers only paid the correct amount of GST), and then deducted the overpayment from its own GST liability. This led to an assessment by the Minister of National Revenue in which UPS was disallowed the deduction of \$2,937,123 from its own liability. After a minor adjustment by the Minister, UPS still found itself out of pocket \$2,900,858 in respect of the GST payments made in error.

GST Rebate Available to Any Person Who Actually Pays In Error

Although the Minister made a factual concession that the amount in question constituted an "overpayment" of GST, the Agency took the position that UPS was not entitled to a refund on the basis that UPS was not the person who "paid" the amount on account of the GST pursuant to subsection 261(1) of the Act. In essence, the CRA argued that UPS could not claim a refund of the GST because UPS was never liable to pay the GST, only its customers were. The Supreme Court of Canada disagreed with this proposition, stating that "it cannot have been the intention of Parliament that persons who were not liable for GST but paid GST in error could not obtain a rebate." Although the Minister relied on the precedent set in *West Windsor Urgent Care Centre Inc. v. Canada* as support for his argument that the only person entitled to a rebate is the person who was liable to pay the GST, the Supreme Court of Canada held that the case actually "stands for the proposition that the person who in

fact paid and was out of pocket for the GST is the person that can claim a rebate under s.261(1)." Based on the broad wording of the section, the Supreme Court of Canada further commented that "it would not be in accordance with the ordinary and grammatical meaning of the provision to read s. 261(1) in such a way as to preclude persons who have paid or overpaid GST in error from obtaining a rebate from the Minister."

Court Rejects Minister's Argument Concerning Possible Double Recovery of GST

One of the arguments made by the Minister against allowing UPS to claim the rebate for GST paid in error was the fact that the customers of UPS could have claimed a rebate or, if registrants, an input tax credit for the same amounts claimed by UPS. In rejecting this submission, the Court noted that the "Minister is essentially arguing that a customer could fraudulently claim a rebate or input tax credit knowing that UPS had already made a claim for the same rebate." The Court went on to hold that a person who acted in this way would be subject to criminal sanctions. Furthermore, the Court stated that it does not "lie in the mouth of the Minister to raise such an argument ... where he has agreed that there has been an overpayment and where his position is that he is entitled to retain overpaid GST."

Import-Based Rebate Provisions Not a Bar to Claim by UPS Under General Rebate Rules

The CRA also argued that UPS was not entitled to claim a rebate for GST paid in error because a rebate was "available" pursuant to one of two other specific rebate provisions dealing with overpaid GST on imported goods. The Supreme Court of Canada interpreted the relevant provisions of the *Excise Tax Act* as not precluding a rebate under the "general" rebate provision (ss.

261(1)) just because a rebate could have been claimed under one of two other provisions (ss. 215.1(1) or ss. 216(6)) of the Act. Instead, Rothstein J. stated that the intent of the Act was to avoid the double payment of rebates. As a result, since no rebate had been claimed by UPS or its customers under the more specific rebate provisions, it followed that UPS was not barred from making a claim under the general rebate provision.

Comments

The Supreme Court of Canada unanimously rejected the entirety of the CRA's arguments and came out strongly in favour of UPS, holding that UPS was entitled to the rebate of the \$2,900,858 it paid in error and that, pursuant to subsection 296(2.1), the Minister was obliged to apply the rebate against the net tax remittable assessed against UPS. This decision by the Supreme Court of Canada will, for UPS, bring closure to its hard-fought 10-year battle. For taxpayers generally, the decision should provide greater certainty and flexibility with respect to the persons who are entitled to make claims for GST paid in error.

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also be involved in consultations with Health Canada officials as they develop policy guidelines with respect to the new legislation.

The purpose of I.E.Canada's submission was to underscore the association's support for the submission made by the coalition and to highlight a number of key issues, some of which had been referred to in that submission, others of which had not. I.E.Canada has also requested to appear before the Standing Committee.

The submission highlighted a number of key issues with respect to Bill

Shipping and Trade Horizons



Leo Ryan

Shipping and Trade Horizons, a Tradeweek column, is produced by Leo Ryan. The column addresses Canadian industry issues and trade developments of interest to our members.

Fourth Seacoast Slumbers

At latest count, there were more than 600 containerships sitting at anchorage at various world ports waiting for cargo demand to rebound from a punishing global recession. Closer to home, throughout what has sometimes been described as North America's Fourth Seacoast, the Great Lakes/St. Lawrence Seaway System, there are idled bulk carriers aplenty.

When the Seaway opened in 1959, this navigable corridor connecting the Atlantic Ocean to the industrial heartland of North America became the world's largest inland waterway. But the cargo trend is disappointing on the Golden Anniversary of the waterway that is as long as the Atlantic is wide.

Latest statistics confirm that commercial shipping on the waterway has diminished significantly as the global recession strengthens its grip on the Canadian and U.S. economies. Fleet utilization by domestic Canadian shipping lines has dropped by about 20 per cent. In

normal times, the 68 vessels operated by the member companies of the Canadian Shipowners Association are almost fully employed. Nearly 40 per cent of the U.S.-flag fleet on the Great Lakes is sitting at anchor. Biggest factor: the depressed state of the steel and automobile industries in the region.

Commercial traffic on the St. Lawrence Seaway's channels and locks, which began on March 31 following the annual winter closing, fell dramatically in the first month of the 2009 season. Total cargo to the end of April amounted to 2.58 million tonnes versus 4.6 million tonnes in April 2008. Worst hit was iron ore which plunged from 1.5 million tonnes in April last year to 495,000 tonnes in April of this year. Observers expect Seaway throughput for all of 2009 to decline at least 10 per cent below last year's 40.7 million tonnes.

"Things are really not good," said Paul Pathy, executive vice-president of Montreal-based Fednav Limited, largest ocean-going user of the Seaway.

"There is so little cargo coming in that it's very hard to position ships for cargo going out," Pathy remarked. "Up till a few years ago, we used to carry a lot of high-grade steel to Detroit, but this business has disappeared."

He recalled that, under the traditional pattern, backhaul grain out was justified by steel coming in. This is no longer the case.

Pathy said he hoped that the massive economic stimulus plan by the Obama administration "will have a positive impact on inbound steel despite Buy America provisions."

Gerald Carter, president of Canada Steamship Lines, said "it's the most challenging, unpredictable year in a long time. While some business is

recession-proof, about 20 per cent of our capacity is not being used. Much of the downturn is related to steel."

According to the Cleveland-based Lake Carriers Association (LCA), which represents 18 American companies operating U.S.-flag ships in the intra-Great Lakes trades, only 46 vessels were in service on May 1. This amounted to a decrease of 28 hulls compared to a year ago.

U.S. 'laker' vessels transported in April barely half of the iron ore, limestone, coal and other commodities compared with a year-earlier. The LCA said the total April cargo movement dropped 45 per cent to 5.1 million short tons due to a steel industry functioning "at less than 50 per cent capacity" and "a weak pulse in the construction industry."

Overall shipments by U.S. carriers on the Great Lakes during the first four months stood at 6.6 million tons, a decrease of 59 per cent from a year earlier. Iron ore traffic suffered the biggest decline.

In summary, shipping lines on the Great Lakes and St. Lawrence waterway are hoping for signs of revival by the steel and automobile industries especially by this fall. This may not be a sure bet.

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Closer EU-Canada Economic Partnership, estimates that a free trade pact between Canada and the EU could bolster Canada's annual gross domestic product by \$12 billion and boost bilateral trade by over 20 per cent.

Early in January, I.E. Canada was invited by Louis Lévesque, deputy minister of international trade, to be part of a high-level business ad-

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visory group to provide the Canadian government with feedback during discussions on a potential comprehensive economic agreement between Canada and the EU. On January 20, 2009, I.E.Canada provided the government with feedback on issues that had been brought to our attention concerning the agreement.

To ensure Canadian priorities are addressed during the talks, the Canadian government is consulting Canadian stakeholders with an interest in the EU market. These consultations, which will continue throughout the negotiations, will focus on a range of issues, including market access, rules of origin, technical barriers to trade, intellectual property, cross-border trade in services, investment, and government procurement.

"I.E.Canada will continue to work closely with the Canadian government to ensure the interests of members are represented and that the final agreement secures better access to the European market and new trade opportunities for Canadian importers and exporters," says Mary Anderson, president of I.E.Canada.

Foreign Affairs and International Trade Canada (DFAIT) has created a questionnaire that seeks preliminary input on goods, services and investment. The questionnaire is available at: www.international.gc.ca/consultations/active/question-eu-ue.aspx. Members are encouraged to complete the questionnaire. The federal government's deadline for comments is June 30, 2009.

In order to better understand members' issues related to a potential agreement, I.E.Canada is also developing a survey - drawn from the Canadian government's questionnaire - which will focus on the "trade in goods" section. Our survey

results will be held in complete confidence and will aid the association in providing input to Canada's negotiating team. Please keep a lookout for the survey in *I.E.Today* and in the "We Need Your Input" section of our website.

According to I.E.Canada's latest member survey, trade agreements with other nations are of critical interest to I.E.Canada members.

"With our largest trading partner in a recession and growing global protectionism, it is more important than ever to start these negotiations," says Carol Osmond, vice president, policy, I.E.Canada. "It's also critical that our members provide us with feedback so that we in turn can provide the government with accurate and comprehensive information as well as ensure that the final agreement represents their interests as importers and exporters."

On July 16, 2009, I.E.Canada will hold a briefing on the Canada-EU trade talks in Toronto. Please be sure to save the date and watch for future updates.

Last Chance to Register

I.E.Canada's Transfer Pricing Conference and Workshop will be held on June 3 and 4, 2009, at the Westin Bristol Place Toronto Airport Hotel located at 950 Dixon Road by Toronto Pearson International Airport. One- and two-day packages, and group discounts are available.

Effective transfer pricing requires a team effort. Group discounts are available for two or more members from the same company. For more information, please contact Fée Kiessling at 416-223-7072 or at fkiessling@iecanada.com.

For a copy of the conference brochure and to register, please visit I.E.Canada's website at:

www.iecanada.com/events/2009/Transfer_Pricing_Conf/TPC_2009.html.

We hope to see you on **June 3 and 4, 2009**.

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C-6 as follows:

- Incident Reporting (Section 14)
- Recall Orders (Section 30)
- Record Retention (Section 13)
- Import Requirements (Subsection 13(4))
- Ministerial Orders for Testing, Studies, Etc. (Section 12)
- Confidential Business Information (Sections 16 and 17)
- Inspections, Seizures and Stop Orders (Sections 20 and 31)
- Due Diligence Defences (Sections 38, 39, 46 and 52)

In general terms our concerns with the proposed Act are that it (i) does not take into consideration the process that a company undertakes to investigate and risk assess a complaint from a consumer or other source about a product; (ii) does not place "reasonableness" limits in many cases on the enforcement powers granted to the Minister or inspectors; and (iii) does not contain sufficient procedural safeguards for persons who could be the subject of enforcement action under the legislation.

A copy of the I.E.Canada submission is available at www.iecanada.com/article/I.E.Canada_Submission-Bill_C-6-May_26_2009.pdf and the coalition's submission at www.iecanada.com/article/Coalition_HESA_Submission-final_May_2009.pdf.

If you would like additional information or have concerns regarding Bill C-6, please contact Carol Osmond, vice president, policy at cosmond@iecanada.com.

Claude Germain on Changing Global Logistics Patterns



Claude Germain, executive vice president and chief operating officer, Schenker of Canada Limited, addresses delegates at I.E.Canada's conference on April 22, 2009 (Photo courtesy of Katrina Fyfle)

Claude Germain, executive vice president and chief operating officer at Schenker of Canada Limited, shared supply chain strategies and risk management tips for challenging economic times with delegates at I.E.Canada's "Emerging Issues in Customs and Trade Compliance" Conference on April 22, 2009.

Despite the economic slowdown, global sourcing is now the norm. Over the last decade, access to lower wages, rapidly growing local markets, and stable foreign markets have driven global sourcing. Nonetheless, the risk of protectionism in the face of a sharp economic downturn is a factor companies need to consider.

For many firms, core capabilities have shifted from manufacturing to design, procurement, and distribution. New practices have led to decoupled manufacturing processes for many products. In fact, manufacturing has emerged as a mobile and global phenomenon.

Effective management of the global supply chain is a source of value for companies, which allows them to differentiate themselves from their

competition. The supply chain - a large and relevant part of business processes - is the most significant component of gross domestic product (GDP) outside of government. In fact, supply chain management has never been as strategic as it is today.

Evolving supply chain dynamics have left a distinct mark on global sourcing practices. Indeed, favourable off-shoring conditions have changed considerably in recent years. For example, the cost of shipping a 40-foot ocean container (FEU) has tripled since 2003, primarily as a result of higher fuel prices. CIBC World Markets estimates that in 2003, shipping costs essentially created a 3 per cent tariff on products shipped to North America. Today, that figure has climbed to 11 per cent.

The growing prevalence of near-shoring has been a key outcome of evolving global sourcing dynamics. Claude noted that since 2003, wage inflation in China has witnessed a compound annual growth rate (CAGR) of 19 per cent. In 2003, Mexican labour was twice as expensive as Chinese labour, but is only 1.15 times more costly today. Con-

gestion, unpredictable lead times, quality issues or product returns also generate additional hidden shipping costs from Asia. In fact, total landed costs for products shipped from Asia to North America have grown significantly in the last five years.

Claude took stock of the factors companies need to consider to understand their total landed costs. Visible costs range from raw materials, processing, and manufacturing to transportation, inventory, and warehousing. Hidden costs include duties and taxes; quality-related problems and returns; and transit-time variability or poor control and visibility. Higher safety stocks/in-transit inventory, expedited shipment costs, such as airfreight, and lost sales contribute to fluctuations in transit time.

How should companies adapt to these changes? Claude had two key messages for delegates: manufacturing is mobile and companies need to understand their total landed costs.

Changing global sourcing dynamics have also affected purchasing. Organizational barriers and old paradigms limit value creation. Examples of organizational barriers include:

- Poor forecasting
- Transportation personnel not aligned with merchandising
- Purchasing managers removed from supply chain activities and focused on lowest transportation unit costs
- Lack of focus on total landed costs
- Incoterms - supply chain costs paid by vendor and buried in the cost of goods sold (COGS).

Changing global sourcing dynamics have also influenced purchasing models. Claude described the most

Anderson to Join Trade Policy Business Advisory Group

Mary Anderson, president of I.E.Canada, served as a member of the Market Access Advisory Group (MAAG), which was established by Foreign Affairs and International Trade Canada (DFAIT). The group's advice and feedback were useful to the government in refining Canada's position in international trade negotiations.

MAAG was recently dissolved to make way for a specific advisory group to provide the government with advice on Canada's trade policy and negotiating agenda. The new Trade Policy Business Advisory Group (TPBAG) will operate in parallel to the advisory group created for the Canada-EU Comprehensive Economic Agreement. (I.E.Canada is a member of the latter.)

TPBAG will provide DFAIT with timely input on issues related to Canada's international trade policy and negotiating agenda, including market access and other trade policy matters or instruments.

Mary recently accepted an invitation to serve in the newly formed group and she is honoured to be amongst a select group of members.

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common models:

Model A - hands-off/laisser-faire - is characterized by a stable and predictable long-term relationship; a limited number of vendors; procurement decisions by supervisors or lower-level managers; and little requirement for key performance indicators (KPIs), standard operat-

ing procedures (SOPs), or continuous improvement plans.

Model B - active transactional - is characterized by requests for quotations (RFQs) or e-bids on an annual or even a quarterly basis; a multitude of vendors; "baloney slicing" logistics services in an attempt to arrive at the lowest cost; and the cost and risk of switching vendors are perceived as being low.

Model C - a combination of A and B - is defined by lead vendor (A) with the majority of freight; subordinated vendor (B) with the rest - largely to keep the lead vendor honest on rates; a medium-term commitment (one to two years); and a modest requirement for KPIs, SOPs, and continuous improvement.

Model D - dedicated freight management - is characterized by operational, cultural, and technological integration; a long-term partnership with one or a few vendors; full transparency with respect to cost and the contract, along with an alignment of incentives in a gain share/pain share arrangement; and sophisticated management of KPIs and continuous improvement.

Claude urged delegates to partner with their vendors and use model C or D as a means to adapt to shifting supply chain dynamics.

He also encouraged them to take control by adopting the following practices: change Incoterm to "EXW" or Ex Works; increase visibility throughout the supply chain; and improve forecasting. Finally, he emphasized the importance of organizational alignment.

New Members

The following organizations joined I.E.Canada in March and April. Welcome aboard!

FIT Outsourcing Solutions

Marco Mo
Managing Director

CEVA Logistics

David Rish
Vice President, Global Trade Services

Organization of Women in International Trade – Toronto Chapter

Amanda de Vogel
President

Sensient Flavors Canada

Nancy MacLeod
Regulatory Affairs Manager

U.S. Bank – Power Track

Peter Gowanlock
Vice President, Canada Operations

Annual Conference: Save the Date

I.E.Canada's 78th Annual Conference and Trade Show will run from October 19-21, 2009, at the Delta Meadowdale Resort and Conference Centre. The hotel is about a 15-minute drive from Toronto Pearson International Airport.

Please mark your calendars and watch for updates in *I.E.Today* and future issues of *Tradeweek*.

The full conference brochure and other details about the conference will be available in the coming months at www.iecanada.com.

We hope to see you there!

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Tradeweek is published twice each month for and on behalf of the Canadian Association of Importers and Exporters Inc. / Association canadienne des importateurs et exportateurs inc. It is circulated by first class mail to members only. Reproduction of any of the contents of *Tradeweek* is encouraged provided that appropriate source credit is given.