Date: 19981030 Docket: C.A. 146800

NOVA SCOTIA COURT OF APPEAL

Cite as: Robinson Plymouth Chrysler Ltd. v. Nova Scotia (Finance), 1998 NSCA 175

Glube, C.J.N.S., Roscoe, Bateman, JJ.A.

BETWEEN:

ROBINSON PLYMOUTH CHRYSLER LIMITED

Appellant

- and -

THE MINISTER OF FINANCE

Respondent

Douglas B. Shatford, Q.C.
for the Appellant

Jennifer Palov
for the Respondent

Appeal Heard:
October 9, 1998

Judgment Delivered:
October 30, 1998

THE COURT: Appeal allowed and matter remitted for a rehearing before a differently constituted Board as per reasons for judgment of Bateman, J.A.; Glube, C.J.N.S., and Roscoe, J.A., concurring.

BATEMAN, J.A.:

This is an appeal by Robinson Plymouth Chrysler Limited from a decision of the Nova Scotia Utility and Review Board.

Background:

The appellant, Robinson Plymouth Chrysler Limited, has since 1983 operated an automobile dealership in Amherst, Nova Scotia.

In January of 1997, a Provincial Tax audit was conducted of the appellant's business covering the period from January of 1993 to October of 1996. The Auditor determined that between February 8th, 1996 and October 8th, 1996, the appellant sold seventeen vehicles upon which the appellant had incorrectly calculated the Health Services Tax owing. The general nature of the transactions was as follows:

a) The appellant purchased a vehicle wholesale from either Acadia Toyota, an automobile dealership or CRC RV Center, a recreational dealership, both located in Moncton, New Brunswick.

b) The appellant sold the purchased vehicle to a retail customer, a resident in Nova Scotia.

c) The appellant took a trade-in from the retail customer.

d) The trade-in vehicle was then sold by the appellant to either Acadia Toyota or to CRC RV Center in New Brunswick.

e) Each retail customer's trade-in vehicle was located in the Province of Nova Scotia prior to the transaction and was registered in Nova Scotia.

f) The vehicle traded in was delivered, not to the appellant, but to the dealer in Moncton or his agent.

g) The appellant realized a total profit of Two Hundred Dollars ($200.00) in each of the seventeen transactions.

The appellant remitted the provincial tax based upon the difference between the selling price of the new vehicle and the value of the trade-in.

The Auditor disallowed the deduction of a trade-in allowance from the purchase price for the purpose of calculating the tax owing. Robinson was assessed tax, interest and penalty in the amount of Fifty-One Thousand Twenty-Eight Dollars and Seventy-Two Cents ($51,028.72).

The appellant filed a Notice of Objection to the assessment with the Provincial Tax Commissioner. In a letter dated May 20th, 1997, the Commissioner advised the appellant that she found no reason to vary the tax assessed. Robinson then unsuccessfully appealed the assessment to the Nova Scotia Utility and Review Board.

It is from that decision that Robinson Plymouth Chrysler Limited appeals.

Grounds of Appeal:

1. The Nova Scotia Utility Review Board erred in law in its interpretation of the **Revenue Act**, S.N.S. 1995-96 c.17, s.21 formerly the **Health Services Tax Act**, R.S.N.S. c. 198 s. 10 interpreting that actual delivery and control of the article in the province was necessary for the section to apply.

2. The Nova Scotia Utility Review Board erred in law in refusing to consider the affect of the **Revenue Act**, S.N.S. 1995-96 c.17, s.15(2) formerly the **Health Services Tax Act**, R.S.N.S., c. 198 s.5(2).

> 3. The Nova Scotia Utility Review Board failed to consider the **Revenue Act**, S.N.S. 1995-96 c.17, s.18(1)(e), formerly the **Health Services Tax Act**, R.S.N.S. c. 198 s.7(1).
>
> 4. The Nova Scotia Utility Review Board erred in failing to determine that the **Revenue Act**, S.N.S. 1995-96 c. 17, s.18(2) and the **Health Services Tax Act**, R.S.N.S. c. 198 s.7(2) are *ultra vires* the Constitution Act, 1967, s.121;

Analysis:

An appeal lies to this Court from a decision of the Utility Review Board on a question of law or jurisdiction. (**Utility Review Board Act**, S.N.S. 1992, c.11, s.30) The Board must be correct in its interpretation of the law. (**Nova Scotia Attorney General v. Haddad Brothers Enterprises Limited** (1993), 121 N.S.R. (2d) 75 (N.S.C.A.))

This appeal concerns the interpretation of **Section 21** of the **Revenue Act** S.N.S. 1995-96, c.17 and its predecessor, **s.10** of the **Health Services Tax Act**, R.S.N.S 1989, c.98, in particular the meaning of the phrase “accepted in trade”. There are minor differences in the wording of the two sections which are not material to this appeal. **Section 21** provides:

> 21 Where tangible personal property located in the province is accepted in trade from the purchaser at the time of sale by a vendor on account of the price of the tangible personal property sold the purchaser shall pay the tax on the difference between the purchase price of the property sold and the credit allowed for the tangible personal property accepted in trade on account of the purchase price.

The focus of the auditor’s concern in disallowing the trade-in credit was the fact that the dealer did not have physical control of the trade-ins. In each transaction under review, the trade-in vehicle was delivered not to Robinson

Plymouth Chrysler but to the one of the Moncton dealerships. It was Mr. Robinson's evidence before the Utility Review Board that it is standard practice in the industry for one dealer to buy a car from another dealer to sell to a customer, rather than stock a full inventory. He had an arrangement with the Moncton dealerships that if Robinson's bought a car from that dealership to sell to one of his customers, the Moncton dealer would buy the vehicle traded-in from Robinson's, generally at a markup of $100. The auditor said in his report to the Commission:

> . . . In all cases there was a trade-in and the trade-in subsequently sold to the dealer in Moncton N.B., immediately after the sale by Robinson Plymouth Chrysler to their Nova Scotia customer. The trade-in was never "Held for sale in Nova Scotia" (refer to NASUARB-TX-95-29)[a reference to **Truro International Incorporated v. Minister of Finance** a decision of the Utility Review Board dated January 25, 1996] . . .
> (Emphasis added)

In upholding the reassessment, the Board determined that the vehicle, purportedly traded-in on the new car, and for which the trade-in credit was allowed by the dealer was not in fact "accepted in trade" within the meaning of **s.10** of the **Act**. The operative part of the Board's decision is brief:

> Despite Counsel for the Appellant's intriguing argument, the Board is of the opinion that **s.10** contemplates that there must be an actual delivery of the article traded in by the purchaser to the vendor or, at the very least, persuasive evidence that the vendor has taken over the control of the article traded in. Otherwise, there is no evidence that the Appellant gained control of the trade-ins and therefore the value assigned to the trade-ins cannot be used to reduce the tax calculated on the sale of the new vehicles in the transactions. ...

In the course of its decision the Utility Review Board found guidance in two provincial tax decisions: **Truro International Incorporated v. Minister of Finance** NSUARB-TX-95-29 and **Nova Enterprises Limited v. The Provincial Tax Commission** January 15, 1992.

In the latter case, Nova was a vendor of large trucks and trailers throughout the Maritimes. Four transactions involving trade-in allowances were reassessed by the Commission and the trade-in credit disallowed in calculating the health services tax. In each of the four transactions the purchaser ordered a new vehicle from Nova trading in for credit his current vehicle. The commitment to purchase the new unit was in certain cases conditional upon a buyer being found for the trade-in unit. In others, the customer approached to purchase a new unit, having already arranged a buyer for the used unit. When that occurred, the trade-in vehicles were never set up in the inventory of Nova. There was a lapse of time between the taking of the trade by Nova and delivery of the new unit - often about 90 days. Counsel for the Provincial Tax Commission argued that the sale of the new unit must take place either at the same time or within a very short period of time after the used unit it taken in trade. At issue was the meaning of ". . . at the time of sale . . ." as used in **s.10** of the **Health Services Act** (". . . Where tangible personal property is accepted in trade from the purchaser at the time of sale by a vendor . . ."). The Board was satisfied that in three of the transactions under scrutiny, although the trade-in unit was sold weeks before the new unit was delivered, the transaction accorded with the usual business practice in the trucking industry and the trade-in credit was allowed. That the trade-in unit was not set up in the vendor's inventory prior to sale was not a determinative factor, nor was the fact that the trade-in was sold before delivery of the new vehicle. The trade-in credit on one transaction, however, was disallowed by the Board because of "lack of evidence that the trade-in vehicle was ever accepted by Nova in Nova Scotia". In that one instance there was a clear

finding of fact by the Board that the transactions involved in this deal "were handled by Universal Truck and Trailer of New Brunswick and merely put through the record of Nova to reduce the amount of tax payable . . . it is quite obvious that Nova did not make a profit on any of the transactions . . . and merely recorded the amounts to accommodate the Universal Truck and Trailers customer."

In the **Truro** case, Lounsbury Company Limited, operating a General Motors dealership in Sackville, New Brunswick, sold cars to Nova Scotia residents and accepted trade-ins. (Pursuant to **s.18(2)** of the **Health Services Tax Act**, where a trade in was made on an out-of-province purchase, the trade-in credit would not be allowed for purpose of calculating the tax payable. This section of the **Act** was repealed in May of 1997.) The transaction was put through the books of MacLean's Diesel Limited of Truro (which had become Truro International Incorporated by the time of the hearing) in order to take advantage of the trade-in credit.

In disallowing the trade-in credit the Board in **Truro** said:

> *Section 10* unequivocally states that the article traded-in must be "accepted . . . by the seller or vendor on account of the price of the property sold . . . ". In the opinion of the Board the Section contemplates that there must be an actual delivery of the article traded-in by the purchaser to the vendor or, at the very least, persuasive evidence that the vendor has taken over the control of the article traded-in. Otherwise there is no acceptance by the vendor as required under the section.

The **Health Services Tax Act** defines sale under **s.2(r)**:

> S.2(r) "sale" includes a conditional sale, hire purchase and any transfer of title or possession, conditional or otherwise, including a sale on credit or where the price is payable by installments, an exchange, barter, lease or rental, or any other contract whereby at a price or other consideration a person delivers to another tangible personal property and also includes the provision by way of promotional distribution of any tangible personal

> property.
>
> The price or other consideration in the sale of a motor vehicle with a trade-in is the residual amount of money paid plus the trade-in. The Board finds it unreasonable to suggest that a Nova Scotia automotive dealer would sell a new vehicle located in another jurisdiction for the net amount of money paid without having the trade-in under his or her control.
>
> In order to satisfy the requirements of **s.2(r)** and **s.10** of the Act the Board finds that the trade-in would have to be received by the Nova Scotia dealer.
>
> There is no evidence in the present case that MacLean's gained control of the trade-ins.
> (Emphasis in original)

A "sale" as defined in **s.2(r)** of the **HSTA**, quoted above, includes a contract whereby one person delivers to another, tangible personal property. It appears that the Board in that case misapplied this definition of "sale" to encompass a requirement that a vehicle traded-in must also be delivered to the vendor to be "accepted" within the meaning of **s.21** of the **HSTA**.

This same error was imported by the Board into the decision in this case. While it is a question of fact whether a vehicle has been "accepted in trade", the Board here, as in the **Truro** case, erred in its interpretation of the meaning of that phrase.

In **A.G.N.S. v. Oxner** (1993) 121 N.S.R. (2d) 237 (N.S.C.A.), the respondent traded in his Mirage 30 sailboat and ordered a new one. Purchase of the new boat was contingent upon the sale of the Mirage 30. The issue differed from that under consideration here - it was whether the trade-in credit was appropriately allowed in circumstances where there was a substantial delay between the trade-in and the

delivery of the new unit. The remarks of Freeman, J.A. are, however, of assistance in pinpointing the issue that should have been addressed by the Board here. He said, commencing at p.240:

> 15 I would therefore conclude as a point of law that once a trade-in credit is established, *s.10* does not prescribe the form in which it is to be carried forward to be applied to the purchase price of a new unit. Whether there has been a trade-in, and whether the credit from the trade-in is actually applied to the purchase price, are therefore matters of fact for the determination of the Review Board.
>
> . . .
>
> 17 No problem was created by the need to find a buyer before the transaction could proceed. Yachts are expensive commodities; as the Board found, it is often necessary for a purchaser to be found for a used unit before either the broker or the purchaser can make a final commitment. It seems immaterial whether the dealer or broker takes the trade-in unit into inventory or disposes of it immediately so long as the transaction generates a credit to the customer to be applied toward the purchase of the new unit. If the Westcoast 34 had been available for delivery by Coastal Yachts when the Mirage 30 was sold, there could be little doubt that the transaction was a trade-in within *s.10*.
>
> 18 Ownership of the Mirage 30 did not pass into Coastal Yachts on the brokered sale, nor did it need to. At the bidding of Coastal Yachts Mr. Oxner signed the transfer papers in favour of the new owner. . . .
>
> (Emphasis added)

"Acceptance" or "control" of the trade-in can be established in a number of ways of which actual delivery to the dealer is only one. For example, in **Nova**, **supra**, the trade-in credit was specifically approved by the Board although the purchaser of the new vehicle had a buyer for the used vehicle already in place and the trade-in was never set up in the inventory of the vendor.

In requiring actual delivery of the trade-in vehicle the Board, here, applied the wrong legal test. This error is clearly revealed in the question the Board posed to itself:

> . . . The issue for consideration in this case is whether or not the tangible personal property in each of the transactions, on which the tax has been paid, was accepted

> at the time of sale - was it received by Robinson Chrysler Plymouth Limited? (Emphasis added)

The Board should have asked whether, in fact, there had been a trade-in credit allowed by Robinson to the purchaser on the sale of the new vehicle, not whether the trade-in vehicle had been delivered to the dealer. In requiring that the dealer receive delivery of the vehicle or "control the trade-in" the Board failed to focus upon the true nature of the transaction between the customer and Robinson Plymouth Chrysler. Was there an agreement between the two that upon the purchase of a new vehicle, the trade-in unit would be accepted for credit?

A further issue arises in this case in that the Board in its decision did not make factual findings but simply recited portions of the evidence and reached a legal conclusion. It did not provid "reasons" as required by **Section 27** of the **Utility and Review Board Act**:

> 27 (1) A final decision of the Board shall be in writing and shall set forth reasons for the decision.
>
> (2) The reasons for the final decision shall include
>
> (a) any agreed findings of facts;
> (b) the findings of fact on the evidence; and
> (c) the conclusions of law based on the findings referred to in clauses (a) and (b).

In **Survival Systems v. Nova Scotia (Minister of Finance)**, (1995) 144 N.S.R. (2d) 392 Hallett, J.A. noted that with the creation of the single Utility Review Board which assumed the function of several predecessor boards, ". . . the Board's jurisdiction covers a wide variety of subject matters; it does not function as a

narrowly specialized tribunal." It does not enjoy the protection of a full privative clause. The legislation permits review on questions of law and jurisdiction. The provision of reasons is not only crucial to this review process but is mandated by the legislation. The failure to furnish reasons constitutes jurisdictional error. Hallett, J.A. said at p.398:

> 20 An appeal court [in reviewing a decision of an administrative tribunal] . . . must look to the relevant legislation, in this case the *Health Services Tax Act* and the *Utility and Review Board Act*, to determine: (i) the scope of the function assigned by the Legislature to the tribunal whose decision is under review by an appellate court; and (ii) the degree to which the Legislature intended such decisions should be subject to the scrutiny of the courts. Pursuant to the *Utility and Review Board Act* the Board's findings of fact are binding and conclusive if made within jurisdiction. However, findings of fact are not immunized from judicial interference if such findings are so irrational as to result in a patently unreasonable decision . . . There is an appeal to this Court on questions of jurisdiction and questions of law. The Board's decisions are not protected by a full privative clause but are open to an appellate review by this Court on the two questions indicated in the *Act*. It is apparent that the Legislature intended this Court to play a significant appellate role in reviewing the Board's decisions. In view of the extensive jurisdiction conferred on the Board as a result of the combining of the four predecessor Boards, this would appear to be a prudent policy decision by the Legislature.
>
> 21 Pursuant to *s. 27* of the *Utility and Review Board Act* the Board is required to set forth reasons for its decisions. This makes good sense, otherwise, how can a decision be adequately reviewed on appeal? With respect to the only issue before the Board, whether or not the articles in question as enumerated on Exhibit S-3 were "school supplies" as defined in the *Act,* Commissioner Green gave no reasons for finding that most of the articles for which exemption was claimed were not exempt. Such a failure is a serious jurisdictional error as Commissioner Green failed to do what the Legislature directed him to do. It is clear from a review of his decision that he gave no reasons for finding the articles were not exempt; he simply made a finding that they were not. Nor can one infer from other parts of the decision the basis for refusing the exemption claimed.
> (Emphasis added)

In my view the Board here committed both legal and jurisdictional error.

Accordingly, I would allow the appeal and remit the matter for a re-hearing before a differently constituted Board.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.

C.A. No. 146800

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REASONS FOR JUDGMENT BY:
Bateman, J.A.