CUSTOMS AND EXCISE

EXCISE TAX ACT

Appeal from Tax Court of Canada (T.C.C.) decision (2017 TCC 1) concluding that reassessments issued to appellant correct — Appellant entering into contracts with Menova Energy Inc. (Menova) for sale, installation of solar panels — Contracts requiring appellant to pay one-half of purchase price, including HST, up front with balance payable on delivery — Menova later cancelling contracts, becoming insolvent — Upon cancellation of each contract, Menova issuing credit memo to appellant confirming particular contract cancelled, documenting its obligation to refund associated up-front payment, including HST — Appellant claiming deduction from net tax as input tax credit for HST paid on up-front payments — Also adding tax to be refunded to net tax, consistent with *Excise Tax Act*, R.S.C., 1985, c. E-15, s. 232 — For periods contracts cancelled, Minister of National Revenue adding amount of HST to be refunded to appellant's net tax pursuant to Act, s. 232(3)(c), with effect that reassessments not allowing deduction for HST paid by appellant that was to be refunded — T.C.C. concluding s. 232(1) applied on basis of overpayment of tax credited to appellant by credit memos — Concluding that "credit" meaning acknowledgement of sum owed — Determining that appellant's actions in acknowledging validity of credit memos fatal to its appeal — Rejecting appellant's public policy argument to effect that Minister's position could encourage "nefarious and sharp" behaviour from impecunious suppliers — Issue herein meaning of term "credit" for purposes of Act, s. 232 — S. 232 not applying to transactions at issue as HST not credited to appellant — By issuing credit memos, Menova giving formal notification to appellant that it was cancelling contracts, agreeing to refund associated up-front payments, including HST — Question whether agreement to refund tax is a "credit" within meaning of "refund or credit" in Act, s. 232(2) — T.C.C. erring in concluding that term "credit" taking its meaning from commercial terms "credit note", "credit memorandum" — These commercial terms not appearing in s. 232(1),(2) — Term "credit note" as used in s. 232(3) cannot refer to its ordinary commercial meaning because term in legislation applicable not only to credits, but also to adjustments, refunds — Legislative context, purpose suggesting narrower meaning of "credit" intended — At time s. 232 introduced into law, existing case law ascribing to term "credit" in income tax context narrow interpretation — Interpretation suggested by appellant not only possible, but one accepted in another tax context — Broad interpretation of "credit" in context of s. 232 appearing to open door for tax consequences to taxpayers like appellant contrary to general scheme of Act — HST is a tax that is generally intended to be borne by consumers — Businesses acting as pass-through entities, not bearing tax burden — Interpretation of "credit" advancing this objective more in harmony with scheme of Act as a whole — Financial position of suppliers not changing their obligation to collect tax on behalf of government — No relief provided for credit in s. 232 which becomes bad debt — Not relevant that appellant initially treating credit memos as being subject to s. 232 — Term "credit" in s. 232 should mean an operation by which a sum is put at someone else's disposal — Menova likely never in position to satisfy credit memos — Appellant's failure to recover anything except through recovery efforts telling — Menova not putting funds at disposal of appellant when issuing credit memos — Therefore tax not credited — Matter referred back to Minister for reconsideration, reassessment — Appeal allowed.

NORTH SHORE POWER GROUP INC. V. CANADA (A-53-17, 2018 FCA 9, Woods J.A., judgment dated

January 12, 2018, 15 pp.)