



Supreme Court of Canada Decision – *United Parcel Service Canada Ltd. v. Her Majesty the Queen* [2009]

On April 23, 2009, the Supreme Court of Canada rendered a decision in the case of *United Parcel Service Canada Ltd. v. Her Majesty the Queen* [2009] with respect to the recovery of amounts paid as tax in error on imported goods. This notice explains the impact of the decision for GST/HST purposes.

Note: Legislative references in this notice refer to the *Excise Tax Act* unless otherwise specified

Summary of decision

As a licensed customs broker, United Parcel Service Canada Ltd. (UPS) acted as an agent on behalf of its customers with respect to the importation of goods in respect of which it paid amounts as tax in error. UPS did not seek a reimbursement of the overpayments from its customers, but rather deducted the amounts in its monthly GST/HST returns. The Canada Revenue Agency (CRA) subsequently disallowed the amounts deducted by UPS. At issue in the case was whether UPS was entitled to a rebate of the amounts paid as tax in error.

The Supreme Court of Canada concluded that, although UPS would not have had a liability to pay tax in respect of the importations had tax been payable, it was entitled under section 261 to a rebate of the overpayments that could be recovered as a deduction in its return. The decision was based on several key facts including the fact that the Crown had agreed in the statement of agreed facts that overpayments of tax had been made and that UPS had not been reimbursed by its customers for the overpayments.

Impact of decision

The impact of the decision is not restricted to the recovery of amounts paid as tax in error in respect of imported goods, but also applies to amounts paid as tax in error in respect of supplies in certain circumstances. As a result, subject to the exceptions described below, if a person, including a customs broker or other agent, who does not have a liability to pay tax in respect of an importation of goods or a supply, pays an amount as tax in error in respect of that importation or supply, the person will be entitled to recover the amount if the following conditions are met:

- the person has not been reimbursed the amount by the person who would have had the obligation to pay tax in respect of the importation or supply if tax had been payable; and
- with respect to an amount paid as tax in error on imported goods, the person has first undertaken the necessary legislative steps under the *Customs Act* to establish that the amount was not payable and that an overpayment of tax was consequently made.

A registrant, including a broker or other agent, who satisfies the above conditions may claim an input tax credit (ITC) for the amount that the registrant is considered to have paid as tax in error. This is based on the application of subsection 296(2.1), which would require the amount deducted to be offset at the time of an assessment of the net tax of the person by the amount of the rebate to which the person would otherwise be entitled in respect of the amount.

La version française de la présente publication est intitulée *Décision de la Cour suprême du Canada – United Parcel Service du Canada Itée c. Sa Majesté la Reine* [2009].



The manner described in this notice by which persons such as customs brokers and other agents acting on behalf of a customer may recover amounts applies only with respect to amounts that are paid as tax in error. It does not apply for purposes of recovering an amount of tax paid that was and remains payable by a customer under the legislation.

Exceptions

1. The recovery of an amount paid as tax in error on imported goods described above is not available where section 178.8 applies. This provision applies where a “specified supply” of the goods has been made outside Canada to another person who is the “constructive importer” of the goods, which can include a customs broker’s customer. A “specified supply” is defined in the legislation to include a supply of goods that are imported after the supply of the goods is made. It is also defined to include a supply of goods that have been imported where the supply is deemed to have been made outside Canada because the goods are delivered or made available in Canada to the recipient before their release. The “constructive importer” of the goods for purposes of section 178.8 is the recipient of a specified supply of the goods made outside Canada who has not made a supply of the goods outside Canada before their release. For examples of how to determine the person who would be considered to be the constructive importer in various circumstances, refer to GST/HST Policy Statement P-125R *Input Tax Credit Entitlement for Tax on Imported Goods* available on the CRA Web site.

Where section 178.8 applies, the imported goods are deemed to have been imported by the constructive importer, and any amount paid or payable as or on account of tax on the importation is deemed to have been paid or payable, by or on behalf of the constructive importer and not by or on behalf of any other person. For example, if a customs broker pays an amount as tax in error on goods imported on behalf of a customer who is the constructive importer of the goods, the customer will be deemed by the legislation to be the only person who has paid the amount for purposes of recovering the amount, regardless of whether the broker has been reimbursed for the amount by the customer. In this case, the recovery of the amount by the broker from the customer is a matter that must be resolved between the parties and the decision in the UPS case has no application.

2. If a person such as a broker or other agent is at any time reimbursed for the amount of an overpayment of tax, the person will not be considered to be out of pocket for the amount and will not be the person who is entitled under the legislation to recover the amount. If the amount of the overpayment has already been deducted in the person’s return when the reimbursement is made, the person will have an obligation under the legislation to pay the amount to the Receiver General along with any applicable interest. If, on the other hand, a customer claims an ITC for an overpaid amount that the person would be entitled to recover based on the conditions explained in this notice, the customer will be required to repay that amount with applicable interest. To avoid the need for repayments, parties to which this notice applies may want to ensure that they clearly agree up-front how they will proceed to recover amounts paid as tax in error.

Enquiries by telephone

Technical enquiries on the GST/HST: 1-800-959-8287

General enquiries on the GST/HST: 1-800-959-5525 (Business Enquiries)

If you are located in Quebec: 1-800-567-4692 (Revenu Québec)

All technical publications on GST/HST are available on the CRA Web site at www.cra.gc.ca/gsthsttech.