

TAX COURT OF CANADA

BETWEEN:

SHEFFIELD INTERNATIONAL CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

*** * * * ***

CLOSING SUBMISSIONS BY MR. BARTLEMAN

**HEARD BEFORE THE HONOURABLE ASSOCIATE
CHIEF JUSTICE ROSSITER**

at the Tax Court of Canada
180 Queen Street West, 6th Floor, Toronto, Ontario
on Tuesday, September 27, 2011

*** * * * ***

APPEARANCES:

Mr. Andrew Pelletier

for the Appellant

Mr. Laurent Bartleman

for the Respondent

Also Present:

William O'Brien

Court Registrar

Eugene Wong

Court Reporter

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CLOSING SUBMISSIONS BY MR. BARTLEMAN

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1 Toronto, Ontario
2 --- Upon commencing the closing submissions
3 by Mr. Bartleman on Tuesday, September 27, 2011
4 at 9:54 a.m.

5 CLOSING SUBMISSIONS BY MR. BARTLEMAN:

6 MR. BARTLEMAN: Before I begin,
7 your Honour, I do have a copy of the Excise Tax Act
8 with me, if your Honour would like to read Section
9 133.

10 ASSOCIATE CHIEF JUSTICE ROSSITER:
11 I have it here, too.

12 MR. BARTLEMAN: Okay. Your
13 Honour, in the course of my submissions I may make
14 reference to an aid of summary of some of the
15 evidence that I've prepared, visual aids. And I
16 believe, your Honour, I passed up my Book of
17 Authorities to your Honour already. Do you have
18 that, your Honour?

19 ASSOCIATE CHIEF JUSTICE ROSSITER:
20 Yes.

21 MR. BARTLEMAN: Now, your Honour,
22 this case boils down to one question: Did the
23 transactions at issue actually occur, or were they
24 a sham? It's a factual question. And I would
25 submit that it makes no difference, in the

1 analysis, as to whether or not the question is were
2 the agreements, which pursuant to 133 are deemed to
3 be the supply, the agreements were a sham or if the
4 transactions themselves were a sham. It's a
5 difference meaning nothing.

6 What your Honour, I submit, is
7 faced with is fundamentally a factual question.

8 ASSOCIATE CHIEF JUSTICE ROSSITER:
9 What you're saying is the glass half empty, the
10 glass half full?

11 MR. BARTLEMAN: Exactly. Either
12 the software -- the transactions are fake because
13 the software didn't exist or the transactions are
14 fake because there was never an agreement to supply
15 the software because it never existed. It makes no
16 difference at which level you characterize the sham
17 or how you choose to characterize the sham. It's
18 still a sham.

19 Now, when faced with such factual
20 considerations, I would submit that Justice Woods
21 of this Court, in her recent decision of Landry,
22 which is found at Tab 6 of the respondent's Book of
23 Authorities, provides useful guidance to the Court
24 as to how to weigh this factual dispute.

25 In that case, Justice Woods,

1 relying on the comments in Springer and Aird &
2 Berlis, a decision of the Ontario Superior Court,
3 found as follows -- and I'm at page 4 of Tab 6,
4 your Honour. And this is quoting from the Springer
5 case:

6 "In making credibility and
7 reliability assessments I
8 find helpful the statement of
9 O'Halloran J.A. in R. v.
10 Pressley."

11 I'll omit the cite.

12 "The Judge is not given a
13 divine insight into the
14 hearts and minds of the
15 witnesses appearing before
16 him. Justice does not
17 descend automatically upon
18 the best actor in the
19 witness-box. The most
20 satisfactory judicial test of
21 truth lies in its harmony or
22 lack of harmony with the
23 preponderance of
24 probabilities disclosed by
25 the facts and circumstances

1 in the conditions of the
2 particular case."

3 And I submit, your Honour, that
4 provides a very useful matrix in which to frame the
5 facts presented in this case. Are the facts and
6 circumstances before your Honour more consistent
7 with fraudulent sham? Or are they more consistent
8 with bona fide commercial activity? And it will be
9 the Crown's submission that this was a sham.

10 So what is the test for sham?
11 It's not particularly controversial. The two
12 leading cases are *Stubart*, a Supreme Court of
13 Canada case. I haven't put the whole case in, your
14 Honour. I simply put in at Tab 1, the Federal
15 Court of Appeal Case of 2529-1915 Quebec and
16 Canada, because in it the Federal Court of Appeal
17 rather succinctly talks about sham and the
18 application of the *Stubart* decision in a tax
19 context.

20 And at page 13 of Tab 1, your
21 Honour, Justice Noël quotes the relevant section of
22 *Stubart*. And at page 57, Justice Noël comments:

23 "However, courts have always
24 felt authorized to intervene
25 when confronted with what can

1 properly be labeled as a
2 sham. The classic definition
3 of "sham" is that formulated
4 by Lord Diplock in *Snook*,
5 *supra*, and reiterated by the
6 Supreme Court on a number of
7 occasions since. In *Stubart*
8 *Investments Ltd. v. The*
9 *Queen*."
10 I'll omit the cite.
11 "Estey J. said the following:
12 "... This expression comes to
13 us from decisions in the
14 United Kingdom, and it has
15 been generally taken to mean
16 (but not without ambiguity) a
17 transaction conducted with an
18 element of deceit so as to
19 create an illusion calculated
20 to lead the tax collector
21 away from the taxpayer or the
22 true nature of the
23 transaction; or, simple
24 deception whereby the
25 taxpayer creates a facade of

1 reality quite different from
2 the disguised reality.

3 Now, in many cases in tax,
4 especially in cases perhaps where there are a
5 number of artificial transactions entered into for
6 the sole purpose of generating a tax benefit, the
7 Crown will be sitting arguing that it may be a
8 sham. The taxpayer will be sitting on the other
9 side arguing that the taxpayer is entitled to
10 arrange their affairs however they want. And often
11 the issue of whether or not there is this element
12 of deceit will come up.

13 Now, I submit, your Honour, this
14 is not one of those cases where there's a fine
15 distinction as to whether or not a complex series
16 of tax arrangements gives rise to deceit or not so
17 as to show a sham. In this case, we've actually
18 got the guilty plea of the person who arranged it
19 whereby he admitted that he claimed these input tax
20 credits through fraud and deceit. But we are in
21 the Tax Court; we're not in the criminal world.
22 And it is useful to briefly consider that the test
23 for sham has been even further reduced in the tax
24 world, and that's the Antle decision, your Honour.

25 In Antle, which was released last

1 year, the Federal Court of Appeal clarified the
2 deceit requirement, the mens rea requirement. And
3 at page 7, your Honour, of Tab 2, the Antle
4 decision, again Justice Noël, starting at paragraph
5 19:

6 "The Tax Court judge found as
7 a fact that both the
8 appellant and the trustee
9 knew with absolute certainty
10 that the latter had no
11 discretion or control over
12 the shares. Yet both signed
13 a document saying the
14 opposite. The Tax Court
15 judge nevertheless held that
16 they did not have the
17 requisite intention to
18 deceive."

19 Paragraph 20:

20 "In so holding, the Tax Court
21 judge misconstrued the notion
22 of intentional deception in
23 the context of a sham. The
24 required intent or state of
25 mind is not equivalent to

1 mens rea and need not go so
2 far as to give rise to what
3 is known at common law as the
4 tort of deceit (compare
5 MacKinnon v. Regent Trust
6 Company Limited... it
7 suffices that parties to a
8 transaction present it as
9 being different from what
10 they know it to be. That is
11 precisely what the Tax Court
12 judge found."

13 Now, your Honour, I submit that's
14 the proper test for sham in the tax court context.
15 It's even lower than what you would have proven in
16 criminal. And in this case, we actually have that.
17 Having said that, what is the evidence of sham
18 before us?

19 Well, the first piece of evidence,
20 your Honour, is the guilty plea. Now, at law, a
21 guilty plea is an admission of all material facts
22 that make up the offence. Your Honour, I take you
23 to Tab 3 of the respondent's Book of Authorities.
24 This is the case of Hansen and Ocean Victoria.
25 Ocean Victoria was a ship who had a bit of an

1 accident, spilled some oil, and they were being
2 sued. Now, there had been a guilty plea in respect
3 of the spilling of oil. The plaintiffs were moving
4 to strike out the defendant's statement of claim,
5 in essence, based on the guilty plea. It was
6 denied.

7 Justice Muldoon of the Federal
8 Court at page 4 properly describes the effect at
9 law of a guilty plea. At paragraph 8, Justice
10 Muldoon reads:

11 "In law, a guilty plea is an
12 admission of all elements and
13 ingredients which go to make
14 up the offence.

15 However, an admission is not
16 an abject confession, for
17 those who plead guilty to
18 secular offences may have
19 motives and purpose other
20 than clearing their
21 consciences. But, this
22 admission by the defendant
23 ship of its having discharged
24 a pollutant, oil, into
25 Burrard Inlet while it does

1 not of itself summarily win
2 for the plaintiffs a
3 conclusive judgment on
4 liability, could furnish
5 weighty and admissible
6 evidence of negligence on the
7 defendants' part at the trial
8 of this action."

9 Your Honour, that's what we have
10 here. Mr. Eickmeier's plea of guilty and his
11 agreement to the elements of the joint statement
12 isn't conclusive. But it provides weighty evidence
13 of the sham. Now, Mr. Eickmeier is fully entitled
14 to try to explain before your Honour why he pled
15 guilty and why little or no weight should be given
16 to his admission of guilty plea. However, your
17 Honour, this is not the Hurricane Carter or
18 Hurricane Reuben situation where an innocent man
19 pleads guilty after being strong-armed.

20 Your Honour, just at Tab 4 we have
21 the Charlton decision, which at paragraph 6 again
22 reinforces the idea that a guilty plea is
23 admissible and is an admission but is capable of
24 explanation.

25 So, I would submit, your Honour,

1 that the evidence doesn't disclose any actual
2 pressuring of the appellant into conceding a fact
3 which is not true for the sole purpose of resolving
4 a conflict. But that's not the only thing the
5 Crown relies on. What other facts are there that
6 are consistent with the sham other than the
7 managing mind's own admission?

8 Well, I would say that the fact
9 that Sheffield International had a fake name as a
10 contacting person on their GST returns is also
11 extremely indicative of a sham. A legitimate
12 company wouldn't have to try to hide itself.
13 Mr. Eickmeier's explanation that he wanted to make
14 sure that Canada Revenue Agency identified itself
15 when they called, frankly, is ridiculous.

16 If someone calls you and they
17 don't identify who they are, just don't return
18 their call. Or call them and say, "Who are you?"
19 Mr. Eickmeier then went on to say that other
20 members of the Canada Revenue Agency who called him
21 quite happily identified themselves. But if you're
22 running a scam, you absolutely want to know when
23 the Agency is onto you.

24 Next, we come to the issue of the
25 sales. Now would Sheffield International, a

1 Sheffield. Now, Mr. Eickmeier controlled Frontier
2 Metals, and his evidence was that Singh 2,
3 Mr. Singh down in Buffalo, ran a separate division
4 and he handled all the software. Well, your
5 Honour, it stretches credibility so far past the
6 breaking point that we can't even see it anymore to
7 believe that a company would have a division
8 incurring tens of millions of dollars of expenses
9 and the directing mind of the company would not
10 only be unconcerned about this but wouldn't even
11 know what they're selling, what they're buying and
12 doesn't seem to really care one way or the other as
13 to whether or not they'll ever generate any money.
14 But what it is consistent with is it's consistent
15 with a fraud. It's consistent with a sham.

16 Because for this fraud to work,
17 they needed a U.S. company. They needed somewhere
18 to pretend to sell to across the border so that
19 they could get the zero-rated supply. They needed
20 a way to get those ITCs. Because, your Honour,
21 I've actually done a little diagram in my little
22 submissions -- I don't think it's controversial --
23 but this bears remembering, Heavy Metal, Sheffield,
24 Frontier, they're all Peter Eickmeier.

25 Now, Mr. Eickmeier quite happily

1 too. He was utterly unconcerned. That's not
2 consistent with real transactions, but it's sure
3 consistent with a sham.

4 The next factor to consider, your
5 Honour, is the simple evidence of these goods ever
6 existing. Now, there is some evidence that the
7 steel existed. It was a Mr. Dimitrov, I believe,
8 who ran Patriot Forge. And there is some evidence
9 that maybe steel was taken from Patriot Forge
10 Ontario and driven across the border.

11 Mr. Eickmeier may or may not have directed someone
12 to take it to Steel Traders. Then Steel Traders
13 may or may not have sold it or just simply have
14 returned it to Patriot.

15 But, your Honour, what we don't
16 have is we don't have any evidence of Sheffield
17 actually supplying the steel to Frontier Metals,
18 other than the invoice. I'm going to ask your
19 Honour to draw an adverse inference from the fact
20 that the appellant did not call Helina Jawor, the
21 person that apparently organized this transaction.

22 The appellant did not call John Dimitrov from
23 Patriot Forge to testify, did not call anyone from
24 Steel Traders to testify as to what they did with
25 the goods. I wouldn't go so far as to ask for an

1 adverse inference about the trucker because that
2 might be harder to find. But if this was a real
3 transaction, certainly somebody could have come to
4 testify.

5 Now, I would ask that your Honour
6 be cautious, perhaps, about placing any weight on
7 the evidence of Mr. Misiak with respect to what
8 Mr. Dimitrov said at the prehearing conference even
9 though it was unchallenged. I'm just concerned
10 about whether or not that would be considered
11 hearsay even though it was unchallenged. We don't
12 need to go there to make a finding that this sale -
13 - and I use the word for lack of a better word --
14 was just an accommodation by Patriot Forge and that
15 the steel just went in a big loop, but Sheffield
16 never supplied it.

17 And for the purposes of this
18 Court, that's what the appellant has to prove, not
19 that steel just went across a border, not just that
20 they exchanged these cheques on the same day, not
21 just that Peter Eickmeier sat at his computer and
22 typed out an invoice; he has to show that Sheffield
23 supplied it. There's a distinct lack of evidence.

24 Coupled with his admission in the guilty plea that
25 this was a fictitious sale, I would submit that the

1 Crown has more than made its case that the steel
2 transaction never occurred.

3 Similarly, with the software,
4 there the case is even stronger, I would submit.
5 Mr. Eickmeier claims that he never kept copies of
6 the software. Sheffield never kept copies of the
7 software. Well, the story is what it is. But not
8 even Frontier kept copies of the software? If it
9 was being sold on, certainly somebody must have had
10 a copy of it. And if Frontier didn't have copies
11 of it because they sold it, where are the proceeds
12 flowing back?

13 Now, there's some evidence that
14 Frontier paid \$495,000 to Sheffield through cash
15 dumps in a mailbox somewhere. And frankly, your
16 Honour, I would ask that that evidence isn't
17 credible either, but that's the best case scenario.
18 But from the fact that Frontier was never paying
19 Sheffield more than \$495,000, it's reasonable to
20 assume that no material sales were ever made by
21 Frontier. So certainly the software should be down
22 at Frontier.

23 Now, Mr. Eickmeier controls
24 Frontier, so it would have been very easy for him
25 to bring up the software. And if he sold or

1 deleted any of it, because that was the terms of
2 the agreement, let's see the agreements that he
3 sold it to so we could ask the purchasers or the
4 licensees. Mr. Eickmeier wasn't even sure if he
5 was selling or licensing it. And since he ran the
6 company, that's pretty basic information I thought
7 one would know. Again, I'd ask that an adverse
8 inference be drawn from that.

9 So really, your Honour, taken on
10 its totality, none of these facts points towards
11 the existence of a real transaction. So what
12 evidence do we have? Furthermore, one last point,
13 your Honour: Mr. Eickmeier did testify as to what
14 happened to the money. Said he took it out as
15 cash, paid some of his personal living expenses,
16 and he invested it in companies that he owned.

17 And what I did -- this is what I
18 handed up, your Honour -- is I went through fiscal
19 1997, which is August 1 to July 31 of the next
20 year, and I just and tracked the cash flow. And
21 it's consistent with what Mr. Eickmeier said. This
22 is taken out of the summaries of the bank
23 statements, which weren't challenged. If your
24 Honour goes to my submissions, what I've done is
25 I've just put out Sheffield account No. 1, Frontier

1 account, Sheffield No. 2. And then I've shown the
2 invoices going between the parties.

3 The only thing I'm going to ask
4 that your Honour draw from this is looking at this
5 type of transaction, given the amounts owing by the
6 parties, makes no sense. The money was deposited
7 into Sheffield account No. 1, stripped out almost
8 immediately -- within a few weeks -- and
9 transferred into Frontier's account. As
10 Mr. Eickmeier said, invested it in the company that
11 he controlled.

12 Frontier then dribbled just enough
13 money into Sheffield account No. 2 to pay for its
14 operating expenses. Your Honour can see, for
15 example, the October 1, 1996 transactions. Sorry,
16 it starts on February 27, 1996. There's two GST --
17 it's a total, but there's actually two GST invoices
18 of \$24,138. I'm sorry, that's not a double.
19 That's a single deposit of \$24,138. But either way
20 it's in the Book of Authorities.

21 The Monday after that, you have
22 \$7,000 being transferred into Frontier. The
23 Tuesday after that, you have \$20,000 being
24 transferred into Frontier. That very same day,
25 Frontier transfers \$3,500 into Sheffield. If your

1 grossly negligent when they prepared their returns.

2 Subject to any questions from your
3 Honour, that concludes my closing.

4 ASSOCIATE CHIEF JUSTICE ROSSITER:

5 What do you have to say about costs?

6 MR. BARTLEMAN: Your Honour, I
7 would ask that costs be fixed. I don't have a bill
8 of costs quite ready. If your Honour wants, I can
9 quickly try to calculate one. Otherwise, I'd be
10 more than happy to submit a submission on costs
11 within 48 hours. Otherwise, I'll be happy to
12 settle -- well, we had discoveries on this, two
13 days of trial. I can have a bill of costs for your
14 Honour within a few hours. But I'd also be happy
15 with an order for fixed costs of \$10,000.

16 That may be higher than what the
17 regular bill of cost would be, your Honour, but
18 frankly, this case is egregious. I in no way wish
19 to criticize the conduct of my friend,
20 Mr. Pelletier, but merely of the conduct of the
21 appellant. Mr. Pelletier has behaved himself with
22 the highest level of professionalism.

23 ASSOCIATE CHIEF JUSTICE ROSSITER:

24 Thank you. Mr. Pelletier?

25 MR. PELLETIER: Your Honour, the

1 only thing I'm going to say with respect to costs
2 is that obviously my client was of the view that he
3 wanted to have his matter heard before a court with
4 the understanding of the tax principles that he had
5 advised himself on. He felt very confident in his
6 view that he had an approach that was within the
7 law and proceeded on that basis. All that I ask is
8 that you temper my friend's request with some
9 regard to that approach.

10 ASSOCIATE CHIEF JUSTICE ROSSITER:

11 Okay.

12 MR. PELLETIER: Thank you.

13 ASSOCIATE CHIEF JUSTICE ROSSITER:

14 Anything further?

15 MR. BARTLEMAN: No, your Honour.

16 ASSOCIATE CHIEF JUSTICE ROSSITER:

17 The court will take the matter under advisement
18 and render judgment at 1:30.

19 --- Whereupon the closing submissions by

20 Mr. Bartleman concluded at 10:31 a.m.

I HEREBY CERTIFY THAT I have, to the best of my skills and abilities, accurately recorded by shorthand, and transcribed therefrom, the foregoing proceeding.

Eugene Wong, Court Reporter