

Docket: 2016-1831(GST)I

BETWEEN:

PETER THIMIO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 26, 2017, at Toronto, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: J.M. (Michelle) Farrell

Counsel for the Respondent: Kanga Kalisa

JUDGMENT

The appeal from the assessment dated May 29, 2015 under Part IX of the *Excise Tax Act* for the period from January 1, 2014 to December 31, 2014 is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 1st day of September 2017.

“Réal Favreau”

Favreau J.

Citation: 2017 TCC 164
Date: 20170901
Docket: 2016-1831(GST)I

BETWEEN:

PETER THIMIO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal against an assessment dated May 29, 2015 made by the Minister of National Revenue (the “Minister”) under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the “ETA”) for the period of January 1, 2014 to December 31, 2014 (the “period under appeal”).

[2] The Appellant was the sole proprietor, owner and operator of Big Pete’s Swimming School which offered private swimming lessons.

[3] For the period under appeal, the Appellant reported sales of \$14,806.77 and zero Goods and Services Tax (“GST”) and claimed Input Tax Credits (“ITC”) of \$3,451.33 and a net refund of \$3,451.33.

[4] By way of notice of assessment dated May 29, 2015, the Minister disallowed the ITC of \$3,451.33 claimed by the Appellant for the period under appeal.

[5] In assessing the Appellant, the Minister relied on, *inter alia*, the following assumptions of fact set out in paragraph 10 the Amended Reply to the Notice of Appeal:

- a) the facts stated and admitted above
- b) the Appellant is a GST/HST registrant;
- c) the Appellant operated a sole proprietorship involved in swimming instruction;
- d) the Appellant is required by the *Act* to file GST returns on an annual basis;
- e) on February 26, 2014 (*sic*), the Appellant was charged with sexual interference, invitation to sexual touching, sexual assault (x2) and sexual exploitation contrary to the Criminal Code (“the charges”);
- f) the complainant in respect of each of the charges was an individual who was employed by the Appellant;
- g) the alleged incidents giving rise to the charges occurred between July 13, 2010 and April 30, 2011;
- h) two of the alleged incidents giving rise to the charges occurred at the addresses where the Appellant employed the complainant, namely at 100 Finch Ave W. and Graydon Hall Manor;
- i) three of the alleged incidents giving rise to the charges occurred in the Appellant’s vehicle and residence;
- j) the Appellant pleaded not guilty to all of the charges;
- k) the Appellant was represented by legal counsel in respect of the charges;
- l) the Appellant was tried concurrently on all of the charges;
- m) the Appellant was acquitted of the charges;
- n) for the period under appeal, the Appellant claimed ITCs of \$3,451.33 in respect of legal fees incurred to defend the charges;
- o) the Appellant incurred legal fees for the period under appeal in addition to the periods of January 1, 2013 to December 31, 2013 and January 1, 2015 to December 31, 2015;
- p) the total amount of HST on the legal fees incurred by the Appellant was \$22,151.52;
- q) the Appellant ceased the sole proprietorship in 2013;
- r) the amount reported as income in the GST/HST return for the period ending on December 31, 2013 of \$14,806.77 was a partial repayment of a loan;
- s) the Appellant loaned a business an amount of \$94,045.60 and received an aggregate amount of \$123,659.14, including the above \$14,806.77, as repayment; and
- t) the legal fees were not incurred in the course of the Appellant’s commercial activities;

[6] Mr. Peter Thimio testified at the hearing. He explained that he was arrested on April 4, 2013 and charged for having unlawfully committed the offences described in paragraph 10(e) of the Amended Reply on a 15-year old female employee. On April 5, 2013, he was released from custody, on bail to a surety of

\$50,000 with conditions, namely: (a) not to enter any public park, swimming area, daycare centre, school ground, playground or community centre or any place where children under of age of 18 (eighteen) years old are known to congregate except in the continued presence of an adult and except while picking up and dropping off his wife at work at 150 Graydon Hall Manor in the City of Toronto; and (b) not to attend the premises of 185 Graydon Hall Manor, or the Good Life locations at 185 The West Mall, 25 Peel Centre Drive, Brampton and 1000 Finch Avenue West.

[7] On April 10, 2013, due to the nature of the criminal charges, the Lifesaving Society suspended all his Lifesaving Society certifications for an indefinite period and on April 15, 2013, the Canadian Red Cross terminated the Training Partner Agreement dated December 12, 2011, executed between the Canadian Red Cross Society and Big Pete's Swimming School. As a result of the termination of the latter agreement, Big Pete's Swimming School could no longer identify itself as a training partner of the Canadian Red Cross Society, nor could it use any training partner logos or provide any course of the Canadian Red Cross Society to the public.

[8] Goodlife management told CBC News that they were severing ties with the swimming instructor and will no longer rent their facilities to him.

[9] As the charges were the subject of many media, Big Pete's Swimming School's revenues (before HST) went from 245,255.38 in 2012 to \$132,902.79 in 2013 (until after the summer session). The swimming classes for the fall session of 2013 were suspended even before resuming, as the school did not have enough students enrolled in the programs but the school did not close permanently. Mr. Thimio kept his Harmonized Sales Tax number for his business but closed his payroll account and laid off his 11 swimming instructors.

[10] From the fall of 2013, Mr. Thimio's priority has been to defend himself against the charges. After an eleven-day trial, he was found not guilty on all counts. He received the verdict on April 13, 2015. He said that he has paid \$176,000 (before HST) in legal fees for this trial and when he was acquitted, the media made very little mention on the verdict.

[11] Since the verdict, Mr. Thimio has been working to get back his qualifications to resume his business operations. On February 15, 2017, he received a clear police reference check which allows him to work with children.

The Issue

[12] The only issue in this case is to determine whether the appellant is entitled to claim ITC in relation to the Harmonized Sales Tax added to his legal fees to defend himself against charges of sexual misconduct under the Criminal Code.

Position of the Appellant

[13] The Appellant was required to hire employees in order to conduct his business.

[14] As a result of false allegations made by a former employee, the commercial viability of the Appellant's business was threatened.

[15] If a person is falsely accused of sexual misconduct in the exercise of his work activities, the only issue at stake is the performance of the individual's work activities.

[16] The Minister erred in concluding that three of the five charges did not relate to a work specific context. All of the criminal allegations ostensibly involved sexual misconduct in locations directly related to the operations of Big Pete's Swimming School.

[17] The legal fees incurred by the Appellant to defend these charges of sexual misconduct were inherently linked to his work activities and the income-earning activities of Big Pete's Swimming School.

[18] Apart from the business, the Appellant would have had no need to defend himself from charges of sexual misconduct. He knew that he was innocent and falsely accused. Our legal system upholds the principle of the presumption of innocence of any accused. It was not unreasonable to incur the expenses to defend the charges.

[19] Therefore, the appellant requests that the appeal be allowed and an adjustment of \$22,151.52 be granted to permit ITC for the period ending December 31, 2014.

[20] To support the Appellant's position, counsel for the Appellant referred the Court to the following decisions:

- *Bilodeau v. The Queen*, 2004 TCC 685 by Justice Lamarre Proulx (CanLII);
- *The Queen v. Eric Doiron*, 2012 FCA 71; and
- *Gordon Ironside v. The Queen*, [2015] 5 C.T.C. 2001.

Position of the Respondent

[21] The Respondent submits that the Appellant is not entitled to ITC in the amount of \$3,141.55 or any amount, as the legal fees incurred by the Appellant were not incurred in the course of his commercial activities pursuant to sections 169 and 170 of the *ETA*.

[22] The Respondent further submits that the Appellant is not entitled to ITC in the amount of \$3,141.55 or any amount, as the legal fees were not incurred for the purpose of making taxable supplies in the course of an endeavour of the Appellant as provided for under section 141.01 of the *ETA*.

[23] To support the Respondent's position, counsel for the Respondent referred the Court to the following decisions:

- *The Queen v. Eric Doiron*; 2012 FCA 71; and
- *David D. Haggart v. The Queen*, 2003 TCC 185, affirmed by the Federal Court of Appeal, 2003 FCA 446.

Legislation

[24] The relevant provisions of the *ETA* that are applicable in this case are the following: subsections 123(1) (for the definition of "business" and "commercial activity", 141.01(1), (1.1), (2), (3) and (5), 169(1), 169(4) and 170(2). They read as follows:

123(1) Definitions

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

“commercial activity” of a person means

(a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

(b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

141.01(1) Meaning of “endeavour” – In this section, “endeavour” of a person means

(a) a business of the person;

(b) an adventure or concern in the nature of trade of the person; or

(c) the making of a supply by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply.

(1.1) Meaning of “consideration” – In subsections (1.2), (2) and (3), “consideration” does not include nominal consideration.

...

(2) Acquisition for purpose of making supplies [limitation on ITCs] –

Where a person acquires or imports property or a service or brings it into a participating province for consumption or use in the course of an endeavour of the person, the person shall, for the purposes of this Part, be deemed to have acquired or imported the property or service or brought it into the province, as the case may be,

(a) for consumption or use in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person for the purpose of making taxable supplies for consideration in the course of that endeavour; and

(b) for consumption or use otherwise than in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person

(i) for the purpose of making supplies in the course of that endeavour that are not taxable supplies made for consideration, or

(ii) for a purpose other than the making of supplies in the course of that endeavour.

(3) Use for purpose of making supplies – Where a person consumes or uses property or a service in the course of an endeavour of the person, that consumption or use shall, for the purposes of this Part, be deemed to be

(a) in the course of commercial activities of the person, to the extent that the consumption or use is for the purpose of making taxable supplies for consideration in the course of that endeavour; and

(b) otherwise than in the course of commercial activities of the person, to the extent that the consumption or use is

(i) for the purpose of making supplies in the course of that endeavour that are not taxable supplies made for consideration, or

(ii) for a purpose other than the making of supplies in the course of that endeavour.

...

(5) Method of determining extent of use, etc. – Subject to section 141.02, the methods used by a person in a fiscal year to determine

(a) the extent to which properties or services are acquired, imported or brought into a participating province by the person for the purpose of making taxable supplies for consideration or for other purposes, and

(b) the extent to which the consumption or use of properties or services is for the purpose of making taxable supplies for consideration or for other purposes,

shall be fair and reasonable and shall be used consistently by the person throughout the year.

169(1) General rule for [input tax] credits – Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

(a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,

(b) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

...

(4) Required documentation – A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,

(a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and

(b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax payable in respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

170(2) Further restriction [— must be reasonable] – In determining an input tax credit of a registrant, no amount shall be included in respect of the tax payable by the registrant in respect of property or a service acquired, imported or brought into a participating province by the registrant, except to the extent that

(a) the consumption or use of property or services of such quality, nature or cost is reasonable in the circumstances, having regard to the nature of the commercial activities of the registrant; and

(b) the amount is calculated on consideration for the property or service or on a value of the property that is reasonable in the circumstances.

Analysis

[25] Based on the evidence, there is no doubt that criminal charges were laid against the appellant personally. The swimming school was not charged nor the owners of the buildings where the school was operating nor any other employee of the school. It is also clear that three of the alleged incidents giving rise to the charges occurred in the appellant's vehicle and residence, outside the business locations of the school.

[26] I accept the fact that the criminal charges against the Appellant had a huge impact on his business earnings and his reputation. In fact, he lost his certifications and could not work at his swimming school anymore.

[27] I also recognize that the Appellant did not close his swimming school but simply suspended its operations until he can get his certifications back.

[28] However, I do not see in this instance, the link between the legal fees incurred to defend the Appellant's reputation and the earning ability of his swimming school and the commercial activities *per se* carried out in 2014 by the swimming school.

[29] It is well recognized in case law under the *ETA*, that ITC are available only to the extent that the inputs were acquired for consumption, use or supply in the course of commercial activities of the person claiming it (please refer to *Two Carlton Financing Ltd. v. R.*, [1998] G.S.T.C. 59 (T.C.C.), *Nineteen Ninety Clothing v. R.*, [1994] G.S.T.C. 89 (T.C.C.), *Blanchard v. R.*, [2001] T.C.J. No. 484 (T.C.C.) and *Haggart v. R.*, [2003] G.S.T.C. 71 (T.C.C.) affirmed by the Federal Court of Appeal, 2003 F.C.A. 446).

[30] Although the Appellant did not close his business and still had the intention to restart it as a sole proprietorship, he has not established a connection, direct or indirect, between the legal services sought and any ongoing supply of taxable services.

[31] For the purposes of subsection 169(1) of the *ETA*, the legal services were not acquired “in the course of commercial activities” of the Appellant and, for the purpose of subsection 141.01(2) of the *ETA*, the legal services were not acquired “for the purpose of making taxable supplies in the course of that endeavour” (please refer to paragraph 2 of the *Haggart’s* decision rendered by the Federal Court of Appeal, cited above).

[32] The cases of *Bilodeau* and *Ironside* cited by the Appellant are instructive since the issue of “connectivity” between the need met by the legal expenses and the business itself is raised, but their relevancy for the purpose of this appeal is limited, because they deal exclusively with the deductibility of legal expenses for the purpose of the *Income Tax Act*.

[33] The *Doiron* case cited by both parties is more relevant because it dealt specifically with the issue raised in this appeal. The Federal Court of Appeal clearly determined that the person claiming the inputs, has the burden of proving that the inputs, in the form of legal services acquired for defending himself in the criminal proceedings, were made in the course of his commercial activities. The Appellant did not meet his burden to demonstrate that a direct and clear connection existed between the charges that were laid against the Appellant and the activities he engaged in for the purpose of earning income.

[34] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 1st day of September 2017.

“Réal Favreau”

Favreau J.

CITATION: 2017 TCC 164
COURT FILE NO.: 2016-1831(GST)I
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PLACE OF HEARING: Toronto, Ontario
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APPEARANCES:

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