

Docket: 2004-656(GST)I

BETWEEN:

A & W TRADE MARKS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 24, 2004 at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: David E. Graham

Counsel for the Respondent: Lisa M. Macdonell

AMENDED JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated April 25, 2003 and bears number 11BU0502273, is allowed, **without** costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

This judgment is issued in substitution for the Judgment dated September 9, 2005.

Signed at Vancouver, British Columbia, this **21st** day of **October** 2005.

"L.M. Little"

Little J.

Citation: 2005TCC493
Date: 20051021
Docket: 2004-656(GST)I

BETWEEN:

A & W TRADE MARKS INC.,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Little J.

I. FACTS:

[1] The Appellant is a corporation that carries on the business of licencing trade-marks. Under an acquisition agreement, the Appellant purchased certain trade-marks from A & W Food Services of Canada Inc. ("A & W Food Services"), and then entered into a licence and royalty agreement granting a licence to A & W Food Services to use the trade-marks.

[2] The A & W Revenue Royalties Income Fund (the "Fund") was established for the purpose of investing in debt and equity securities of the Appellant through an initial public offering (the "IPO").

[3] The Fund raised \$83,400,000.00. Most of the money which was raised was invested in the Appellant. The Appellant used the money that the Fund invested to purchase the trade-marks from A & W Food Services.

[4] The Goods and Services Tax ("GST") appeal relates to input tax credits ("ITCs") claimed by the Appellant for expenses incurred with respect to the IPO.

[5] It is agreed between the parties that the Appellant paid certain invoices to several law firms, RBC Capital Markets and a printing company.

[6] The Appellant claimed \$77,688.23 in ITCs for these invoices. The ITCs that were claimed by the Appellant were denied by the Respondent. This is the only amount in issue.

[7] The parties agree that if the Appellant acquired the goods and services to which the \$77,688.23 relate (the "IPO Services") in the course of a commercial activity carried on by the Appellant, within the meaning of subsection 169(1) of the *Excise Tax Act* (the "*ETA*"), then the Respondent should reassess to that extent.

II. ASSUMPTIONS:

[8] I have assumed the following:

- (a) the Fund did not pay the Appellant any consideration for the IPO Services;
- (b) the Appellant shows the IPO Services as a business expense on its financial statements; and
- (c) the Appellant did not receive any significant interest, dividends, or fees for financial services.

III. ISSUE:

[9] The issue in this case is whether the Appellant is entitled to ITCs in relation to the IPO Services. In order to clearly understand all of the points involved and the relevant legislation I have subdivided this issue as follows:

- (1) Did the Appellant "acquire" the IPO Services, within the meaning of subsection 169(1) of the *ETA*?
- (2) If so, were the IPO Services acquired for use in the course of the Appellant's "commercial activity", as defined in section 123 of the *ETA*?

IV. ANALYSIS AND CONCLUSION:

[10] Subsection 169(1) of the *Excise Tax Act* reads as follows:

169. (1) 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: ...

For the purpose of this appeal, subsection 169(1) contains three tests:

FIRST TEST

The Appellant must have acquired or imported the goods or services.

SECOND TEST

The Appellant must have done so for use in its commercial activities.

THIRD TEST

The Appellant must have paid the GST. The parties agree that the third test has been satisfied.

Based on a careful analysis of the evidence, the relevant case law dealing with the word "acquired" and the overall scheme of the *Act*, I am satisfied that the Appellant acquired the goods and services in question. I have therefore concluded that the Appellant has satisfied the First Test.

I will now deal with the Second Test – i.e. did the Appellant acquire the goods and services for use in its commercial activities?

[11] Based on the testimony of Mr. Axel Rehkatsch, C.A., the Chief Financial Officer of A & W Food Services and Vice-President of the Appellant, I have concluded that the Appellant acquired the goods and services to enable it to borrow money in order to carry on its commercial activities. I have therefore concluded that the goods and services were acquired by the Appellant for use in its commercial activities.

[12] In my opinion the Appellant has satisfied the three tests contained in subsection 169(1) of the *Act*.

[13] The appeal is allowed, **without** costs.

Signed at Vancouver, British Columbia, this **21st** day of **October** 2005.

"L.M. Little"

Little J.

CITATION: 2005TCC493
COURT FILE NO.: 2004-656(GST)I
STYLE OF CAUSE: A & W Trade Marks Inc. and
Her Majesty the Queen
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: August 24, 2004
REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF **AMENDED**
JUDGMENT: **October 21, 2005**

APPEARANCES:

Counsel for the Appellant: David E. Graham

Counsel for the Respondent: Lisa M. Macdonell

COUNSEL OF RECORD:

For the Appellant:

Name: David E. Graham

Firm: Koffman Kalef
Vancouver, British Columbia

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada