Docket: 2010-1699(GST)I

BETWEEN:

9180-2801 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal called for hearing on February 22, 2011, at Quebec City, Quebec

Before: The Honourable Justice Lucie Lamarre

Appearances:

Agent for the appellant:	David Jondeau
Counsel for the respondent:	Valérie Ouellet

JUDGMENT

The appeal from the assessment made by the Minister of Revenue Quebec for the Canada Revenue Agency, dated August 31, 2009, pursuant to the *Excise Tax Act* for the period of January 1, 2009, to March 31, 2009, for $822.36 (including interest) is dismissed and the assessment in question is confirmed.

Signed at Ottawa, Canada, this 28th day of February 2011.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 29th day of March 2011.

Elizabeth Tan, Translator

Citation: 2011 TCC 129
Date: 20110228
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9180-2801 QUÉBEC INC.,

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REASONS FOR JUDGMENT

Lamarre J.

[1] The appellant is appealing though its majority shareholder and president David Jondeau from an assessment made August 31, 2009, by the Ministère du Revenu du Québec (**MRQ**) for the Canada Revenue Agency, requiring a net goods and services tax (GST) of $822.16 (including interest) from the appellant for the period of January 1, 2009, to March 31, 2009. This net tax corresponds to the amount of the input tax credit (ITC) the MRQ denied the appellant on the purchase price of $18,758.48 for a 2009 Mazda motor vehicle on February 19, 2009.

[2] The respondent relies on subsection 199(2) of the *Excise Tax Act* (ETA) to deny these ITC. Subsections 199(2) and 199(3) of the ETA state:

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…

(2) Where a registrant acquires or imports personal property or brings it into a participating province for use as capital property,

> (a) the tax payable by the registrant in respect of the acquisition, importation or bringing in of the property shall not be included in determining an input tax credit of the registrant for any reporting period unless the property was acquired, imported or brought in, as the case may be, for use primarily in commercial activities of the registrant; and
>
> (b) where the registrant acquires, imports or brings in the property for use primarily in commercial activities of the registrant, the registrant is deemed, for the purposes of this Part, to have acquired, imported or brought in the property, as the case may be, for use exclusively in commercial activities of the registrant.

(3) For the purposes of this Part, where a registrant last acquired or imported personal property for use as capital property of the registrant but not for use primarily in commercial activities of the registrant and the registrant begins, at a particular time, to use the property as capital property primarily in commercial activities of the registrant, except where the registrant becomes a registrant at the particular time, the registrant shall be deemed

> (a) to have received, at the particular time, a supply of the property by way of sale; and
>
> (b) except where the supply is an exempt supply, to have paid, at the particular time, tax in respect of the supply equal to the basic tax content of the property at the particular time.

[3] The respondent claims that the appellant did not establish that the motor vehicle was purchased for the purpose of being used primarily in its commercial activities.

[4] For the audit, Mr. Jondeau completed a form in which he indicated he used the appellant's motor vehicle 60% for business and 40% for personal reasons. More specifically, in the form submitted as Exhibit I-2, he indicates a total annual business use of 8,000 to 9,000 km and 6,000 km for personal use. To calculate the distance travelled for business purposes, he used the number of kilometres between his personal residence, which is the appellant's head office, and the premises rented for the company (the office) or the appellant's laboratory, which was at another location.

[5] The appellant operates a company that makes and exports natural products and processes herbs. According to the form submitted (Exhibit I-2), the auditor found that almost all the kilometres indicated for business purposes were for travel between Mr. Jondeau's residence and his workplace (see paragraph 6(k) of the Reply to the Notice of Appeal (Reply)). These trips were for personal reasons, so the auditor found that the majority of Mr. Jondeau's travel with the appellant's vehicle was personal (see paragraph 6(l) of the Reply).

[6] In the objection, Gilles Gravel, objections officer for the MRQ, reviewed the monthly travel records for the months of March to December 2009. He explained in court that he received the objections file on January 27, 2010. Since the vehicle was acquired on February 19, 2009, he analyzed the vehicle's period of use from March 2009 (first full month of real use) to December 2009 (last month of use in the calendar year and also the last full month of use before the objection review). In his opinion, it was a representative period of Mr. Jondeau's use of the motor vehicle. According to the analysis of the travel records provided by Mr. Jondeau, he calculated the number of personal kilometres driven during this period, including travel from the residence to the workplace, for a total of 7,548 km and for business purposes, 7,502 km, for a total distance of 15,050 km. This results in a percentage of 50.15% for personal purposes and 49.85% for professional purposes. In the kilometres allocated for business purposes, he allowed all the travel costs for trips outside the region for training activities and courses offered by the Fédération des médecines alternatives and the École des médecines alternatives, despite the fact he did not have all the documentary evidence in support of these trips (see Memorandum on Objection, Exhibit I-1, Tab 1).

[7] In court, Mr. Gravel explained that in January and February 2009, there was almost no business travel (since the vehicle was only acquired in mid-February 2009).

[8] The appellant is not challenging the personal nature of the travel between Mr. Jondeau's residence and the workplace. It claims that Mr. Gravel should have analyzed the travel over a full year, from March 2009 to March 2010, not only for a period of 10 months. Mr. Jondeau claims that the use of the vehicle for business purposes increased progressively and if the travel in January and February 2010 is taken into consideration, according to his calculations, there would be a proportion of 54.08% for business and 45.92% for personal use. He submitted to evidence documents showing that during January 2010, he travelled to Montreal to purchase a range of natural products (Exhibits A-4, A-5 and A-6). He also submitted an invitation from the École de formation M.K.O. for Mr. Jondeau to give training

courses in Quebec City, Saguenay and Trois-Rivières in January and February 2010, and invoices for M.K.O. from Mr. Jondeau for these three training periods (Exhibits A-7 and A-8). The appellant also submitted gas receipts for January and February 2010, (without, however, clarifying which trips they were related to) and an invoice for products he had to go pick up in Quebec City, in January 2010.

[9] In summary, the appellant claims that the summer months are less active for the business and it is penalized if the percentage of use of the motor vehicle is not calculated over a full 12-month period. In fact, the appellant feels that the months of January and February 2010 were active months and if they are taken into consideration, the percentage representing the business portion increases to more than 50%.

[10] Although I understand the appellant's concern, I feel that the MRQ conducted a sufficiently complete analysis of Mr. Jondeau's travel to conclude on the facts that he did not use the appellant's vehicle primarily for business purposes. The new data presented in court by Mr. Jondeau may be analyzed again in a new claim by the appellant to establish that, from January 2010 the use of the vehicle changed to such an extent that it became used primarily for business purposes. This is possible under subsection 199(3) ETA.

[11] The fact the period analyzed was 10 months and not 12, as the appellant noted, is not a sufficient element to warrant a review of the MRQ decision in my opinion. The MRQ confirmed the assessment based on the elements it had at the time of the objection and even accepted trips without all the documentary evidence, which was not in the appellant's favour. The test imposed by subsection 199(2) ETA, as such, does not specify an evaluation period. This legislative provision requires that the vehicle be acquired for the purpose of being used primarily for commercial purposes. Therefore, the appellant would have had to show that this was the intention at the time of acquisition.

[12] In *Coburn Realty Ltd. v. R.*, 2006 TCC 245, 2006 CarswellNat 1091, Chief Justice Bowman, as he was then, stated the following in regard to subsection 199(2) ETA, at paragraph 9, et seq.:

> 9 The words in subsection 199(2) "... for use primarily in commercial activities..." imply purpose or intent. The French version of the provision is consistent with this interpretation:
> "... en vue d'être utilisé principalement dans le cadre de ses activités commerciales."

> 10 Statements by a taxpayer of his or her subjective purpose and intent are not necessarily and in every case the most reliable basis upon which such a question can be determined. The actual use is frequently the best evidence of the purpose of the acquisition. In *510628 OntarioLimited v. The Queen*, [2000]G.S.T.C. 58, 2000 GTC 877 (T.C.C. [Informal Procedure]), the following was said:
>
> > [11] It should be noted that the expression "for use primarily ..." (en vue d'être utilisé) requires the determination of the purpose of the acquisition, not the actual use. Nonetheless, I should think that as a practical matter if property is in fact used primarily for commercial purposes it is a reasonable inference that it was acquired for that purpose.
>
> 11 I shall turn then to the actual use that was made of the boat. Mr. Coburn testified that the boat was used for entertaining clients and for rewarding his sales staff. He stated that the appellant was seeking to expand its business to cottage country. I accept that he wished to expand the appellant's business but I am not persuaded that the boat was used or was intended to be used primarily for business purposes. Although I think there was probably an element of business in some of its use, the evidence of its actual use does not support the conclusion that the primary purpose of its acquisition was for use in the appellant's business.
>
> 12 The word "primarily" is generally taken to mean over 50%. The problem is, however, to determine what one should apply the 51% to: time, number of trips, distance travelled, number of passengers, length of voyage, the amount of business generated, the number of potential sales locations visited? All of these factors may have a bearing but they illustrate the difficulty in applying a mechanical sort of test. Ultimately, it boils down to a question of judgement and common sense.
>
> …
>
> 17 In the event that the business use increases to the point at which it can be said to be the principal use, there is some relief available in a subsequent year to the appellant under subsection 199(3) of the *ETA*. That point had not been reached in 2003. The evidence would have to be more persuasive and complete than it has been here.

[13] In the present case, the evidence does not show that based on the actual use of the motor vehicle, the intention at the beginning was to use it primarily for commercial purposes. Nor did the appellant submit sufficient evidence establishing that this was the primary reason for the purchase at the time of acquisition. In fact a careful review of the use of the vehicle indicates that in the months following its purchase, for all intents and purposes, it was used solely for personal reasons. It was only in April, May and October 2009 that the business use significantly surpassed the

personal use. In all the other months, except for November when the commercial use slightly exceeded the personal use, personal use predominated (see summary of travel records, Exhibit I-1, Tab 6).

[14] I therefore conclude that the appellant did not show, on a balance of probabilities, that it acquired the 2009 Mazda motor vehicle to be used primarily for its commercial activities in order to be eligible for the input tax credit on the acquisition price of this vehicle during the period in question, pursuant to subsection 199(2) ITA.

[15] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 28th day of February 2011.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 29th day of March 2011.

Elizabeth Tan, Translator

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PLACE OF HEARING:	Quebec City, Quebec
DATE OF HEARING:	February 22, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	February 28, 2011

APPEARANCES:

Agent for the appellant:	David Jondeau
Counsel for the respondent:	Valérie Ouellet

COUNSEL OF RECORD:

For the appellant:

Name:	
Firm:	

For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada