Docket: 2011-3459(GST)I

BETWEEN:

CHARLES TOUPIN,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 13, 2012, at Montréal, Quebec

Before: The Honourable Jean-Louis Batiot, Deputy Judge

Appearances:

Counsel for the appellant	François Barette
Counsel for the respondent	Philippe Gilliard

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, the notice for which is dated December 15, 2010, bearing no designation number, for the period from April 1, 2010, to June 30, 2010, is dismissed.

Signed at Montréal, Quebec, this 6th day of November, 2012.

"Jean-Louis Batiot"

Batiot D.J.

Translation certified true
on this 19th day of December 2012
Francie Gow, BCL, LLB

Citation: 2012 TCC 381
Date: 20121106
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CHARLES TOUPIN,

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REASONS FOR JUDGMENT

Batiot D.J.

[1] On November 3, 2011, Charles Toupin appealed a notice of assessment concerning the goods and services tax (**GST**) issued against him on December 15, 2012, for the period from April 1 to June 30, 2010, under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (**ETA**). At issue is the disallowance of the deduction of a certain input tax credit (**ITC**) for the above-mentioned quarterly statement.

[2] The ITC in question, of $3,424.44 (out of a total of $16,412.00 ($6,681.27 and $9,730.73)) is the GST assessed on two invoices for professional services that his lawyer provided to him and to his father until February 28, 2010, and March 31, 2010, respectively, therefore prior to the period at issue.

[3] The appellant submits that, as a registrant under the ETA, he is entitled to deduct this amount from any other amounts that he must remit; the fees in question were not paid exclusively to obtain a remedy for the situation concerning his and his father's investments, but he was encouraged by the new law firm, which, by sending him several professional mandates on which he collected GST, enabled him to pursue his notarial practice and finance his legal action.

[4] The respondent submits that these professional fees, for bringing an action before the Superior Court of Québec to obtain a civil remedy, constitute a personal expense incurred by the appellant as an investor, and not *"in the course of [his] commercial activities"* (ETA, paragraph 169(1)(*c*)) as a notary; this GST can therefore not be claimed as an ITC.

[5] An explanation is required.

[6] Having been a lawyer and then a student, in 2005 the appellant became a self-employed notary. He took advantage of the contacts he had made as a lawyer with the firm Melouche Séguin (later Melouche Tourpin) to obtain mandates from the new firm Jarry Bazinet, two lawyers who had left the same firm shortly after him.

[7] The appellant is and was then an informed investor. He and his father purchased some speculative shares. Business disputes between them as shareholders, on one side, and his former employer, Mr. Seguin of Melouche Séguin, on the other side, led to legal action being taken against the latter. The law firm Davies Ward Phillips & Vineberg, acting on behalf of the appellant and his father, obtained a judgment in their favour from the Superior Court of Québec (currently under appeal).

[8] The judgment, penned by the Honourable Justice Louis Lacoursière and filed as evidence by the appellant, reveals that the appellant, his father (two of the five original investors) and one intervener have claimed 800,000 shares from Mr. Seguin, the defendant, that are being held by a mis-en-cause who alleged that he had exercised a purchase option against the father and son, who, in any case, were merely nominal shareholders for the defendant. The lengthy judgment describes the complex facts and finds in favour of the appellant and his father.

[9] It should be noted that the appellant's father was a friend of the defendant and that they and been co-investors since 1997. The appellant joined them later the same year, investing $20,000 in the Junior Capital Pool Company Wild Grizzly, listed on the Alberta Stock Exchange. Each investor received 400,000 shares.

[10] Questions later arose regarding the date of signature of the option agreement and the exercise of those options, hence the dispute in question, the legal fees and the resulting GST. The appellant, Mr. Toupin, is claiming a portion of that amount as an ITC, against the GST that he was required to remit to Revenu Québec,

received from his own clients. Part of that clientele was referred to him by the firm Jarry Bazinet.

[11] Mr. Toupin argues that his business dealings with the firm Jarry Bazinet are connected, not completely but significantly, to the success of his practice, and that one aspect of this connection was the handling of his dispute with Mr. Seguin, and Jarry Bazinet's interest therein.

[12] François Barette, counsel for the appellant, submits the following in his clear and precise submissions:

> [TRANSLATION]
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> 1. Paragraph 169(1)(*c*) allows an input tax credit to "the extent (expressed as a percentage) to which the person acquired the . . . service . . . for consumption, use or supply in the course of commercial activities of the person".
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> 2. Subsection 169(1) of the *Excise Tax Act* does not require that use be exclusively commercial: *Midland Hutterian Brethren v. Canada,* 2000 CanLII 16725 (FCA) at paragraph 25 (*Midland*). That case involved the deductibility of GST on the purchase of work cloth used to make work clothes.
>
> 3. The test set out in that subsection to determine whether an ITC can be used is more liberal that the test for deductibility under the *Income Tax Act*: *Hleck, Kanuka, Thuringer v. Her Majesty the Queen,* 94 DTC 1968, at page 7 (*Hleck*). The purchase, and the GST paid thereon, of an airplane ticket for the spouse of a lawyer attending a business meeting is an expenditure made in the course of the firm's business activities.
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> 4. The purpose of the commercial activity need not be exclusively "making taxable supplies to qualify for the ITCs": *BJ Services Co. Canada v. R.*, 2002 CarswellNat 5064, [2002] G.S.T.C. 124, 2003 G.T.C. 513 (Tax Court of Canada (General Procedure)), (*BJ Services*).

[13] Justice Malone, in *Midland*, considered whether the GST paid on the cloth for work clothes for all the members of the religious community in question could be written off as an ITC. The practice was to purchase two grades of cloth, the best for the clothing worn by members during religious services, and the other, more durable, for daily wear. The members—a small percentage of the community—who participated in the daily farm chores wore it as well, hence the claim of 50% of the GST "incurred on the work cloth" (paragraph 6).

[14] The community supplied all of its members with "shelter, education, food and clothing". In exchange, the members worked without monetary compensation (paragraph 3).

[15] Justice Malone held, on the basis of the evidence filed, that "[o]nce an item is found to be acquired and used in connection with the commercial activities of a GST registrant and that item directly or indirectly contributes to the production of articles or the provision of services that are taxable, then an ITC is available using the formula in that subsection" (paragraph 25). He held immediately prior that "the supplies must contribute to the production of articles or the provision of services that are taxable" (paragraph 24).

[16] In this case, the fees that the appellant collects and pays are taxable. The issue is whether those that he pays to his law firm fall within his commercial activities, within the meaning of paragraph 169(1)(*c*).

[17] Justice Bell, in *Hleck*, held that the GST paid on the airplane ticket of the spouse of a partner in a law firm could be used as an ITC, since the test is less strict than the one imposed by the *Income Tax Act*, given the lawyer's professional obligations to attend certain conferences and the clear need to have his wife accompany him for social and professional reasons: "In this instance, despite an element of personal enjoyment, the expense was made and the airline ticket was acquired and used in the course of the commercial activity of the Appellant."[1]

[18] In this case, the appellant paid fees to his own lawyer to bring an action on his behalf, as an investor who has suffered a prejudice, on September 25, 2003—the dispute originated before he established his notarial practice in 2005—with respect to a claim for shares that should have taken place earlier. He wishes to deduct these from the GST that he receives from his own notarial clients. His litigation is not an expense incurred "in the course of [his] commercial activities" as a notary.

[19] Justice Miller, in *BJ Services*, holds that the "legislation, case law and GST policies do not support the Respondent's position that a taxpayer only gets ITCs if it can show that the purpose of inputs is in connection with making taxable supplies" (paragraph 77).

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1 [1994] T.C.J. No. 498 at para. 30.

[20] In that case, the appellant, a company operating in the business of oilfield services and faced with a hostile takeover bid, received advice from RBC Dominion Securities Inc., Simmons & Company International, of Texas, and the law firm Blake Cassels & Graydon. Following their advice, the appellant secured another bid from a "white knight". The first purchaser outbid the second and ended up purchasing all of the shares, but at a higher price than that originally offered. At issue in that appeal was the significant GST paid by the appellant to RBC and Blake of $914,765 and $15,750 respectively (Simmons was not a GST registrant).

[21] Because the purpose of these expenses was to protect shareholder interests, at worst the appellant would have been forced to pass on these GST expenses only to its own clients, and probably not to the shareholders, who in fact benefited from these expenses.

[22] Justice Miller, at paragraph 67, held that a "company that makes a supply that is neither an exempt supply nor taxable supply can still be seen as doing so in the course of a commercial activity, provided that supply is not purely of a non-commercial or personal nature".

[23] In this case, the appellant testified that the firm Jarry Bazinet had an interest in the action that he undertook against their former common colleague and that the firm sent him between $10,000 and $30,000 of notarial work each year. Messrs. Jarry and Bazinet did not testify to confirm this arrangement.

[24] I accept that there are good relations between the appellant and Jarry Bazinet, business relations that seem to be mutually beneficial, as a law firm and notary office. However, this does not include investments that the appellant made independently prior to becoming a notary.

[25] The appellant pays legal fees to pursue and protect his interests as an investor; these expenses are not incurred "in the course of [his] commercial activities" as a notary. Therefore they are personal. The appeal is dismissed.

Signed at Montréal, Quebec, this 6th day of November 2012.

"Jean-Louis Batiot"

Batiot D.J.

Translation certified true
On this 19th day of December 2012
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REASONS FOR JUDGMENT BY:	The Honourable Jean-Louis Batiot, Deputy Judge
DATE OF JUDGMENT:	November 6, 2012

APPEARANCES:

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Counsel for the respondent	Philippe Gilliard

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