

Docket: 2019-350(GST)I

BETWEEN:

VICTUS ACADEMY LP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 12, 2020 at Hamilton, Ontario

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

Counsel for the Appellant: Amit Ummat

Counsel for the Respondent: Rebecca L. Louis

JUDGMENT

In accordance with my attached Reasons for Judgment;

The appeal from reassessments dated February 7, 2017 made under Part IX of the *Excise Tax Act* for the Appellant's reporting periods between May 27, 2016 to July 31, 2016 and August 1, 2016 to October 31, 2016, is dismissed, without costs.

Signed at Ottawa, Canada, this 10th day of December 2020.

“K.A. Siobhan Monaghan”

Monaghan J.

Citation: 2020 TCC 134
Date: 20201210
Docket: 2019-350(GST)I

BETWEEN:

VICTUS ACADEMY LP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Monaghan J.

[1] Victus Academy LP (“Victus Academy”) operates a for-profit private school in Kitchener, Ontario. It is appealing a reassessment under the *Excise Tax Act* (Canada) (the “ETA”) of two 2016 reporting periods, May 27, 2016 to July 31, 2016 and August 1, 2016 to October 31, 2016. The Minister disallowed input tax credits (ITCs) of approximately \$28,500 for those two reporting periods.

[2] The Minister denied the ITCs on the basis that Victus Academy is a school authority that made exempt supplies of educational services.

[3] Victus Academy does not dispute that it is a school authority that made exempt supplies of educational services. However, Victus Academy claims that it makes two separate supplies, only one of which is an exempt supply. The second, it says, is a commercial activity requiring it to collect harmonized sales tax (“HST”) and entitling it to ITCs.

[4] For the reasons described below, Victus Academy’s appeal is dismissed, without costs.

I. BACKGROUND FACTS

[5] Victus Academy was co-founded in 2016 by Daniel C. Schmidt. Mr. Schmidt explained that one of his sons, an accomplished hockey player, attended a school in Toronto with a program for talented hockey players. While the Schmidts were very pleased with the quality of the hockey program, they were very disappointed with the academic program at the school. Following that experience, Mr. Schmidt and an older son decided to establish Victus Academy as a private school in the Waterloo region offering students an excellent hockey program and an excellent academic program. Mr. Schmidt described his family as passionate about hockey and excellent education.

(1) Activities in the Reporting Period Under Appeal

[6] The 2016-2017 academic year was the first in which Victus Academy operated. In that first year, it offered academic programming for students in grades 7 to 12.¹ Victus Academy was inspected by the Ontario Ministry of Education and its high school courses qualify for the Ontario Secondary School Diploma. For convenience, I will refer to Victus Academy's service of teaching students in grades 7 to 12 as the academic program.

[7] The second aspect of the service offered by Victus Academy was referred to as its hockey program. In the reporting periods under appeal, the hockey program was offered to Victus Academy students during the school day. It consisted of a combination of on-ice training and off-ice conditioning. For convenience, I will refer to this aspect of the service as the school day hockey program.²

[8] Victus Academy operates out of a municipally-owned facility. In the reporting periods under appeal, it had access to six classrooms, an office, one ice pad, five designated dressing rooms and a training/fitness room in that facility. The contract with the City gave Victus Academy three 50-minute periods of ice time, four days a week, between the hours of 8:15 a.m. and 11:40 a.m. Victus Academy had access to the classrooms and training/fitness room on school days between 7 a.m. and 4:30 p.m. The office was available to Victus Academy for those same hours, but seven days a week.

¹ It now has academic programming for students in grades 5 to 12.

² While I am using "program" to describe both elements of the service offered by Victus Academy, this is for convenience and is not intended to indicate whether they are properly viewed as separate supplies or two elements of a single supply.

[9] Victus Academy engaged third parties to run the school day hockey program. The on-ice training was directed by Mike Ellis and the off-ice conditioning was directed by Brandon Merlie. Each was described as having his own business and other clients. As Mr. Schmidt put it, any individual could engage the services of these individuals. Mr. Ellis, for example, sometimes had other clients on the ice with the Victus Academy students. But those other clients had no relationship with Victus Academy. These two third parties paid their own employees and operated their respective aspects of the school day hockey program with little input from Victus Academy. Each had direct interactions with the students' parents.

[10] However, parents contracted with Victus Academy and paid Victus Academy for both the academic program and the school day hockey program. Victus Academy paid the City for the use of the facilities, its teachers, and the two third party businesses that provided services in connection with the school day hockey program. A student made a single application to Victus Academy for both programs. Victus Academy issued a single invoice with separate amounts shown for school tuition fees and the hockey program.³ Thus, parents have a single contract with Victus Academy under which both programs are supplied to the students. (The contract between the parents and Victus Academy was not put into evidence. Mr Schmidt stated there is no written contract *per se* but rather, based on Mr. Schmidt's testimony, the contract consists of the application form, the acceptance letter from Victus Academy⁴ and possibly some waiver documents.)

[11] Victus Academy's website contains the following description:

Victus Academy is an independent private school designed for both male and female elite hockey players in grades 7 through 12.

Victus Academy provides the best of two disciplines – university level schooling combined with elite competitive hockey skills training, while still allowing students to play on their rep hockey teams.

At Victus Academy, both hockey and academics are pursued with the same vigour, excellence and competitiveness. We ensure the curriculum is designed to

³ Referred to as "Hockey", "Hockey School" or, in the case of an invoice issued to a university student, "Athletic Program." The nature of this last invoice is described below.

⁴ Not made available to the Court.

accommodate the hockey program and the other strenuous demands placed on the elite athlete.

Victus Academy is not for everyone. Successful applicants to Victus Academy will be those individuals who not only possess high level hockey skills and academic ability, but they must also be ready for the rigors and demands of this highly competitive school.

[12] While Mr. Schmidt described this document as a marketing document, in my view it is telling. Victus Academy seeks elite hockey players as students. Nowhere does it suggest that students may participate in the academic program alone or the school day hockey program alone. Indeed, it is hard to imagine a non-hockey playing student looking at this web page considering an application to Victus Academy.

[13] Mr. Schmidt explained that the advantage of attending Victus Academy is that a student can participate in both programs during the school day, at the same facility, without interfering with the student's regular hockey team practices and games. This was the business model and marketing strategy for Victus Academy from the outset.

[14] Nonetheless, Mr. Schmidt said a student could choose to participate in the academic program only, the school day hockey program only, or both. While he agreed Victus Academy is most interested in students who participate in both programs (fees for both programs being better than fees for one), he said students have participated in one without the other.

[15] When asked if any students participated in only one program in the reporting periods under appeal, Mr. Schmidt offered two examples from the 2016-2017 academic year. One student, a goalie, applied to Victus Academy on the basis he would not participate in the school day hockey program because he preferred to work with his own goalie coach. However, he withdrew his application and never attended Victus Academy. The second student, also a goalie, enrolled in both programs in September 2016, but withdrew from the school day hockey program part-way through the second term. This appears anomalous, rather than usual: a student who enrolled at Victus Academy to participate in both programs and, for personal reasons, withdraws in the second term from one is not particularly compelling evidence. For example, students attending high school may decide to drop a course before the end of a term.

[16] Victus Academy's position is that it has two separate programs, the academic program and what Mr. Schmidt describes as the Hockey Program. Mr. Schmidt characterized the Hockey Program as encompassing not only the school day hockey

program, but also spring hockey tournaments and summer hockey camps offered by Victus Academy. As Mr. Schmidt describes it, individuals do not need to be students in its academic program to participate in its Hockey Program. Mr. Schmidt says many participants in its spring tournaments and summer camps are not Victus Academy academic students. Clearly, this testimony is offered in support of Victus Academy's position that it offers two completely separate services, each constituting a separate supply.

[17] Mr. Schmidt could not remember whether there was a spring tournament or summer camp in 2016. The Respondent's exhibits include documents Victus Academy provided to the Canada Revenue Agency in support of its claim for ITCs. Those documents indicate that Victus Academy's use of municipal facilities commenced on August 2, 2016, on-ice skills training commenced September 6, 2016, and construction of a classroom and a training facility occurred in August 2016. Victus Academy's Transactions by Account Report for the period August 1 to October 31, 2016 reports hockey revenue from academic students only.⁵

[18] The documents related to spring tournaments and summer camps submitted into evidence are dated May 2017 and 2018, respectively. I have concluded that no spring tournament or summer camp was offered by Victus Academy during the reporting periods under appeal. Accordingly, I am satisfied the only services Victus Academy supplied in the reporting periods under appeal were the academic program and the school day hockey program.

(2) Documentation

[19] With the exception of the letter from the Ontario Ministry of Education confirming Victus Academy's authority to grant credits towards the Ontario Secondary School Diploma, none of the documentary evidence submitted by Victus Academy relates to the 2016-2017 academic year or the reporting periods under appeal. I found the absence of relevant documentary evidence from the reporting periods under appeal surprising. Respondent's counsel asked Mr. Schmidt several times whether he had documents from the reporting periods under appeal, as those

⁵ Each entry for Hockey Revenue is for \$2,000 with the exception of the entry for a student whose fees were approximately 68% lower. That student was given the same discount on the tuition fees for the academic program. Mr. Schmidt indicated some students were given financial assistance which may explain this discount. However, regardless of the reason, it is clear the individual participated in both elements of Victus Academy's program.

are the most relevant. No explanation was given for Victus Academy submitting only documents from other reporting periods other than that they were examples.

[20] Assuming that the application form submitted by Victus Academy for the 2020/2021 academic year is the same as the one used in 2016,⁶ it does not suggest that Victus Academy was interested in students who would participate only in one of the two programs. The application form's focus is entirely on academics, although it describes the applicant as a "Student Athlete". It includes a request, to be signed by the parent, for the Ontario Student Record to be forwarded to Victus Academy.

[21] Mr. Schmidt testified that this application form was suitable for a student who wanted to participate in the school day hockey program only, in that the same information would be necessary. I am far from convinced. Too much of the information sought would be entirely irrelevant. Moreover, Mr. Schmidt said that they were interested in competitive hockey players who would be able to keep up with the rigours of the school day hockey program.⁷ Yet, the application form does include any questions about hockey experience, something one might expect for an applicant only applying to the school day hockey program. Notably, the Victus Academy application form does not offer the applicant a choice, or ask the applicant to indicate hockey only, academic only, or both. The underlying assumption appears to be that an applicant will participate in both.

(3) Activities in Periods following the Reporting Periods under Appeal

[22] Activities conducted in periods following the reporting periods under appeal are not necessarily relevant to the appeal. Yet, much of the testimony and almost all of the documentary evidence offered by Victus Academy related to reporting periods long after those under appeal.

⁶ The Respondent's exhibits included an application form for the 2017/2018 academic year which appears identical to that for the 2020/2021 taxation year, with the exception of the reference to the academic year.

⁷ Mr. Schmidt did describe one House League hockey player Victus Academy accepted but that too sounded exceptional. He said they went to see his hockey skills before agreeing to accept his application. Moreover, very good hockey players may choose to participate in recreational (non-competitive) hockey for a number of reasons not associated with skill level such as concern about concussions or required time commitment.

[23] For example, an application completed by a university student, for what was described as the school day hockey program, was submitted in evidence as an example of a student choosing only the Hockey Program. Yet, that application was signed 10 days before the hearing and after the student had started participating in the school day hockey program.⁸ I give no weight to this evidence, except to the extent it indicates how inappropriate the Victus Academy application form is for an individual who seeks to participate only in the Hockey Program (whether that is the school day hockey program or the Hockey Program as Mr. Schmidt views it). Much of the information sought in that application form is simply not applicable, as noted on the completed application.

[24] Spring hockey tournaments conducted in reporting periods that followed those under appeal are not particularly relevant. Given Mr. Schmidt's uncertainty about when the first spring tournament or summer camp was held, I have assumed they occurred no earlier than 2017 and 2018, respectively, consistent with the documentary evidence Victus Academy provided.⁹ The spring tournament used an entirely different application form, that not surprisingly seeks far less information than the one used for an academic student. Moreover, the fee for the spring tournament is very modest, \$50.

[25] The material for the 2018 summer camp states it is hosted by Victus Academy but is marketed as a **Hockey Detail – Midget Junior Prep Camp**. Those interested were directed to contact Mark at Hockey Detail, not Victus Academy, to confirm a spot. This camp involved three three-hour sessions for 25 individuals over a weekend.

[26] In my view, this evidence suggests that to the extent the Victus Academy Hockey Program includes programming other than the school day hockey program, that programming is either entirely separate or perhaps incidental to the school day hockey program. But, the nature of those programs is not an issue in this appeal as

⁸ The application form (2020/2021) is dated November 2 but the invoice issued to him is for sessions he attended in October 2020. It is possible that the student continued to participate beyond October 2020, but the evidence is not particularly relevant in my view since it is for activities four years after the reporting periods under appeal.

⁹ I also observe that correspondence sent on Victus Academy's behalf to the Canada Revenue Agency dated July 12, 2018, states "the Victus hockey program has the ability *and intends to conduct* summer hockey programs and other activities." [Emphasis added.] This language indicates no summer camp was held before July 12, 2018.

these programs were not offered in the reporting periods under appeal. My comments should not be viewed as drawing any conclusions regarding the nature of those services. I am simply stating that the evidence regarding them is neither persuasive nor particularly relevant in this appeal.

[27] With the exception of the university student, Mr. Schmidt did not describe any student who participated in the school day hockey program who was not an academic student at Victus Academy. Indeed, it would be difficult for an elementary or secondary student other than one attending Victus Academy as an academic student to participate in the school day hockey program. Because that program is offered during the regular school day, attending would presumably interfere with the student's attendance at another school for academic learning. With that one exception, the only non-academic student who Mr. Schmidt described as participating in Victus Academy's Hockey Program (as he described it) were participants in its spring tournament and summer camps.

[28] While Mr. Schmidt said there were students who attended the academic program but did not participate in the school day hockey program, the only case he described in detail concerned three siblings, all in the same grade, who attended Victus Academy in the 2018-2019 academic year. The invoice for these siblings indicates two of them participated in both the academic program and the school day hockey program, while the third participated in the academic program only (with a small fee for access to the gym (conditioning) facilities). In those circumstances, the desirability to parents of having all three children at one school is obvious, particularly where tuition is reduced under a sibling discount arrangement.¹⁰ This single example from the 2018-2019 academic year, not the reporting periods under appeal, appears to be a special circumstance rather than a typical arrangement. As noted above, I similarly view a student who enrolled for both programs but withdrew from the school day hockey program part way through the second term as reflective of special circumstances, not the usual practice.

II. POSITION OF THE PARTIES

[29] Victus Academy frames the issue in this appeal as whether its activities constitute a single supply of educational services that are exempt supplies or constitute two supplies, consisting of educational services which is an exempt

¹⁰ The second student's academic tuition was less than half the full tuition and the third student's academic tuition was less than 15% of the full tuition.

supply, and a hockey training program that is a commercial activity, requiring it to charge HST and entitling it to ITCs.

[30] The Respondent frames the issue in this appeal as whether the ITCs were properly denied on the basis that Victus Academy made an exempt supply of educational services pursuant to section 2 of Part III of Schedule V to the *ETA*. The Respondent submits Victus Academy made a single supply of educational services because the school day hockey program was fully integrated with the educational program. The Respondent states Victus Academy offered students a single (combined) service.

III. LAW

[31] The provision of exempt supplies is not a commercial activity. Thus, a supplier of exempt supplies is not entitled to any ITCs. Part III of Schedule V prescribes the educational services that are exempt supplies.

(1) Single Supply or Two Supplies

[32] The focus of the argument was whether Victus Academy's activities constitutes one supply or two. The jurisprudence is clear that this determination turns on the facts, although it identifies a number of factors to be considered. The Respondent and Victus Academy both point to facts that favour their position.

[33] Victus Academy submits the following factors in support its position:

- 1) The academic program and school day hockey program could be purchased separately;
- 2) Severing one service from the other would not render the remaining service of no use;
- 3) They are separately invoiced; and
- 4) The two activities are provided by separate suppliers, being Victus Academy's teachers and principal for the academic program, and the two third parties engaged by Victus Academy to run the school day hockey program.

[34] The Respondent argues that the very essence of Victus Academy is the combined offering of the academic program and the school day hockey program. The Respondent says Victus Academy has organized itself expressly to provide

hockey playing students with an academic program and school day hockey program in a single facility over the course of the school day. This says the Respondent is more than a marketing strategy. It is what makes Victus Academy Victus Academy. Therefore, says the Respondent, the two elements are an integral part or component of the single supply made by Victus Academy to its students. While in theory a student could purchase the two programs separately, it is not practical to separately contract for the school day hockey program because it operates during the school day.

[35] While both positions have some merit, it is not necessary for me to determine whether Victus Academy's services in the reporting periods under appeal constituted a single supply or a separate supply. In my view, that determination is irrelevant. That is, even if I accept that the academic program and the school day hockey program are separate supplies¹¹. I am satisfied both are educational services as prescribed under Part III of Schedule V of the *ETA* and thus are exempt supplies.

(2) Section 2 of Part III

[36] The Respondent relies on section 2 of Part III of Schedule V for its conclusion that the services Victus Academy provides constitutes a single exempt supply:

A supply made by a *school authority* in a province of a service of instructing individuals in a course that is provided primarily for *elementary or secondary students*.

[37] A school authority is an organization that operates an elementary or secondary school in which it provides instruction that meets the standards of educational instruction established by the government of the province in which the school is operated: subsection 123(1) of the *ETA*. All agree Victus Academy is a school authority.

[38] An elementary or secondary school student means an individual who is enrolled in a school that is operated by a school authority in a province and in courses that are at the elementary level of education or courses for which credit may be obtained toward a diploma or certificate issued or approved by the government of the province or courses equivalent to such courses: section 1 of Part III of Schedule

¹¹ About which I express no opinion.

V to the *ETA*. Every student enrolled in Victus Academy's academic program is an elementary or secondary school student.

[39] Section 2 does not specify the nature of the courses that are exempt. All that is required is that individuals receive instruction in a course provided primarily for elementary or secondary students and that the instruction be provided by a school authority.

[40] The word "course" is not defined. While it might be unusual to use the word "course" to describe the school day hockey program, I note that section 16 of Part III refers to instructing individuals in courses "other than courses in sports, games, hobbies or other recreational pursuits that are designed to be taken primarily for recreational purposes". This suggests the meaning of "course" in Part III includes training in sports and recreational pursuits. Indeed, while not addressed at the hearing, it is conceivable that the school day hockey program fulfilled the physical education component of the Ontario curriculum for Victus Academy's students.¹²

[41] Under that view, instruction in hockey skills and strength conditioning skills (like lessons in other recreational pursuits or physical education classes) provided by a school authority primarily for elementary or secondary students may be encompassed within section 2 of Part III. Victus Academy's school day hockey program clearly is provided primarily for its elementary or secondary students.

[42] Thus, in my view, even if separate supplies, Victus Academy's school day hockey program and academic program both appear to be exempt supplies described in section 2 of Part III of Schedule V.

(3) Section 3 of Part III

[43] However, it may be that "course" has a narrower meaning and would not include the school day hockey program. Nonetheless, in my view that program is an exempt supply.

[44] Section 3 of Part III of Schedule V includes as an exempt supply:

A supply of food or beverages (other than . . .), services or admissions made by a school authority primarily to elementary or secondary school students during the

¹² It is possible that high school students earned one or more physical education credits toward their Ontario Secondary School Diploma for participation in the school day hockey program.

course of extra-curricular activities organized under the authority and responsibility of the school authority.

[45] While this provision does not include goods provided by school authorities, it includes services. The academic program and the school day program offered by Victus Academy are services.

[46] Extracurricular is not defined in the *ETA*. There is no suggestion it should be given a special or technical meaning. Therefore, the ordinary meaning of the word is relevant. Extracurricular means:

“outside the normal curriculum” (The Oxford English Dictionary);

“not falling within the scope of a regular curriculum *specif*: of or relating to officially or semi-officially approved and usually organized student activities (as athletic) connected with the school and usually carrying no academic credit (Merriam Webster’s Collegiate Dictionary);

“(of an activity or subject of study) not included in the normal curriculum” (Canadian Oxford Dictionary).

[47] If the school day hockey program offered by Victus Academy to its academic students is a separate supply, it is an exempt supply described in section 3 of Part III of Schedule V. That is, it is a supply of services (on-ice training and off-ice conditioning) made by Victus Academy, a school authority, primarily to its (academic) elementary or secondary students during the course of extra-curricular activities (as defined above). Like extra-curricular activities at other schools, the school day hockey program does not mandate that all students participate (although all did in the reporting periods under appeal). That activity is organized by Victus Academy under its responsibility to fulfil its obligation to provide the school day hockey program under the terms of its agreements with the parents. Victus Academy has authorized the two third-party businesses to provide the services to its students by engaging them to provide that service and providing them with the facilities to do so.

IV. CONCLUSION

[48] For these reasons, I have concluded that the services provided by Victus Academy in the reporting periods under appeal are exempt supplies. Accordingly, Victus Academy’s appeal is dismissed without costs.

Signed at Ottawa, Canada, this 10th day of December 2020.

“K.A. Siobhan Monaghan”

Monaghan J.

CITATION: 2020 TCC 134

COURT FILE NO.: 2019-350(GST)I

STYLE OF CAUSE: VICTUS ACADEMY LP v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: November 12, 2020

REASONS FOR JUDGMENT BY: The Honourable Justice K.A. Siobhan
Monaghan

DATE OF JUDGMENT: December 10, 2020

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