Federal Court of Appeal		Cour d'appel fédérale

Date: 20100203

Docket: A-465-08

Citation: 2010 FCA 37

CORAM: **NADON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

J. HUDON ENTERPRISES LTD.

Respondent

Heard at Toronto, Ontario, on January 18, 2010.

Judgment delivered at Ottawa, Ontario, on February 3, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
EVANS J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Race tracks pay money to drivers and trainers of standardbred horses when their horses are successful in races. When that happens, must the goods and services tax ("GST") under the *Excise Tax Act*, R.S., 1985, c. E-15, be paid?

[2] In the judgment under appeal (2008 TCC 348), the Tax Court ruled that GST need not be paid. It based its ruling on subsection 188(2) of the Act, which provides an exemption for "prizes" won in "competitive events" by "competitors." How subsection 188(2) should be interpreted and applied is the issue in this appeal.

B. Facts

[3] Standardbred horses race to win a portion of a pool of money, known as purse money, that is offered by the race track. Horses that finish in the top positions are successful and win purse money. The race track then distributes that money in accordance with regulatory rules and any agreements that exist. In this case, certain agreements, important to the disposition of this appeal and discussed in more detail below, required race tracks to distribute the money as follows: 90% to the owner, 5% to the driver and 5% to the trainer.

[4] The respondent drives and trains standardbred race horses at various Ontario race tracks. During 1999 to 2001, some of the horses driven and/or trained by the respondent won purse money. The race tracks distributed 5% payments to the respondent in accordance with the agreements.

[5] Are these 5% payments a "prize" won by a "competitor" in a "competitive event"? If so, then the subsection 188(2) exemption applies and no GST is owing. Or are the 5% payments actually payments of fees made by the race track on behalf of owners who have retained drivers and

trainers for their services? If so, then the subsection 188(2) exemption does not apply and GST is owing. The appellant took the position that GST is owing and issued an assessment to that effect under Part IX of the Act. The respondent objected. The Tax Court allowed the respondent's appeal, finding that the exemption in subsection 188(2) applied. The appellant now appeals to this Court.

C Statutory provisions

[6] The *Excise Tax Act*, R.S., 1985, c. E-15, subsection 165(1), sets out a general rule: those who receive property or a service in the course of a commercial activity (known under the Act as a "taxable supply") have to pay a goods and services tax ("GST").

Imposition of goods and services tax	Taux de la taxe sur les produits et services
165. (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.	**165.** (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5% sur la valeur de la contrepartie de la fourniture.

[7] The words "taxable supply" used in subsection 165(1), are defined in subsection 123(1):

Definitions	*Définitions*
123. (1) In section 121, this Part and Schedules V to X,	**123.** (1) Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X.
…	

[…]

"supply" « *fourniture* »	« fourniture » "*supply*"
"supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;	« fourniture » Sous réserve des articles 133 et 134, livraison de biens ou prestation de services, notamment par vente, transfert, troc, échange, louage, licence, donation ou aliénation.
…	[…]
"taxable supply" « *fourniture taxable* »	« fourniture taxable » "*taxable supply*"
"taxable supply" means a supply that is made in the course of a commercial activity;	« fourniture taxable » Fourniture effectuée dans le cadre d'une activité commerciale.

[8] Subsection 188(2) creates an exemption from the GST liability imposed by subsection 165(1). It provides that when "competitors" win "prizes" in "competitive events," neither the prize nor the competitor's participation in the competitive event will be regarded as a "taxable supply." Without a "taxable supply," there is no liability for GST under subsection 165(1) of the Act.

Prizes in competitive events	*Compétition*
188. (2) Where, in the course of an activity that involves the organization, promotion hosting or other staging of a competitive event, a person gives a prize to a competitor in the event,	**188.** (2) Les règles suivantes s'appliquent dans le cas où une personne remet, dans le cadre d'une activité qui comporte l'organisation, la promotion, l'animation ou la présentation d'une compétition, un prix à un compétiteur:
(*a*) the giving of the prize shall be deemed, for the purposes of this Part, not to be a supply;	*a*) pour l'application de la présente partie, la remise du prix est réputée ne pas être une fourniture;
(*b*) the prize shall be deemed, for the purposes of this Part, not to be consideration for a supply by the competitor to the person; and	*b*) pour l'application de la présente partie, le prix est réputé ne pas être la contrepartie d'une fourniture par le

	compétiteur au profit de la personne;
(*c*) tax payable by the person in respect of any property given as the prize shall not be included in determining any input tax credit of the person for any reporting period.	*c*) la taxe payable par la personne relativement à un bien qui constitue le prix n'est pas incluse dans le calcul de son crédit de taxe sur les intrants pour une période de déclaration.

D. The parties' positions

[9] Before the Tax Court and in this Court, the parties agreed that the subsection 188(2) exemption applies when three conditions are all met:

(1) the amounts received must be a "prize";

(2) the prize recipient must be a "competitor" in the event; and

(3) the prize must be given in the course of an activity that involved the organization, hosting, staging or promotion of a "competitive event."

[10] Both parties agree that the third requirement is met: horse racing is a "competitive event." However, both before the trial judge and in this Court, they disagree about whether the first two requirements are met in this case.

[11] The appellant says that the amounts received by the respondent are not "prizes." Instead, the only "prizes" in the race, the purse money, are won by the owners of successful horses. The appellant agrees that race tracks distribute 5% payments to drivers and trainers and that these payments come out of the purse money. But the appellant points to uncontradicted evidence that these distributions are nothing more than a convenient and effective payment mechanism: they ensure that drivers and trainers recover for the driving and training services that they provide to owners. The reality of the situation, says the appellant, is that drivers and trainers are receiving fees for services provided to the owners, not "prizes."

[12] The respondent disagrees. It contends that the 5% payments received by it are truly "prizes" won for its driving and training skill in competitive horse races. It stresses the competitive nature of horse racing, competition among drivers and trainers, and the significant, sometimes determinative effect that good drivers and trainers have on the horse's performance in a race. It points to the fact that the 5% payments come from what even the appellant admits is a prize pool – the purse money – and are given to drivers and trainers only when their horse is successful. Therefore, in the respondent's view, the subsection 188(2) exemption for "prizes" applies.

E. The Tax Court's judgment

[13] The Tax Court judge agreed with the respondent and found that the subsection 188(2) exemption applied in this case. Therefore, he concluded that the respondent was not liable to pay GST.

[14] In reaching this conclusion, the Tax Court judge emphasized (at para. 87) the highly competitive nature of a horse race. He also found (at para. 90) that "the driver as well as the trainer is a very important part of the process and has a great deal of effect on the outcome of the race and the success of a horse" and the success of the horse affects "the amount of money to be earned by the parties." In his view (at para. 87), the respondent, as driver and/or trainer in races, was a "competitor" in those races, which are "competitive events" within the meaning of subsection 188(2).

[15] A key finding made by the Tax Court judge (at paras. 98 and 99) was that the purse money won by the horse belonged jointly to the owner, the driver and the trainer. He based this finding on "the evidence of all of the witnesses given in this case" (at para. 97), but he did not identify the witnesses or their evidence.

F. Analysis

[16] Before this Court, the appellant attacked the Tax Court judge's finding that the purse money belonged jointly to the owner, driver and trainer. The appellant submitted that none of the evidence of the witnesses supported that finding and, in fact, the only evidence on point supported a finding that the purse money belonged only to the horse's owner. I have thoroughly reviewed the evidentiary record and I agree with the appellant's submission. A finding that is not based on any evidence is vitiated by palpable and overriding error. Such a finding must be set aside: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 1. In any event, the question of who owns purse money is ultimately a legal matter that cannot be determined solely on the basis of the subjective beliefs, opinions and conjectures of witnesses.

[17] The Tax Court judge's other factual findings are well supported by the evidence. In particular, he found that the 5% payments made to the respondent were contingent on success in competitive horse races and that the skills and efforts of drivers and trainers, such as the respondent, can improve the horse's performance, causing more purse money to be won. But these findings take the analysis under subsection 188(2) only so far. They support two possible, but opposite, characterizations:

(1) the 5% payments to drivers and trainers could be characterized as fees, contingent on success, that are intended to remunerate drivers and trainers for services rendered to owners; or

(2) the 5% payments to drivers and trainers could be characterized as "prizes" under subsection 188(2), distributed by the race track in order to reward successes by drivers and trainers in competition.

In my view, these differences in characterization lie at the core of this appeal. They point to one key question that the Tax Court did not determine: what are "prizes" under subsection 188(2) of the Act?

[18] I begin by observing that the Act is a taxation statute. In *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54 at para. 10, the Supreme Court of Canada prescribed the proper approach for interpreting taxation statutes:

> …The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

The Supreme Court went on to observe (at para. 13) that the particular taxation statute it was considering, the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), "remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation." These words are apposite to the Act at issue in this appeal, the *Excise Tax Act*.

[19] Parliament drafted subsection 188(2) with some particularity. Section 188(2) covers the giving and receiving of "prizes," not the paying and receiving of fees. There is a distinction between the two based on their plain meaning. A "prize" under subsection 188(2) is an honour, an award or winnings that are won by those who demonstrate superiority or achievement over and beyond the rest of the field of competitors in a competition or contest. A fee, on the other hand, is remuneration, emolument, recompense or compensation that is earned by a particular person for performing particular services under a contract of employment or other direct retainer.

[20] Fees for services that are calculated on the basis of performance, result or profitability – for example, success fees, commissions, contingency fees and bonuses – are not thereby transformed into "prizes." They retain their character as fees for services. Only the method by which the fees are calculated has changed. A contrary interpretation would have the result of exempting fees for services that are calculated on the basis of performance, result or profitability. That result would require much clearer wording in the Act.

[21] In determining whether or not particular payments are "prizes" under subsection 188(2), it is necessary to determine the true nature of the payments and the "supply" under subsection 123(1) (*i.e.*, what property or services are being sold, transferred, bartered, exchanged, licenced, rented, leased, given or disposed for the payments). All of the circumstances may be examined. Some useful circumstances to examine include the purpose behind the payments, the true relationships among the parties, and any agreements, laws and regulatory provisions that apply.

[22] In this case, the only possible conclusion is that the monies received by the respondent are success fees for driving and training services it provided to owners, not "prizes" within the meaning of subsection 188(2). Two particular circumstances in this case are compelling: the regulatory framework and the agreements under which drivers and trainers received their 5% payments.

The regulatory framework

[23] In Ontario, where the respondent drove and trained horses, standardbred horse racing is a heavily regulated activity. The Ontario Racing Commission is the relevant regulator. Under its statutory authority in the *Racing Commission Act 2000*, S.O. 2000, c. 20, s. 11, the Ontario Racing Commission has enacted comprehensive administrative rules, known as the *Rules of Standardbred Racing*. Among other things, they regulate in precise detail the conduct and the relationships among race tracks, drivers, trainers and owners, including issues relating to purse monies.

[24] Rule 18.11 sheds considerable light on the nature of the payments made to the respondent in this case:

> **18.11** Where an agreement exists between a recognized harness participants' association and a racing association, drivers' and/or trainers' fees may be deducted from the purses payable to owners and paid to the drivers and/or trainers within 30 days. A copy of such agreement must be filed with the Commission.

Rule 18.11 is significant because it shows that the purse money is "payable to owners." It is the owners, and the owners alone, who are entitled to purse money. The Rule confirms that "drivers'

and/or trainers' fees" [my emphasis] are deducted from the owners' purse money. This shows that drivers and trainers are not entitled to purse money; rather, they are entitled to their "fees" and they are entitled to have them paid from the purse money.

[25] The uncontested evidence before the Tax Court was that before Rule 18.11 was enacted, drivers and trainers received as a fee 5% of the amount of the purse money available to the owner. Because drivers and trainers had difficulties in collecting this fee from owners, some race tracks began to withhold the fee. All that Rule 18.11 does is to permit this practice. It cannot be interpreted as the awarding of a prize to a driver or trainer for his or her superior performance in a competition.

[26] Rule 18.08, like Rule 18.11, also speaks of "fees." It provides for the refund of "driving and/or training fees" [my emphasis] if a horse is disqualified or declared ineligible:

> **18.08** If for any reason a horse is disqualified or declared ineligible, any purse monies or trophies received by the owner, or driving and/or training fees (paid under Rule 18.11 to the driver and/or trainer of the horse in the race) shall be returned, within 15 days of notification, to the association for redistribution.

At paragraph 15 of its memorandum of fact and law, the respondent submitted that this Rule requires drivers and trainers to return purse money if there is a disqualification. The respondent then submitted that if drivers and trainers actually were receiving fees for services, there would be no requirement to return the purse money. I disagree. First, the Rule explicitly states that drivers and trainers are to return "driving and/or training fees," not purse money. Second, since the fees are 5% of the purse money, it makes sense that if, through disqualification, the horse should not have

won purse money, the fees for drivers' and trainers' services, based as they are on the horse's success in the race, should be zero.

[27] Rules 18.08 and 18.11 appear in Chapter 18, "Placing and Money Distribution." Those rules contemplate that purse money is won by horses based on their placing in a race. Rule 18.11 is the only rule that contemplates any onward distribution of purse money won by horses to drivers or trainers. Such a distribution only can happen in order to pay "fees" to drivers and trainers and only if that distribution is set out in an agreement between a recognized harness participants' association and a racing association. Other than Rule 18.11, which only contemplates withholdings of purse money on account of fees, there is no rule permitting any award of purse money to drivers and trainers.

The agreements under which drivers and trainers received their 5% payments

[28] Agreements of the kind contemplated under Rule 18.11 are in the evidentiary record. These agreements allowed the respondent to receive 5% payments from the purse money when the horses it drove or trained were successful.

[29] One agreement was between the Ontario Harness Horse Association and Hiawatha Horse Park Inc. Article IX provided for the 5% payments to drivers out of the purse money "won by

horses," not won by drivers. The title to the Article clearly identifies the 5% payments as amounts for "drivers' fees" [my emphasis]:

> ARTICLE IX – PURSE CHEQUES AND DRIVERS' FEES
>
> 9.01 Purse cheques shall be made available to horse owners by the Company weekly on a specified day. Cheques not picked up within 30 days of the race meet's conclusion shall be mailed to the owners.
>
> 9.02 The Company shall, as authorized by the Ontario Racing Commission Rule 18.11, withhold on behalf of all drivers competing at Hiawatha Horse Park five (5) percent of all purse money won by horses driven by each driver. Said withholding and any expenses in connection therewith shall be borne by the Company at the Company's expense. All sums payable under this Article shall be paid once a month.

[30] Another agreement was between the Ontario Harness Horse Association and Flamboro Downs Holdings Limited. Article 2.10 explicitly describes the 5% payments to drivers and trainers as "fees," and states that the purse money is "payable to owners," not drivers and trainers:

> 2.10 The Company agrees to deduct five (5) percent drivers fees and five (5) percent trainers fees from purses payable to owners and pay the monies deducted in a manner satisfactory to both parties.

[31] Finally, there is an agreement between the Woolwich Agricultural Society and the Ontario Harness Horse Association. Article 6.7 of that agreement also describes the 5% payments to drivers and trainers as "fees," and states that the purse money is "payable to owners," not drivers and trainers:

> 6.7 The ASSOCIATION agrees to deduct five percent (5%) driver and trainer fee from the purses payable to owners and pay the monies as per article 6.5.

[32] These clauses in these agreements echo Rules 18.08 and 18.11 in the *Rules of Standardbred Racing* and clearly distinguish the purse money, won by the horses and paid to the owners, from the

"fees" that are paid to the drivers and trainers. Neither agreement provides for drivers and trainers to be awarded purse money directly, as an honour, an award or winnings for demonstrating superiority or achievement as competitors, over and above the rest of the field of competitors.

No other reliable evidence

[33] There was no other reliable evidence in this record that could establish that the monies received by drivers and trainers were a "prize" within the meaning of subsection 188(2), as described above. Similarly, there was no other reliable evidence in this record that could rebut a finding that the monies received by drivers and trainers were fees, as described above.

G. Conclusion

[34] The respondent did not receive a "prize" within the meaning of subsection 188(2) of the Act. Therefore, the subsection 188(2) exemption does not apply and GST is payable.

[35] As noted above, the parties also made submissions on whether the respondent, in its driving and training activities, was a "competitor" within the meaning of subsection 188(2) of the Act. The determination of that issue is not necessary for the disposition of this appeal and should be left for another day.

[36] Therefore, I would allow the appeal from the judgment of the Tax Court of Canada, set aside that judgment and restore the assessment made under Part IX of the Act, with costs to the appellant both in this Court and below.

"David Stratas"
J.A.

"I agree
M. Nadon J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-465-08
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE T.E. MARGESON DATED AUGUST 12, 2008, NO. 2004-3932(GST)G	
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DATED:	February 3, 2010

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