

Docket: 2014-2339(GST)I

BETWEEN:

ANDREI 95 HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on August 21, 2015  
at Kelowna, British Columbia.  
Before: The Honourable Justice B. Paris

Appearances:

Agent for the Appellant: Viorel Mazilescu  
Counsel for the Respondent: Pavanjit Mahil Pandher

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**JUDGMENT**

The appeal made under Part IX the *Excise Tax Act* for the periods of September 1, 2010 to August 31, 2011 and September 1, 2011 to August 31, 2012, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of October 2015.

“B.Paris”

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Paris J.

Citation: 2015 TCC 224  
Date: 20151023  
Docket: 2014-2339(GST)I

BETWEEN:

ANDREI 95 HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Paris J.

[1] This is an appeal from an assessment made pursuant to Part IX of the *Excise Tax Act* (the “*Act*”). The issue before the Court is whether the Appellant is entitled to Input Tax Credits (“ITCs”) of \$10,099.74 and \$4,632.67, which it claimed for its reporting periods ending August 31, 2011 and August 31, 2012, respectively. The ITCs represent GST on legal fees paid by the Appellant.

[2] The Minister of National Revenue (“Minister”) denied the ITCs on the basis that the Appellant did not incur the legal fees in the course of any commercial activity carried on by it, and that the Appellant is therefore not entitled to the ITCs pursuant to subsection 169(1) of the *Act*.

[3] The relevant portions of subsection 169(1) read 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:

$$A \times B$$

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is...

(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

[4] The definition of “commercial activity” is found in subsection 123(1) of the *Act*. The relevant portion of the definition reads as follows:

“commercial activity” of a person means

(a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

...

[5] The Appellant maintains that its commercial activities included the business of providing management services and that the legal fees were incurred in relation to that activity.

[6] The Respondent takes the position that the legal fees were incurred by the Appellant in part in the course of negotiating the purchase or sale of shares owned by it and by its shareholders, Viorel Mazilescu and his spouse Anca Mazilescu, and, in part in the course of litigating a dispute unrelated to any commercial activity carried on by the Appellant.

[7] Mr. Mazilescu owns 75% of the shares and is the sole director of the Appellant. His spouse, Anca Mazilescu, owns the remainder of the Appellant's shares.

[8] Mr. Mazilescu represented the Appellant at the hearing and was the only witness.

[9] During the period in issue, the Appellant and Mr. Mazilescu between them owned 50% of the shares of two companies: Waycon Manufacturing Ltd. ("Waycon") and JAV Entreprises Ltd., ("JAV"). John O'Connell and entities controlled by him owned the other 50% of the shares of Waycon and JAV.

[10] Waycon manufactured logging equipment and soil screens and JAV owned the land and buildings used by Waycon.

[11] Another company, OMH Innovations Inc. ("OMH") was owned equally by O'Connell, Anca Mazilescu and Bradley Hilmoe. OMH distributed Waycon's products.

[12] Mr. Mazilescu and O'Connell were employees of Waycon, and Anca Mazilescu was an employee of OMH.

[13] In early 2008, O'Connell was diagnosed with cancer and took a leave of absence from his position at Waycon. Mr. Mazilescu testified that he became solely responsible for the management of Waycon, OMH and JAV until O'Connell returned in 2010. He said that those management duties were outside his regular employment duties for Waycon and that he performed the management duties as a consultant on behalf of the Appellant.

[14] Mr. Mazilescu testified that the Appellant received management fees of \$33,947 in 2008 and \$90,000 in 2009 from Waycon and \$100,000 from OMH in 2010 as compensation for the management services. He said the OMH payment covered three years of management services.

[15] After O'Connell returned from leave in 2010, the relationship between him and Mr. Mazilescu began to deteriorate. As a result, Mr. Mazilescu said that they decided to separate their business interests and began negotiations to have one of them buy out the other's interest. Mr. Mazilescu was represented in those negotiations by Grant Hardwick of the firm Doak Shirreff LLP.

[16] The relationship between Mr. Mazilescu and O'Connell remained strained and, in January 2011, O'Connell brought an application for an Anton Piller Order against 13 defendants, including the Appellant, the Mazilescus and another company owned by them, OMH Proscreen Inc. ("Proscreen"). The Anton Piller Order was granted on January 19, 2011.

[17] While the Order itself was not put before me, it appears that the relief granted included an order terminating Mr. Mazilescu's employment with Waycon and Anca Mazilescu's employment with OMH. Litigation related to the Order continued into 2012 and was ultimately settled in November 2012 with O'Connell buying out Mr. Mazilescu and the Appellant's interest in Waycon, JAV and another related company. Mr. Hardwick also represented the Mazilescus and their companies throughout the litigation and settlement.

[18] Mr. Mazilescu testified that a separate court action was brought by O'Connell in respect of matters relating to OMH, and that that action has not yet been resolved.

[19] The evidence also showed that, in addition to the amounts reported by the Appellant as management fees, it reported dividends of \$125,619 in 2008 and \$5,619 in 2009 and rental income of \$4,200 in 2011 and \$13,407 in 2012. The source of the dividend income was not disclosed at the hearing, but Mr. Mazilescu confirmed that the rental income was unrelated to the activities of Waycon, JAV or OMH.

### Analysis

[20] After reviewing the decisions rendered by the Supreme Court of British Columbia in respect of O'Connell's application for the Anton Piller Order and related relief, and after reviewing certain affidavits sworn by Mr. Mazilescu that were filed in those proceedings, and after considering the evidence presented by Mr. Mazilescu at the hearing before me, I conclude that the Appellant has not shown that it is entitled to ITCs in respect of the legal fees in issue.

[21] The legal fees incurred by the Appellant up to the time O'Connell applied for the Anton Piller Order in January 2011 were incurred for the purpose of negotiating a separation of Mr. Mazilescu's and O'Connell's business interests by way of a buyout of one or the other's shares. Mr. Mazilescu admitted in cross-examination that all of the legal fees incurred by the Appellant in 2010 were related to this potential share transaction.

[22] Since shares are financial instruments as that term is defined in subsection 123(1) of the *Act*, and since supplies of financial instruments are exempt supplies under the *Act*, no ITCs in respect of inputs to supplies of financial instruments are available under subsection 169(1). This is because the making of exempt supplies is excluded from the definition of “commercial activities” as set out in paragraph 4 above.

[23] Also, I find that the legal fees incurred by the Appellant in the course of litigation commenced in January 2011 have not been shown to have been related to or connected with any commercial activity carried on by the Appellant. The Appellant has not produced a copy of the Anton Piller application made by O’Connell, but it appears that it was based on an alleged breach by Mr. Mazilescu and his spouse of the provision of a shareholder’s agreement prohibiting competition with Waycon. Details of the allegations underlying the application were set out at paragraph 22 of the decision of Armstrong J. dated June 6, 2011 as follows:<sup>1</sup>

[22] O’Connell sets out details of ten complaints which are the foundation for the relief claimed in this proceeding. They are:

1. Anca falsely certified a baking resolution for OMH appointing Viorel as a signing authority.
2. Viorel took \$100,000 from OMH without the consent or knowledge of O’Connell or Hilmoie.
3. Viorel unlawfully removed confidential information belonging to Waycon Innovation.
4. Viorel and Anca set up OMH Proscreen to compete directly with OMH.
5. Viorel removed a computer from the Waycon premises and had it cloned, converting intellectual property of Waycon and Waycon Innovation.
6. Viorel and Anca caused OMH Proscreen to sell products manufactured by or for OMH to a German company and kept the proceeds otherwise belonging to OMH or Waycon.

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<sup>1</sup> 2011 BCSC 732.

7. Viorel intentionally or negligently failed to ensure that welding certifications for Waycon were maintained.

8. Viorel advised Loewen that he was going to open a new shop, but learned he could not do so because of the shareholders' agreement.

9. Viorel and Anca paid their 14-year-old son, Andrei, wages in 2010 in excess of what was agreed to for that year.

10. \$100,000 appears to be missing from Waycon Innovation. Viorel and Anca manipulated statements to inflate the value of Waycon.

[24] The evidence shows that the litigation brought by O'Connell dealt with conduct of the Mazilescu personally or in connection with their company, Proscreen. Mr. O'Connell alleged that the Mazilescu set up Proscreen to compete with Waycon. I find, therefore, that the alleged violation of the shareholders' agreement concerned conduct by the Mazilescu that was unconnected with the Appellant.

[25] I also find that the Appellant has not shown that it ever carried on the business of providing management services to Waycon, OMH or JAV. In the course of the Anton Piller litigation, Mr. Mazilescu deposed to certain facts relating to the \$90,000 he now claims were management fees earned by the Appellant from Waycon in 2009. In an affidavit dated February 2, 2011, Mr. Mazilescu indicated that the amount of \$90,000 paid to the Appellant by Waycon was an "equalizing draw for personal benefits taken by O'Connell from Waycon." Paragraphs 81 and 82 of that affidavit read as follows:

81. In fact O'Connell's use of Waycon for personal purposes was so extensive that in-house accounting staff maintained a separate ledger of personal benefits taken by O'Connell from Waycon.

82. In 2010, those personal benefits were accumulating to a substantial sum and accordingly, in May of 2010, O'Connell did personally issue and sign a cheque drawn on the account of Waycon to Andrei 95 in the amount of \$90,000.00 representing an equalizing draw for personal benefits taken by O'Connell from Waycon.

[26] This material supports the view that the \$90,000 paid to the Appellant was not for consulting services rendered by Mr. Mazilescu while O'Connell was absent

from the business. This conflicts directly with Mr. Mazilescu's testimony before this Court.

[27] With respect to the \$100,000 that Mr. Mazilescu claimed the Appellant received from OMH as management fees in 2010, Mr. Mazilescu in his affidavit of February 2, 2011 stated as follows:

75. As respects the allegation in paragraph 39 that I had wrongfully removed \$100,000.00 from the OMH Innovation account, it is correct that I had in or about the month of May, 2010, removed \$100,000.00 from the account of OMH Innovation. This removal was done with full disclosure to the outside accountant and was done for the purpose of putting the funds beyond the reach of Brad Hilmo. This action was taken for reasons that include the following:

(a) Hilmo had on earlier occasions wrongfully removed funds from OMH Innovations and taken those funds to the United States for either the benefit of OMH USA or himself personally,

(b) by the time of the removal of the \$100,000.00 amount, the agreement in principal to separate the operations of OMH Innovations from OMH USA was several months overdue in implementation. OMH Innovations was turning a substantial profit and I did not want to see those profits eroded by either OMH USA or Hilmo personally.

[28] Armstrong J. ultimately ordered the return of the \$100,000 to OMH in those proceedings.

[29] Mr. Mazilescu's representation before me concerning the nature of the payment of this amount by OMH to the Appellant contradicts his statements in his affidavit.

[30] No explanation was provided for the inconsistencies between his affidavit evidence and his testimony in this matter. On the basis of these inconsistencies, I find that his testimony before this Court is not reliable.

[31] Finally, Mr. Mazilescu did not provide any details of the circumstances of the receipt of the amount of \$33,947 reported by the Appellant on its income tax return for its 2008 taxation year and I am unable to conclude that the labelling of those amounts as management fees was accurate.



[32] For these reasons, I find that the Appellant has not shown that the legal services it acquired during the periods in issue were for consumption or use in the course of any commercial activity carried on by it. Therefore, the Appellant is not entitled to the ITCs claimed and the appeal is dismissed.

Signed at Ottawa, Canada this 23rd day of October 2015.

“B.Paris”

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Paris J.

CITATION: 2015 TCC 224

COURT FILE NO.: 2014-2339(GST)I

STYLE OF CAUSE: ANDREI 95 HOLDINGS LTD. MAJESTY  
THE QUEEN

PLACE OF HEARING: Kelowna, British Columbia

DATE OF HEARING: August 21, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: October 23, 2015

APPEARANCES:

Agent for the Appellant: Viorel Mazilescu  
Counsel for the Respondent: Pavanjit Mahil Pandher

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm: N/A

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