Docket: 2015-4367(GST)I

BETWEEN:

RAR CONSULTANTS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 6, 2016, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant:	Roger Georges Abou-Rached Douglas Bencze
Counsel for the Respondent:	Zachary Froese

JUDGMENT

The appeal from the assessment under the *Excise Tax Act* for the period from July 1, 2007 to September 30, 2007 is dismissed.

Signed at Ottawa, Canada, this 20th day of September 2016.

"V.A. Miller"

V.A. Miller J.

Citation: 2016TCC206
Date: 20160920
Docket: 2015-4367(GST)I

BETWEEN:

RAR CONSULTANTS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in this appeal is whether the Appellant is entitled to input tax credits ("ITCs") in the amount of $13,582.84 for the period July 1 to September 30, 2007 (the "Period").

[2] The Appellant was represented by Roger Abou-Rached ("Mr. Rached"). He and Douglas Bencze were the only witnesses at the hearing.

[3] Mr. Rached testified that he was the President, CEO and only director of the Appellant. Mr. Bencze is Mr. Rached's accountant.

Facts

History

[4] The Appellant initially filed its Goods and Services Tax ("GST") return for the Period on April 26, 2010. It was a nil return as it reported nil sales, nil GST collected, nil ITCs and nil Net Tax.

[5] On May 12, 2011, the Appellant filed its GST return for the period January 1 to March 31, 2011. In this return, the Appellant claimed ITCs of $14,712.64 in respect of supplies allegedly purchased from January 1, 2005 to December 31,

2006. The claim was not allowed. The Appellant later reduced its claim to $13,582.84.

[6] In September 2011, the Appellant advised the Minister of National Revenue (the "Minister") that it would be refiling its return for the Period to claim the ITCs of $13,582.84 rather than continue to claim the ITCs in the 2011 period.

[7] The Appellant then sent a GST return dated October 4, 2011 to the Minister for the Period in which it claimed the ITCs at issue. The Minister cancelled this return as a GST return had already been filed and posted for the Period.

[8] According to Mr. Rached, the Appellant had refiled its return for the Period on the advice of Ms. Yoon, the auditor with the Canada Revenue Agency ("CRA") who had disallowed these ITCs in the 2011 period.

[9] In August, 2013, the Appellant sent an amended return for the Period and again it claimed the ITCs of $13,582.84. The Minister reassessed the Appellant on February 10, 2014 to deny the ITCs.

[10] The invoices which supported the ITCs in question were for supplies and services provided directly to and paid by IHI Development II Ltd. ("IHI Dev II") in the period July 1, 2005 to December 31, 2006 in the course of its business.

[11] The Appellant objected to the reassessment. Mr. Rached testified that the appeals officer advised that if the supplier invoices were reissued in the Appellant's name, the ITCs would be allowed. The Appellant contacted the suppliers and several of them acquiesced and reissued the invoices in the Appellant's name.

The Corporations

[12] IHI Dev II is one of 27 corporations incorporated by Mr. Rached and his family.

[13] Mr. Rached testified that the Appellant owns 80% of IHI Dev II. According to a chart (exhibit R-3) prepared by Mr. Rached on June 3, 2014, the Appellant directly owns 40% of the shares of IHI Dev II. It owns 100% of the shares in IHI Developments Ltd. ("IHI Dev") which in turn owns 40% of the shares in IHI Dev II.

[14] No share registers were produced at the hearing to support any of the shareholdings stated by Mr. Rached or written in exhibit R-3.

[15] According to a Memo dated September 30, 2007 (exhibit A-1) to the Appellant from IHI Dev, IHI Dev II and International Hi Tech Industries Inc. ("IHI"), IHI Dev II purported to assign unclaimed input tax credits to the Appellant. The Memo reads:

> Effective Date: September 30, 2007
>
> To: RAR Consultants Ltd. (RAR C)
>
> From: IHI Development II Ltd. (IHI D II)
> IHI Developments Ltd. (IHI D)
> International Hi Tech industries Inc. (IHI)
>
> With Reference to the purchase share agreement of September 30, 2007, between RAR Consultants Ltd. and International Hi Tech Industries Inc. with regards to the purchase of assets and liabilities of IHI D, (a fully owned subsidiary company of IHI) including but not limited to any credit adjustment, after conducting the proper accounting and auditing of IHI D II.
>
> This is to confirm that any input tax credits that is most probably outstanding (if applicable) due to shareholder advances to IHI D II, to fund its operations and expenses will be in its entirety credited to RAR C.
>
> IHI D II will undertake to properly account for all its expenses and filings as per above, however, for whatever reason if IHI D II fails to fulfill its obligations, then RAR C will have full access to all related records and will file the returns on behalf of IHI D II and to RAR C's credit as part of its "assets" that it purchased as per the above agreement effective September 30, 2007.

[16] I note that Mr. Rached signed the Memo on behalf of all three corporations.

Law

[17] The GST regime is designed so that the GST is paid by the final consumer. To achieve that result, a buyer of goods and services gets credit for the inputs which are used in the course of its commercial activities. Subsection 169(1) of the *ETA* provides:

> 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

(a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,

(b) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

(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 <u>in the course of commercial activities of the person</u> (emphasis added).

[18] The documentation which a registrant must provide to claim an ITC is given in subsection 169(4) of the *ETA*. It reads:

Required documentation

(4) A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,

> (a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and
>
> (b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax payable in respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

[19] The prescribed information is set out in the *Input Tax Credit Information (GST/HST) Regulations*, (SOR/91-45) (the "*Regulations*"), section 3 and the *Regulations* must be strictly adhered to: *Key Property Management Corp v R*, 2004 TCC 210; *Davis v R*, 2004 TCC 662; affirmed by *Systematix Technology Consultants Inc v R*, 2007 FCA 226.

[20] The term "commercial activity" is defined in subsection 123(1) of the *ETA*. It reads:

> "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,
>
> (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in 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 adventure or concern involves the making of exempt supplies by the person, and
>
> (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

Analysis

[21] To be eligible to receive the ITCs in issue, the Appellant had to demonstrate that it was contractually liable to pay for the supplies or services and that the supplies or services were acquired for consumption, use or supply in the course of its commercial activities: *General Motors of Canada Ltd v R*, 2008 TCC 117; affirmed 2009 FCA 114 and *YSI's Yacht Sales International Ltd v R*, 2007 TCC 306). This, the Appellant failed to do.

[22] According to the Minister's assumptions and the evidence at the hearing, IHI Dev II purchased the supplies or services in the course of its business. The vendors provided the supplies or services directly to IHI Dev II. IHI Dev II received the supplies or services and paid the consideration for them.

[23] The Appellant was not the recipient of the supplies or services and it was not entitled to receive the ITCs in issue. Reissuing the invoices for these supplies and services 10 years after the events does not change the recipient.

[24] IHI Dev II cannot assign its rights to the ITCs to the Appellant: *Telus Communications (Edmonton) Inc v R*, 2009 FCA 49.

[25] I do not believe that Mr. Rached was told that he would receive the ITCs if he had the invoices reissued in the Appellant's name. However, even if he had been so told, an estoppel cannot apply so as to prevent the Minister from applying the proper principles under the *Excise Tax Act*: *Hawkes v R*, [1997] 2 CTC 133 (FCA) at paragraph 12. See also Bowman, A.C.J.T.C.'s decision in *Moulton v R*, [2002] 2 CTC 2395 where he stated at paragraph 11:

> Estoppel *in pais*, as it applies to the Crown, involves representations of fact made by officials of the Crown and relied and acted on by the subject to his or her detriment.
>
> The doctrine has no application where a particular interpretation of a statute has been communicated to a subject by an official of the government, relied upon by that subject to his or her detriment and then withdrawn or changed by the government. In such a case a taxpayer sometimes seeks to invoke the doctrine of estoppel. It is inappropriate to do so not because such representations give rise to an estoppel that does not bind the Crown, but rather, because no estoppel can arise where such representations are not in accordance with the law. Although estoppel is now a principle of substantive law it had its origins in the law of evidence and as such relates to representations of fact. It has no role to play where questions of interpretation of the law are involved, because estoppels cannot override the law.

[26] IHI Dev II did not claim these ITCs because it had a tax debt and it knew that the CRA would set-off the amount of the ITCs against its tax debt.

[27] This is the second time that Mr. Rached has had one of his corporations attempt to claim ITCs which properly belonged to another related corporation. In both appeals, the corporation entitled to claim the ITCs was a tax debtor and Mr. Rached was attempting to avoid a set-off of the corporation's refund against its tax debt.

[28] Counsel for the Respondent requested that I award costs of $1,000 against the Appellant because Mr. Rached has wasted the court's time by raising the same issue in this appeal that he had raised in *Garmeco Canada International Consulting Engineers Ltd v The Queen*, 2015 TCC 194. However, subsection 9(2) of the *Tax Court of Canada Rules of Procedure respecting the Excise Tax Act (Informal Procedure)* (the "*Rules*") allows for costs to be awarded to the Respondent "only if the actions of the appellant have unduly delayed the prompt and effective resolution of the appeal". In the present appeal, there was no delay.

[29] There was no application to find that Mr. Rached was a vexatious litigant and I cannot order costs against him pursuant to section 13.1 of the *Rules*.

[30] The appeal is dismissed.

Signed at Ottawa, Canada, this 20th day of September 2016.

"V.A. Miller"

V.A. Miller J.

CITATION:	2016TCC206
COURT FILE NO.:	2015-4367(GST)I
STYLE OF CAUSE:	RAR CONSULTANTS LTD. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 6, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	September 20th, 2016

APPEARANCES:

Agent for the Appellant:	Roger Georges Abou-Rached Douglas Bencze
Counsel for the Respondent:	Zachary Froese

COUNSEL OF RECORD:

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Name:

Firm:

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