

Docket: 2005-1892(GST)I

BETWEEN:

AAPEX DRIVING ACADEMY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on February 25, 2008 at  
Toronto, Ontario

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Appellant: Jeffrey L. Goldman

Counsel for the Respondent: Suzanne M. Bruce

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### **JUDGMENT**

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated May 11, 2004 and bears number 085P0051048 for the period from January 1, 2001 to December 31, 2002 is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

IT IS FURTHER ORDERED that the filing fee of \$100 be refunded to the Appellant.

Signed at Vancouver, British Columbia, this 8th day of January 2009.

“L.M. Little”

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Little J.

Citation: 2009 TCC 13  
Date: 20090108  
Docket: 2005-1892(GST)I

BETWEEN:

AAPEX DRIVING ACADEMY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Little J.**

##### A. FACTS

[1] This appeal was heard in common evidence with the appeals from the income tax assessments concerning *Christine Raby v. the Queen* (“*Raby*”) and *Aapex Driving Academy Ltd. v. the Queen* (“*Aapex*”). I refer to the facts and defined terms as they are stated in those respective decisions, in addition to the facts as outlined below.

[2] In the reassessments issued against *Raby*, the Minister of National Revenue (the “Minister”) included certain amounts in the business income of Christine Raby relating to the Vehicle Fees that Aapex credited in her Shareholder Account for the use of the Vehicles that she owned.

[3] The Minister determined that although adjusting entries were made in the books of the Appellant to reverse out the Vehicle Operating Expenses at the end of each relevant taxation year, no adjustments were made to account for the Goods and Services Tax (“GST”) relating to the Vehicle Operating Expenses.

[4] The Appellant claimed Input Tax Credits (“ITCs”) in the amounts of \$5,906.00 and \$7,016.00 for the respective periods ending December 31, 2001 and December 31, 2002 with respect to the Vehicle Operating Expenses.

[5] The Appellant also claimed ITCs in the amounts of \$6,756.97, \$4,800.00 and \$6,432.36 for the respective periods ending June 30, 2001, September 30, 2001 and December 31, 2001, with respect to the Vehicle Fees it paid to Raby and Racine.

[6] The Minister reassessed the Appellant for the period January 1, 2001 to December 31, 2002. The Minister:

- (a) increased the GST collectible by \$12,922.00;
- (b) disallowed ITCs totalling \$30,911.33;
- (c) imposed interest in the amount of \$2,589.83, calculated as of May 3, 2004; and
- (d) imposed a penalty in the amount of \$5,897.82, calculated as of May 3, 2004.

B. ISSUES TO BE DECIDED

[7] The issues under this appeal are as follows:

- (a) whether the Minister was correct to disallow ITCs in the amounts of \$5,906.00 and \$7,016.00 for the respective periods ending December 31, 2001 and December 31, 2002 with respect to the Appellant’s payment of the Vehicle Operating Expenses on behalf of Raby and Racine;
- (b) whether the Minister was correct to disallow ITCs in the amounts of \$6,756.97, \$4,800.00 and \$4,432.26 for the respective periods ending June 30, 2001, September 30, 2001, and December 31, 2001, with respect to the Vehicle Fees paid by the Appellant to Raby and Racine;
- (c) whether the Minister was correct to impose interest in the amount of \$2,589.83, calculated as of May 3, 2004, with respect to the reassessment of GST on the Appellant; and
- (d) whether the Minister was correct to impose a penalty in the amount of \$5,897.82, calculated as of May 3, 2004, with respect to the reassessment of GST on the Appellant.

C. ANALYSIS

[8] During the hearing, counsel for the Respondent stated that the revised tax payable under the current appeal should be calculated as follows:

GST Payable: Aapex

<b>Annual Periods Ending</b>	<b>12/31/2001</b>	<b>12/31/2002</b>
<b>Net Tax per Reassessment</b>	45,470.85	52,363.23
<b>Less: ITCs Claimable</b> ITCs on Vehicle Allowance	24,954.00	31,141.00
<b>Revised Net Tax Payable</b>	<b>20,516.85</b>	<b>21,222.23</b>

(Note: This is a change from the original reassessments)

[9] However, neither counsel for the Appellant nor counsel for the Respondent made any submissions or arguments with respect to the Minister's reassessment of the disallowance of ITCs claimed by the Appellant. Counsel for the Respondent did not make any submissions with respect to the revised tax payable amounts that she presented during the hearing.

[10] Canadian courts have established that the onus is on the taxpayer to prove that the reassessments are incorrect. Based on the lack of any evidence or argument regarding the disallowance of ITCs under this appeal, I reject the Appellant's position on these issues.

[11] In addition, counsel for the Respondent did not make any submissions or arguments with respect to the penalty levied on the Appellant by the Minister.

[12] Based on the lack of evidence and argument with respect to the imposition of penalties, I am unable to ascertain how these penalties were calculated, and under which basis they were assessed.

[13] In *Consolidated Canadian Contractors Inc. v. R.*, [1998] G.S.T.C. 91 ("*Consolidated Canadian Contractors*"), the Federal Court of Appeal held that a penalty assessed under section 280 of the *Act* may be cancelled if the Appellant can demonstrate due diligence in attempting to comply with the GST legislation.

[14] In *Tri-Bec Inc. v. R.*, [2003] G.S.T.C. 75, the Court considered the decision in *Consolidated Canadian Contractors* in deciding whether to cancel an assessment of penalty under section 280 of the *Act*. In paragraph 25, Justice Lamarre Proulx said:

The respondent made no representation or comment on the assessment of penalty. Relying on the decision by the Federal Court of Appeal in *Consolidated Canadian Contractors Inc. v. R.* ..., I do not see any clear manifestation of a lack of diligence in this case. It is therefore my view that the assessment of penalty is not founded under the *Act*.

[15] Similarly, based on the lack of any evidence or argument on this issue, I am not convinced that the Minister was correct to levy a penalty on the Appellant.

[16] Accordingly, the appeal is dismissed with respect to the reassessment, but is referred back to the Minister for reconsideration and reassessment on the basis that the penalties should be deleted in respect of the relevant periods.

[17] Since success is divided, I am not prepared to award any costs.

Signed at Vancouver, British Columbia, this 8th day of January 2009.

“L.M. Little”

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Little J.

CITATION: 2009 TCC 13

COURT FILE NO.: 2005-1892 (GST)I

STYLE OF CAUSE: Aapex Driving Academy Ltd. and  
Her Majesty the Queen

PLACE OF HEARING Toronto, Ontario

DATE OF HEARING February 25, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT January 8, 2009

APPEARANCES:

Counsel for the Appellants: Jeffrey L. Goldman

Counsel for the Respondent: Suzanne M. Bruce

COUNSEL OF RECORD:

Counsel for the Appellants:

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