

Docket: 2010-598(GST)I

BETWEEN:

AHMAD A. KHAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of Ahmad A. Khan
(2008-2680(IT)I) on November 1, 2010, at Toronto, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Samantha Hurst

JUDGMENT

The appeal from the reassessment made under Part IX of the *Excise Tax Act* (the "*ETA*"), the notice of which is dated February 10, 2006 and bears number 05DP-GB 0525 1193 5412, for the period from January 1, 2001 to December 31, 2003, is allowed, without costs, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to additional input tax credits in the amount of \$14.18 for the 2002 taxation year and that the penalties under section 285 of the *ETA* shall be cancelled.

Signed at Ottawa, Canada, this 26th day of October 2011.

"Réal Favreau"

Favreau J.

Citation: 2011 TCC 481
Date: 20111026
Docket: 2010-598(GST)I

BETWEEN:

AHMAD A. KHAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal, by way of the Informal Procedure, from a reassessment dated February 10, 2006 No. 05DP-GB 0525 1193 5412 made under Part IX of the *Excise Tax Act*, R.S.C. 1985, c.E-15, as amended, (the "*ETA*"), for the period from January 1, 2001 to December 31, 2003 (the "period"). By virtue of that reassessment, the Minister of National Revenue (the "Minister") assessed the appellant in the amounts of \$7,167.83 for net tax, \$652.12 for interest and \$3,695.71 for penalties in respect of uncollected Goods and Services Tax ("GST") for the period.

[2] In assessing the appellant, the Minister relied on the following assumptions of facts set out in paragraph 13 of the Reply to the Notice of Appeal (the "Reply"):

- a) the facts stated and admitted above;
- b) the appellant is a GST registrant with GST Registration No. 86480 4893 RT0001, which was obtained on July 10, 2000; (**denied**)
- c) the appellant did not file any GST returns for the period 2001-01-01 to 2003-12-31 (the "period"); (**admitted**)
- d) the total value of the appellant's supplies for each of the 2001, 2002 and 2003 taxation years exceeded \$30,000; (**admitted for 2001 and 2002 only**)

- e) the appellant was operating a car maintenance and repair shop (Khan Auto Repairs) and a paralegal business (Khan and Associates) during the period; **(admitted except for the auto repair business that was not carried on in 2003)**
- f) both businesses were sole proprietorships sharing the same GST registration number; **(admitted)**
- g) the appellant did not maintain proper books and records during the period; **(denied)**
- h) the appellant did not report all of his business and professional income during the period; **(denied)**
- i) the appellant did not maintain receipts for expenses claimed on the statements of business activities filed; **(denied as all work orders and invoices were remitted to the auditor)**

Unreported income from paralegal business

- j) the appellant did not retain any invoices for services provided in the 2001 taxation year; **(denied)**
- k) the appellant's income for the 2001 taxation year was the average of income earned in the 2002 and 2003 taxation years; **(admitted)**
- l) the appellant received income in the amount of \$7,477 in the 2001 taxation year; **(admitted)**
- m) the appellant collected or should have collected \$523 in GST for the 2001 taxation year that he failed to remit to the Receiver General; **(denied)**
- n) the appellant retained invoices for the 2002 taxation year; **(admitted)**
- o) the appellant's income for the 2002 taxation year was \$7,654, which he failed to report; **(admitted for the amount only)**
- p) the appellant collected or should have collected \$536 in GST for the 2002 taxation year that he failed to remit to the Receiver General; **(denied as no GST was collected)**
- q) the appellant retained invoices for the 2003 taxation year; **(admitted)**
- r) the appellant's income for the 2003 taxation year was \$9,322, which he failed to report; **(admitted for the amount only)**

- s) the appellant collected or should have collected \$653 in GST for the 2003 taxation year that he failed to remit to the Receiver General; (**denied as no GST was collected**);

Unreported income from the auto repair business

- t) in the 2001 taxation year, the appellant received income in the amount of \$106,500 that he failed to report; (**admitted for the amount only**)
- u) in the 2001 taxation year, the appellant collected or should have collected the amount of \$7,455 in respect of GST, and he failed to remit that sum to the Receiver General; (**denied as no GST was collected**)
- v) in the 2002 taxation year, the appellant received income in the amount of \$78,741 that he failed to report; (**denied as the right amount should be \$48,191**)
- w) in the 2002 taxation year, the appellant collected or should have collected the amount of \$5,512 in respect of GST, and he failed to remit that sum to the Receiver General; (**denied as no GST was collected**)

GST on unreported income for both businesses

- x) the following chart sets out the GST calculated on the unreported income from both businesses for the period: (**denied**)

	2001	2002	2003
Khan and Associates GST	\$523	\$536	\$653
Khan Auto Repairs GST	\$7,455	\$5,512	\$0
TOTAL GST	\$7,978	\$6,048	\$653

Input tax credits

- y) the appellant did not retain all receipts for the period; (**denied as all receipts were presented**)

- z) of the receipts that he retained, the following chart sets out all the GST, rounded up, paid by the appellant in the period: **(admitted)**

	2001	2002	2003
Parts for auto repairs	\$201	\$233	\$0
Maintenance and repairs	\$325	\$0	\$0
Motor vehicle expenses	\$256	\$216	\$239
Office expenses	\$78	\$306	\$59
Supplies (Canadian Tire)	\$88	\$0	\$0
Rent	\$1,480	\$1,634	\$1,711
Telephone and utilities	\$288	\$380	\$0
Other expenses	\$0	\$0	\$17
Total Input Tax Credits	\$2,716	\$2,768	\$2,025

- aa) the appellant has net tax amounts owing of \$5,262 in 2001, \$3,279 in 2002 and (\$1,373) in 2003, totalling \$7,168. **(denied as no GST was collected)**

[3] In assessing the gross negligence penalties, the Minister relied on the following further facts set out in paragraph 14 of the Reply:

- a) the appellant was a GST registrant as early as July 2000, but he never filed a return for GST purposes; **(admitted as no GST was collected)**
- b) the appellant was obligated to file a return for GST purposes as he was not a small supplier; **(admitted but the appellant did not know that at the time)**
- c) the appellant maintained his own books and records; **(admitted)**
- d) the appellant held himself out to the general public as a person having sophistication and legal knowledge, as he purported to operate a paralegal business; **(admitted)**
- e) the appellant filed his income tax returns and therefore knew or should have known that GST was collectible and remittable on income; **(denied as the appellant did not know that at the time)**
- f) the appellant did not cooperate with the auditor, as he initially refused to provide any books and records to the auditor; **(denied)**
- g) the appellant refused to attend meetings with the auditor; and **(denied)**
- h) the appellant refused to speak with the auditor on the telephone. **(denied)**

[4] The Minister also relied on the other material facts set out in paragraph 15 of the Reply:

15. The appellant retained receipts for the 2002 year that the Minister did not review when conducting the audit. These receipts represent an additional amount of \$14.18 in input tax credits to be allowed in 2002.

[5] The appellant testified at the hearing. He admitted that, during the period, he was operating a car maintenance and repair shop ("Khan Auto Repairs") and a paralegal business ("Khan and Associates") and that both businesses were sole proprietorships sharing the same GST registration number. He also admitted that the total value of his supplies for each of the 2001 and 2002 taxation years exceeded \$30,000 and that he did not file any GST returns for the period.

[6] The only explanation given by the appellant for not collecting GST from the customers of Khan Auto Repairs was that GST was already paid when the parts were purchased. In support, 15 receipts for parts purchases made in 2001 and 2002 were attached to the GST Amended Notice of Appeal, dated February 18, 2010, filed with the Court on March 18, 2010.

[7] According to the appellant, he was not required to file any GST returns nor to remit GST to the Receiver General because no GST was collected.

Analysis

[8] The appellant reported, in his income tax returns for the 1999 and 2000 taxation years, gross business income in the amounts of \$48,000 and \$122,954, respectively. In his income tax returns for the 2001, 2002 and 2003 taxation years, the appellant reported gross business income in the amounts of \$112,100, \$48,191.23 and nil, respectively. For the 2002 and 2003 taxation years, the gross income from the paralegal business was reported as professional income in the amounts of \$4,000 and \$7,000 respectively. During the period, the appellant was not a "small supplier", as defined in subsection 148(1) of the *ETA*, because he made more than \$30,000 in taxable supplies in each year. The appellant was required to register for GST purposes and there is no evidence that registration was revoked at any time during the period.

[9] The supplies for auto repairs and paralegal services made by the appellant were "taxable supplies", as defined in subsection 123(1) of the *ETA* (i.e. a supply made in the course of a commercial activity). The recipients of the taxable supplies were required to pay GST on the value of the consideration for the supply pursuant to subsection 165(1) of the *ETA* and the appellant was required to collect the GST

payable by the recipients on the taxable supplies that he provided pursuant to subsection 221(1) of the *ETA*. Subsection 221(1) reads as follows:

(1) Collection of tax -- Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

[10] Pursuant to subsection 245(2) of the *ETA*, the appellant was required to file GST returns for each quarterly period and, pursuant to subsection 228(1) of the *ETA*, to calculate the net tax for the period for which the return was required to be filed.

[11] The net tax to be remitted to the Receiver General is calculated pursuant to subsection 225(1) of the *ETA* after deducting the input tax credits from the GST collected. In this instance, the Minister denied the claims for the input tax credits where certain receipts and invoices were not provided or where the appellant did not provide sufficient evidence to support the claims, including any information prescribed by the *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45.

[12] Pursuant to section 299 of the *ETA*, an assessment or a reassessment is deemed to be valid and binding and the burden of proof is on the appellant to show that the assessment or reassessment is wrong.

[13] The appellant testified at the hearing but he has not provided any reasonable and plausible explanation as to why the GST has not been collected and why GST returns have not been filed. No other witness testified to corroborate the appellant's version of the facts. Consequently, the appellant has not met his burden of proof and the reassessment remains.

[14] The appellant was assessed gross negligence penalties under section 285 of the *ETA*. This section provides a 25 percent penalty for false statements or omissions that are made either knowingly, or under circumstances amounting to gross negligence. The relevant part of that provision provides:

285. [Gross negligence penalty for] False statements or omissions — Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which is in this section referred to as a "return") made in respect of a reporting period or transaction is liable to a penalty of the greater of \$250 and 25% of the total of

(a) if the false statement or omission is relevant to the determination of the net tax of the person for a reporting period, the amount determined by the formula

$$A - B$$

where

A is the net tax of the person for the period, and
B is the amount that would be the net tax of the person for the period if the net tax were determined on the basis of the information provided in the return,

...

[15] It is clear from the wording of that provision that the penalty applies only in circumstances where a taxpayer has made some type of false statement in a return, application, form, certificate, statement, invoice or answer.

[16] A person who failed to report net tax by failing to file GST returns can be considered to have knowingly evaded tax but he cannot be considered to have made a false statement in a return (see *Lee v. The Queen*, 2010 TCC 400, 2010 G.S.T.C. 114 (TCC)) and *Calandra v. The Queen*, 2011 TCC 7, 2011 G.S.T.C. 3 (TCC). For this reason, the penalty under section 285 of the *ETA* shall be deleted from the reassessment.

[17] As a result of the above findings, the appeal is allowed and the reassessment is referred back to the Minister for reconsideration and reassessment on the basis that the appellant is entitled to additional input tax credits in the amount of \$14.18 for the 2002 taxation year and that the penalties under section 285 of the *ETA* shall be cancelled.

Signed at Ottawa, Canada, this 26th day of October 2011.

"Réal Favreau"

Favreau J.

CITATION: 2011 TCC 481
COURT FILE NO.: 2010-598(GST)I
STYLE OF CAUSE: Ahmad Khan v. Her Majesty the Queen
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: November 1st, 2010
REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau
DATE OF JUDGMENT: October 26, 2011
APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Samantha Hurst

COUNSEL OF RECORD:

For the Appellant:

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