Docket: 2013-3119(GST)I

BETWEEN:

ACADEMY OF APPLIED
PHARMACEUTICAL SCIENCES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 14, 2014, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant:	Laleh Bighash
Counsel for the Respondent:	Laurent Bartleman

JUDGMENT

The appeal from a Goods and Services Tax/Harmonized Sales Tax assessment dated January 15, 2013, under Part IX of the *Excise Tax Act* for the period July 1, 2010 to June 30, 2012, is dismissed.

Signed at Kingston, Ontario, this 5th day of June 2014.

"Rommel G. Masse"

Masse D.J.

Citation: 2014 TCC 171
Date: 20140605
Docket: 2013-3119(GST)I

BETWEEN:

ACADEMY OF APPLIED
PHARMACEUTICAL SCIENCES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Masse D.J.

[1] This is an appeal from a Goods and Services Tax/Harmonized Sales Tax ("GST/HST") assessment dated January 15, 2013, under Part IX of the *Excise Tax Act* (the "Act") for the period July 1, 2010 to June 30, 2012. By this assessment, the Canada Revenue Agency (the "CRA") disallowed the Appellant's claim for Input Tax Credits ("ITCs") in the approximate amount of $30,000.

[2] A Notice of Objection was filed on January 23, 2013. The Notice of Objection was disallowed and on July 19, 2013, the CRA confirmed the re-assessment. Hence the appeal to this Court.

Factual Context

[3] The Appellant, the Academy of Applied Pharmaceutical Sciences, was at all material times a GST/HST registrant. The Appellant is a post-graduate training college for persons who are seeking a career in pharmaceutics. The Appellant also provides continuing education programmes for the pharmaceutical industry.

[4] The Academy has two kinds of programmes:

1) The Diploma Programme on pharmaceutical science which is GST/HST exempt, and

2) The Workshop Programme which provides continuing education in the form of conferences on new trends in pharmaceutical sciences. The Workshop Programme is subject to GST/HST.

[5] Laleh Bighash is a founder and the director of the Academy of Pharmaceutical Sciences. She provided the background of this litigation.

[6] In June 2008, Ms. Sherrie Yu, an auditor with the CRA, conducted an audit of the Appellant's net tax liability for the GST (the precursor to the HST) for the period of January 1, 2007 to December 31, 2007. At the end of the audit, Ms. Yu was of the view that improvements to the record-keeping system of the Appellant were required in order to meet the requirements of the Act. It was determined that the Appellant did track income from the Diploma Programme (GST exempt) separately from income from the Workshop Programme (taxable) as it should. However, the Appellant did not track related expenses separately. According to the audit, the Appellant claimed ITCs on all expenses incurred regardless of whether the expenses were claimed in order to earn exempt or taxable income. In order to correct this situation, it was necessary to identify which expenses related to earning which type of income; taxable or exempt. Some of the expenses were incurred to earn mixed income (eg. shared expenses such as for office lease costs, marketing, utilities and administration, and classroom costs used for both the Certificate Programme and the Workshop Programmes, etc.). Ms. Yu discussed with Ms. Bighash and her bookkeeper what would be a reasonable percentage basis to apportion mixed expenses as between taxable and exempt earnings in order to calculate allowable ITCs. It was determined that a reasonable percentage for the period under review, given the state of the Appellant's books, would be 50% of mixed expenses, or business inputs, to be allocated to commercial activity. It is the position of Ms. Bighash that it was Ms. Yu who had suggested the allocation of 50% of mixed expenses to commercial activity. Ms. Yu prepared an audit report together with a Statement of Audit Adjustment dated June 27, 2008 (Exhibit A-1). This was addressed to the Appellant to the attention of Ms. Bighash. In this report, Ms. Yu made the following recommendations to improve record-keeping:

a) Segregate taxable income from exempt income;

b) Segregate expenses related to earning taxable income, expenses related to earning exempt income, and expenses related to earning mixed taxable and exempt income;

c) ITCs may be claimed to the extent that purchases and expenses are for consumption, use or supply in providing taxable goods and services.

[7] At the conclusion of this audit, Ms. Yu applied an allocation of 50% of mixed expenses to be attributed to the provision of taxable commercial activity for the period of January 1, 2007 to December 31, 2007. Ms. Bighash testified that Ms. Yu advised the Appellant that on a go-forward basis, the Appellant could use this same allocation of 50% of mixed expenses as being related to taxable commercial activity for the purposes of claiming ITCs. The Appellant looked upon Ms. Yu as a person in a position of authority with the CRA who could provide authoritative direction and guidance. The Appellant therefore applied an allocation of 50% on a go-forward basis to the mixed expenses for the years following this audit including the years here under review. Ms. Bighash takes the position that Ms. Yu never mentioned in any of her discussions that the Appellant had to revisit the percentage apportionment on a yearly basis. Ms. Bighash explains that the operations of the Appellant did not fundamentally change since 2007 and so she felt that the 50% allocation would be acceptable just as it was for the 2007 period.

[8] In November 2012, another audit was conducted by Mr. Dunstan Egbert of the CRA dealing with the period of January 1, 2008, to June 30, 2012. After having completed the audit, Mr. Egbert advised that a 50% allocation was simply not reasonable in the circumstances for the period under review. Mr. Egbert determined that no more than 11% should have been allocated to mixed expenses for the period of January 1, 2010 to December 31, 2010. He also determined that no more than 14% of the mixed expenses incurred by the Appellant in the period from January 1, 2011 to June 30, 2012, related to the provision of taxable supplies. Mr. Egbert recommended that the Appellant re-examine and re-evaluate the apportionment every year.

[9] The Appellant has no issue with the reasonableness of the 14% apportionment to mixed expenses for the period July 1, 2010 to June 30, 2012. However, the Appellant feels that it is terribly unfair that an official from the CRA told them that 50% was acceptable only to have this allocation changed after a second audit. The Appellant feels that it is being penalized for relying on the expertise of an auditor from the CRA.

[10] In cross-examination, Ms. Bighash agrees that the Appellant mechanically applied an allocation of 50% for the period under review. The Appellant never did consider whether or not that percentage actually reflected the reality of the Appellant's business operations.

Theory of the Appellant

[11] Essentially, the Appellant is invoking the doctrines of estoppel and officially induced error. The Appellant takes the position that Ms. Yu, an official of the CRA, had suggested that moving forward the Academy could use an apportionment of 50% of mixed expenses. At no point did Ms. Yu suggest that they should re-examine the apportionment on a yearly basis. The Academy viewed Ms. Yu as being an expert in the field and relied on her expertise and her suggestions. It would be unfair and inequitable to allow the Minister of National Revenue (the "Minister") to now change her/his mind and renege on the position taken by one of its auditors.

[12] The Appellant submits that the appeal should therefore be allowed.

Theory of the Respondent

[13] The CRA takes the position that there was no evidence that the Appellant was instructed or authorized by a CRA official to use an allocation factor of 50% on a go-forward basis. The Appellant was obliged by law to establish a percentage allocation that was fair and reasonable. The allocation of 14% of mixed expenses was reasonable in all the circumstances and any representation made by Ms. Yu, if indeed any was in fact made, are not binding on the Minister. The doctrines of estoppel and officially induced error are simply not available to the Appellant.

[14] The Respondent therefore submits that the appeal should be dismissed.

Legislative Provisions

[15] The relevant provisions of the *Excise Tax Act*, R.S.C., 1985, c E-15 are as follows:

> **S. 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 in the course of commercial activities of the person.

S. **141.01 (5)** Subject to section 141.02, the methods used by a person in a fiscal year to determine

(*a*) the extent to which properties or services are acquired, imported or brought into a participating province by the person for the purpose of making taxable supplies for consideration or for other purposes, and

(*b*) the extent to which the consumption or use of properties or services is for the purpose of making taxable supplies for consideration or for other purposes,

shall be fair and reasonable and shall be used consistently by the person throughout the year.

Analysis

[16] Section 169(1) of the Act sets out the general rule for determining a registrant's eligibility to claim ITCs. Where property or a service is acquired or imported for consumption, use or supply by a registrant, the registrant is entitled to claim an ITC equal to the fraction of the tax paid or payable on the acquisition or

importation that represents the extent to which the property of service is for consumption, use or supply in a commercial activity of the registrant.

[17] Section 141.01 of the Act requires the registrant to apportion the use of inputs based on the extent to which the inputs are consumed or used, or acquired, imported or brought into a particular province for consumption or use, for the purpose of making taxable supplies for consideration or for other purposes. This apportionment is relevant to the determination of ITCs. Subsection 141.01(5) of the Act provides that the method used by a person to apportion inputs must be fair and reasonable and used consistently throughout the year.

[18] A reading of the letter of Ms. Yu dated June 27, 2008 and the documents appended thereto (Exhibit A-1) does indicate that, for the period then under review, the auditor accepted that 50% of the ITCs claimed on mixed expenses were related to commercial activity or taxable supplies. Ms. Yu's letter clearly indicates that expenses related to earning taxable income should be segregated from expenses related to earning tax exempt income and that ITCs could only be claimed to the extent that the expenses were incurred for consumption, use or supply in providing taxable goods and services. Although a 50% allocation was used for purposes of that initial audit, the letter makes no mention that the Appellant was instructed or authorized to use an allocation factor of 50% on a go-forward basis.

[19] The Appellant argues that it relied to its detriment on the representation made by Ms. Yu that a 50% allocation of mixed expenses could be used on a go-forward basis. Ms. Yu did not come to court to testify that she in fact made this representation. However, for purposes of my decision, I will assume that such a representation has been made. The law is clear that any such representation made by a CRA official is not binding on the Minister. In fact the Minister her/himself is not even bound by a position which s/he has taken in the past.

[20] In *Wenger's Ltd. v. M.N.R.,* [1992] 2 C.T.C. 2479, one of the issues was whether the Minister was bound by an earlier decision to vacate an appeal based on the same issue back in 1974. Justice Rip, now Chief Justice of this Court, observed at paragraph 93 of his reasons for decision:

> 93 By consenting to judgment in 1974 the Minister did not make any undertaking to Wenger's as to any procedure it would follow in the future. Indeed, the Minister's act of assessing tax is not a procedural matter; it is the very essence of the Act. Any agreement by the Minister not to tax what the Act requires to be taxed would be a dereliction of his duty to enforce the Act. If, in

prior years, he held a different view of the facts, he is entitled to change his mind. As Cattanach, J. stated in *Admiral Investments Ltd. v. Minister of National Revenue*, [1967] 2 *Ex*. C. R. 308, [1967] C.T.C. 165, 67 D.T.C. 5114, at page 174 (D.T.C. 5120):

> . . . the fact that a concession may have been made to a taxpayer in one year, does not, in the absence of any statutory provisions to the contrary, preclude the Minister from taking a different view of the facts in a later year when he has more complete data on the subject matter. … An assessment is conclusive as between the parties only in relation to the assessment for the year in which it was made.

[My emphasis.]

[21] In *Panar v. R.*, 2001 G.T.C. 400 (TCC), Justice Sarchuk had the following to say about the doctrine of estoppel as it applies to tax law:

> 17 Although it is clear that the Appellant acted to her detriment as a result of the representations made by Revenue Canada employees as to the relevant provisions of the Act, she cannot succeed. Issue estoppel has been considered in a number of cases and the principle which can be taken therefrom is that no representation involving an interpretation of law by a servant or officer of the Crown can bind it. In *Minister of National Revenue v. Inland Industries Ltd.*, [(1971), 72 D.T.C. 6013 (S.C.C.), at 6017] the Supreme Court of Canada considered certain sections of the Income Tax Act respecting the deductibility of past service contributions to a pension plan initially accepted by the Department of National Revenue for registration but with respect of which deductions were later refused. Pigeon J. speaking for the Court effectively disposed of any question of an estoppel by stating:
>
> > . . . However, it seems clear to me that the Minister cannot be bound by an approval given when the conditions prescribed by law were not met.
>
> This principle was applied in *Minister of National Revenue v. Stickel* [(1972), 72 D.T.C. 6178 (Fed. T.D.), at 6185] by Cattanach J. who stated:
>
> > In short, estoppel is subject to the one general rule that it cannot override the law of the land.
>
> 18 The rationale for the principle expressed in these cases was succinctly summarized by Bowman J. in *Goldstein v. R.* [(1995), 96 D.T.C. 1029 (T.C.C.), at 1034]:
>
> > It is sometimes said that estoppel does not lie against the Crown. The statement is not accurate and seems to stem from a misapplication of the term estoppel. The principle of estoppel binds the Crown, as do other principles of law. Estoppel in pais, as it applies to the Crown, involves representations of fact made by

> officials of the Crown and relied 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.
>
> [My emphasis.]

[22] In *Denhaan v. R.*, 2008 TCC 126, a husband and wife operated a business that was a GST registrant under the Act. The Minister assessed the husband's income for 1997 and 1998 on the basis that he was operating a sole proprietorship. The husband appealed but then abandoned the appeal. The Minister later assessed the wife for GST liability of the business in 2002 and 2003 on the basis that she was a partner in the business. The wife appealed arguing that the Minister was estopped by principles of equity from taking a position with respect to the wife that was at variance with the position that the Minister took with respect to the husband. Justice Bowie of this Court, in dismissing the appeal, stated as follows:

> 12 The appellant's argument really comes down to this; the Minister, having assessed Mr. Denhaan for income tax on the basis that he was not in partnership with the appellant in 1997 and 1998, is barred by equity from assessing the appellant on an inconsistent basis under the ETA for 2002 and 2003. There are several reasons why that argument cannot prevail. First, even if it were established that there was no partnership in 1997 and 1998, that is not inconsistent with the position that there was a partnership in the later years. The appellant gave evidence to the effect that the manner in which the business of HTC was conducted did not change between those two time periods. If that evidence is accepted, and there is no reason not to accept it, it simply means that one assessment or the other was wrong. It is trite that the Minister, if he makes a mistake in assessing, is not bound to perpetuate the error in the future [citations omitted].
>
> . . .
>
> 14 My jurisdiction is limited to considering the correctness of the assessment appealed from on the basis of the facts established by the evidence before me and the provisions of the ETA. I have no jurisdiction to grant a remedy based upon the

> position that the Minister may have taken in another case in the past. That principle has been stated and restated repeatedly by this Court, and by the Federal Court of Appeal . . . .

[23] Thus we see that the doctrine of estoppel is very limited in its application to tax law.

[24] I also must consider a doctrine that is very much related to the principle of estoppel, that of officially induced error. This principle ties in with the argument that the Appellant was induced into a course of conduct that was to its detriment as a result of erroneous advice given by Ms. Yu, an official with the CRA. I am of the view that the doctrine of officially induced error is simply not applicable to cases of appeals of tax assessments. In the case of *Brenda G. Klassen v. The Queen*, 2007 FCA 339, Justice Noël of the Federal Court of Appeal definitively stated that such is in fact the case. Justice Noël stated at paragraph 27:

> [27] Finally, I see no basis in the appellant's contention that the assessment should be varied based on an officially induced error. It is trite law that the relief granted by the courts in an appeal against a reassessment under ITA must be based on the law. If in fact the appellant was misled through negligence, some other remedy may be available. However, no relief can be granted on this basis in the context of a tax appeal.

[25] In addition, the learned author David Sherman in his work *Canada GST Service – Sherman, Carswell, Toronto,* arrives at the same conclusion. The author states:

> In a criminal law context (such as a trial on charges for evasion of GST), one could likely rely on "officially induced error of law" as a defence. See *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (S.C.C.). This does not apply to appeals of tax assessments, however.

[26] Therefore, just like the equitable doctrine of estoppel, the doctrine of officially induced error also is not available as a remedy in tax appeals.

[27] The Appellant has not demonstrated a rational basis for using a 50% allocation factor to claim ITCs for the period here under review other than by saying that the CRA accepted it in the past. There is no rational basis for using an allocation rate related to a prior period. The ratio of tax exempt earnings to taxable earnings is susceptible of easy determination so long as proper bookkeeping procedures are in place. The ratio can vary greatly from one period to another and so the need for re-evaluation of this ratio is self-evident.

[28] It is clear that the Appellant provided both exempt and taxable services and supplies in the course of its business. It is also abundantly clear that the Appellant is not entitled to claim any ITC pursuant to section 169(1) of the Act, for HST that became payable or paid on services and property used to make exempt supplies as the appellant did not acquire those supplies in the course of a commercial activity. Pursuant to section 141.01(5) of the Act, the method used by a registrant during a fiscal year to determine the extent to which the property and services it acquired are for the purpose of making taxable supplies must be fair and reasonable. It was not fair and reasonable for the Appellant to use a number that a representative of CRA used in a past audit and then apply it arbitrarily to future years without determining if it bore any relationship to the business reality of the registrant. An Appellant can't just pick a number out of the air, it has to be based on some semblance of reality based not on what they may have been told by an official of the CRA but rather on the basis of their operations, such as for example, revenue data related to exempt and taxable incomes.

[29] Whatever representations may have been made by Ms. Yu, these were representations concerning the operation of the law and not representations of fact. Any representations purportedly made by Ms. Yu are not binding on the Minister and the Minister can re-assess the Appellant subject to any limitation period. This does not relieve the Appellant of its obligation to accurately report liabilities pursuant to the Act. It does not relieve the Appellant of its obligation to allocate mixed expenses as between exempt and taxable supplies or commercial activities in a fair and reasonable way that has some basis in the Appellant's business operations.

Conclusion

[30] In conclusion, I find that:

a) Neither the equitable doctrines of estopped or officially induced error are available to the Appellant in the circumstances of this case on the basis that Ms. Yu may have suggested that an allocation ratio for mixed expenses of 50% could be used on a go-forward basis. There is nothing in law to prevent the Minister from re-assessing the GST/HST liability of the Appellant for the period here under review.

b) The Appellant has not demonstrated on a balance of probabilities that the percentage of expenses incurred by the Appellant attributable to taxable supplies and commercial activity of the Appellant of 11% and

> 14% for the period January 1, 2010 to December 31, 2010, and the period January 1 2011 to June 30, 2012, respectively was not fair or reasonable and not reflective of the Appellant's business activity.

[31] The Appellant also argues that the CRA acted in a very heavy handed manner in that collection proceedings were begun even before the Appellant received a Notice of Confirmation that the Appellant's Objection would be disallowed. If that is true, then I agree that that is unfair. However, that is not something that I have the jurisdiction to deal with on this appeal.

[32] For all of the foregoing reasons, this appeal is dismissed.

Signed at Kingston, Ontario, this 5th day of June 2014.

"Rommel G. Masse"

Masse D.J.

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