Docket: 2008-2819(GST)I

BETWEEN:

FORESTECH INDUSTRIES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 3, 2009, at Vancouver, British Columbia

Before: The Honourable Justice Wyman Webb

Appearances:

Agent for the Appellant: David Bennington
Counsel for the Respondent: Holly Popenia

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act* with respect to the period from February 1, 1996 to April 30, 2003 (the "Period") is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to the input tax credits as claimed by the Appellant in its GST returns filed for the reporting periods of the Appellant that ended during the Period.

Signed at Winnipeg, Manitoba, this 18th day of November 2009.

"Wyman W. Webb"

Webb, J.

Citation: 2009TCC591
Date: 20091118
Docket: 2008-2819(GST)I

BETWEEN:

FORESTECH INDUSTRIES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The issue in this appeal is whether the Appellant has satisfied the documentation requirements of subsection 169(4) of the *Excise Tax Act* (the "*ETA*") in relation to the various input tax credits ("ITCs") that the Appellant claimed in filing its GST returns for the 29 reporting periods of the Appellant that ended during the period from February 1, 1996 to April 30, 2003 (the "Period"). All of the GST returns for these reporting periods were filed on August 18, 2005.

[2] The Appellant was in the business of logging and building logging roads in or around the sunshine coast of British Columbia. The Appellant had four or five rock trucks from 1996 to 2000 or 2001. The Appellant also had two or three excavators. The business of the Appellant included trucking until 2000 or 2001 when the trucks were sold.

[3] The Appellant did not file either its income tax returns or its GST returns on a timely basis. The accountant for the Appellant prepared the Appellant's income tax returns for its 1996 to 2003 taxation years in 2005 and all of these were filed in 2005, before the GST returns for the reporting periods of the Appellant that ended during the Period were prepared.

[4] The financial statements for the Appellant for its taxations years ending April 30, 1996 to and including April 30, 2003 indicated the following amounts as its profit (or loss) for each of these years:

Taxation Year	**Revenue**	**Expenses**	**Profit (Loss)**
1996	$31,696	$35,406	($3,710)
1997	$348,476	$348,476	0
1998	$361,487	$361,026	$461
1999	$445,541	$445,541	0
2000	$444,157	$444,157	0
2001	$329,261	$329,261	0
2002	$86,852	$86,852	0
2003	$484,252	$484,252	0

[5] The accountant for the Appellant stated that the reason why the expenses were exactly equal to the revenue for several years was that he only claimed depreciation in an amount equal to the amount of the profit that would have been realized if no depreciation would have been claimed. Therefore only a portion of the depreciation that otherwise could have been claimed was actually claimed to reduce the profit to nil. Since capital cost allowance ("CCA") is a discretionary deduction and a taxpayer is entitled to claim an amount not exceeding the applicable percentage of the unappreciated capital cost of the assets of the appropriate class[1], a taxpayer has the right to claim only a portion (or none) of the CCA that the taxpayer would otherwise be entitled to claim.

[6] In preparing the income tax returns for the taxation years from 1996 to 2003 the accountant determined the expenses that had been incurred by reviewing the bank statements and canceled cheques. The accountant indicated that he had received various documents from the Appellant prior to preparing the income tax returns which would have included various invoices and other documents. These documents were returned to Wendy Smith (one of the two shareholders of the Appellant) following the completion of the income tax returns.

[7] After the income tax returns for these taxation years were filed the accountant then prepared the GST returns for the reporting periods of the Appellant that ended during the Period based on the expenses as reported in the financial statements and the capital outlays of the Appellant. The accountant stated that in calculating the

[1] Subsection 1100(1) of the *Income Tax Regulations* and paragraph 20(1)(*a*) of the *Income Tax Act*.

amount of GST that was payable by the Appellant he did not include any amount for expenses in relation to which no GST would be payable (for example insurance premiums, salaries or wages). No GST was included in relation to depreciation since the GST payable in relation to the capital assets would have been included when the GST was payable in relation to the acquisition of the capital assets, not when depreciation was claimed. He also calculated the GST based on the cost excluding provincial sales tax on those expenditures in relation to which provincial sales tax was also applicable. The accountant also did not include GST in relation to amounts payable to vendors whom the accountant knew were not registered for GST purposes. Since the accountant practiced in the area he was not only familiar with the various persons who were providing goods and services to the Appellant but he was also the accountant for some of the major suppliers of goods and services to the Appellant.

[8] The total amount claimed as ITCs for all of the reporting periods under appeal was $152,534.15. The Appellant, based on the GST returns that were filed, was claiming a refund for each reporting period except the last reporting period. The Appellant's customers included the Province of British Columbia and native bands who did not pay GST in relation to the services provided to them. The total net refund as claimed for all 29 reporting periods was $7,001.07. When the GST returns were initially assessed on July 14, 2006, input tax credits in the aggregate amount of $139,491.46 were disallowed and therefore instead of receiving a refund of $7,001.07 for the entire Period, the Appellant received a bill for $132,490.39 plus penalties and interest. The initial assessment denied over 91% of the input tax credits that had been claimed.

[9] By notice of reassessment dated June 2, 2008, additional ITCs of $9,790.04 were allowed and during the course of the hearing the Respondent acknowledged that additional ITCs of $6,513.65 would be allowed. The revised amount of ITCs that have been denied is $123,187.77, which is approximately 81% of the ITCs claimed by the Appellant.

[10] A registrant is entitled to claim input tax credits as provided in section 169 of the *ETA*. Subsection 169(1) of the *ETA* provides, in general, that a registrant is entitled to an ITC based on the tax that is payable under the *ETA* in relation to goods and services acquired by the registrant for consumption, use or supply in commercial activities of the registrant and the extent to which such goods or services were acquired for consumption, use or supply in the course of commercial activities of the registrant. Subsection 169(4) of the *ETA* imposes an additional documentation requirement that must be met in order to claim an ITC.

[11] In this case counsel for the Respondent suggested during closing argument that the Respondent was not accepting that the Appellant had incurred the expenses as claimed in its income tax returns and hence was not accepting that these expenses had been incurred for the purposes of the *ETA*. However, the Reply provides in part as follows:

> **A. STATEMENT OF FACTS**
>
> …
>
> 2. With respect to the facts alleged in the second unnumbered paragraph of the Notice of Appeal:
>
> a) he states that the Minister of National Revenue (the "Minister") disallowed Input Tax Credits ("ITCs") based on insufficient documentation to support the Appellant's claim with respect to the Period;
>
> …
>
> 7. In determining the Appellant's liability for GST for the Period, the Minister made the following assumptions of fact:
>
> f) at all material times, the Appellant provided supplies that were taxable at the standard rate of 7% during the Period;
>
> …
>
> h) the Appellant arbitrarily claimed ITCs for the Period based on its bank statements;
>
> …
>
> j) the Appellant did not substantiate ITCs claimed of $129,701.42 with respect to its commercial activities for the Period.
>
> **B. ISSUES TO BE DECIDED**
>
> 8. The issue is whether the Appellant was correctly denied ITCs claimed of $129,701.42 for the Period.
>
> **D. GROUNDS RELIED ON AND RELIEF SOUGHT**
>
> 10. He respectfully submits that the Minister properly assessed the Appellant for net GST, interest and penalties under sections 280, 296, and 298 of the *Act* as the Appellant understated net tax by $129,701.42 respecting the Period.

11. He further submits that the Minister correctly disallowed ITCs claimed of $129,701.42 on the basis that the amounts claimed were not substantiated by supporting documentation, as required by subsection 169(4) of the *Act* and the *Input Tax Credit Information Regulations.*

[12] It seems to me that the only basis for the denial of the ITCs was that the Respondent is alleging that the Appellant did not comply with the documentation requirements of subsection 169(4) of the *ETA*. No assumptions were made that the Appellant did not acquire the goods and services, in relation to which GST of $129,701.42 was payable, for consumption or use in commercial activities of the Appellant or that the amount of GST payable in relation to these goods and services was less than $129,701.42.

[13] Justice Rothstein, when he was a Justice of the Federal Court of Appeal, in *The Queen* v. *Anchor Pointe Energy Ltd.* 2003 DTC 5512 stated that:

> [23] The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.

[14] If the Minister had assessed (or reassessed) on the basis that the Appellant did not acquire the goods and services in relation to which the Appellant claimed the ITCs, then the Minister should have clearly stated this in the Reply. As well, since the auditor had reviewed the financial statements of the Appellant, it would seem logical that if the Minister would have had any concerns that the expenses as claimed had not been incurred, then the Minister would have reassessed the Appellant under the *Income Tax Act* to deny such expenses. Failing to do so, seems to me, to suggest that the Minister has accepted that the expenses as claimed by the Appellant were incurred by the Appellant.

[15] Therefore, in my opinion, the Respondent cannot, in closing arguments, raise the issue of whether the expenses had been incurred by the Appellant for its taxation years from 1996 to 2003 and whether the Appellant had acquired the goods and services related to these expenses for consumption or use in its commercial activities. In any event, I am satisfied, based on the testimony of James Smith (the other shareholder of the Appellant) and the accountant that, on a balance of probabilities, the Appellant incurred the expenses as claimed for its taxation years from 1996 to 2003 and that the Appellant had acquired the goods and services related to these expenses for consumption or use in its commercial activities. I am also satisfied that

the Appellant acquired the capital assets, in relation to which GST was payable and claimed as an ITC, for use in its commercial activities.

[16] The only issue in this appeal is whether the Appellant has satisfied the documentation requirements of subsection 169(4) of the *ETA* and the related regulations. Subsection 169(4) of the *ETA* provides, in part, as follows:

> (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

[17] The documentation requirements of subsection 169(4) of the *ETA* and the *Input Tax Credit Information Regulations* are mandatory (*Systematix Technology Consultants Inc.* v. *The Queen* 2007 FCA 226, [2007] GSTC 74).

[18] However, it seems to me that it is important to examine what this subsection actually requires. In particular, the subsection requires that the required documents must be obtained "before filing the return in which the credit is claimed".

[19] In *Sikora* v. *The Queen* 2005 TCC 261, [2005] G.S.T.C. 90, Justice McArthur made the following comments:

> 11 To offset the rigid enforcement of obtaining the "prescribed information", there is an argument to be made that the phrase in subsection 169(4) "the registrant has obtained sufficient evidence" could be interpreted as follows: as long as the taxpayer has the information at the time the return is filed then that is sufficient without the necessity of presenting "any such information as may be prescribed".
>
> 12 The respected GST author David Sherman supports this approach, stating the following in an editorial comment after the decision in *Owraki* v. *The Queen*, [1 [2004] G.S.T.C. 1, at pages 1-5 and 1-6.]
>
>> ... Subsection 169(4) is often thought to require the registrant to produce the document on audit or at the Tax Court hearing. However, as I have noted in previous editorial comments, this is not technically what it requires. It requires only that the registrant have the documentary evidence *at the time of filing the GST return*. If a witness is credible, the Court can conclude that the registrant had the documents at some point before filing the return, even if they are no longer available. This position was accepted by the CCRA in a Consent Judgment before the Tax Court when I presented this point to the Department

> of Justice: see David Sherman, "Input Tax Credits Without Documentation -- Sometimes the Impossible is Possible". *GST & Commodity Tax* (Carswell), Vol. XIII, No. 9 (November 1999) pp. 65-67.
>
> *Owraki* was precisely such a case. The Appellants had a believable tale of having left a briefcase, with all their financial records and supporting documents, in a taxi in Iran. The Court accepted this evidence and concluded that the required documentation for subsection 169(4) had been available at the time.
>
> See also *Dosanjh*, [2004] G.S.T.C. 47, where Justice Miller applied the same approach. It is refreshing to see the Court taking this direction.

> 13 I do not disagree with this approach, but the Appellant has not established that he had the documentary evidence at the time of filing the return. He did not accept the suggestion that it would be in his best interest to adjourn the hearing to present his documentation.

[20] In a subsequent commentary, David Sherman corrected his comment that the person must have the required documentation at the time of filing the GST return. He noted that the subsection only requires that the necessary documentation must have been obtained prior to filing the GST return.

[21] In *Dosanjh* v. *The Queen* 2004 TCC 285, [2004] G.S.T.C. 47, Justice C. Miller stated that:

> 1. …. Apart from 2001, the Minister did not allow Mr. Dosanjh any ITCs, reasoning that Mr. Dosanjh had not sought any, and that he had not provided appropriate documents in prescribed form to be entitled to claim any ITCs. At the outset, I wish to indicate my concern with an approach that would rely on a taxpayer's reported income to assess GST, yet completely ignore the taxpayer's reported expenses for purposes of determining reasonable ITCs. The result is harsh. I do not suggest taxpayers can blatantly ignore the rules -- obviously not. I do suggest however that taxpayers might expect an element of reasonableness in the manner in which their objections are handled, especially given "reasonableness" is a concept sprinkled liberally throughout our tax legislation.
>
> …
>
> 12 I do not construe subsection 169(4) as a requirement for a taxpayer to have to produce prescribed information to CCRA. It only requires that the "the registrant has obtained *[sic]* sufficent evidence ...". The requirement is for Mr. Dosanjh to have, at some point prior to claiming ITCs, the necessary evidence. CCRA did not find fault with the expenses for income tax purposes, and I accept Mr. Dosanjh's evidence that

> he incurred those expenses. We are not talking about quantum -- we are only talking about whether Mr. Dosanjh has satisfied the obligation to have obtained the necessary prescribed information.

[22] It is therefore necessary that the Appellant must have obtained the required documentation at some time prior to filing its GST returns in 2005. The documentation was not available at the time of the audit and it appears that it was not available when the GST returns were prepared and filed. The ITCs were calculated based on the expenses claimed and the capital assets acquired, taking into account only the expenses on which GST would be payable, the provincial sales tax that would be payable in relation to certain expenditures and the vendors that were not registered for the purposes of the *ETA*.

[23] James Smith and the accountant for the Appellant testified during the hearing. The shareholders of the Appellant were married to each other but Wendy Smith left James Smith in May 2005. The breakdown of the marriage was acrimonious. It appears that both individuals moved out of the premises in which they were living in 2005. As well, in 2005, his son died. Amidst this upheaval in their personal lives, it appears that the various invoices and other documentation that they had in relation to the GST payable for goods and services that were acquired by the Appellant during the Period, were misplaced.

[24] Wendy Smith did not testify at the hearing. With the consent of the Respondent, her affidavit was filed. In this affidavit Wendy Smith stated in part as follows:

> 7. Due to my association in this matter, I can verify that during the period from 1996 to 2003, the company (*[sic]* Foretech Industries Ltd.) received purchase invoices with GST charged and paid those invoices, and those invoices and other records were given to David Bennington in order to prepare financial statements and T2 tax returns. I can therefore verify those invoices were in existence as of June of 2005.

[25] In addition to the affidavit of Wendy Smith the Appellant also filed copies of various cheques that were written in 2000, 2001 and 2002. Several of these cheques referred to either invoice numbers or account numbers on the front of the cheques. The cheques were payable to various suppliers of goods and services to the Appellant. There is no indication in this case that any suppliers were paid in cash. It appears that all payments were made by cheque.

[26] In *Lesnick* v. *The Queen* 2008TCC522, I reviewed the decisions of the Supreme Court of Canada in *The Continental Insurance Company v. Dalton Cartage Company Limited*, [1982] 1 S.C.R. 164, and *Hickman Motors Limited v. The Queen*, [1997] 2 S.C.R. 336, and of the House of Lords in the cases of *In re Doherty*, [2008] UKHL 33, and *In re B (Children)*, [2008] UKHL 35. The conclusion that I reached based on these decisions was that:

> 16. It seems to me that these cases are consistent and the issue in a civil case (which will include the current appeal) will be whether the evidence as presented is sufficient to satisfy the trier of fact, on a balance of probabilities, that the person who has the burden of proof has established what is required of him or her. In analyzing the proof or evidence that has been presented, the probability or improbability of the event that is in issue is a factor that can be taken into account in this analysis. The more improbable the event the stronger the evidence that would be required. Conversely it would also seem to me that a person may be able to establish, on a balance of probabilities, that a highly probable event occurred based on weaker evidence than would be required to establish that an improbable event had occurred.

[27] The *Input Tax Credit Information (GST/HST) Regulations* provide, in general, that an invoice issued by a supplier in respect of a taxable supply of goods or services will satisfy the documentation requirements if it contains the following information:

(a) For supplies of less than $30:

(i) the name of the supplier;

(ii) the date of the invoice;

(iii) the total amount payable;

(b) For supplies of $30 or more and less than $150:

(i) the name and registration number of the supplier;

(ii) the information referred to in (a)(ii) and (iii) above;

(iii) the amount payable under the *ETA* shown separately (with provincial sales tax, if applicable, also being shown separately); and

(c) For supplies of $150 or more:

(i) the information referred to above;

(ii) the recipient's name;

(iii) the terms of payment; and

(iv) a description of the supply sufficient to identify it.

[28] It seems to me that the information described above is information that one would typically expect to find in an invoice issued by a supplier. It also seems to me that it is a highly probable event that suppliers, who were to be paid by cheque, would have issued invoices that contained the information described above, before being paid. Therefore I find that it was more likely than not that the Appellant would have received an invoice from its suppliers prior to paying such suppliers and that such invoice would have contained the required information as set out above.

[29] Counsel for the Respondent argued that even if the Appellant had the required documentation prior to filing its GST returns the Appellant should still not be entitled to its ITCs because it did not prepare its GST returns using the required documentation. The method by which the GST payable was determined was based on the financial statements that had been prepared. However it seems to me that it should not matter how the amount of ITCs are determined provided that the amount is correct. It seems to me that in order for a registrant to claim an ITC:

1. The amount of tax payable under the *ETA* by the registrant for goods or services acquired by the registrant for consumption, use or supply in commercial activities of the registrant has to be determined; and

2. The registrant must have obtained the required documentation prior to filing his, hers, or its return under the *ETA* in which the ITC is claimed.

[30] The fact that the registrant may determine its ITCs based on documentation other than the required documentation should not result in the registrant losing its ITCs if the registrant can establish that the amount determined is correct and that the registrant had the required documentation (even though the registrant did not use such documentation in preparing its returns). Based on the position of counsel for the Respondent, if a registrant were to receive invoices from a supplier that complied with the documentation requirements and also monthly, quarterly or annual

summaries that did not satisfy the documentation requirements and the registrant were to prepare its GST returns based on the monthly, quarterly or annual summaries, counsel for the Respondent would presumably take the position that such registrant would not be entitled to any ITCs if the invoices were lost because the ITCs were determined by using the monthly, quarterly or annual summaries that would not satisfy the documentation requirements. It does not seem to me that this should be the correct result. If the registrant can establish that the ITCs as claimed were correct in the amount as claimed then it should not matter how that amount was determined so long as the registrant had obtained the required documentation at some point prior to filing the GST returns.

[31] The Appellant, in this case, has satisfied the onus on it to establish that it did have the required documentation at some point prior to filing its GST returns. As a result the appeal is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to the ITCs as claimed by the Appellant in its GST returns that it filed for the reporting periods ending during the Period from February 1, 1996 to April 30, 2003.

Signed at Winnipeg, Manitoba, this 18th day of November 2009.

"Wyman W. Webb"

Webb, J.

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COURT FILE NO.:	2008-2819(GST)I
STYLE OF CAUSE:	FORESTECH INDUSTRIES LTD. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 3, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
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APPEARANCES:

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