Docket: 2010-611(GST)G

BETWEEN:

SYDNEY MINES FIREMEN'S CLUB,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 20, 2011, at Sydney, Nova Scotia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	William P. Burchell
Counsel for the Respondent:	Jill L. Chisholm

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* with respect to the Notice of Assessment, bearing number 08323002616123401l2 and dated December 8, 2009, for the period October 1, 2008 to October 31, 2008, is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Summerside, Prince Edward Island, this 26th day of August 2011.

"Diane Campbell"

Campbell J.

Citation: 2011 TCC 403
Date: August 26, 2011
Docket: 2010-611(GST)G

BETWEEN:

SYDNEY MINES FIREMEN'S CLUB,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant is seeking an Input Tax Credit ("ITC") in the amount of $15,759.90 in relation to the purchase of a Rosborough Rough Water Boat (the "Boat") on September 30, 2008. The Respondent believes the Boat was purchased to make exempt supplies and has denied the claim.

[2] The Appellant is a non-profit society incorporated within the Province of Nova Scotia pursuant to the *Societies Act*, Chapter 435 RSNS 1989 amended 1993, c. 42. It is also a Goods and Services Tax ("GST") registrant.

[3] The Appellant is comprised of volunteer members who are either active or retired firefighters. The active firefighters are members of another related but separate and distinct entity known as The Sydney Mines Volunteer Fire Department (the "Fire Department"). Like the Appellant, it has always been a fully volunteer department of unpaid firefighters.

[4] The Fire Department holds a unique position among the fire departments within the Cape Breton Regional Municipality (the "Municipality") because its fire station and equipment are owned by the Appellant. The fire stations and equipment

used by all other fire departments within industrial Cape Breton are owned by the Municipality.

[5] A long-standing practice has existed between the Appellant and the Fire Department whereby the Appellant purchases and holds title to all equipment while making those items available for the Fire Department's use. The Fire Department provides firefighting, rescue and emergency services in the Sydney Mines community. The Appellant is able to retain control over those assets by retaining legal title. The Appellant itself provides no emergency services. To assist the Fire Department in this manner, the Appellant earns revenue primarily through its operation of a bar and community hall.

[6] When the Boat was purchased in 2008, the Appellant retained title. Since the Appellant does not provide rescue or emergency services, the Boat is made available to the Fire Department for rendering emergency services, including water search and rescue.

[7] In deciding whether the Appellant may claim the ITC of $15,759.90 in respect to the Boat purchase, the following two items must be addressed:

a) as a preliminary matter, what is the effect of new documentation and new information that the Appellant's witness, Wayne Young, introduced during the hearing without notice or prior disclosure to the Respondent; and

b) can the Appellant's activities and, in particular, the supply of the Boat, be considered commercial activities within the meaning of subsection 123(1) of the *Excise Tax Act* (the "*Act*").

[8] The Appellant agreed with all of the assumptions of fact relied upon by the Respondent in the Amended Reply to the Notice of Appeal except the following five assumptions:

9. e) the sole purpose of the Appellant's operations was to raise money to fund the Sydney Mines Volunteer Fire Department;

…

r) the boat was not used in the course of commercial activities or the business of the Appellant during the taxation year;

s) the boat was not purchased for the purpose of the Appellant's consumption, use or supply in the course of the commercial activities of raising funds;

…

u) the Appellant maintains title to the boat for the purpose of securing unilateral use of the boat by the Sydney Mines Volunteer Fire Department and to prevent the Cape Breton Regional Municipality from having care and control over the boat;

…

9A. b) at all material times, the Appellant provided the boat to the Sydney Mines Volunteer Fire Department for its use for no consideration.

[9] The Appellant submits that its relationship with the Fire Department is not simply to raise funds for the Fire Department but is "…tantamount to a managerial or directorship role" (Appellant's Submissions, paragraph 15). More specifically, at paragraph 19 of its submissions, the Appellant submits that the supply of the Boat was made in the course of its commercial activities because:

> …it provides, in addition to its other commercial activities, a service of acquiring and managing equipment for the benefit of the Department for consideration in the form of grants it receives from, in this case, the Province and Municipality.

The Appellant's other revenue-producing endeavours include catering, entertainment services and food and alcohol sales. In addition, the Appellant argued that the supply of the Boat was not an exempt supply because the Province of Nova Scotia, by providing some of the funding for the Boat purchase through the Emergency Service Provider Fund (the "EPF"), became the recipient of the supply instead of the Fire Department. The Appellant submits that the EPF funding should be viewed as the consideration for the supply of the Boat to the Fire Department.

[10] The Respondent relies on the initial evidence of Wayne Young given during the examinations for discovery. Mr. Young admitted to all of the facts in dispute in this appeal (Discovery Evidence of Wayne Young, pages 45 to 49), including his admission that the supply of the Boat was not made in the course of the Appellant's commercial activities and that the Appellant, being a public sector body, made the supply for no consideration. Consequently, the Respondent submits that the supply is an exempt supply.

[11] Subsection 169(1) of the *Act* permits registrants to claim an ITC for the GST paid on property and services that are used, consumed or supplied in the course of their commercial activities. The term "commercial activity" is defined in subsection 123(1) of the *Act* as follows:

> **"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.

[12] Before determining whether the supply of the Boat was made in the course of the Appellant's commercial activities, the preliminary issue of the introduction of new documentation and information during the hearing must be addressed. The new document consisted of one page of undated and unsigned handwritten notes authored by Robert Bonnar, a former member of the Appellant and former dive master with the Fire Department. This document was initially introduced through Mr. Young, but he was not the document's author and had no first-hand knowledge of it. However, I provided the Appellant an opportunity to locate and call Mr. Bonnar as a witness. This document lists the various sources of funding used in the Boat purchase, including the EPF and was attached to the Appellant's financial statement for the period January 1, 2008 to December 31, 2008.

[13] The second piece of new information consisted of the contradictory testimony of Mr. Young compared to the responses he gave during the examinations for discovery.

[14] The Respondent submitted that, since there was no notice of either the new document or the contradictory testimony until after the commencement of the hearing, no weight should be given to the document if the Court admitted it into

evidence. The Respondent also argued that Mr. Young's responses during his examination for discovery are more accurate and, therefore, preferable to his contradictory statements made at the hearing.

[15] Two rules of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") are applicable:

> *Use at Hearing*
> 89. (1) Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in evidence by a party unless
>
> (*a*) reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding,
>
> (*b*) it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or
>
> (*c*) it has been produced by a witness who is not, in the opinion of the Court, under the control of the party.
>
> …
>
> *Information Subsequently Obtained*
> 98. (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,
>
> (*a*) was incorrect or incomplete when made, or
>
> (*b*) is no longer correct and complete,
>
> the party shall forthwith provide the information in writing to every other party.
>
> …
>
> (3) Where a party has failed to comply with subsection (1) or a requirement under paragraph (2)(*a)*, and the information subsequently discovered is,
>
> (*a*) favourable to that party's case, the party may not introduce the information at the hearing, except with leave of the judge, or
>
> (*b*) not favourable to that party's case, the Court may give such direction as is just.

[16] Although there was no prior notice of the introduction of the new document and examinations were completed months prior to the hearing, I permitted the document into evidence, subject to the appropriate weight to be eventually assigned to it. Appellant's counsel advised the Court that this document had come to his and his client's knowledge only days before the hearing. In addition, Mr. Bonnar, the author of the document, was able to appear and identify the document, which was

only a short one-page document that had been prepared sometime in 2008 when the Boat was purchased.

[17] The relevant rules provide the Court with a discretionary power to permit such new information into evidence despite the appropriate procedural steps not being followed. In determining whether new documents and new information should be admitted, there must be a balancing of the competing interests of both parties so there will be no resulting miscarriage of justice.

[18] Considering a rule very similar to Rule 98 of the *Rules*, Justice Richard in *Doiron v Haché*, 2005 NBCA 75, [2005] N.B.J. No. 347, at paragraph 57, stated the following:

> … The degree of freedom afforded a court in procedural matters under the "discretion" umbrella is significant but not unfettered. The discretion must be exercised judicially, that is "according to the rules of reason and justice, not according to private opinion", "according to law" and it must not be "arbitrary, vague and fanciful, but legal and regular": as stated by Lord Halsbury in *Sharp v. Wakefield*, [1891] A.C. 173 at 179 and quoted by Kellock J. in *Wrights Canadian Ropes Ltd. v. Canada (Minister of National Revenue)*, [1946] S.C.R. 139 at p. 166, varied at [1947] A.C. 109 (P.C.). To exercise discretion means to choose between two or more reasonable options. The choice must be made considering the applicable law and guiding principles and on a proper understanding of the facts. Where the facts are misapprehended and the error is an overriding factor in the exercise of the discretion such that the foundation for the option chosen no longer exists, then an injustice has been done. …

[19] There is not an abundance of case law addressing the acceptance of new documents and information without notice at trial. However, it appears that decisions have both allowed the admission of new information (see *Lacroix v The Queen*, 2006 TCC 558, 2008 D.T.C. 3761) and prevented its introduction (see *Walsh v The Queen*, 2009 TCC 557, 2009 D.T.C. 1372).

[20] Neither of the Appellant's witnesses had a personal stake in the outcome of this appeal. In fact, Mr. Bonnar, who authored the new document, is a retired firefighter who is no longer involved with the activities of the Appellant or the Fire Department.

[21] In the interests of justice and the overriding importance of having all of the information before the Court to enable me to arrive at a proper and just determination of the Appellant's appeal, I permitted the introduction into evidence of the new document and new information given by Mr. Young. At the end of the day, with all

of the information and evidence before me, it is nonetheless in my discretion to assign the appropriate weight, if any, to the evidence.

[22] If the new evidence has merit and is not designed to prolong the proceedings, the policy reflected in subrule 4(1) also supports the admission of the new information, in the circumstances of this appeal, to enable me to arrive at a just determination. Subrule 4(1) of the *Rules* requires a liberal interpretation to secure the just, most expeditious and least expensive determination of the proceeding on its merits.

[23] To successfully claim an ITC pursuant to subsection 169(1) of the *Act*, the Appellant must have acquired the Boat in the course of its commercial activities. In determining whether the Appellant was engaged in commercial activities, two sub-issues need to be addressed:

(a) Was the Appellant carrying on a "business" pursuant to the definition in subsection 123(1) of the *Act*?

(b) Even if the Appellant was carrying on a business, was it making an exempt supply as a public sector body to the Fire Department for no consideration?

[24] Subsection 123(1) of the *Act* defines the term "business" to include:

> **…**a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment.

There is a strong association between conducting a business and the underlying intent to make a profit within the business activity. However, case law has held that while the profit motive may be an influencing factor, it is not determinative when deciding if activities are conducted as a business. Since the Appellant is incorporated as a non-profit society, the issue is whether the Appellant's supply of the Boat to the Fire Department is an undertaking that falls within the "business" definition.

[25] At paragraph 22 in *Glengarry Bingo Association v Her Majesty the Queen*, [1995] T.C.J. No. 690, this Court held that "… a business includes an undertaking, whether it is engaged in for profit [*sic*]. That undertaking is defined to be a

'commercial activity'." Although appealed to the Federal Court of Appeal, this portion of the decision was unaffected.

[26] The wording in subsection 123(1) assigns the definition of business a wide scope to include an "undertaking of any kind whatever". Since the scope is broad and the Appellant conducts its business activities as a non-profit society, it is reasonable to apply a liberal interpretation to the Appellant's activities. The Appellant frequently purchases equipment and supplies that equipment to the Fire Department to support its emergency and rescue services within the community of Sydney Mines. On cross-examination, Mr. Young testified that the Appellant did:

> "… a lot of other things in the community besides raise money for the Fire Department. I would say it is our main purpose to raise money for the Fire Department but not the only reason that we raise money. We also -- we do things to help out other organizations. We have put on a number of things to help mentally handicapped in the area. We have donated our hall for funerals …
>
> (Transcript, page 55, lines 11 to 18)

Mr. Young also referenced fundraising through ticket sales, bingo and catering events.

[27] When reviewed in their entirety, I believe the Appellant's activities can be considered a business. Although the Appellant's members are entirely volunteer, the evidence and the standards of ordinary commercial common sense support the conclusion that they approach their activities in an orderly and businesslike manner.

[28] The definition of commercial activity recognizes that any business activity that involves making an exempt supply must be notionally severed for GST purposes. (*398722 Alberta Ltd. v Her Majesty the Queen*, [2000] F.C.J. No.644 (F.C.A.)) A business may be engaged in mixed-purpose activities, that is, several portions of the activities may be used in the commercial activities of the business while the balance of the activities may be exempt supplies. An ITC cannot be claimed in respect to the exempt supply portion of a business under subsection 169(1) of the *Act*.

[29] On this point, the Respondent argues that the supply of the Boat by the Appellant to the Fire Department is an exempt supply captured by section 10, Part VI, Schedule V and as a result, not a commercial activity of the Appellant. Therefore the ITC should be denied.

[30] Exempt supply in subsection 123(1) means, “a supply included in Schedule V”. When a business makes an exempt supply it cannot be engaged in a commercial activity.

[31] Section 10 states:

> 10. A supply made by a public sector body of any property or service where all or substantially all of the supplies of the property or service by the body are made for no consideration, but not including a supply of blood or blood derivatives.

[32] The Appellant admitted that it is a public sector body as defined in subsection 123(1) of the *Act*, but denies that it is engaged in the making of exempt supplies. The question therefore is whether the supply was made by the Appellant for no consideration.

[33] The Appellant argues that approximately $80,000 of the purchase price of the Boat came from the Province of Nova Scotia through an EPF grant. In addition, this grant was specifically made for the purpose of acquiring the Boat for the Fire Departments’ use. Therefore the Appellant submits that those funds constituted consideration for the supply. (Appellant’s Submissions, paragraph 28).

[34] The Respondent’s position is that the Appellant’s evidence respecting the funding was insufficient to enable the Court to support a conclusion that any consideration was ever paid. In addition, since the Appellant’s evidence changed between discovery and the hearing and the new document at the hearing was submitted without notice, the evidence to support the Appellant’s consideration argument should be given no weight.

[35] In *Regina (City) v Her Majesty the Queen*, [2001] T.C.J. No. 315, Justice Rip (as he was then), discussed the “direct link test” adopted in Technical Information Bulletin B-067. At paragraphs 28 and 29, he stated the following:

> [28] The author of Part I of T.I. Bulletin B-067 explains that "if there is a direct link between a transfer payment received by a person and a supply provided by that person, either to the grantor of the transfer payment or to third parties, the transfer payment will be regarded as consideration for the supply". The Bulletin emphasizes that "[a] direct link may not always be apparent and therefore it will be necessary to consider the circumstances surrounding each case". Relevant circumstances may include: the agreement between the parties; the conduct of the parties; the objectives or policy statements of the grantor; and the legislation, by-laws and any applicable regulation under which the payment is made.

> [29] Part II of T.I. Bulletin B-067 states policy guidelines to clarify whether a direct link exists between a transfer payment and a supply and, therefore, whether the transfer payment is consideration. According to these guidelines, where a supply takes place in respect of a transfer payment, there will be a direct link between the supply and the transfer payment if the supply is provided to the grantor for a "purchase purpose" as opposed to a "public purpose". The Bulletin refers to a "purchase purpose" as "one which benefits the grantor or a specific third party and may be of a commercial nature" and to a "public purpose" as "one which benefits the general public or a particular segment of the general public".

[36] In an earlier decision, the Federal Court of Appeal in *Commission scolaire Des Chênes v The Queen*, [2001] F.C.J. No. 1559, 2001 FCA 264, found that a subsidy for transportation purposes was consideration although it did not fully cover the cost of the goods or services for which the subsidy is given. Justice Noël determined that there was a sufficient link between the subsidy paid by the Province of Quebec and the services provided by the school board for students. A subsequent decision by the Federal Court of Appeal in *Calgary (City) v The Queen*, 2010 FCA 127 (CanLII), 2010 FCA 127, appears to narrow *Des Chênes* to the terms of the written agreements that exist between the province and a public sector body. However, neither *Des Chênes* nor *Calgary (City)* considered section 10.

[37] The Appellant's primary argument is based upon its submissions that the grant it received from the EPF is consideration for the supply of the Boat. This argument has merit based upon the Federal Court of Appeal decision in *Des Chênes*. However, the Appellant failed to adduce sufficient evidence to establish that "direct link" between the EPF funds and the purchase of the Boat. This evidence is required if the Appellant is to succeed. To prove that the EPF grant constituted payment for the supply of the Boat, the Appellant submitted one page of undated, unsigned handwritten notes (Exhibit A-11). There were no other documents put into evidence. Mr. Bonnar explained that it contained a breakdown of the origin of the accounts, where the money came from to purchase the Boat. However, on cross-examination, he was unable to give any information on one of these sources of funds, the Centennial grant. In addition, no evidence was submitted that would confirm actual receipt of those funds. I assume that other documents exist besides the one page of handwritten notes. They may have been in the form of agreements, applications, or correspondence between the parties. The appropriate person on behalf of the Province could have been called to assist in establishing a direct link between the supply and the transfer payment. Evidence concerning the applicable legislation could have also been produced.

[38] The onus was upon the Appellant to adduce such evidence to establish that a direct link exists between the subsidy funds and the supply to the Fire Department. The Appellant failed to adduce sufficient evidence to determine whether the subsidy was made to fund a particular supply. In other words and unfortunately, the direct link was not established. The Boat is not the only asset owned by the Appellant, therefore the subsidy funds given by the Province to the Appellant could have been intended for a number of uses. In these circumstances, it is imperative that the Appellant adduce evidence to establish a direct link between the supply of the Boat and the subsidy funds. Had this link been established, the consideration argument would have succeeded.

[39] At the end of his submissions, Appellant's counsel made an alternative argument. Although unclear, if I am correct in my understanding, the argument is that less than "all or substantially all" of its supplies are made for no consideration. Interpreting "all or substantially all" in section 10 to mean 90 per cent or greater, the Appellant contends that its GST liability of $15,759 respecting the Boat is less than 90 per cent of its total GST burden of $35,268 in 2008. In order for a supply to constitute an exempt supply under section 10, at least 90 per cent of all the Appellant's activities must be made for no consideration. If I understand the argument correctly, it fails because it is directly contradicted by case law.

[40] In *North Vancouver School District No. 44 (North Vancouver) v The Queen*, [2008] T.C.J. No. 354, 2008 TCC 475, Justice Woods reviewed the language of section 10 and, at paragraph 31, determined that the exemptions should be given a narrow scope, based on the wording in the section:

> [31] An important consideration in the interpretation of section 10, in my view, is the language used in the section, which implies that the exemption is to have narrow scope. This is inferred from both the words "the" and "property" in the phrase "the property or service." These words suggest that the properties or services that qualify for the exemption must be the very same properties or services that are provided for no consideration.

[41] I agree with the conclusion of Justice Woods respecting the language contained in section 10. Using the same narrow interpretation which Justice Woods applied, only the supply of the Boat must be considered while the Appellant's other taxable supplies will not. Consequently, the Appellant's alternative argument must fail.

[42] The Appellant and the Fire Department provide an invaluable service to their community. They constantly risk their lives to perform emergency and rescue

services. All of this is provided on a volunteer basis. Unfortunately, the Appellant did not adduce the necessary evidence regarding the EPF funding which was required to establish its direct link argument on consideration.

[43] For these reasons, the appeal is dismissed. Neither Appellant counsel nor Respondent counsel addressed costs in their written or oral submissions. In addition, the Reply to the Notice of Appeal makes no claim for costs. In these circumstances, I am making no award respecting costs.

Signed at Summerside, Prince Edward Island, this 26th day of August 2011.

"Diane Campbell"

Campbell J.

CITATION:	2011 TCC 403
COURT FILE NO.:	2010-611(GST)G
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PLACE OF HEARING:	Sydney, Nova Scotia
DATE OF HEARING:	July 20, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	August 26, 2011

APPEARANCES:

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