Docket: 2004-4348(GST)G

BETWEEN:

RAYMOND F. WAGNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 9, 2011, at Halifax, Nova Scotia.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Gerard Tompkins, Q.C.
Counsel for the Respondent:	Dominique Gallant Scott Millar

JUDGMENT

The appeal is allowed in part and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment to reflect a 25% reduction of the tax owed by the appellant and adjustments to the interest and penalties, as agreed to by the respondent. Costs are to be determined after hearing both parties. In all other respects, the assessment is confirmed.

Signed this 23rd day of February 2012.

"François Angers"

Angers J.

Citation: 2012 TCC 59
Date: 20120222
Docket: 2004-4348(GST)G

BETWEEN:

RAYMOND F. WAGNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a reassessment dated June 30, 2004, made under Part IX of the *Excise Tax Act* (the "*Act*") for the period from January 1, 1999 to September 30, 2001. The reassessment represents tax which the appellant allegedly failed to collect and remit on amounts invoiced to his clients. Adjustments were made to the tax initially assessed, and the interest and penalties were reduced. The Goods and Services Tax/Harmonized Sales Tax (GST/HST) assessed is $43,393.67, the interest is $4,407.41 less an adjustment of $1,195.97, and the penalties are in the amount of $6,043.55 less an adjustment of $1,404.41.

[2] At the hearing, counsel informed the Court that the amount of GST/HST assessed against the appellant is to be reduced by 25%, which amounts to $10,848 and reduces the assessed tax to $32,544. In addition, the appellant acknowledged that the assessment is valid in part, to the extent of $5,641. The remaining balance is still in dispute and relates to GST/HST that either should or should not have been collected by the appellant in relation to disbursements under the heading of independent medical examination reports (IMEs).

[3] The appellant has been a practising lawyer since February 1980. Since 1995, his firm has been exclusively doing personal injury litigation for plaintiffs. At all

relevant times during the period under appeal, the appellant had three lawyers associated with him and everyone at the firm followed the same procedure.

[4] The appellant is retained almost exclusively under a contingency fee agreement, a standard form agreement in which the terms and details of the financial arrangements between the client and the appellant are set out. The solicitor's fees are payable according to certain percentages, with payment being contingent upon success in obtaining a finding of liability or in settling the client's claim.

[5] The contingency fee agreement also provides that, regardless of results, the client will be responsible for all reasonable and proper disbursements and expenses incurred by the solicitor. The relevant portion of the contingency fee agreement in that regard reads as follows:

> ii) The client will be responsible regardless of results for all reasonable and proper disbursements and expenses incurred by the solicitor. Disbursements and expenses paid by the solicitor will be invoiced to the client as soon as reasonably possible after its payment. Repayment to the solicitor shall be made by the client as soon as reasonably possible after invoicing.
>
> iii) Other than for payment of all reasonable and proper disbursements and expenses, no compensation other than the amounts collected by the solicitor is payable by the client excluding costs awarded against the client. Costs awarded against the client are the client's responsibility solely and do not form part of this Agreement.
>
> iv) As expanded upon in the paragraphs to follow, before the lawyers fees are calculated, all reasonable disbursements and expenses will first be deduced from the total award to arrive at a net figure.

[6] As mentioned earlier, the disbursement that is the subject of this appeal is one that relates to medical reports and independent medical examinations that are necessary to advance a client's case and that assist in determining the client's medical care and treatment. The term IME was used generally throughout the hearing of this appeal to include medical reports from general practitioners or specialists, as well as independent medical examinations which are done by someone other than the treating physicians. In other words, the services that are in issue relate to the use of services provided by the medical profession.

[7] Despite the fact that the contingency fee agreement provides for repayment of the disbursements to the solicitor as soon as reasonably possible after invoicing, the

reality is, according to the appellant, that the client is in almost all cases unable to pay for various obvious reasons. It is the practice of the appellant's firm to pay for the IMEs and to keep them as non-billed disbursements in the ledger until a final resolution of the case or until there is an advance made on the client's claim.

[8] All IMEs are requested on behalf of the client and after a discussion with the client regarding their importance in terms of the litigation itself and in terms of the client's medical care and treatment. Payment for the IMEs is subject to a practice rule adopted in the late 1990s by the Nova Scotia Barristers' Society whereby medical practitioners, on receiving a request for a medical legal report, will provide the report within 45 days and the lawyers who requested it will not wait until payment can be made from the client's funds or by some other means, but will pay the invoice themselves within 45 days.

[9] The appellant acknowledges that the content of the IMEs is a necessary tool in advising his clients and that IMEs form an integral part of a client's case. They are helpful in recommending a settlement or in determining how to pursue the claim. The appellant has used a particular medical practitioner for almost 20 years for IMEs and he acknowledges that the letter requesting the IME says that it is being requested on behalf of his client but does not say that the client is responsible for payment. The invoice for the IME is addressed to the lawyer and the appellant acknowledges that the medical practitioner seeks payment from him and that there is no mention of anyone else being liable.

[10] At the end of the day, the appellant invoices his client for his services and disbursements. There is no doubt that the supply of services by the medical practitioner is an exempt supply. The issue here is whether the appellant was required to collect and remit GST/HST on amounts invoiced to his clients with respect to the IME services provided by the medical practitioners, for which he paid.

[11] Counsel for the appellant relies on the decision of this Court in *Riverfront Medical Evaluations Limited v. R.*, [2001] G.S.T.C. 80, affirmed by the Federal Court of Appeal (2002 FCA 341), for the proposition that the services provided here by medical practitioners are an exempt supply, that it does not matter who arranges or pays for the services, and that the services should not become taxable simply by virtue of the appellant's involvement. In addition, counsel submits that the appellant was acting as an agent of his client and thus was not required to collect or remit GST/HST on the IMEs.

[12] Counsel for the respondent relies on the recent decision of the Federal Court of Appeal in *Canada v. Merchant Law Group v. Canada*, 2010 FCA 206, in which it was held that for a lawyer not to be the recipient of the goods or services, the lawyer must establish that he or she was acting as an agent on behalf of his or her client when the goods or services were acquired. That onus, according to counsel for the respondent, was not met in this case. Counsel further submitted that the supply of services in this fact situation was by the appellant to his client and that the IMEs are part of what the appellant needs in order to provide advice and professional services to his client.

[13] In *Riverfront Medical Evaluations Limited*, *supra*, the appellant hired physicians to supply IME reports to insurance companies and lawyers in personal injury cases. The issues were whether the IME services provided by the appellant constituted medical care and were therefore exempt under the *Act* and whether the appellant operated a "health care facility" within the meaning of the *Act*. This Court answered both questions affirmatively and ultimately found that the provision of the reports to the lawyers and insurance companies was not subject to GST/HST, which finding was upheld by the Federal Court of Appeal.

[14] The example of an invoice from a medical practitioner to the appellant provided in the present case indicates clearly that the appellant was charged no GST/HST nor was any collected from him by the medical practitioner, which was all in accordance with the decision in *Riverfront*, *supra*, and with the *Act* for that matter. That, however, does not authorize a lawyer not to collect GST/HST on IMEs he invoices as a disbursement to his client.

[15] The latter situation was dealt with by the Federal Court of Appeal in *Merchant Law Group*, *supra*. Madam Justice Dawson clearly lays out the legislative scheme at paragraph 11:

> As a general principle, Division II of Part IX of the Act imposes GST on "every recipient of a taxable supply made in Canada." See: subsection 165(1) of the Act. The terms "recipient," "supply" and "taxable supply" in material part are defined in subsection 123(1) of the Act as follows:

123(1) "recipient" of a supply of property or a service means

(*a*) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

[...]

"supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

"taxable supply" means a supply that is made in the course of a commercial activity;

"acquéreur"

a) Personne qui est tenue, aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;

…

"fourniture" Sous réserve des articles 133 et 134, livraison de biens ou prestation de services, notamment par vente, transfert, troc, échange, louage, licence, donation ou aliénation.

"fourniture taxable" Fourniture effectuée dans le cadre d'une activité commerciale.

[16] She then goes on to say, at paragraphs 12, 13 and 14, that disbursements can be incurred by a lawyer in two ways, and indicates how they are to be treated.

12 Disbursements incurred by a lawyer can be incurred in one of two ways. Disbursements can be incurred by a lawyer as the client's agent, or can be the lawyer's own expense incurred in the course of providing legal services. There is no dispute about how disbursements should be treated in either situation.

13 In the former situation, the lawyer is not the recipient of the supply as defined by subsection 123(1) of the Act so long as the lawyer is not the entity liable to pay the consideration owing under the agreement with the third-party supplier. The lawyer does not provide a supply. The lawyer is simply acting as an agent or conduit of his or her principal. In such case, the disbursement does not form part of the lawyer's expenses. It is the client's obligation and the lawyer pays the account on the client's behalf.

> 14 In the latter situation, where the lawyer is a "recipient" of a supply, the disbursement is the lawyer's expense. The client may reimburse the lawyer for the expense, but the client had no obligation to pay the third-party supplier. The lawyer incurred the expense in order to provide legal services to the client. Because the goods or services were acquired for use or consumption in the course of providing legal services, lawyers who are GST registrants may claim an input tax credit so as to remove GST from the original disbursement. The pre-GST disbursement is then charged by the lawyer to the client. If exigible, GST is then levied on the entire account to the client, including the pre-GST disbursement.

[17] Madam Justice Dawson further goes on to state the requirements for the existence of an agency relationship and sets out what a lawyer must establish to show that he was not the "recipient" of the goods and services. She says the following at paragraphs 15 to 18 and at paragraph 21:

> 15 What is in dispute in this case is whether the disbursements at issue were incurred by the respondent as agent for its clients. Canada Revenue Agency's position concerning whether one person acts as an agent for another is set out in the GST/HST Policy Statement P-182R. This Court has previously found the policy to not be binding upon the Court, but nonetheless to be "a useful tool in determining whether an agency relationship exists." See: *Glengarry Bingo Assn. v. Canada,* (1999), 237 N.R. 63.
>
> 16 P-182R lists three essential qualities of an agency relationship. For the purpose of this appeal the relevant quality is that an agent must possess the authority to affect the principal's legal position.
>
> 17 It is settled at common law that for an agency relationship to exist the agent must be able to affect the principal's legal position with third parties by entering into contracts on the principal's behalf or by disposing of the principal's property. See, for example, G.H.L. Friedman, *Canadian Agency Law*, (Markham: LexisNexis Canada Inc., 2009) at page 4, and F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 17th ed. (London: Sweet & Maxwell, 2001) at paragraph 1-001. In the words of Professor Fridman, citing *Royal Securities Corp. Ltd. v. Montreal Trust Co.*, [1967] 1 O.R. 137 at 155 (H.C.J.) aff'd [1967] 2 O.R. 200 (C.A.), "the law of agency will apply only when the acts of one person on behalf of another make a difference to that other's legal position, that is to say, his or her rights against, and liabilities towards, others. The grant of the right to exercise another person's legal powers, thereby potentially affecting the grantor's legal position, is an essential feature of agency."
>
> 18 P-182R goes on to discuss eight indicators that are said to be helpful when determining whether the essential qualities of agency exist in respect of a transaction. They include the following indicators which are relevant to this appeal:

- Accounting Practices: While agents are not necessarily required to keep segregated funds, the fact a person segregates from their own funds any monies received or paid in connection with another person is indicative of an agency relationship.

- Alteration of Property Acquired: In general, agents do not alter the nature of property acquired from a third-party before passing it on. However, this is also true in many other cases where someone other than an agent acquires property from a third-party.

- Liability under Contract/Liability for Payment: Where a person purchases goods on behalf of another person and the other person is liable to pay for whatever it is that the supplier has sold, the person acting on behalf of the purchaser is considered to be an agent of the purchaser.

- Ownership of Property: Generally, an agent does not acquire an interest in any property the agent acquires as agent on behalf of the principal. This is because ownership of the property passes directly to the principal. However, a principal and an agent may agree that the agent will hold title to the property.

. . .

21 As discussed above, for a lawyer who acquires goods or services not to be the "recipient" of the goods or services, the lawyer must establish that he or she was acting as agent on behalf of their client when the goods or services were acquired. The onus is on the lawyer to establish the existence of the agency relationship. See: *Glengarry Bingo* at paragraph 10.

[18] The Federal Court of Appeal's conclusion — which, I believe, I must determine — is found in paragraphs 25 and 26 and part of paragraph 35 of the decision:

25 In my respectful view, the Judge erred in law by relying upon the general nature of the solicitor-client relationship. As a matter of law it does not follow that, because the solicitor-client relationship is generally one of agency, all financial obligations incurred by a lawyer while providing legal services are incurred as agent of its clients. Indeed, the Judge recognized this by dismissing that portion of the appeal that related to office expenses incurred by the respondent on behalf of clients. Application of the proper test required the Judge to determine whether the respondent's clients were bound by the contracts with third-party suppliers and were, therefore, liable for payment under the contracts and also exposed to any risk as a party to the contracts. If so, it follows that the respondent made payments to the suppliers only as an agent.

> 26 The absence of any evidence to support the conclusion that it was the respondent's clients who were bound to the contracts with third-party suppliers means that the respondent could not meet the onus upon it to establish that it acted as agent for its clients when it incurred disbursements. It follows that goods and services that attracted the disbursements were taxable supplies received by the respondent so that it was required to collect and remit GST on the disbursements.
>
> . . .
>
> 35 Finally, as explained above, it is an error in law to conclude that because the solicitor-client relationship is generally one of agency every action taken by a lawyer is taken as the agent of the client. To establish the lawyer was not the recipient of a taxable supply at least some evidence must be led with respect to the particular transaction and the extent of the lawyer's ability to bind his or her client to the transaction. . . .

[19] The determination to be made hinges on the ability of the appellant to affect the legal position of his client and his assumption of the client's liability to pay the medical practitioner for the IMEs.

[20] Our final citation regarding the relationship between principal and third party in contract law is found in Gerald Fridman, *Canadian Agency Law* (Markham, On: LexisNexis, 2009) at pages 139-140:

> If an agent has made a parol or written contract with a third party on behalf of a disclosed principal who actually exists and has authorized the agent to make such contract, the principal can sue and be sued by the third party on such contract. A direct contractual relationship is thereby created between principal and third party by the acts of the agent, who is not, himself, a party to that relationship.
>
> The agent must have been acting with authority in making such contract. A principal will not be bound by, and cannot sue upon, any contract made by an agent outside the scope of the agent's authority, by whatever way it was invested in the agent. The previous discussion may be summarized for present purposes by saying that, for a direct contractual relationship to result from the conduct of an agent, it must be shown: (i) that the principal expressly authorized the agent to make the contract; or (ii) that the agent was acting within the scope of some implied authority, in that it was necessary or usual or customary for an agent in his trade, business or profession to make such a contract; or (iii) that the principal had held out the agent as having authority to make the contract; or (iv) that the agent was not authorized to make such contract but his action was subsequently ratified; or (v) that the making of such contract was within the scope of the authority of an agent of necessity.

[21] In my opinion, the evidence in this case does not support a finding that the appellant's clients were bound under the contracts with the medical practitioner to

pay them for the IMEs. The only legal obligation the client had upon signing the contingency fee agreement was to repay to the appellant all reasonable and proper disbursements and expenses incurred and paid by him. There was no obligation on the client here to pay any third party, including medical practitioners, any expenses or disbursements in relation to IMEs. I will concede that the appellant requested the IMEs on behalf of his client and that IMEs cannot be obtained without the consent of the client, but neither of these facts makes the client liable or exposes the client to any legal obligation towards the medical practioner. The consent is only necessary in order for the medical practitioner to release the report, given its confidential nature, to the lawyer and does not carry or imply an obligation on the client-patient to pay the medical practitioner directly for the IMEs. In order for the lawyer to be his client's agent, there must be clear evidence that this agency has been disclosed to the medical practitioner and that the client patient is the one liable to pay for his services even though the lawyer pays the account on his client's behalf.

[22] The fact situation in this case makes it clear that the medical practitioners look to the appellant for payment. The invoice found in Exhibit A-1 is addressed to the appellant only, and the payments for IMEs are subject to a practice rule agreed to by the medical profession and the Nova Scotia Barristers' Society, whereby lawyers are to pay for IMEs within a 45-day period. The client has no obligation to pay the medical practitioner. This makes the appellant lawyer in this case the recipient of a supply, as the disbursement is the lawyer's expense. Even though the client may reimburse the appellant lawyer for the expense, the client has no obligation to pay the medical practitioner. That is exactly the type of situation that falls within the *Merchant Law Group* second way in which disbursements can be incurred, that is, as a lawyer's own expense incurred in the course of providing legal services.

[23] In such a situation, obtaining the IMEs becomes part of the appellant's services supplied to his client in the course of providing legal services. For a lawyer to properly advise his clients, he needs IMEs: they help him with their cases as they do have an impact on how he will advise the clients and on such things as whether to settle or pursue a claim. They are an integral part of a client's case and are acquired for use in providing legal services. That being so, GST/HST is exigible.

[24] The appeal is allowed in part and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment to reflect a 25% reduction of the tax owed by the appellant and adjustments to the interest and penalties, as agreed to by the respondent. Costs are to be determined after hearing both parties. In all other respects, the assessment is confirmed.

Signed this 23rd day of February 2012.

"François Angers"

Angers J.

CITATION:	2012 TCC 59
COURT FILE NO.:	2004-4348(GST)G
STYLE OF CAUSE:	Raymond F. Wagner and Her Majesty the Queen
PLACE OF HEARING:	Halifax, Nova Scotia
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APPEARANCES:

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