

Citation: 2013 TCC 254
Date: 20130913
Docket: 2008-3719(GST)G

BETWEEN:

ANTHONY M. SPECIALE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Margeson J.

[1] The Appellant was assessed by the Minister of National Revenue (the “Minister”) by notice of assessment number 05DP0326520 dated March 15, 2007, in the amounts of \$59,588.59 net tax, \$4,350.32 net interest, and \$8,657.07 penalties, in respect of Goods and Services Tax (“GST”) return for the period of January 1, 2004 through April 30, 2006.

[2] The Minister disallowed \$68,990.00 of claimed input tax credits (ITCs).

[3] The Appellant disputes the disallowance of these ITCs in this appeal.

Evidence

[4] Anthony M. Speciale was educated at the University of Toronto and at Osgoode Hall Law School. He started his present practice in 1976-77 and is still practicing law. His primary practice is civil litigation. His position was that 715866 Ontario Limited (“715866”) was responsible for running his law practice as a “bare trustee”.

[5] The Appellant was the incorporator of this entity and its sole officer and director as to this day. The company is in good standing. The shares have been owned by his wife.

[6] 715866 is a Trustee only. It has no financial statements. The financial statements are filed by his law practice. 715866 was not a registrant for GST purposes. It had a nil assessment since its incorporation. The Appellant filed all GST returns and including all ITCs to which the Appellant and 715866 were entitled for the relevant taxation years. Starting in 2003, he tried to carry forward income losses which were subject to GST paid at the rate of 7 percent.

[7] Canada Revenue Agency (“CRA”) asked him for a sampling of invoices which he used to make up his claim for ITCs.

[8] He then said that any claim made for the periods prior to 2003 will be excluded.

[9] He said that the cheque stub found in Exhibit A-3 as receipt No. 5530 was a typical payment that he made. Telephone bills were also paid by 715866. He admitted that the Visa statement found in Exhibit A-3 as number 5541 was both personal and business. Further, the amounts shown as numbers 5570 (Visa) and 5520 (Rogers) were not claimed. He gave these documents to CRA, as a sampling of his receipts, at the audit stage.

[10] Exhibit R-1 was entered by consent with the exception of Tab 4. Exhibit A-4 at Tab 20 showed that he did own vehicles. The costs of the renewal for plates were not claimed. The cost of the Ford Villager motor vehicle was not claimed. He referred to the record of cheques, found in Exhibit A-4 at Tab 21, and said that any amount listed that had a line drawn through it was not being claimed and any categories scratched out were not claimed.

[11] The receipts for Ikea and Costco were for furniture for the office. Exhibit R-1 at Tab 19 showed cheques written on his general account. The cheque ledgers are available but were not produced due to solicitor-client privilege and it was argued that a sampling of the invoices would be sufficient but this position was rejected by counsel for the Respondent and he argued that general ledgers are not source documents.

[12] The Appellant said that the spreadsheets and information contained in Exhibit R-2 at Tabs 7 and 8 were provided to the Respondent.

[13] At this time, the Appellant moved to amend his Notice of Appeal to include the due diligence argument but it was objected to by the Respondent and this motion was dismissed.

[14] The Appellant stated that all items coloured in yellow, at Tab 23, in Exhibit A-4, should be added to the list provided by the Respondent as they represent non-credit card items.

[15] Tab 26 of Exhibit A-4 showed amounts reported by the Appellant on his GST returns and on which the Appellant claimed ITCs. These amounts were disallowed by the Minister who indicated that the amounts claimed could not be verified even after the Minister had asked for verification in a telephone call.

[16] Exhibit A-4 at Tab 30 showed copies of GST returns and calculations of GST completed by the Appellant. The Appellant said that the returns speak for themselves.

[17] In cross-examination, the Appellant stated that during the period November 1, 2000 to April 30, 2006, he was practicing law, primarily at the office of Anthony M. Speciale, in civil litigation. He had no other income and no other business. His personal income was as a sole practitioner and he reported it as such during this period.

[18] He prepared the GST returns for the period in question. An untrained person helped on the ledger. He did not raise the issue of a bare trust in the Notice of **Objection**.

[19] The T2 return referred to in Exhibit R-2 at Tab 21 for 715866 Ontario Limited refers to it as the Trustee only and therefore the Minister should have known that it was a bare trustee. However, it was pointed out to him that the amended return found at Tab 11 of Exhibit A-2 did not refer to a bare trustee and the same thing applied to his T-2 general return for 1998. No mention was made of the numbered company.

[20] It was pointed out to him that he initially submitted Visa statements and other credit card statements as proof of his supplies used within his law practice but they are not being claimed now.

[21] It was pointed out to him that invoice number 5600, a bill from Union Gas was not claimable. Further invoice number 5592 included no GST.

[22] The Respondent referred the Appellant to a large number of receipts or invoices contained in Exhibit A-3 and pointed out that many of these items were not claimable by the Appellant, were not identified by him, offered no proof of payment, were issued to a different entity, contained no indication that they were business related, related to his home, related to Visa amounts that were not being claimed, that were personal expenses or that were no longer being claimed.

[23] The Appellant said that he did not know why some invoices were addressed to him and some were addressed to 715866. Further, 715866 reported no income or expenses.

[24] He did not include the two entities in his income tax return as he was given tax advice not to do so. 715866 was only a Trustee.

[25] He said that 715866 entered into the lease.

[26] The Appellant said that he claimed the losses in 2001. It was suggested to him that the losses had nothing to do with the ITCs that he claimed during this process and that the amounts calculated from the invoices do not match the amounts claimed at Tab 8 of Exhibit R-2 at page 17, the amount shown as GST ITCs at 100 percent amounts to \$2,138.39, whereas the amount claimed by the filing was \$6,030.

[27] It was suggested to the Appellant that there was no proper evidence before the Court to support these claims.

[28] In Exhibit R-2 at Tab 8, page 19, we see items that should not be claimed. At page 20, there are expenses for personal items that were claimed and should not have been and are not now being claimed.

[29] At page 25, the amounts claimed for Costco and Sam's Club contain items that were personal.

[30] At page 26, we see items of expenditure for automobiles that were claimed at first but not now.

[31] It was suggested to the Appellant that at the time of the audit that the documents given were not complete or correct. The Appellant said that he "had to prepare something".

[32] In re-direct, the Appellant said that 715866 was not set up in an attempt to avoid creditors. He had liability as a director. He had to sign personal guarantees for the vehicles.

[33] The Respondent called Todd Lichty. He has been with CRA since 2006. He is an acting team leader in appeals. He was involved with this file, having received it from the audit division.

[34] He reviewed the notice of objection referred to in Exhibit R-1 at Tab 5. The notice was dated June 13, 2007. The ITCs were denied because of insufficient documentation. These documents were requested.

[35] He received a summary of expenses and the ITCs claimed but no original source documentation was received.

[36] This witness completed the amount in Exhibit R-1 at Tab 4 in order to analyze the ITCs' listing submitted by the Appellant and to determine what other documentation was required. The receipt of this document into evidence was objected to by the Appellant but it was admitted into evidence. He concluded that the listings and the cancelled cheques provided by the Appellant were insufficient to enable the calculation of ITCs. They required source documents.

[37] The registrant was Anthony M. Speciale and not 715866. The documents provided raised questions as to whether the Appellant was the recipient of the supplies. He observed that the amount of ITCs claimed would be greater than the amount that might be claimed. He did not take into account credit card payments. He noted that 715866 was not a GST registrant.

[38] He never saw any original source documents relevant to the documents contained in Exhibit A-3. Not all of these documents related to the Appellant and would have raised concerns even if they had been original documents.

[39] The document at Tab 15 of Exhibit R-3 outlined the history of the file which was several months old and there were many delays caused by the Appellant. Many documents were requested and promised but never came forward.

[40] Bad debts would not affect the amount of GST since GST is charged at the time. There are no ITCs on bad debts.

[41] He said that he never indicated to the Appellant that he had made an overpayment. GST is credited at the time it is paid. You do not incur losses to be applied in a future period.

[42] 715866 may not have been the recipient of the supplies and therefore may not have been entitled to the credits even if original source documents had been provided.

[43] He could not have allowed the ITCs without the source documents and therefore he never considered the bare trustee trust agreement.

[44] With respect to Exhibit A-4 at Tab 30, this contained the original GST return of the Appellant. He did not see it except on his computer. He never saw the calculations presented at pages 2 and 3 of this document before today.

[45] However, if he had seen it there would have been serious concerns raised because the amounts referred to are estimates. ITCs must be based on actual amounts paid and need to be supported by original source documents.

[46] In cross-examination, he was referred to Exhibit A-4 at Tab 30, the GST return, and it was suggested to him that one may claim ITCs from the past.

[47] He said that he reviewed the account and there were several other accounts that were under review. He was referred to Exhibit A-2 at Tab 14. This was a notice of assessment dated December 29, 2004, and referred to net capital losses of \$999,301 which could be used to apply to other years. He said that losses do not matter for the purposes of this case. It comes down to whether the GST was paid. Section 169 of the *Excise Tax Act* (the “*Act*”) requires that original source documents be provided. There was no need to consider the question of a bare trustee.

[48] He said that he reviewed the summary of GST calculations prepared by the Appellant. He reviewed only one-quarter since no original source documents were provided.

[49] In re-direct, he was referred to the GST return found in Exhibit A-4 at Tab 30, and he said that there was nothing there about bad debts.

Argument on behalf of the Appellant

[50] In argument, the Appellant said that the Court must weigh and consider the evidence and determine the case on the balance of probabilities.

[51] Mila (from the office of the CRA) wrote to him and told him that she might read into evidence pages 64 to 73 of the discovery evidence. She said that the auditor and the appeals officer would attend court. Mila was not called to give evidence. Therefore, the Court should draw an unfavourable inference against the Respondent. Mila had been examined.

[52] The Appellant's evidence was cordial and consistent. He made concessions with respect to the credit cards and personal payments.

[53] No damage was done to the Appellant's case. His testimony was not refuted. The documents were not fabricated. The Court should consider the circumstances.

[54] The Respondent tried to show that the numbered company was a sham, but the evidence does not support that conclusion. There was a T-2 return filed for the year 2004. It showed no income, and that it was acting as a Trustee. It was set up to manage the law practice as an agent.

[55] This company had a leasehold interest. The lease sets out the amount of the rent payable. Monies come from the practice. 715866 owned vehicles. The T-1 showed up in the tax returns of the law practice. Who is responsible for the bills and who is the beneficiary? The Appellant is the person responsible for 715866. The relationship has been accepted by the Minister in accepting the filings of 715866.

[56] The auditor did not know about the relationship between the Appellant and 715866. The Appellant never said that no documentation would be provided. The Appellant asked for an extension of time.

[57] Todd Lichty was never involved in this type of situation before. Revenue Canada has agreed that the Appellant is entitled to this type of credit.

[58] The auditor concentrated on credit cards and the Appellant's personal expenses. He only reviewed one-quarter. This is patently unfair. The Appellant has given evidence to show what the taxpayer was doing.

[59] The burden of proof has been satisfied by the Appellant.

[60] Cheques were given as a sample and then the Minister should have gone to the next phase. He merely ignored the documents. If he did not have enough, he should have looked at the documents that I provided. By means of these documents, he has eliminated the GST.

[61] One is entitled to ask for input tax credits on the losses. This is what he did. The Appellant has shown that there are enough input tax credits available and he has shown that they were enough to eliminate the Minister's claim. If the Court does not accept this proposition, then the result is punitive.

[62] The question of losses is not a theory. There was over \$3,000,000, in losses. Mr. Lichty did not give the facts enough thought. The Respondent's best position was that the jury is still out on the question of losses. The taxpayer should be entitled to consideration. What more is the taxpayer to do?

[63] He has given the Minister photocopies of documents. It is the final person who gets the benefit of the supply. In this case, the law practice, the Appellant.

[64] 715866 was not set up as a Trustee for the Appellant. It is not fair to disallow these credits.

[65] There were no facts presented to support the presumptions contained in the Amended Reply.

[66] The Appellant relied upon *Lau v Canada*, 2007 TCC 718, [2007] GSTC 171, *Davis v Canada*, 2004 TCC 662, [2004] GSTC 134, *Leowski v Canada*, [1996] TCJ No. 829 (QL), [1996] GSTC 55, and *Canada v. Merchant Law Group*, 2010 FCA 206, [2010] FCJ No. 990 (QL).

[67] He said that the cases of *Systematix Technology Consultants Inc. v Canada*, 2007 FCA 226, [2007] FCJ No. 836 (QL) and *Technogold Imports Inc. v. Canada*, [1998] TCJ No. 109 (QL), [1998] GSTC 31, are distinguishable.

[68] There is enough evidence here to allow the appeal in full or in part. If allowed in part, the Court should use the numbers as shown in Exhibit A-4 and then allow 7% of those numbers. This throws out all credit card amounts.

[69] The Court could conclude that there is no tax payable because it can draw down the amount claimed by the taxpayer.

Argument on behalf of the Respondent

[70] The law in this case is simple. Did the Appellant acquire property between November 2003 and April 30, 2006 under subsection **169(1)** of the *Excise Tax Act*?

[71] There are elements that must be satisfied to allow the Appellant any relief.

1. He must be a registrant. He was.
2. The registrant must acquire a supply **or** service during the period. This is not in dispute.
3. The property or service must be subject to GST. This is disputed.
4. The person claiming must be liable to pay the tax or acquire the credit or pay the GST. This is disputed.

[72] The supply must be consumed in the context of a commercial activity. Here the home office does not qualify.

[73] The Appellant cannot claim roofing expenses and groceries. Those items are not subject to the Input Tax Credit (“ITC”) rules. Section 169 is simple. It is the only applicable section. Subsection 169(4) requires a registrant to provide sufficient information to allow the amount of ITCs to be calculated.

[74] Depending on the value of the supply, there is an escalating scale. The more the credit allowable the more detailed the information that is required. The bulk of the amounts claimed by the Appellant do not comply with the section. The Appellant could have gone through the exercise and provided numbers but he did not. The Minister is not required to do that.

[75] In *Systematix*, the issue was the same as here. Was the documentation sufficient? That case held that the legislation is mandatory and under section 3, it requires that persons who have paid GST to suppliers to have valid GST registration numbers from those suppliers when claiming input tax credits.

[76] Here the Appellant must fail. The cancelled cheques are not enough. They do not establish the GST number of the supplier and the GST paid. The registrant must be liable to pay the amount. There is a formula under section **169** that must be

complied with. With respect to the bad debt argument, there are many elements that have to be established to claim the bad debt.

[77] The amount must be taxable or zero rated. It must be made for consideration. It must be made to a recipient who was dealing with the taxpayer at arm's length. You must ask if all or part of it only was a bad debt. The amount must be written off in the supplier's books not as an ITC. The supplier must claim the bad debt and it must be reported in the GST return of the supplier.

[78] The taxpayer must show in his return where he claimed the amount and then prove that it was not paid. There is a four-year limitation period. Here there is no evidence of the above.

[79] The evidence before the Court is that the Appellant was not claiming a bad debt. He was assigning numbers to his GST return so that he could claim a refund. The amount of \$6,030.00 referred to in Exhibit A-4 at Tab 30 has not been shown to be a real number. It was merely an ad hoc number used by the Appellant to claim a refund.

[80] In Exhibit R-1 at Tab 8, the Appellant has arrived at a figure that is below what he claimed. Therefore, the number at Tab 30 of Exhibit A-4 is wrong. He merely throws in a number for his losses. If we were to pull out all of the non-allowable items, we would get a lower figure than that claimed by the Appellant at Tab 8 of Exhibit R-1 which was \$2,138.39 as the ITC claimed. The Appellant says that it does not matter. Give me a zero balance. I have losses that have been denied by the Minister. This appeal should be dismissed.

[81] On the bare trust issue, there is no evidence of a trust. 715866 is not the Trustee for the Appellant. It is not enough to file a return merely saying that it is as a Trustee only, that does not make it so.

[82] *Lau* and *Leowski* are cases that reflect on the bare trust argument.

[83] The Respondent says that a bare trust is where the Trustee holds property for another. A business is not property.

[84] In *Leowski*, there was a declaration of trust and there was property involved. It was not a business.

[85] In *Lau*, it was decided that where partners are dealing with third parties at non-arm's length they must be put on notice. Just to put the name Trustee on a return is insufficient. The Appellant was wrong where he argued that the burden of proof on him was on a balance of probabilities. He must demolish the Minister's presumptions to argue that the Court should draw an adverse inference against the Respondent on the facts of this case is not reasonable. The Respondent was not attempting to show that 715866 was a sham.

[86] There was no evidence to show that 715866 was the owner of the cars but only plates. The Appellant has not established that 715866 was operating for his interest. The evidence of the Trust is vague and evasive. It had no income and no cheques.

[87] The appeal should be dismissed and there should be an increased tariff of costs because the Appellant was guilty of the late filing of documents and made many concessions on the stand. He is also guilty of undue delay.

[88] In reply, the Appellant said that the matter of costs should be for another day.

Analysis and Decision

[89] In the Appellant's argument, he appears to be casting some blame on the person of the auditor and said that he did not know about the relationship between the Appellant and 715866. Further, he claimed that the auditor had never been involved in this type of situation before. Further he said that the auditor only reviewed one-quarter of the statements and concentrated on personal expenses credit cards.

[90] However, the Court found Mr. Lichty to be a straightforward and honest witness. The Court is satisfied that he knew what he was doing.

[91] His main concern was that the Appellant had provided insufficient documents for the credits to be allowed. He gave the Appellant every opportunity to provide the source documents to support his claim for ITCs and they were not forthcoming. What he received from the Appellant was a summary of the expenses and the ITCs claimed but no original source documents to support the amounts claimed.

[92] He completed Exhibit R-1, Tab 4 in order to analyse the ITCs' listings submitted by the Appellant and to determine what other documentation was required. He received none. His conclusions that the cancelled cheques and the listings were inadequate to enable the calculations to be made appeared to be reasonable. The

registrant was the Appellant and not 715866 and that itself raised questions as to whether the Appellant was the recipient of the supplies and services.

[93] Further, he found documents that were unrelated to the Appellant and that in itself would have raised concern even if the documents were original documents.

[94] This witness said that many delays were caused by the Appellant and many documents that were requested and promised by the Appellant did not come forward.

[95] His position was that the bad debts issue would not help the Appellant because GST is charged at the time the goods or services are delivered. There was an issue as to whether 715866 was the recipient of some of the supplies and therefore it may not have been entitled to the credits even if original source documents had been provided.

[96] This witness never considered the bare trustee argument because he could not have allowed the credits without the original source documents.

[97] A further concern that he had was that the amounts claimed were estimates, whereas ITCs must be based upon actual amounts paid.

[98] He was adamant that losses do not matter in this case. It comes down to whether the GST was paid. With this position in mind, he reviewed only about one-quarter of the documents because no original documents were provided.

[99] Further, he reviewed the GST return found in Exhibit A-4 at Tab 30 and there was no referral there to bad debts.

[100] On the submission put forward by the Appellant about the Court drawing an unfavourable inference against the Respondent because a number of CRA employees were not called as witnesses, the Court finds no merit in this submission and it is rejected. The Appellant argued that his evidence was candid and consistent, but the Court finds that his evidence did not address the issue raised by the auditor, which was the lack of original source documents to support the claim of the Appellant.

[101] The Appellant stated that he never told the auditor that no further documentation would be provided but it was not and a further extension of time would not have cured that and even at trial no attempt was made to do so. The Appellant seemed to be suggesting in argument that once he provided the cheques to the auditor then the Crown should have gone further to substantiate his

claim. The Court rejects this argument. The Court is satisfied that the auditor did not merely ignore the documents that were provided, as suggested by the Appellant.

[102] The Court agrees with the submissions of the Respondent that the question before the Court is simple. Did the Appellant acquire property under subsection 196(1) of the *Excise Tax Act* between the relevant dates?

[103] If he did, then there are certain thresholds that he must meet to gain the relief sought. The thresholds that the taxpayer did not meet according to the Respondent were:

1. Was the property or service subject to GST?
2. The Appellant has not shown that he was the person who paid the tax or acquired the credit or paid the GST.
3. The Appellant has not shown that the supply was consumed in the context of a commercial activity. Many of the items listed by the Appellant were not so consumed.
4. Most significantly the Appellant must supply sufficient information to allow the amount of the credit to be calculated.

[104] The Court accepts the argument raised by the Respondent that the bulk of the amounts claimed by the Appellant do not comply with the section. The Court has already commented upon the weight it gives to the evidence of the auditor in this regard and the result is that evidence of the Appellant fails to satisfy the Court that he is entitled to the amounts claimed. As mentioned by the auditor, there was a failure to provide the source documentation required, and as a result, the Appellant has failed to meet the burden of proof that is upon him.

[105] The cancelled cheques and invoices that the Appellant provided and his calculations by way of estimate fall far short of providing the degree of proof necessary for him to be given the credits claimed.

[106] On the bad debt argument, the Court is satisfied that the Appellant has failed to prove the existence of the bad debt claimed in accordance with the requirements of the *Act* as indicated by the Respondent in his argument.

[107] The Court is not satisfied that the Appellant was actually claiming a bad debt in any event and as argued by the Respondent, he seemed to be merely assigning numbers to his GST return so that he could claim a refund.

[108] The Court is satisfied on the evidence that the numbers provided by the Appellant are inconsistent and do not match the amount claimed as a credit (see Exhibit A-4 at Tab 30 and Exhibit R-2 at Tab 8).

[109] The Court rejects the bare trustee argument as having any effect on the outcome of this case. There is no evidence of a trustee relationship and as argued by the Respondent to use the name on a return, does not make it a reality.

[110] The cases that have been referred to support this conclusion.

[111] The appeal is dismissed with costs to the Respondent on a party and party basis.

[112] The Respondent has asked for an increased tariff but the Court does not find that to be a proper result in this case, but it is close.

[113] The Appellant asks that costs be addressed on another day, but this position is also rejected.

These Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment dated August 13, 2013.

Signed at New Glasgow, Nova Scotia, this 13th day of September 2013.

"T.E. Margeson"

Margeson J.

CITATION: 2013 TCC 254

COURT FILE NO.: 2008-3719(GST)G

STYLE OF CAUSE: ANTHONY M. SPECIALE and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 5 and 6, 2012

AMENDED REASONS
FOR JUDGMENT BY: The Honourable Justice T.E. Margeson

DATE OF AMENDED REASONS: September 13, 2013

APPEARANCES:

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

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada