Docket: 2016-1065(GST)G

BETWEEN:

JOVIC DEVELOPMENTS LIMITED,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Gaston Jorré, Deputy Judge

Appearances:

Counsel for the Applicant:	Victor Peters
Counsel for the Respondent:	Gregory B. King

ORDER

In accordance with the attached Reasons for Order, the motion to obtain an Order that a question be determined pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 3rd day of March 2021.

"G. Jorré"

Jorré D.J.

Citation: 2021 TCC 19
Date: 202103**16**
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BETWEEN:

JOVIC DEVELOPMENTS LIMITED,

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Respondent.

AMENDED REASONS FOR ORDER

Introduction

[1] The Applicant has made an application for an order that there be a determination of a question pursuant to Rule 58 of the General Procedure Rules. The Respondent opposes the application.[1]

Background/Nature of the Issues

[2] This matter is a GST/HST ("Goods and Services Tax/Harmonized Sales Tax") appeal that covers 10 quarterly reporting periods of the Applicant that fall within the calendar years 2011 and 2012 as well as the first six months of 2013.

[3] The Applicant carries on both "commercial activities" that result in taxable supplies and other activities ("exempt activities") that consist of making "exempt supplies".

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[1] The Applicant asked that the motion be disposed of upon consideration of written representations, the Respondent advised the Court that it was amenable to a written hearing and the Court subsequently advised the parties by letter that the matter would be heard in writing.
No affidavit was filed by either party. The Applicant stated in the Notice of Motion that it would rely on the Pleadings, section 141 of the Excise Tax Act and its written submissions. The Pleadings are the Notice of Appeal of the Applicant, the Reply to Notice of Appeal of the Minister and the Answer filed by the Applicant. There are two Replies, but the second one is not materially different from the first; the only change in it is that it refers to the Notice of Appeal served on it on 21 June 2016, after the Court ordered the Appeal moved from the Informal Procedure to the General Procedure, instead of referring to the Notice of Appeal dated 4 December 2014 which appeal was under the Informal Procedure. The Court file shows that the original Notice of Appeal was simply treated by the Court as a new Notice of Appeal after the Order moving the matter to the General Procedure and was served as such on the Respondent.

[4] At filing, the Applicant reported certain amounts of GST/HST collectible and certain amounts of input tax credits ("ITCs") in each quarterly period.

[5] Subsequently, the Minister of National Revenue assessed the Applicant. The Minister made certain changes not in issue here, including increasing GST/HST collectible.

[6] At that stage of the assessments in issue, the Applicant also claimed significant additional ITCs that were not claimed at filing. In assessing, the Minister allowed considerably more ITCs than had been claimed on filing but approximately $62,000 less than the total amount of ITCs claimed at that stage. It is this amount of approximately $62,000 that is in issue.

[7] In its Notice of Appeal, the Applicant alleges that it did not claim ITCs in respect of expenditures directly incurred in its exempt activities but it "… did claim ITCs on all its other expenditures directly on the basis that substantially all of such expenditures were incurred in the course of its commercial activities."[2]

[8] The Respondent alleges in its Reply to Notice of Appeal that it relied on certain assumptions of fact including that the Applicant had three kinds of expenses: i) expenses relating to taxable supplies, ii) expenses relating to exempt supplies and iii) "mixed-use" expenses relating to both types of supply.[3]

[9] The issues fall into three categories[4]:

i) Most of the dispute relates to ITCs on expenditures for property or services that the Respondent considers to be for both commercial activities and exempt activities (the "mixed-use" expenditures) whereas the Applicant considers those expenditures to be deemed to be entirely in the course of commercial activities by reason of section 141 of the *Excise Tax Act*.[5]

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[2] Paragraph 4 of the Notice of Appeal. In paragraph 3, first sentence of its Answer, the Applicant alleges that it had no "mixed-use" supplies. I am not sure how this allegation of fact is to be reconciled with paragraph 4 of the Notice of Appeal, unless what is intended there, but not expressed, is an allegation that substantially all the consumption or use of any mixed use expenditures was in the course of commercial activities and, as a result section 141 of the *Excise Tax Act*, "… all of the consumption or use of the property or service by the person [is] deemed to be in the course of those activities."

[3] Paragraph 9e) of the Reply.

[4] For the purpose of understanding the issues I have considered not only the pleadings but also the Written Representations of the Applicant on Motion, the Respondent's Written Submissions and the Further Written Representations of the Applicant. The submissions elaborate further on the issues.

[5] In the Applicant's written representations on the motion dated September 8, 2020, especially paragraphs 5 to 10 and 13, it is clear that it views the main issue before the Court as: whether substantially all the consumption or use of the ITCs that the Respondent treated as ITCs related to mixed-use expenditures was in the course of the

ii) There are also ITCs in relation to certain expenditures that the Respondent considers to relate solely to exempt activities; the Applicant considers that they should be entirely deductible.[6]
iii) Finally, there is a third issue relating to the heating costs of a building where the ground floor was commercial but the second floor was residential.[7]

[10] The question that the Applicant proposes to have determined is whether "substantially all" of the expenditures in issue were made in the course of its commercial activities within the meaning of section 141 of the *Excise Tax Act*.

General Scheme of the GST/HST in Respect of ITCs

[11] It is useful at this point to very briefly outline in a very simplified way some key points about the general scheme of the Part IX of the *Excise Tax Act*.

[12] The tax is applied period by period, in this case on a quarterly basis.

[13] Where a taxpayer engages only in commercial activities, the net tax to be paid by the taxpayer is the GST collected or collectible minus GST paid, the ITCs. If the result is positive then the taxpayer must remit the amount if it is negative the taxpayer receives a refund.

[14] However, where a taxpayer engages in both commercial activities and in exempt activities only those ITCs for expenditures relating to commercial activities may be deducted for the computation of net tax.

[15] The *Act* does this by allowing the deduction of the ITC only *to the extent* that the property or service is used, consumed or supplied on the course of a commercial activity.[8] For example,[9] ITCs may be deducted:

> [to] … the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

[16] In addition to this, two additional sections of the *Act* qualify the determination of the extent of use for commercial activities and are relevant here.

Applicants commercial activities with the consequence that section 141 will deem the entire consumption or use to be in the course of commercial activities.

[6] Written Representations of the Applicant on Motion dated September 8, 2020, paragraph 10.

[7] Written Representations of the Applicant on Motion, paragraph 11.

[8] See section 169 of the *Excise Tax Act*.

[9] See paragraph 169(1)(c) of the *Excise Tax Act*.

[17] The first is subsection 141.01(5) that requires that, in determining the extent of use or consumption, one must do so in a fair, reasonable and consistent way. It reads:

> Subject to section 141.02, the methods used by a person in a fiscal year to determine
>
> > (a) the extent to which properties or services are acquired, imported or brought into a participating province by the person for the purpose of making taxable supplies for consideration or for other purposes, and
> >
> > (b) the extent to which the consumption or use of properties or services is for the purpose of making taxable supplies for consideration or for other purposes,
>
> shall be fair and reasonable and shall be used consistently by the person throughout the year.

[18] I note that the text says "methods" in the plural.

[19] Second, section 141 is also relevant. Subsections 141(1) and (2) read as follows:

> (1) For the purposes of this Part, where substantially all of the consumption or use of property or a service by a person, other than a financial institution, is in the course of the person's commercial activities, all of the consumption or use of the property or service by the person shall be deemed to be in the course of those activities.
>
> (2) For the purposes of this Part, where substantially all of the consumption or use for which a person, other than a financial institution, acquires or imports property or a service or brings it into a participating province is in the course of the person's commercial activities, all of the consumption or use for which the person acquired or imported the property or service or brought it into the province, as the case may be, is deemed to be in the course of those activities.[10]

[20] Section 141 further qualifies the "to the extent" by simplifying things where substantially all of the use or consumption of a property or service is either in the course of a commercial activity, or not in the course of a commercial activity. Where section 141's requirements are met there is no need to do an allocation between uses for a very small amount of usage.

[21] I would observe at this point that determining whether substantially all of the consumption or use of a property or service is in the course of a commercial activity necessarily requires a determination of the extent to which it is so

[10] Subsections (3) and (4) cover the reverse situation with a rule that deems all of the use not to be in a commercial activity if substantially all the use is not in a commercial activity.

consumed or used, at least to the extent necessary to determine if the substantially all threshold is met.[11]

Rule 58

[22] The Rule reads as follows:

> **58** (1) On application by a party, the Court may grant an order that a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of any evidence be determined before the hearing.
>
> (2) On the application, the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.
>
> (3) An order that is granted under subsection (1) shall
>
> (a) state the question to be determined before the hearing;
>
> (b) give directions relating to the determination of the question, including directions as to the evidence to be given — orally or otherwise — and as to the service and filing of documents;
>
> (c) fix time limits for the service and filing of a factum consisting of a concise statement of facts and law;
>
> (d) fix the time and place for the hearing of the question; and
>
> (e) give any other direction that the Court considers appropriate.

[23] In considering Rule 58, it is also useful to bear in mind Subrule 4(1):

> 4(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[24] In the 2016 decision, in *Paletta v. R.*[12], Justice Owen provides a useful analysis of Rule 58[13]. These are some of the key portions[14]:

> …
>
> 13 Rule 58 continues to describe a two-stage process. Subsection 58(1) states that the Court may, in response to an application by a party, grant an order that
>
> 1. a question of law, fact or mixed law and fact raised in a pleading, or
>
> 2. a question as to the admissibility of any evidence,
>
> be determined before the hearing.
>
> 14 Under subsection 58(2), the Court may grant such an order if it appears that the determination of the question before the hearing may

[11] Similarly, where one must determine whether substantially all the consumption or use for which something is acquired is in the course of a commercial activity necessarily requires a determination of the extent to which it is acquired for such purposes.

[12] 2016 TCC 171.

[13] The decision was upheld by the Federal Court of Appeal 2017 FCA 33.

[14] Footnotes omitted.

1. dispose of all or part of the proceeding,
2. result in a substantially shorter hearing, or
3. result in substantial savings in costs.

15 In the first stage, the Court determines whether an order should be granted, having due regard to the requirements of subsections 58(1) and (2), which are determined by applying the usual rules of statutory interpretation, keeping in mind, however, subsection 4(1) of the Rules, which requires that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

16 With respect to the requirements in subsections 58(1) and (2), subsection 58(1) requires that there be either (i) a question of law, fact or mixed law and fact raised in a pleading, or (ii) a question as to the admissibility of evidence.

17 In Canada (Director of Investigation & Research) v. Southam Inc., [1997] 1 S.C.R. 748 (S.C.C.), the Supreme Court of Canada described what constitutes a question of law, fact or mixed law and fact as follows (at paragraph 35):

> ... Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact....

18 The question of law, fact or mixed law and fact must have been raised in the pleadings. Rule 58 does not provide a means to address such questions that are not raised in the pleadings.

19 The second, alternative, requirement in subsection 58(1) was introduced with the 2014 amendments to Rule 58. It expands the scope of Rule 58 to allow for questions regarding the admissibility of evidence. The inclusion of this requirement confirms the broad scope of current Rule 58, as it may now be used to address virtually any issue that could arise in a full hearing of the appeal.

20 Subsection 58(2) requires only that "it appear" that the Rule 58 hearing "may" lead to one or more of the specified outcomes. The word "may" is used in two senses in subsection 58(2). The first sense is permissive and this is also the sense in which it is so used in subsection 58(1). The repetition of the permissive sense makes clear the fact that the decision to grant an order is wholly in the discretion of the Court. In particular, the fact that a question may meet the requirements in subsections 58(1) and (2) by no means compels the Court to grant an order under Rule 58.

21 This discretionary aspect of the rule is entirely consistent with the fact that the Tax Court of Canada has the implied authority to control the process of the Court. In Cunningham v. Lilles, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.) , the Supreme Court of Canada stated:

> Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
>
> ... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime ....
>
> (ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

22 Apart from being reflective of the Court's implied authority to control its own process, the repetition of the permissive aspect of Rule 58 reinforces the point that there may well be other considerations at play that factor into the Court's decision whether or not to grant an order. The repeated use of permissive language in subsections 58(1) and (2) confirms that the Court is not limited to considering only the requirements set out in those subsections.

23 The second sense of "may" used in subsection 58(2) expresses possibility. Specifically, if "it appears" to the judge hearing the Rule 58 application that the determination of the question "may" (i.e., could possibly) give rise to one or more of the three outcomes described in subsection 58(2), then the judge may (not must) grant the order.

24 The cases on the former version of Rule 58 are well summarized by the Chief Justice in Suncor, supra. As the Chief Justice observes, some cases under former Rule 58 have held that a question fails to meet the requirement now in subsection 58(2) if only one of two possible answers would lead to the desired results.

25 I do not read these cases as setting a hard and fast rule that must be applied to the current version of Rule 58. Moreover, the broad discretionary language used in current subsection 58(2) supports the position that a question should not automatically fail to meet the requirement in that subsection because one possible answer to the question would not lead to one or more of the desired results. Rather, the possibility of that answer should be factored into the Court's consideration of whether or not to exercise its discretion to grant an order under Rule 58. In my view, such an approach respects the broad discretionary language of subsection 58(2) and is consistent with the mandate under subsection 4(1) of

> the Rules and the general principles enunciated by the Supreme Court of Canada in Hryniak.
> …

Submissions of the Applicant

[25] The Applicant submits that there are essentially two legal questions and a number of factual questions that arise in the appeal. The first legal question is the question the Applicant seeks to have determined.

[26] The Applicant says that this first question is separate from the second question: whether a fair and reasonable method is being used to allocate mixed-use expenditures in accordance with subsection 141.01(5)? According to the Applicant, if section 141 applies, then subsection 141.01(5) has no application.

[27] Both of these questions are mixed questions of law and fact.

[28] The Applicant submits that there would be only a minor degree of evidentiary overlap between the two issues and that the first issue requires much less and more general evidence than the second issue with the consequence that it could be heard in a day whereas the entire case would take three days.[15] I note that in its written submission, the Respondent takes the position that a full hearing would take two days.[16]

[29] The Applicant further submits that if successful there will be no need for a hearing on the other issues.

Analysis of the Applicant's Submissions

[30] There is no simple formula in the *Act* for determining "substantially all". It is necessary to consider all the facts relating to the expenditure for the property or service including its specific use (or uses) in the business and the nature of the business.

[31] To do so requires a rich evidentiary background. In this respect, it is worth recalling two further considerations.

i) The tax is computed, in the case of the Applicant, on a quarterly basis and one must therefore make the determinations in each quarter. While it may be that operations are relatively constant from period to period and the fact

[15] See paragraphs 3 and 17 of the Applicant's Written Representations and paragraphs 6 to 10 of the Applicant's Further Written Representations.
[16] See paragraph 27 of that submission.

patterns are much the same, it may also be that there are sometimes significant shifts from period to period. While I have no way of knowing the degree of variation from the materials before me, the table in paragraph 1 of the Applicant's Answer that shows the ITCs in dispute in each period, if accurate, suggests that there might be significant factual variation from period to period.[17]

ii) The determination is to be done property by property and service by service[18] although it may be that, depending on the facts, as a practical matter certain expenditures can be analyzed together.

[32] As I observed above, one cannot determine whether substantially all the use of a good or service is for commercial activities without determining what the extent of such use is, at least to the point where you can conclude that the extent of use amounts to substantially all.

[33] While determining that a certain extent of use amounts to "substantially all" might perhaps require slightly less detailed evidence than simply determining the actual extent of use, it is not going to materially reduce the evidence needed. The documentary evidence and testimony needed would be pretty much the same.

[34] With respect to the ITCs related to expenditures, that the Minister concluded were entirely for activities other than commercial activities, the evidence on whether or not these expenditures were solely for activities other than commercial activities would have to be heard at the determination so that it could then be determined whether section 141 applied, if it is shown those expenditures are partially for commercial activities.[19]

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[17] Of the ten periods, there are five where the disputed amount is under $1,000, of which the lowest is $85, a further three where the disputed amount is under $3,500, one where it is about $17,000 and one where it is a little less than $35,000.

[18] This is clear from the scheme of the ITC provisions in sections 169, 141 and 141.01(5) given the wording. For example, in (c) of B in the formula in subsection 169(1) it refers to "… the extent (expressed as a percentage) to which the person acquired… the property or service... for consumption, use or supply in the course of the commercial activities of the person." Section 141 and subsection 141.01(5) provide further direction regarding this determination of the extent to which the good or service was acquired for the purposed of the commercial activity. See also Section A, third paragraph, of the commentary to section 141 in the Canada GST Service - David Sherman where it states: "Note that subsections 141(1) to (4) apply on a property-by-property basis. That is, the determination of the use, or intended use, of each property owned by a registrant is examined separately, rather than looking at the business as a whole."(retrieved in GST partner, 2021 – Release 1.)

[19] It might also be that those particular ITCs might be found to relate solely to commercial activities. Further, there could not be any possibility of the determination bringing the matter to an end unless all the evidence and arguments were made in relation to the third issue, the building that has one commercial floor and one residential floor. Special considerations apply to this issue since subsection 141(5) comes into play.

[35] Similarly, the legal argument is going to overlap enormously. For example, suppose there are general office expenses such as rent, telephone costs, stationary and the office is used for all the activities. There will be limited practical differences in the arguments as to how one should allocate such overhead expenses whether it is for the purpose of determining the extent to which they are for a commercial activity or whether it is for the purpose of determining if the extent is sufficient to qualify as substantially all.

[36] As a result, the proposed determination would not save any significant amount of time or money.

[37] In these circumstances, the proposed determination fails to meet the requirements of the second branch of Subrule 58(2).[20]

[38] With respect to the first branch of the Subrule 58(2)[21], as Justice Owen outlined in *Paletta*, *supra*, the Court can take account of wider considerations than those set out in the section. Such **other** considerations can take account of Subrule 4(1).

[39] Such a wider consideration is that the proposed determination would require that, in effect, the bulk of the trial be held. Failure to have the necessary factual foundation – and legal argument – could lead to the determination being inconclusive[22]. If the determination failed to resolve the matter because either the Applicant was unsuccessful or the result was inconclusive, there would then have to be a trial to finish up what was left. This would not be a very effective or efficient way to proceed since there would necessarily be duplication at the trial in circumstances where a somewhat longer single hearing could have completed the matter.

[40] As a result, even if I assume the first branch of Rule 58(2) is otherwise met, this is not an appropriate case for the proposed determination.[23]

Conclusion

[41] The motion is dismissed with costs to the Respondent.

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[20] Insofar as it will not "result in a substantially shorter hearing or a substantial saving of costs."
[21] … the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding …
[22] As happened in *Viterra Inc. v. R*. 2018 TCC 29, a decision of Justice D'Arcy of this Court. The decision was upheld on appeal: 2019 FCA 55.
[23] Given my conclusion, it is not necessary for me to review the Respondent's submissions.

The amended Reasons for Order are issued in substitution for the Reasons for Order dated March 3, 2021. The correction is the second word in the second sentence of paragraph 38 of these Reasons.

Signed at Ottawa, Canada, this **16th** day of March 2021.

"G. Jorré"

Jorré D.J.

CITATION:	2021 TCC 19
COURT FILE NO.:	2016-1065(GST)G;
STYLE OF CAUSE:	JOVIC DEVELOPMENTS LIMITED AND HER MAJESTY THE QUEEN;
	The hearing of the motion was in writing
AMENDED REASONS FOR ORDER BY:	The Honourable Justice Gaston Jorré, Deputy Judge
DATE OF **AMENDED REASONS FOR ORDER**:	March **16**, 2021

APPEARANCES:

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