

Docket: 2008-920(GST)I

BETWEEN:

1418499 ONTARIO LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 18, 2009 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: Kwabena Asubonteng

Counsel for the Respondent: Nikki Kumar

JUDGMENT

The appeal with respect to an assessment made under the *Excise Tax Act* for the period from January 1, 2003 to December 31, 2004 is dismissed.

Signed at Toronto, Ontario this 20th day of March 2009.

“J. Woods”

Woods J.

Citation: 2009 TCC 161
Date: 20090320
Docket: 2008-920(GST)I

BETWEEN:

1418499 ONTARIO LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] 1418499 Ontario Ltd. appeals an assessment under the *Excise Tax Act* for the period from January 1, 2003 to December 31, 2004.

[2] In its GST returns for the period, the appellant reported an aggregate net tax of negative \$5,341.25. This was comprised of GST collectible of nil and input tax credits (ITCs) of \$5,341.25.

[3] In the assessment that is under appeal, the Minister disallowed the ITCs on the basis that the appellant failed to provide documentation as requested by the Minister to substantiate the amounts claimed.

[4] The issues are whether the ITCs should be disallowed and whether a penalty and interest were properly imposed.

[5] The evidence reveals that the appellant did not provide any documentation to the Canada Revenue Agency to support the ITCs claimed, notwithstanding that several requests were made.

[6] At the hearing of the appeal, the only documentation that was presented consisted of handwritten income statements for the two years involved.

[7] The appellant submits that these statements relate to a small courier business that was operated on behalf of the appellant by Kwabena Asubonteng. He is the husband of Lydia Kontor, who was the President and sole shareholder of the appellant. According to their testimony, this business was operated from 2000 to 2005 and is now discontinued.

[8] According to the income statements, the business had revenues of just over \$30,000 and expenses slightly higher than that for each of the years at issue. Many of these purported expenses are the subject of the ITC claims.

[9] The Minister acknowledges that no GST was required to be collected on fees generated by the appellant, on the basis that the courier service was zero-rated as a freight transportation service.

Analysis

[10] The appellant has the burden to establish that it is entitled to the ITCs. For this purpose, the appellant must establish that it incurred GST in relation to expenses of a business, and that it had obtained certain supporting documentation before filing the GST returns, as required by s. 169(4) of the *Act*.

[11] The evidence presented is entirely unsatisfactory to meet this burden in both respects.

[12] The only supporting documentation that the appellant had at the hearing was the handwritten income statements. These could easily have been fabricated and I have given them very little weight. I would also note that some of the expenses listed on the statements (fuel and meals) were estimates consisting of a daily rate. This suggests a lack of proper record keeping.

[13] Also, there were no independent witnesses to substantiate the appellant's story. The appellant submits that its accountant prepared the income statements based on supporting documentation that it had. It suggests that the documentation was subsequently lost during a move that took place in April, 2006. At the very least, the accountant who prepared the income statements should have testified to support this story.

[14] Furthermore, and most important, the testimony of Mr. Asubonteng and Mrs. Kontor was not nearly detailed or cogent enough to satisfy the burden imposed. Mr.

Asubonteng testified on behalf of the appellant and Mrs. Kontor was called as a witness by the Minister. In addition to their testimony being very brief, the evidence of the two witnesses was inconsistent in places, as for example whether expenses were paid by cheque or in cash and whether the supporting documentation was kept in a box or a bag.

[15] I am therefore not satisfied that the expenses claimed were incurred, or that the appellant had obtained the prescribed documentation as required by s. 169(4).

[16] I turn now to the question of penalty and interest. This was not something that was specifically raised by the appellant but was addressed by counsel for the Minister. The Minister included in the assessment a penalty and interest in the amounts of \$550.74 and \$220.43, respectively. Both were imposed under section 280(1) of the *Act*.

[17] According to paragraph 12 of the Minister's reply, the penalty and interest were imposed because the appellant failed to "report and remit or pay net tax as and when required by the *Act*."

[18] This is not a proper basis to impose penalty or interest under section 280(1).

[19] First, I note that s. 280(1) does not refer to a failure to report. It only refers to a failure to remit or pay.

[20] Second, on the facts as assumed by the Minister, the net tax is nil. There is no failure to remit or pay net tax.

[21] After I raised this issue at the opening of the hearing, counsel for the Minister changed the basis for the imposition of the penalty and interest, and led evidence in support.

[22] According to the revised position, the failure was not in respect of net tax at all. It was a failure to pay back the ITCs which previously had been refunded to the appellant. The repayment is required by section 230.1 of the *Act*.

[23] The evidence for the Minister on this issue included a computer-generated summary of the appellant's GST history. According to the summary, the appellant received refund cheques for the ITCs claimed. The appellant does not deny that these amounts were received.

[24] According to the notice of assessment, this amount was included in the assessment as an amount owing. This is specifically permitted by s. 296(1)(d) of the *Act*.

[25] Although it is unfortunate that this issue was not properly dealt with in the reply, I do not think that there was prejudice to the appellant in allowing the Minister to prove it at the hearing.

[26] The appeal will be dismissed.

Signed at Toronto, Ontario this 20th day of March 2009.

“J. Woods”

Woods J.

CITATION: 2009 TCC 161

COURT FILE NO.: 2008-920(GST)I

STYLE OF CAUSE: 1418499 Ontario Ltd. and
Her Majesty the Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 18, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. Woods

DATE OF JUDGMENT: March 20, 2009

APPEARANCES:

Agent for the Appellant: Kwabena Asubonteng

Counsel for the Respondent: Nikki Kumar

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm:

For the Respondent: John S. Sims, Q.C.
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