Docket: 2008-3758(GST)I

BETWEEN:

614730 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 28, 2010, at Ottawa, Canada

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Sam Crupi
Counsel for the Respondent:	Suzanie Chua

JUDGMENT

The appeals under the *Excise Tax Act* from the notices of assessment dated January 10, 2007, February 27, 2007, January 29, 2008, and February 4, 2008 are allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim the following input tax credits:

Reporting Period	**Input Tax Credit Allowed**
1. July 1, 2006 to September 30, 2006	$1,025.91
2. October 1, 2006 to December 31, 2006	$2,565.73
3. January 1, 2007 to March 31, 2007	$668.60
5. July 1, 2007 to September 30, 2007	$35.00
	$4,295.24

The appeal under the *Excise Tax Act* from the notice of assessment dated September 19, 2007 is dismissed, without costs.

It is further ordered that the filing fee of $100 be refunded to the Appellant.

Signed at Halifax, Nova Scotia, this 17th day of February, 2010.

"Wyman W. Webb"

Webb J.

Citation: 2010TCC75
Date: 20100217
Docket: 2008-3758(GST)I

BETWEEN:

614730 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] These appeals relate to various claims under the *Excise Tax Act* ("*Act*") for input tax credits ("ITCs") in five consecutive quarterly reporting periods. All of the ITCs that were claimed were denied. The reporting periods and the amounts claimed are as follows:

Reporting Period	**ITCs Claimed**	**Date of Notice of Assessment**
1. July 1, 2006 to September 30, 2006	$1,060.23	January 10, 2007
2. October 1, 2006 to December 31, 2006	$2,653.50	February 27, 2007
3. January 1, 2007 to March 31, 2007	$840.09	January 29, 2008
4. April 1, 2007 to June 30, 2007	$50.00	September 19, 2007
5. July 1, 2007 to September 30, 2007	$120.95	February 4, 2008
Total:	$4,724.77	

[2] The Appellant submitted a Schedule during the hearing that reorganized the ITCs by the type of expenditure related to the ITCs. The ITCs claimed can be grouped together as follows:

ITCs Related to the Insurance Litigation

Reporting Period	Description	Amount of ITCs Claimed
1. July 1, 2006 to September 30, 2006	Legal Fees	$969.08
1. July 1, 2006 to September 30, 2006	Disbursements	$56.83
2. October 1, 2006 to December 31, 2006	Legal Fees	$2,169.70
2. October 1, 2006 to December 31, 2006	Disbursements	$122.20
2. October 1, 2006 to December 31, 2006	Legal Fees	$179.22
2. October 1, 2006 to December 31, 2006	Disbursements	$8.19
2. October 1, 2006 to December 31, 2006	Engineering report	$70.00
Total:		$3,575.22

ITCs Related to the Roof Problem

Reporting Period	Description	Amount of ITCs Claimed
2. October 1, 2006 to December 31, 2006	Refinancing	$21.00
3. January 1, 2007 to March 31, 2007	Legal Fees	$123.72
3. January 1, 2007 to March 31, 2007	Legal Fees	$37.10
3. January 1, 2007 to March 31, 2007	Legal Fees	$70.00
3. January 1, 2007 to March 31, 2007	Legal Fees	$140.00
3. January 1, 2007 to March 31, 2007	Engineering report	$266.28
5. July 1, 2007 to September 30, 2007	Legal Fees	$35.00
Total:		$693.10

ITCs Related to the GST Appeal

Reporting Period	Description	Amount of ITCs Claimed
3. January 1, 2007 to March 31, 2007	Legal Fees	$35.00

ITCs Related to Accounting Fees

Reporting Period	Amount of ITCs Claimed
2. October 1, 2006 to December 31, 2006	$42.00
5. July 1, 2007 to September 30, 2007	$34.50
Total:	$76.50

ITCs Related the Use of the Automobile and Office Expenses

Description	Amount of ITCs Claimed
Use of the automobile	$207.05
Office Expenses	$138.13
Total:	$345.18

[3] Subsection 169(1) of the *Act* provides that ITCs may be claimed in relation to tax paid on a property or a service that is acquired by a person, to the extent that such property or service is acquired for the consumption, use or supply in the course of commercial activities of that person. This subsection provides as follows:

> 169. (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:
>
> A × B
>
> where
>
> A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and
>
> B is
>
> (a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,
>
> (b) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and
>
> (c) in any other case, ***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.

(emphasis added)

[4] "Commercial activity" is defined in section 123 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;

[5] Section 141.01[1] of the *Act* provides, in part, that:

141.01 (1) In this section, "endeavour" of a person means

(a) a business of the person;

(b) an adventure or concern in the nature of trade of the person; or

(c) the making of a 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.

(1.1) In subsections (1.2), (2) and (3), "consideration" does not include nominal consideration.

…

[1] In *Perfection Dairy Group Ltd. v. The Queen*, [2008] G.S.T.C. 124, 2008 G.T.C. 599 I discussed the issue of whether section 141.01 of the *Act* is a rule of general application (see paragraphs 18 – 21). See also the decision of Justice C. Miller in *BJ Services Co. Canada v. The Queen*, [2002] G.S.T.C. 124, 2003 G.T.C. 513.

> (2) Where a person acquires or imports property or a service or brings it into a participating province for consumption or use in the course of an endeavour of the person, the person shall, for the purposes of this Part, be deemed to have acquired or imported the property or service or brought it into the province, as the case may be,
>
> (a) for consumption or use in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person for the purpose of making taxable supplies for consideration in the course of that endeavour; and
>
> (b) for consumption or use otherwise than in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person
>
> (i) for the purpose of making supplies in the course of that endeavour that are not taxable supplies made for consideration, or
>
> (ii) for a purpose other than the making of supplies in the course of that endeavour.

[6] "Taxable supply", "supply" and "property" are defined in section 123 of the *Act* as follows:

> "taxable supply" means a supply that is made in the course of a commercial activity;
>
> "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;
>
> "property" means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money;

The result of these provisions is that a property or service must be acquired for the purpose of selling or leasing (or otherwise supplying) property or services for consideration in the course of commercial activities in order for the amount payable under the *Act* in relation to the acquisition of such property or services to be eligible to be claimed as an ITC[2].

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[2] In *The Queen* v. *Bronfman Trust*, [1987] 1 C.T.C. 117, 71 N.R. 134, [1987] 1 S.C.R. 32, 36 D.L.R. (4th) 197, 87 D.T.C. 5059, the Supreme Court of Canada dealt with the issue of whether interest on funds borrowed to make a capital distribution (and therefore to preserve income earning properties)

[7] In *Blanchard o/a Four Pillar Financial* v. *The Queen*, [2001] T.C.J. No. 484, [2001] G.S.T.C. 94, Justice Bowie described the interaction of sections 169 and 141.01 of the *Act* as follows:

> 19 The result of finding there to be only one business is that the entitlement to ITCs falls to be determined under sections 169, 141 and 141.01 of the Act. Complex though these are, they may be summarized this way. Entitlement to ITCs arises only to the extent that goods and services tax has been paid on property or services that have been acquired for the purpose of making taxable supplies for consideration.

[8] Subsection 141.1(3) of the *Act* provides that activities related to the termination of a commercial activity will be included as part of commercial activities. This subsection provides as follows:

> (3) For the purposes of this Part,
>
> (a) to the extent that a person does anything (other than make a supply) in connection with the acquisition, establishment, disposition or termination of a commercial activity of the person, the person shall be deemed to have done that thing in the course of commercial activities of the person; and
>
> (b) to the extent that a person does anything (other than make a supply) in connection with the acquisition, establishment, disposition or termination of an activity of the person that is not a commercial activity, the person shall be deemed to have done that thing otherwise than in the course of commercial activities.

[9] The Appellant was incorporated in 1985. Sam Crupi (the President of the Appellant) stated that the Appellant was formed to locate, buy, renovate and sell properties. The Appellant bought two properties – the property located at 577 Gladstone Avenue, Ottawa in 1985 and the property located at 187 Percy Street in Ottawa in either 1986 or 1987. Sam Crupi also referred to a third property, located at 569 Gladstone Avenue, but this property was acquired in his own name. He indicated that this property was adjacent to the property located at 577 Gladstone Avenue and when it was acquired (which was in 1986 or 1987) he was advised to

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would be deductible. Chief Justice Dickson noted that: "[i]n computing income for a taxation year, a taxpayer may deduct interest paid on borrowed money 'used for the purpose of earning income from a business or property'". The Supreme Court of Canada held that since the direct use of the borrowed money was to make the capital distribution, the borrowed money was not used for the purpose of earning income. See also the decision of the Supreme Court of Canada in *The Queen* v. *Singleton* 2001 SCC 61, 2001 D.T.C. 5533 (Eng.), 275 N.R. 133, 204 D.L.R. (4th) 564, [2002] 1 C.T.C. 121, [2001] 2 S.C.R. 1046.

acquire it personally.

[10] The property located at 577 Gladstone Avenue was a commercial property that was leased to another person to operate a garage. The property located at 187 Percy Street was a residential complex that was leased to various tenants as a place of residence. The property located at 569 Gladstone Avenue (which is the property that was owned personally by Sam Crupi) was a mixed commercial and residential property.

[11] The property located at 187 Percy Street was sold in 2000. In October 2001, the property located at 577 Gladstone Avenue was destroyed by fire. The estimated cost of rebuilding the structure to 10,000 square feet (which was the size of the building before the fire) was approximately $1 million. The insurance company paid the Appellant $364,000. A smaller building was constructed on the land and this property was sold in 2005. As well, the property located at 569 Gladstone Avenue (which Sam Crupi owned personally) was sold in 2005 shortly before the property located at 577 Gladstone Avenue was sold.

ITCs Related to the Insurance Litigation

[12] The Appellant is not satisfied with the amount that the insurance company paid in relation to its fire loss claim. As a result, the Appellant has commenced an action against the insurance company and the legal fees, disbursements and the costs incurred in obtaining the engineering report relate to this law suit. If the Appellant should receive any additional amount from the insurance company as a result of the lawsuit, GST will not be payable in relation to such amount.

[13] "Financial service" is defined in section 123 of the *Act*, in part, as follows:

> "financial service" means
>
> …
>
> (f.1) the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy,

[14] The supply of a financial service is an exempt supply[3] and therefore is not a supply made in the course of a commercial activity. Although the receipt of an amount under an insurance policy is included in the definition of financial services, it

[3] Part VII of Schedule V to the *Act* and the definition of "exempt supply" in section 123 of the *Act*.

seems to me that the payment of money by the insurance company would not, in any event, be a supply of property, since "property", for the purposes of the *Act*, excludes money. If the payment of money is not a supply, it is not an exempt supply, nor is it a taxable supply. In any event it is clear that any additional amount that the Appellant might receive from the insurance company under its insurance policy as a result of this litigation would not be taxable under the *Act*.

[15] The issue in this appeal is whether the Appellant is entitled to the ITCs that it claimed. Therefore, the issue is whether the Appellant was acquiring the property and services related to the insurance litigation for the purpose of making taxable supplies *of the Appellant*. Since the Appellant will only "supply" either property or services for the purposes of the *Act* if the Appellant provides such property or services, it is difficult to determine how the receipt of an amount under an insurance policy would result in the Appellant supplying anything. The only possible property that the Appellant might be considered to supply as consideration for any additional amount that it might receive under the insurance policy would be its chose in action against the insurance company for such additional amount. If the Appellant is unsuccessful, then it would presumably not have a chose in action and hence would not have any property that would be provided.

[16] Therefore there are two possible scenarios. One possible scenario is that the Appellant will not be providing any property or any service in relation to the insurance litigation and hence will not be making any supply of any property or service in relation to this litigation. As a result, the properties and services acquired by the Appellant in relation to the insurance litigation would be acquired "for a purpose other than the making of supplies" and hence, as a result of the provisions of paragraph 141.01(2)(*b*) of the *Act*, the Appellant will be deemed to have acquired these properties and services for consumption or use otherwise than in the course of commercial activities and no ITCs could be claimed for any part of the GST paid in relation to the acquisition of these properties or services.

[17] The other possible scenario is that the Appellant provided (or will be providing) its chose in action against the insurance company. However, it seems to me that since this chose in action is a right to receive an additional amount under the insurance policy, that the intention of Parliament must have been that the provision of such a chose in action would be an exempt supply of a financial service since the definition of financial service specifically includes the receipt of an amount under an insurance policy and this chose in action would be the property that would be

supplied for this amount received from the insurance company.[4] The supply of the chose in action would not be a taxable supply (since it would be an exempt supply). Therefore, as a result of the provisions of paragraph 141.01(2)(*b*) of the *Act*, the Appellant will be deemed to have acquired the properties and services that were acquired in relation to the insurance litigation, for consumption or use otherwise than in the course of commercial activities and no ITCs could be claimed for any part of the GST paid in relation to the acquisition of these properties or services. The final result is the same regardless of which scenario is correct.

[18] It therefore seems clear that the acquisition of the property and services related to the insurance litigation were not acquired for the purpose of making any taxable supply and therefore would not be acquired for consumption or use in the course of a commercial activity as a result of the provisions of subsection 141.01(2) of the *Act*.

[19] However, this is not the basis on which the Appellant was assessed. Paragraphs 14 to 19 of the Reply are as follows:

> 14. In determining the appellant's GST liability, the Minister made the following assumptions of fact:
>
> a) the appellant was incorporated on April 23, 1985;
>
> b) the appellant was registered for GST effective January 1, 1991;
>
> c) the appellant was a quarterly filer and has a year-end of March 31;
>
> d) the appellant was in the commercial rental business;
>
> e) the appellant owned a property located at 577 Gladstone in Ottawa (the "property");
>
> f) the property was the only one owned by the appellant;
>
> g) on October 16, 2001 the property was destroyed by fire;
>
> h) the property was rebuilt after the fire;
>
> i) the property was sold in November 2005;
>
> j) after the sale of the property, the appellant was not engaged in any

[4] See paragraph 10 of the decision of the Supreme Court of Canada in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, 2005 DTC 5523 (Eng.), [2005] 5 C.T.C. 215, 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601, for a discussion of the rule of statutory interpretation.

business relating to commercial activities;

k) after the sale of the property, the appellant's sole business was holding mortgage investments;

l) after the sale of the property, the appellant's sole revenue was investment income;

m) during the period from July 1, 2006 to September 30, 2007, the appellant claimed ITCs in the amount of $4,724.77;

n) legal fees were incurred to defend the appellant against legal action filed by suppliers that were involved in reconstructing the property;

o) the ITCs were related to legal fees incurred by the appellant and described in paragraph n) above; and

p) the legal fees and other expenses were not incurred for services for use or supply in the course of the appellant's commercial activities.

15. The Minister also relies on the following facts:

a) during the period January 1, 2002 to December 31, 2005 the appellant received $32,374 in ITCs relating to the cost of rebuilding the property;

b) a portion of the legal fees incurred by the appellant after the sale of the property related to recovering insurance proceeds associated to *[sic]* the fire at the property;

c) the ITCs claimed in relation to the legal fees described in paragraph 14 n) above amount to $672 during the period of July 1, 2006 to September 30, 2007;

d) the ITCs claimed in relation to the legal fees described in paragraph 15 b) above amount to $3,616 during the period of July 1, 2006 to September 30, 2007; and

e) the remaining $437 in ITCs claimed relate to expenses such as accounting fees, automobile, office and supplies;

B. ISSUE TO BE DECIDED

16. The issue to be decided is whether the appellant is entitled to the $4,724.77 claimed in input tax credits.

C. STATUTORY PROVISIONS, GROUNDS RELIED ON AND RELIEF SOUGHT

17. He relies on sections 123, 141 and 169 of the *Excise Tax Act* ("Act").

18. He submits that the ITCs paid of $4,724.77 was not to acquire a property or service for consumption, use or supply in the course of commercial activities of the appellant and therefore the Minister properly disallowed the ITCs pursuant to paragraph 169(1)(c) of the Act.

19. He requests that the appeal be dismissed.

[20] There is no reference in the Reply to section 141.01 of the *Act* (which is not the same section as section 141) nor is there any reference to the language used in this section which limits ITCs by limiting the properties or services that are acquired for consumption or use in commercial activities to those properties or services that are acquired for the purpose of making taxable supplies for consideration (and only to the extent that such properties or services are so acquired). The only language used in the Reply to describe the basis for the assessment is the language used in section 169 of the *Act* (which is one of the three sections that are listed) which limits properties or services acquired to properties or services acquired for consumption, use or supply in the course of commercial activities (and only to the extent that such properties or services are so acquired). There is also no reference to the definition of "financial service" anywhere in the Reply and, in particular, no reference to paragraph (f.1) of this definition which provides that the receipt of an amount as part of a claim under an insurance policy will be an exempt supply. There is also no reference to the definition of property (which excludes money) or to any argument that, if the Appellant is supplying anything as a result of acquiring the properties and services related to the insurance litigation, it will be supplying a chose in action which would be an exempt supply.

[21] Since the Appellant was assessed on the basis that it did not "acquire a property or service for consumption, use or supply in the course of commercial activities of the appellant", in order to qualify for the ITCs the Appellant simply needs to show that the property or service was acquired for consumption, use or supply *in the course of a commercial activity* of the Appellant. If section 141.01 of the *Act* would have formed the basis for the assessment, then the Appellant would have to show how the property or services were acquired for the purpose of making taxable supplies and not just that they were acquired for consumption, use or supply in the course of commercial activities of the Appellant. Subsection 141.1(3) of the *Act* broadens the scope of what is considered to be in the course of commercial

activities to anything done in connection with the acquisition, establishment, disposition or termination of a commercial activity.

[22] In order for me to deny the Appellant's claim based on the provisions of section 141.01 of the *Act*, I would have to deny the ITCs on a basis that is different from the basis on which the Appellant was assessed. In *Pedwell* v. *The Queen*, 2000 DTC 6405, [2000] 3 C.T.C. 246, Justice Rothstein, writing on behalf of the Federal Court of Appeal, stated as follows:

> 15 While the parties referred to a number of older authorities on the issue, *Continental Bank of Canada* now makes it clear (subject to subsection 152(9) which applies to appeals disposed of after June 17, 1999 and is not relevant here in any event) that the Minister is bound by his basis of assessment. While this case does not involve the *Minister* advancing a different basis of assessment, I think the principle in *Continental Bank of Canada* is applicable to a *judicial determination* on a basis different from that in the notice of reassessment.
>
> 16 First, if the Crown is not able to change the basis of reassessment after a limitation period expires, the Tax Court is not in any different position. The same prejudice to the taxpayer results - the deprivation of the benefit of the limitation period. It is not open to that Court or indeed this Court, to construct its own basis of assessment when that has not been the basis of the Minister's reassessment of the taxpayer.
>
> 17 Second, while it is open to the Minister to change the basis of assessment before the limitation period expires, where he does not do so, in my respectful opinion, the Tax Court Judge is bound by the assessment at issue before the Court. Fairness requires that the taxpayer be given a reasonable opportunity to contest a new basis of assessment. If the Tax Court Judge decides on a basis of assessment not at issue during the court proceedings, the taxpayer is deprived of that opportunity.
>
> 18 Here, on his own motion, the Tax Court Judge, in his decision and after the completion of the evidence and argument directed to the Minister's basis of assessment, changed the basis of that assessment without the appellant having the opportunity to address the change. This is clear because the Tax Court judgment allowed the appellant's appeal, i.e. found that there was no appropriation of property which was the basis of the Minister's assessment, but then referred the matter back to the Minister to reassess on the basis that the Euler proceeds and the Landpark deposit were appropriated. What has taken place is tantamount to allowing the Minister to appeal his own reassessment.
>
> 19 I do not say that the Minister cannot assess in the alternative. However, that was not done here.

[23] Therefore I cannot change the basis of the assessment. There is no reference to

section 141.01 of the *Act* in the Reply nor did counsel for the Respondent make any direct reference to this section in her argument. Counsel for the Respondent relied on the decisions of this Court and the Court of Appeal in *Haggart* v. *The Queen,* (2003 G.T.C. 739, [2003] G.S.T.C. 71 and 2003 FCA 446, 2004 G.T.C. 1057, [2003] G.S.T.C. 174). In *Haggart*, Haggart Construction Ltd. had been carrying on business in Fort McMurray, Alberta until its bank called its loan. Mr. Haggart and his company commenced a court action against the bank and were successful in receiving damages. The issue in that case was whether Mr. Haggart (who had continued to carry on the business as a sole proprietor after the company was forced to cease carrying on business) could claim ITCs in relation to the GST paid on the legal fees incurred in relation to the court action against the bank.

[24] Justice Little of this Court, in his decision in *Haggart*, stated that:

> 15 Michael Taylor, counsel for the Respondent, argued that the Appellant was not eligible for input tax credits for the following reasons:
>
> > 1. The Court Action was not commenced in the course of commercial activities but was a claim for compensation.
> >
> > 2. If the Court Action is found to be commenced in the course of commercial activities, when the Court Action was commenced the commercial activities were not those of the Appellant but were those of Construction which is a separate legal entity.
> >
> > 3. If the Court Action were commenced in the course of commercial activities and if you find them to be commercial activities of the Appellant, the Minister's position is that no input tax credits can be claimed because the legal services were not acquired for the purpose of making taxable supplies for consideration.

[25] Although there is no reference to any sections of the *Act*, since the language used in the third paragraph above is “because the legal services were not acquired for the purpose of making taxable supplies for consideration”, it seems clear that the Respondent in that case was, at least for one of the basis of assessment, relying on the provisions of subsection 141.01(2) of the *Act* since the words “for the purpose of making taxable supplies for consideration” are found in this subsection and not in subsection 169(1) of the *Act*.

[26] Justice Little referred to a number of decisions that supported the third point raised by Mr. Taylor, which would have been based on subsection 141.01(2) of the *Act*. In dismissing the appeal, Justice Little stated that:

> 22 In considering the application of section 169 of the Act, I do not believe it could be said that the Appellant commenced the Court Action or paid the legal fees *for the purpose of making or producing taxable supplies*.
>
> (emphasis added by Justice Little)

[27] It seems clear that because Justice Little placed emphasis on the words "for the purpose of making or producing taxable supplies" that he was relying on the provisions of subsection 141.01(2) of the *Act* to limit property or services acquired for consumption or use in the course of commercial activities to those acquired for the purpose of making taxable supplies, which is the limitation imposed by subsection 141.01(2) of the *Act*.

[28] In dismissing the appeal from the decision of Justice Little, the Federal Court of Appeal stated that:

> 2 Although the Applicant restarted his business as a sole proprietorship, he has not established a connection, direct or indirect, between the purchase of the legal services and any ongoing supply of taxable services. Hence, the legal services were not purchased "in the course of commercial activities" of the Applicant for the purpose of subsection 169(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, and, if subsection 140.01(2)* applies, the services were not purchased "for the purpose of making taxable supplies in the course of that endeavour".
>
> 3 This conclusion is further supported by the fact that, in upholding the award of damages made to the Applicant at trial, the Alberta Court of Appeal stated that the damages were more accurately characterized as compensation for the total destruction of the business, rather than for loss of profit: *Haggart Construction Ltd. v. Canadian Imperial Bank of Commerce*, 1999 ABCA 180 (Alta. C.A.) at para. 5.
>
> 4 It is also clear that the basis of the award made by the Alberta courts was the tort committed by the bank in 1989 when it wrongfully called in the loan to the company. The subsequent ongoing loss of business income suffered by Mr. Haggart and/or his company was simply the measure of the damages flowing from the 1989 tort.
>
> 5 For these reasons the application will be dismissed with costs.

[29] The footnote reference was added by the publishers of the decision to note that the reference to subsection 140.01(2)[5] should have been to subsection 141.01(2) of the *Act*. It is not clear why the Federal Court of Appeal stated "if subsection [141.01(2)] applies". The basis for dismissing the appeal was that:

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[5] There is no section 140.01 in the *Act*.

> Although the Applicant restarted his business as a sole proprietorship, he has not established a connection, direct or indirect, between the purchase of the legal services and any ongoing supply of taxable services. Hence, the legal services were not purchased "in the course of commercial activities" of the Applicant for the purpose of subsection 169(1) of the *Excise Tax Act*

[30] The requirement imposed by subsection 141.01(2) of the *Act* was an alternate basis for dismissing the appeal, if that section applied.

[31] At the commencement of the hearing, counsel for the Respondent brought a motion to amend the Reply. Most of the amendments related to deletions of assumptions but the Respondent did want to add a new basis. The Respondent was seeking to add the following to the end of paragraph 18:

> In the alternative, the appellant engaged in "financial services". Therefore, the ITCs were not connected to the production of taxable supplies.

[32] The proposed amendments did not include a reference to section 141.01 of the *Act*. When I indicated that if the Reply were to be amended to reflect this new basis for the assessment, the hearing would have to be adjourned to allow the Appellant time to understand this new basis (the definition of financial service is not a simple short definition) and to prepare for this new basis, counsel for the Respondent withdrew her request to amend the Reply. In any event, the proposed amendments did not include any reference to section 141.01 of the *Act* or any reference to any argument that the property and services acquired in relation to the insurance litigation were not acquired for the purpose of making taxable supplies for consideration. There was also no explanation of how the Appellant was engaged in financial services and counsel for the Respondent acknowledged that the proposed argument related to these amendments was not based on paragraph (f.1) of the definition of "financial service".

[33] As a result, it seems to me that I have to determine whether the Appellant can succeed as a result of the basis on which the Appellant was assessed. The basis for the assessment of the Appellant (which is the same basis for the denial of all of the ITCs) was that the property and services acquired in relation to the insurance litigation were not acquired for consumption, use or supply in the course of commercial activities of the Appellant.

[34] It appears that the assumption in paragraph 14 j) of the Reply was particularly important in assessing the Appellant. This assumption was that:

j) after the sale of the property, the appellant was not engaged in any business relating to commercial activities;

[35] The argument raised by counsel for the Respondent was that if there was no business, there could be no commercial activity. However, commercial activity, is defined in section 123 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***;
>
> (emphasis added)

[36] The making of a supply (which would include a lease or sale) of real property (provided that it is not an exempt supply) will be a commercial activity regardless of whether that supply was part of an activity that could qualify as a business[6]. As well activities that relate to the termination of a commercial activity will be included as part of commercial activities. Subsection 141.1(3) of the *Act* provides as follows:

> (3) For the purposes of this Part,
>
> (a) ***to the extent that a person does anything*** (other than make a supply) ***in connection with the*** acquisition, establishment, disposition or ***termination of a commercial activity of the person, the person shall be deemed to have done that thing in the course of commercial activities of the person***; and

[6] It should also be noted that "business" as defined in section 123 of the *Act* includes any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement.

> (b) to the extent that a person does anything (other than make a supply) in connection with the acquisition, establishment, disposition or termination of an activity of the person that is not a commercial activity, the person shall be deemed to have done that thing otherwise than in the course of commercial activities.
>
> (emphasis added)

[37] Counsel for the Respondent argued that she had not been able to contact the representative of the Appellant and therefore was unable to determine his basis for the Appellant's claims for ITCs. The agent for the Appellant is not a lawyer and the provisions of the *Act* are complex. It also appears to me that the Respondent knew that the property had been a commercial rental property (see paragraph 14 d) of the Reply), the property had been destroyed by fire (see paragraph 14 g) of the Reply), a new building was constructed (see paragraph 14 h) of the Reply) and the Appellant was incurring legal fees to try to recover an amount under the insurance policy (see paragraph 15 b) of the Reply. It seems to me that with this knowledge the Respondent should have reviewed the definitions of "commercial activity" (including paragraph (c) of this definition) and "financial service" and the provisions of sections 141.1 and 141.01 of the *Act*.

[38] It is not clear whether the property was leased after it was rebuilt or whether it was sold before it was leased. However, it does seem to me that the commercial activity of leasing the property was terminated by the fire as the fire destroyed the property. It also seems to me that the activities related to the attempt to collect the amount under the insurance policy were done in connection with the termination of that activity as the fire was the cause of the termination of that activity. There is also a connection between the insurance litigation and the commercial activity of selling the property as the insurance proceeds would be used to rebuild the structure (or to now repay the amounts borrowed to rebuild the structure).

[39] The Appellant was not assessed on the basis that the property and services that it acquired in relation to the insurance litigation were acquired by it for the purpose of receiving an additional amount under its insurance policy (which would not be a taxable supply for the purposes of the *Act* and in relation to which the Appellant would not be making any taxable supply for the purposes of the *Act*) and therefore were not acquired by the Appellant for the purpose of making taxable supplies (as required by subsection 141.01(2) of the *Act*) as outlined above. If this would have been the basis of the assessment of the Appellant or an alternative basis of assessment, the Respondent would have been successful. The failure of the Respondent to deny the ITCs on this basis, or as an alternative basis, means that the Appellant will succeed in this case.

[40] As a result the appeals, in relation to the claim for ITCs for GST incurred in relation to the property and services acquired in relation to the insurance litigation, are allowed except that the GST in relation to the amount paid for the engineering report should be $65.42 instead of $70. The Appellant had received an invoice from the engineer for $2,615.44 (including GST) for his report. The Appellant disputed the amount of the bill and a settlement was reached. The Appellant paid $1,000 in total in full settlement of the claim by the engineer for his work. The $1,000 included GST and therefore the amount of GST that was included in the $1,000 amount was 7 / 107 x $1,000 = $65.42, not 7% of $1,000 since the GST was not paid in addition to the $1,000 but was paid as part of the $1,000.

ITCs Related to the Roof Problem

[41] When the new building was constructed at 577 Gladstone Avenue after the fire, the Appellant had problems with the roof. Sam Crupi stated that the roof was leaking so he refused to make the final payment to the roofing contractor. As a result, the roofing contractor filed a lien against the property. The costs incurred in relation to the roofing problem are the legal fees and engineering fees related to the problems with the leaking roof and the lien that had been filed. It seems to me that these expenditures were for properties and services that were connected to the commercial activity of selling the property located at 577 Gladstone Avenue (which was clearly a commercial and not a residential property). The lien would have to be removed if the property was to be sold. The properties and services acquired by the Appellant in relation to the roof problem were acquired by the Appellant for consumption or use in the course of a commercial activity. Therefore the ITCs related to the acquisition of property and services related to the roofing problem are allowed.

ITCs Related to the GST Appeal

[42] It seems to me that these would relate to the commercial activities of the Appellant to the same extent as the Appellant is successful in this appeal, since the basis of the assessment was limited to section 169 of the *Act*. The amount claimed is only $35 and since as noted below, the Appellant is entitled to approximately 90% of the ITCs claimed, the Appellant will be allowed $31.50.

ITCs Related to Accounting Fees

[43] It appears that the accounting fees related to the preparation of the income tax returns and financial statements for the company. The only source of income for the

Appellant during the period under appeal was investment income. The Appellant's argument was that the Appellant was involved in the commercial activity of locating, buying, renovating and selling properties. However, in the almost 25 years since the Appellant was incorporated, the Appellant only acquired two properties and one of these was a residential property (the leasing or sale of which would have been an exempt supply). The Appellant has not, other than as noted above in relation to the commercial activity related to the property located at 577 Gladstone Avenue, established that the Appellant was carrying on any commercial activity during the period under appeal.

[44] The Appellant has failed to establish the extent to which the accounting services were acquired in connection with the commercial activity related to the property located at 577 Gladstone Avenue and therefore the Appellant cannot succeed in relation to this claim.

ITCs Related to the Use of the Automobile and Office Expenses

[45] Sam Crupi stated that these ITCs relate to automobile expenses and office expenses incurred in relation to the real estate activities of the Appellant. These activities, as described by Sam Crupi, were the location, purchase, renovation and sale of properties. Since, as noted above, the Appellant, in almost 25 years, only acquired two properties (which were acquired in 1985 and in either 1986 or 1987) and since one of these two properties was a residential complex, the Appellant has failed to establish that the Appellant was carrying on an ongoing commercial activity. No connection was established between the acquisition of the properties and services related to the automobile and the office and the commercial activity related to the property located at 577 Gladstone Avenue. As a result the Appellant cannot succeed in relation to this claim.

Conclusion

[46] The appeals are allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim the following input tax credits:

Reporting Period	Item	Amount of ITCs Allowed
1. July 1, 2006 to September 30, 2006	Insurance Litigation	$969.08
1. July 1, 2006 to September 30, 2006	Insurance Litigation	$56.83

Total for the First Reporting Period:		$1,025.91
2. October 1, 2006 to December 31, 2006	Insurance Litigation	$2,169.70
2. October 1, 2006 to December 31, 2006	Insurance Litigation	$122.20
2. October 1, 2006 to December 31, 2006	Insurance Litigation	$179.22
2. October 1, 2006 to December 31, 2006	Insurance Litigation	$8.19
2. October 1, 2006 to December 31, 2006	Insurance Litigation	$65.42
2. October 1, 2006 to December 31, 2006	Roof Problem	$21.00
Total for the Second Reporting Period:		$2,565.73
3. January 1, 2007 to March 31, 2007	Roof Problem	$123.72
3. January 1, 2007 to March 31, 2007	Roof Problem	$37.10
3. January 1, 2007 to March 31, 2007	Roof Problem	$70.00
3. January 1, 2007 to March 31, 2007	Roof Problem	$140.00
3. January 1, 2007 to March 31, 2007	Roof Problem	$266.28
3. January 1, 2007 to March 31, 2007	GST Appeal	$31.50
Total for the Third Reporting Period:		$668.60
5. July 1, 2007 to September 30, 2007	Roof Problem	$35.00
Total for the Fifth Reporting Period:		$35.00
Total ITCs allowed:		$4,295.24

[47] The appeal under the *Excise Tax Act* from the notice of assessment dated September 19, 2007 is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 17th day of February 2010.

"Wyman W. Webb"

Webb J.

CITATION:	2010TCC75
COURT FILE NO.:	2008-3758(GST)I
STYLE OF CAUSE:	614730 ONTARIO INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	January 28, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	February 17, 2010

APPEARANCES:

Agent for the Appellant:	Sam Crupi
Counsel for the Respondent:	Suzanie Chua

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada