Docket: 2009-3063(GST)G

BETWEEN:

ALEXANDER TRAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 23, 2012 at Ottawa, Ontario

By: The Honourable Justice J.M. Woods

Appearances:

Counsel for the Appellant:	Ryan E. Flewelling
Counsel for the Respondent:	Andrew Miller Michael Ezri

JUDGMENT

It is ordered that:

(1) the appeal with respect to assessments made under the *Excise Tax Act* for reporting periods from 1998 to 2001, inclusive, is dismissed;

(2) the appeal with respect to an assessment made under the *Act* for reporting periods in 2002 is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the business was not owned by the appellant after October 31, 2002;

(3) the appeal with respect to an assessment made under the *Act* for reporting periods in 2003 is allowed, and the assessment is vacated; and

(4) the respondent is entitled to its costs in accordance with the tariff.

Signed at Toronto, Ontario this 15th day of November 2012.

"J. M. Woods"

Woods J.

Citation: 2012 TCC 404
Date: 20121115
Docket: 2009-3063(GST)G

BETWEEN:

ALEXANDER TRAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, Alexander Tran, operated an acupuncture clinic in Ottawa from 1998 until 2002. In 2009, he pleaded guilty to evasion under the *Income Tax Act* and *Excise Tax Act* relating to this business and was fined a total of $250,000 for the above periods.

[2] This appeal concerns goods and services tax (GST) assessments relating to the business for periods from 1998 to 2003, inclusive. The Crown conceded at the hearing that the reassessment for 2003 should be vacated on the ground that the business had been sold to the appellant's son.

[3] The amounts that have been reassessed are reproduced from the Reply in the table below. The calculations are not in dispute.

	1998	**1999**	**2000**	**2001**	**2002**	**2003**
Net Tax	$27,472	$14,929	$30,976	$21,063	$26,813	$10,399
Penalties	$3,281	$3,491	$1,698	$4,252	$5,997	$1,369

[4] The only issue raised in the Amended Notice of Appeal is whether the acupuncture services performed at the appellant's clinic are exempt supplies for

purposes of the *Excise Tax Act* (the "*Act*"). Several types of relief were sought, some of which are beyond the jurisdiction of this Court. I have assumed that all of the relief sought, including the removal of interest and penalties, is consequential to the exempt supply issue since this was the only issue raised in the Amended Noticed of Appeal and at the hearing.

[5] The appellant submits that the acupuncture services performed at his clinic are an exempt supply as a listed health service pursuant to section 2 of Part II in Schedule V of the *Act*.

[6] At the hearing, the appellant abandoned a further argument that the services were exempt on the basis that he was a medical practitioner, as defined, for purposes of section 5 of Part II.

Background facts

[7] The appellant was born in Vietnam, where he received training and accreditation as an acupuncturist. He came to Canada in 1988, and opened an acupuncture clinic in Ottawa shortly after his arrival. The appellant and his son both provided acupuncture services at the clinic.

[8] The appellant admits the following facts which are reproduced from the respondent's request to admit.

1. From January 1, 1998 to October 31, 2002, the appellant was the sole proprietor of Asian Acupuncture (the "Business"), a business offering acupuncture treatments to the public.

2. From November 1, 2002 to December 31, 2003, the Business continued operating under the name New Acupuncture.

3. From January 1, 1998 to October 31, 2002, the appellant provided acupuncture treatment at the offices of Asian Acupuncture (the "facility") which was located at 1340 Wellington Street, Ottawa, Ontario.

4. The acupuncture treatment provided by the appellant consisted of supplying acupuncture needles and applying them to the surface of a client's skin.

5. Blood tests, MRI scans, CT scans and x-rays were never administered by the appellant or any other person working at the facility.

6. During the 1998, 1999, 2000, 2001 and 2002 taxation years, the appellant

charged a flat fee for each acupuncture treatment.

7. For 1998, 1999, 2000 and 2003 the appellant neither collected, reported or remitted GST on the consideration paid for the acupuncture treatment provided in those years.

8. For 2001 and 2002 the appellant reported GST on only a portion of the consideration paid for the acupuncture treatment provide in those years.

9. At no time was the appellant a member of the College of Physicians and Surgeons of Ontario or a similar college established under the legislation of any other Province or Territory of Canada.

10. At no time was the appellant a member of the Royal College of Dental Surgeons of Ontario or similar college established under the legislation of any other Province or Territory of Canada.

11. At no time during the period under appeal did the appellant hold a licence to practice acupuncture issued under the authority of a legislative enactment of any Province or Territory of Canada.

12. The appellant first became a member of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario in December of 2010.

13. […]

14. […]

15. At no time did the facility operate for the purposes of providing hospital care, including acute, rehabilitative or chronic care.

16. At no time did the facility operate primarily for the purposes of treating individuals with mental health disabilities.

17. At no time did the facility have any residents.

18. […]

19. At no time did the treatment received by individuals at the facility include the administration of drugs, biologicals or related preparations.

20. At no time did the acupuncture treatment include the use of medical or surgical prosthesis.

21. At no time did the facility provide for the use of operating rooms, case rooms or anaesthetic facilities.

22. At no time did the facility provide clients with rooms other than one common room with thirteen beds separated by a distance of one metre from each other.

23. […]

24. The only equipment used by the appellant for the purposes of the acupuncture treatment were needles and a needle sterilizer.

25. At no time did the acupuncture treatment received by individuals at the facility consist of radiotherapy, physiotherapy or occupational therapy.

26. At no time did the appellant provide accommodations or meals at the facility for individuals receiving acupuncture treatment.

Preliminary matter

[9] It is worth mentioning that the parties acknowledged that a finding in favour of the appellant would be inconsistent with his guilty plea in the criminal proceeding. Often in these circumstances an argument based on estoppel is made by the Crown. Counsel chose not to make an estoppel argument in this case partly because the criminal proceeding focused almost entirely on the income tax charge. Therefore, I have not considered whether estoppel should apply.

Analysis

[10] The appellant submits that the services provided at Asian Acupuncture are exempt supplies by virtue of section 2 of Part II of Schedule V of the *Act*. This provision, as it read during the relevant period, is reproduced below.

Applicable on or before December 10, 1998

2. A supply of an institutional health care service made by the operator of a health care facility to a patient or resident of the facility, but not including a service related to the provision of a surgical or dental service that is performed for cosmetic purposes and not for medical or reconstructive purposes.

Applicable after December 10, 1998

2. [Institutional health care service] - A supply of an institutional health care service made by the operator of a health care facility if the service is rendered to a patient or resident of the facility, but not including a supply of a service related to the provision of a surgical or dental service that is performed for cosmetic purposes and

not for medical or reconstructive purposes.

[11] There are two elements of section 2 that are relevant in this case. The service must be provided by an operator of a health care facility and the service must be an institutional health care service. Both of these terms are defined in section 1 and are reproduced below.

> 1. In this Part,
>
> **"health care facility"** means
>
> > (a) a facility, or a part thereof, operated for the purpose of providing medical or hospital care, including acute, rehabilitative or chronic care,
> >
> > (b) a hospital or institution primarily for individuals with a mental health disability, or
> >
> > (c) a facility, or a part thereof, operated for the purpose of providing residents of the facility who have limited physical or mental capacity for self-supervision and self-care with
> >
> > > (i) nursing and personal care under the direction or supervision of qualified medical and nursing care staff or other personal and supervisory care (other than domestic services of an ordinary household nature) according to the individual requirements of the residents,
> > >
> > > (ii) assistance with the activities of daily living and social, recreational and other related services to meet the psycho-social needs of the residents, and
> > >
> > > (iii) meals and accommodation;
> > >
> > > […]
>
> **"institutional health care service"** means any of the following when provided in a health care facility:
>
> > (a) laboratory, radiological or other diagnostic services,
> >
> > (b) drugs, biologicals or related preparations when administered, or a medical or surgical prosthesis when installed, in the facility in conjunction with the supply of a service included in any of paragraphs (a) and (c) to (g),

> (c) the use of operating rooms, case rooms or anaesthetic facilities, including necessary equipment or supplies,
>
> (d) medical or surgical equipment or supplies
>
> > (i) used by the operator of the facility in providing a service included in any of paragraphs (a) to (c) and (e) to (g), or
> >
> > (ii) supplied to a patient or resident of the facility otherwise than by way of sale,
>
> (e) the use of radiotherapy, physiotherapy or occupational therapy facilities,
>
> (f) accommodation,
>
> (g) meals (other than meals served in a restaurant, cafeteria or similar eating establishment), and
>
> (h) services rendered by persons who receive remuneration therefor from the operator of the facility;

[12] It is sufficient in this case to consider the definition of "institutional health care service." This provision provides an exemption for listed services. Acupuncture is not among the services listed.

[13] The appellant relies on the reference to other diagnostic services in paragraph (a) of the definition of "institutional health care service."

[14] The evidence reveals that the appellant is required to conduct an examination of the patient for the purpose of making a proper diagnosis so that the acupuncture service may be properly performed.

[15] This is not sufficient to enable an acupuncture service to be a diagnostic service for purposes of the relevant definition. It is the essential part of the service that must be looked at, and in this case the essential part is the treatment, which consists of the insertion of needles into the skin. The diagnostic work performed by the appellant is only an incidental part of the service. It was acknowledged in argument that the diagnostic service would only comprise about 5 percent of the value of the service as a whole.

[16] A contextual and purposive interpretation of the definition of "institutional health care service" suggests that the diagnostic services that are included in this

provision are diagnostic services that are performed as the essential element of the service. Diagnostic services that are made as incidental to the provision of treatment are not intended to be included.

[17] The appellant also suggests that the needles used in the service are exempt as medical supplies under paragraph (d) of the definition of "institutional health care service." The problem with this argument is that medical supplies qualify only if they are used in providing a service recognized in this definition. Since the services provided by the appellant's clinic do not qualify as a institutional health care service, equipment used such as needles likewise do not qualify.

Conclusion

[18] The appeal will be dismissed, except for the period in which the Business was owned by the son. The evidence suggests that this period began on November 1, 2002.

[19] The Crown is entitled to its costs.

Signed at Toronto, Ontario this 15th day of November 2012.

"J. M. Woods"

Woods J.

CITATION:	2012 TCC 404
COURT FILE NO.:	2009-3063(GST)G
STYLE OF CAUSE:	ALEXANDER TRAN and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
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APPEARANCES:

Counsel for the Appellant:	Ryan E. Flewelling
Counsel for the Respondent:	Andrew Miller Michael Ezri

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