

Docket: 2011-3694(GST)I

BETWEEN:

D-WIN COMPUTER SYSTEMS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 10, 2013 at Ottawa, Canada

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Jonathan P.M. Collings

Counsel for the Respondent: Serena Sial

JUDGMENT

The appeal from the reassessments made under Part IX of the *Excise Tax Act* for the periods from April 1, 2004 to March 31, 2005, April 1, 2005 to March 31, 2006, April 1, 2006 to March 31, 2007 and April 1, 2007 to March 31, 2008 is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons delivered orally at the hearing.

Signed at Ottawa, Canada this 14th day of June 2013.

"Patrick Boyle"

Boyle J.

BETWEEN:

D-WIN COMPUTER SYSTEMS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**EDITED VERSION OF TRANSCRIPT
OF ORAL REASONS FOR JUDGMENT**

Let the attached edited transcript of the Reasons for Judgment delivered orally from the Bench at Ottawa, Canada on May 10, 2013 be filed. I have edited the transcript (certified by the Court Reporter) for style, clarity and to make minor corrections only. I did not make any substantive changes.

Signed at Ottawa, Canada this 14th day of June 2013.

"Patrick Boyle"

Boyle J.

Citation: 2013 TCC 187
Date: 20130614
Docket: 2011-3694(GST)I

BETWEEN:

D-WIN COMPUTER SYSTEMS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Appeal heard and decision rendered orally from the Bench
on May 10, 2013 at Ottawa, Canada)

Boyle J.

[1] These are my reasons in D-Win Computer Systems Inc.'s informal GST appeal heard today in Ottawa regarding the Appellant's claim for input tax credits in respect of its real estate development project which was subject to a section 273 joint venture election.

[2] At the outset, the Respondent withdrew its preliminary objection to the appeal as it relates to 2005 and 2006. In addition, the Crown conceded that the taxpayer's appeal should be allowed in respect of \$20,730.12 of the input tax credits in issue as the Respondent is satisfied the inputs, including GST, were paid by D-Win outside the provisions of the section 273 joint venture.

[3] The facts in evidence are clear and straightforward. The Appellant's documents were all relevant and well-organized and were admitted on consent. The evidence of both of the taxpayer's witnesses went in very efficiently. The Respondent did not cross-examine Mr. Baldwin, and had only one question for Mr. McConnell. Both counsel were similarly well-prepared and focused in their argument; for this and for the concessions, both parties and counsel are to be commended.

[4] The Appellant, D-Win Computer Systems Inc., acquired the property for development from its sole shareholder and director, Mr. Baldwin. Mr. Baldwin and his wife had originally intended to build their own home on the property, but their personal circumstances changed. This was to be the first real estate development project for either D-Win or Mr. Baldwin. D-Win hired a qualified builder, Eagle Designers and Builders, to act as its general contractor by written contract drafted by Mr. Baldwin. Mr. Baldwin had previously hired Eagle on two occasions for foundation-related work.

[5] Under the contract, Eagle was to have the homes built for D-Win on a cost plus basis providing Eagle with a fixed amount per unit. The contract also dealt with financing and distributions.

[6] D-Win and Eagle filed a joint venture election under section 273 of the *Excise Tax Act* identifying Eagle as the operator of the project and D-Win as the co-venturer. In general terms, the effect of a section 273 election is to deem the transactions between the electing parties not to create another level of GST and input tax credits.

[7] For purposes of the transaction in issue in this case, paragraphs 273(1)(a) and (c) specifically deem, (i) supplies acquired by Eagle on behalf of D-Win to have been supplies acquired by Eagle and not by D-Win, and (ii) the supplies by Eagle to D-Win not to be supplies.

[8] D-Win's re-development project did not go as smoothly as Mr. Baldwin had hoped. For purposes of this appeal, it is sufficient to say that D-Win was not satisfied with Eagle's performance, including its accounting reporting. However, I have no evidence that Eagle did not claim the ITCs to which it was entitled as operator by virtue of paragraph 273(1)(a) in respect of all of the GST paid on the inputs to the houses built.

[9] Following the disappointing financial position D-Win was left with in respect of its project, in its appeal to this Court it is now seeking to claim input tax credits in respect of it having advanced the money to its general contractor to pay the third party suppliers. It is the Appellant's position that this ITC entitlement of D-Win is the effect of subsection 141.01(4) after applying subsection 141.01(7).

[10] Subsection 141.01(7) applies for purposes of subsection (4) among others if a provision of the GST legislation "deems the consideration for a supply not to be consideration for the supply", or "deems a supply to be made for no consideration", or "deems a supply not to have been made by a person."

[11] Counsel for the taxpayer argues that at least one of these pre-conditions to subsection 141.01(7) is met by virtue of the section 273 election and specifically paragraph 273(1)(a). I can not agree. It is clear that paragraph 273(1)(a), for our purposes, deems the acquisition of an input by Eagle on behalf of D-Win to have been an acquisition by Eagle not D-Win. That is, it is a deeming rule regarding the person who acquired the input. It does not deem consideration not to be consideration, does not deem a supply to have been made for no consideration, and does not deem a supply not to have been made by D-Win.

[12] Even if I read on to paragraph 273(1)(c), which was not argued by counsel for the taxpayer, and which does deem certain supplies made by the operator Eagle to the co-venturer D-Win not to have been made, I do not see how the taxpayer can succeed in its position. This is because the next and final step in its argument is to apply subsection 141.01(4) to establish its ITC entitlement. However, the first pre-condition to applying subsection 141.01(4) as set out in paragraph (a), is that a supplier makes the taxable supply of property for no consideration. That can not be satisfied as regards supplies between Eagle and D-Win. In fact and law, there was clearly lots of consideration flowing between these two parties as set out in their contract. Further, even if the taxpayer is correct, that subsection 141.01(7) provides that section 273 does not apply in applying subsection 141.01(4), no supply can even be argued to have been deemed to have been made for no consideration. Finally, even if paragraphs 273(1)(a) and (c) both apply, as discussed above, they do not deem any supply to have been made for no consideration. For all of these reasons, subsection 141.01(4) can not be engaged in this case.

[13] For the above reasons, the taxpayer's position on the law can not succeed. The appeal will be dismissed except as regards the amounts conceded by the Respondent noted above.

[14] I would note that this also seems to be the appropriate result as regards at least all of the inputs from third parties. D-Win elected under section 273 to have its operator Eagle be the one entitled to the ITCs in respect of GST charged by the third party suppliers. There is no evidence that Eagle did not claim all of the ITCs to which it was entitled, nor is there any evidence that Eagle charged or collected GST to D-Win or remitted any GST when D-Win funded Eagle to permit Eagle to pay these third party suppliers, hence, if D-Win were now to obtain input tax credits in respect of the GST paid by Eagle to the third party suppliers, there would clearly be double counting, or at least double counting could not be excluded as a risk.

[15] The appeal is allowed in part, only to the extent of the Respondent's concession of input tax credits totalling \$20,730.12.

Signed at Ottawa, Canada this 14th day of June 2013.

"Patrick Boyle"

Boyle J.

CITATION: 2013 TCC 187

COURT FILE NO.: 2011-3694(GST)I

STYLE OF CAUSE: D-WIN COMPUTER SYSTEMS INC. AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Canada

DATE OF HEARING: May 10, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: June 14, 2013

APPEARANCES:

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Counsel for the Respondent: Serena Sial

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