Docket: 2016-953(GST)G

BETWEEN:

MEDALLION CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 28, 2018, at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Neil E. Bass Angelo Gentile Jess Waslowski (Student-at-law)
Counsel for the Respondent:	Frédéric Moran Bhuvana Sankaranarayanan

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JUDGMENT

The appeal of the assessments raised February 23, 2015 respecting monthly reporting periods January 1, 2011 to December 31, 2011 and the reassessments raised March 11, 2015 regarding the monthly reporting periods January 1, 2012 to December 31, 2013 under the *Excise Tax Act* (Canada) is allowed, and the said appealed assessments/reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that at all material times Medallion Corporation and the various Owners were operating together as joint venturers. The parties may have 30 days from this date to reach agreement on costs and alternatively to file written representations as to costs with the Court.

Signed at Summerville Centre, Nova Scotia, this 30th day of July 2018.

"B. Russell"

Russell J.

Citation: 2018TCC157
Date: **20180821**
Docket: 2016-953(GST)G

BETWEEN:

MEDALLION CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Russell J.

Introduction:

[1] The Appellant, Medallion Corporation (MC), has appealed assessments raised February 23, 2015 under the *Excise Tax Act* (Canada) (Act) respecting MC's monthly reporting periods for January 1, 2011 to December 31, 2011, and also has appealed reassessments raised March 11, 2015 respecting monthly reporting periods for January 1, 2012 to December 31, 2013. The Minister of National Revenue (Minister) assessed/reassessed on the assumption MC was not engaged in a joint venture with certain leasehold building owners, and that in actuality MC supplied property management services to those leasehold building owners. The Minister accordingly assessed/reassessed on the basis that the proportionate share received by MC was entirely taxable as being consideration received for the supply of taxable property management services to the owners of the particular buildings. The issue in this matter is whether during the said reporting periods MC was engaged in a joint venture with those owners. If it were then the appealed assessments and reassessments would be invalid.

Facts:

[2] The parties filed an extensive partial agreed statement of facts (PASF), including amongst others the following facts. MC has expertise in the leasing, management and operation of real property. Certain persons own (Owner, Owners)

residential and commercial real property in Ontario (Property, Properties). MC and the Owners do not deal with each other at arm's length. Between January 1, 2011 through December 31, 2013 MC entered into ten written agreements each entitled "Joint Venture Agreement" (JVA) with one or more Owners, each *re* a Property or Properties.

[3] Each JVA party could carry on its own business outside the activity governed by the particular JVA. The key terms of each JVA include section 1, entitled "Establishment of Joint Ventures", providing for formation of a separate joint venture to earn revenues from the leasing of each Property specified in the JVA, as of an effective date. Sections 2 and 3 headed "Participation in Joint Ventures" provide for each party's participation in each joint venture (JV) equal to the proportionate interests set out in a schedule to the JVA in respect of each Property. The said proportionate interest is as to the Gross Rental and Other Income (GROI) derived from each Property listed in the JVA. The GROI means all income received for each Property including rent, parking and laundry income, common area maintenance charges **and** property tax billings. Excluded are security deposits and damage and loss reimbursement payments.

[4] Sections 4 and 5 under the heading "Owner's Joint Venture Contributions" provide that the Owner agrees to make each Property available for leasing and use for benefit of each JV and to pay for its expenses in connection with each JV per terms of the JVA. For greater certainty, MC has no ownership interest in the Properties and no entitlement to proceeds from any mortgage, sale or disposition thereof. The Owner is to provide MC with 90 **days** notice of any Property sale.

[5] Section 6, headed "[MC's] Joint Venture Contributions", provides that MC contributes its leasing, management and property operation expertise for each JV, and will pay all its expenses incurred for each JV, *per* the applicable JVA. Specifically, MC will negotiate leases for space in the Properties in MC's own name, on behalf of JV parties, and to give or permit occupancy, and Owner grants MC the right to do so for each Property. Further MC will collect all revenues generated by the Properties to be deposited for the benefit of parties' GROI for each JV. Both Owner and MC will have a joint property interest in the GROI for each JV to the extent of their proportionate interests. MC is generally to do all things necessary and desirable for proper operation of the Properties, including dealing with tenants, insurance, taxes and minor repair (up to $25,000 *per* item), keep appropriate records, prepare annual unaudited financial statements and annual budgets. Owner has no ownership interest in property or equipment MC uses in carrying out its obligations.

[6] Section 7, headed "[MC's] Expenses", makes MC responsible for all administrative costs, salaries**,** etc. it incurs to carry out its JVA duties except for any cost etc. *re* repair, maintenance or capital improvement except for on-site maintenance, as specified in a JVA schedule. Section 8, headed "Owner's Expenses" provides that each Owner is responsible for all other on-site supervision, repair, maintenance and capital improvements except as to extent of on-site personnel referenced above. JVA section 9, headed "Payment of Joint Venture Proportionate Shares" provides that MC will keep a record of proportionate interests in GROI and shall pay all Owner expenses out of Owner's proportionate interest. MC shall pay out resultant proportionate interest amounts on a monthly basis.

[7] Sections 10 & 11 entitled "Joint Venture Management Committees" provide that one person (Manager) appointed by each party (Owner, MC) will comprise a Joint Venture Management Committee (JVMC) for each JV. The JVMC meets at least once a month unless otherwise agreed, "to discuss and resolve any significant business, operational, strategic or regulatory issues of concern to each [JV]". All decisions are to be made by mutual agreement of the Managers. If unable to agree, a third party arbitrator may be appointed. If there still is not agreement then either party may terminate the JVA.

[8] Section 12 entitled "Right to Inspect Books and Records" gives that right to all parties of a JV, regardless of who has possession of the actual books and records. Section 15 provides for periodic review and renegotiation of respective JV proportionate interests in the applicable GROI for a one year period. Section 16, *re* "GST", provides that each of Owner and MC is responsible for remitting GST *per* the Act collected in respect of commercial rents according to their proportionate interests in the GROI and shall be entitled to own **input tax credits (ITCs)** in respect of property and services consumed, used or supplied in connection therewith. That is MC's filing position in this appeal.

[9] Section 17 expressly confirms for each party that they have no intention to create a partnership, and that no act done by either shall operate to create a partnership relationship. Section 18 provides for a "Term" which automatically renews annually unless the JVA is validly terminated *per* its termination clauses. They include that at any time either party can terminate the JVA on 90 **days** notice to the other.

[10] The PASF provides also that the Respondent does not allege that the JVAs are a sham, and the Respondent does not dispute that each party to a JVA followed and abided by the JVA terms.

[11] As noted above the appealed assessments/reassessments taxed all income to MC derived from its proportionate share of the various JVs' respective GROIs, on the basis all such income was consideration for services rendered as property managers for the respective Owners. MC's position is that it was only taxable under the Act for the portion of its received percentage of the GROI relating to commercial leases.

Issues:

[12] In its Reply the Respondent pleaded that the herein alleged JVs did not exist, submitting (para. 68 of Respondent's Written Submissions) that four "vital characteristics" of a JV were missing from the alleged JVs. They are:

(a) MC had no JV interest in the subject matter of the venture;

(b) MC had no right of mutual control or management of the enterprise of each alleged JV;

(c) MC had no expectation of profit, or the presence of an adventure in the nature of trade; and

(d) MC had no right to participate in the profits/benefits - this being the factor primarily advanced in the Reply to support the assessment/reassessment position that MC was not in receipt of income from the alleged JVs.

Legal Analysis:

[13] The following is a review of jurisprudence and a Canada Revenue Agency (CRA) policy statement, pertaining to the flexible meaning of the term joint venture.

[14] *Central Mortgage & Housing Corp. v. Graham*, 1973 43 DLR (3d) 687 (NSSCTD), is commonly recognized for being an early Canadian decision establishing basic legal aspects of a "joint adventure", subsequently referred to as "joint venture". Extensively citing from *Williston on Contracts*, 3rd edition, vol. 2 (1959), Jones, J. at p. 706-7 noted **Williston's** list of "certain requisites deemed

essential for the existence of a joint venture" as being, in addition to having a contractual basis:

(a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;

(b) A joint property interest in the subject matter of the venture;

(c) A rate of mutual control or management of the enterprise;

(d) Expectation of profit, or the presence of "adventure" as it is sometimes called;

(e) A right to participate in the profits;

(f) Most usually, limitation of the objective to a single undertaking or *ad hoc* enterprise.

[15] In the decision of this *CMHC* case CMHC had sued for foreclosure with the purchaser (Graham) counter-claiming for alleged defects in the building against both CMHC and the builder on the basis they were engaged as a joint venture. CMHC said it was merely a lending agency which provided financial backing for the construction project. Thus it was only a mortgagee as to the plaintiff builder. However the Court found they were engaged in a joint venture as the six requisites for being a joint venture had been met. CMHC "clearly had a financial interest at stake and was vitally concerned with the successful completion of the venture".

[16] In *Westcan Malting Ltd. v. Her Majesty*, [1998] TCJ No. 252, Teskey, J. of this Court considered whether an agreement between the appellant owner of a malting plant and a village was a joint venture agreement. The agreement provided that the village would obtain government funding to pay for construction by the appellant of an improved water supply and effluent disposal system that the village would benefit from and that the appellant required for its malting plant operations. The village would own the system but would transfer it to the appellant for $1 if the village stopped operating it; and the appellant would be entitled to the water and effluent disposal service at cost. The appellant was assessed on the basis of failure to collect GST on the sale of the system to the village. The appellant argued on appeal *inter alia* that it and the village were engaged in a joint venture and had elected under section 273, rendering the undertaking tax free. The Court found (paragraphs 54 and 55) that:

> Whether a joint venture exists for the purposes of section 273 of the Act must be determined on the basis of conduct between the parties, the nature of their intentions, the facts and circumstances of their situation, and the **Agreement** between them. While the list of factors set out by Williston are not determinative as to the existence of a joint venture between the parties, on the basis that they have been cited in approval in [*CMHC*] and *Bow Valley supra,* they must be given consideration.
>
> I do not find there existed the right to participate in profits nor **an** expectation of profit, from the infrastructure for either party. The benefit accruing to [the village] from the infrastructure would not be in the form of profit, but rather a decreased tax rate available to its citizens should the **Appellant** locate in the municipality. The benefit accruing to the **Appellant** from the infrastructure is that it gets its water and sewage disposal at cost with very little capital outlay. There does not exist the element that a financial interest is at stake, nor is there an assumption of risk in the overall success or failure of the joint utilities program. I am not convinced that both parties had a joint property interest in the infrastructure necessary to constitute a joint venture.

[17] Cited in this extract is the decision of *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1995)*, 126 DLR (4th) 1 (Nfld.C.A.). In *Bow Valley* Cameron, JA found (paras. 35, 36) *per* the *CMHC* requirement (above) of "a joint property interest in the subject matter of the venture" that there was no joint venture between parties A and B to build and operate a drill rig named the Bow Drill 3. This was because the subject matter of the undertaking was the construction and management of that drill rig, and parties A and B held no joint property interest in that drill rig, which was owned solely by party C. Neither did parties A and B have any responsibility for operation of the rig. Thus there was no joint venture between parties A and B to build and operate the drill rig. The subject matter of the undertaking could not be redefined as being east coast exploration. This decision on this point was subsequently affirmed by the Supreme Court of Canada - *Bow Valley Husky (Bermuda) Ltd*., [1997] 3 SCR 1210, at para. 49 (minority but not on this point) - "While related contractually, the Court of Appeal correctly held that the plaintiff and the property owner cannot, on any view of the term, be viewed as joint venturers."

[18] The decision of *Semenoff v. Saskatoon Drug & Stationary,* (1988), 49 DLR (4th) 102 established that an employee who entered into a joint venture agreement with his employer which involved doing many of the same actions the employee had carried out in his employment, was not detrimental to the otherwise valid joint venture agreement. The focus now was on sharing of gross profit.

[19] In *Lyman Langille v. Her Majesty*, 2009 TCC 139, Campbell, J. considered whether a joint venture **was** reflected in the teaming of the appellant's company and another company in each pooling or contributing cash to fund purchasing by the other party of certain inventories for resale with gross proceeds divided between the parties; where both companies, although the appellant's to a lesser extent, participated in deciding what and whether to purchase and on what terms**,** etc. In particular the question was whether did the appellant's company have a joint property interest in the inventory purporting to be the source of the joint venture income, being one of the six *CMHC* and **Williston** requirements.

[20] The Respondent Crown argued that it was not a joint venture as only the other company held title to the inventory purchased for resale. But Campbell. J. pointed to the cash contributions made by the appellant's company and held that if a mortgagee in *CMHC* could be found to be a joint venturer, the appellant's company's ownership of the funds participating in purchasing the inventories was enough to find a property interest here, sufficient to constitute a joint venture participant. The subject-matter of the joint venture was not the purchased inventory but rather the profit earned therefrom and divided on a gross basis between the two joint venturers. The appellant's company was not an investor but rather an active participant in this profit-generating adventure.

[21] In *Dover Financial Corp.*, 1996 NSCA 23, the Court held that a joint venture was maintained if profits were realized in the parties' separate domains rather than a sharing of overall profit. Here, **one** party intended to make a profit from the rents or eventual sale of the project. However the other party expected to make a profit from its substantial fees or financing arrangements.

[22] In *Woodlin Developments Inc.*, [1986] 1 CTC 2188, Christie, ACJTC cited at length from a 1985 article that utilized the *CMHC* and **Williston** joint venture criteria in distinguishing between a partnership and a joint venture.

[23] Notable also is the PEI Court of Appeal decision of *ADI International Inc. v. WCI Waste Conversion Inc.*, 2011 PECA 14. Here, Jenkins, C.J. at para. 40 expressed the following general observations regarding joint ventures:

> In my opinion, this does not demonstrate a reversible error. First, there was no legal error. The modern authorities do not treat the list of requisites as rigid; rather, they take a more nuanced approach. The Nova Scotia Court of Appeal has held that depending on the circumstances, the profits of the participants can be realized from separate domains rather than in sharing the overall profit, and

> sharing of overall profits is not essential: [*Dover Financial Corp., supra, citing CMHC*] Pugsley J.A. observed in [*Dover*]
>
> > that joint venture is not a term of art in English law and is not always capable of exact definition. In consequence, he advised that in approaching the "so-called Williston prerequisites", it is important to consider Williston's remarks as setting forth general principles that may be modified "depending not only on what the parties have expressed, but also on their conduct, and on all the facts and circumstances." The modern texts are consistent with this approach. Both Chitty on Contracts, 13th ed. 2008 at 37-017, and Goldsmith on Canadian Building Contracts, 4th ed. 2010 at 1(1)(a)(i)(H), in their description of 'Joint Ventures' state that profit is distributable as agreed; and neither text now contains a list of prerequisites.

[24] As well, the CRA's Policy Statement P-171R has been noted - entitled, "Distinguishing Between a Joint Venture and a Partnership for the Purposes of the Section 237 Joint Venture Election", and dated February 24, 1999. Generally it identifies the **Williston** factors and expresses them in relatively open terms. Of course these are not statements of law but can offer guidance where there is some doubt or ambiguity remaining after application of usual principles of legal interpretation.

[25] With this jurisprudential background respecting joint ventures, as provided by the two parties, I return to the issues pressed by the Respondent. The first is that the appeal should fail on the basis that one of the **Williston** requisites has not been met; namely that MC had no joint property interest in the subject matter of the venture.

[26] The Respondent says that the subject matter of the ventures in the case at bar are the various Properties, all owned by the Owners and not at all by MC, and which Properties MC per the JVAs is to actively oversee being leased to residential and commercial tenants. But the Appellant, MC, cites *Langille* (*supra*) for the proposition that the subject matter of the venture actually is the revenue generated from the operations purporting to be a joint venture. The Court in *Langille* reached this conclusion in part from the fact that therein both joint venturers had contributed cash to purchase the various inventories for re-sale so as to generate the gross revenue to be split between them, regardless that only one of them actually held title to the purchased inventories awaiting re-sale.

[27] In the present case however the undertaking of each the purported joint ventures is not the sale of the Properties. Nor in my view is it the GOIA specifically. Rather, the subject matter of the JVs in this present case is the use of the Properties; specifically through the leasing of same. The right to lease the Properties is, *per* the JVAs, held by MC which has expertise in arranging and managing the leasing of the Properties, which expertise would be MC's significant contribution to the purported joint ventures. Subsection 123(1) of the Act provides in its definition of "property" that that term "includes a right of interest of any kind". This language would cover MC's contractual right, pursuant to the JVAs, to lease the subject Properties in its own name. Accordingly, MC and the Owners do have joint property interests in the aforesaid subject matter of the JVs. *Bow Valley* (*supra*) is distinguished on the basis that unlike in that case, here the Owners do of course have a property interest in the Properties and MC has an interest in their management and operation.

[28] The Respondent's second argument is that MC had no right of mutual control or management of the enterprise of each alleged JV. I do not accept this. The JVAs each include sections 10 and 11 pertaining to JVMCs (noted *supra*), which provisions ensure that MC (and each pertinent Owner) has a representative on each JV's JVMC, and that decisions can only be made "by mutual agreement" and that each JVMC must meet at least monthly. The evidence also is that both parties to this appeal accept that these and all other provisions of each JVA are observed in fact. The fact that MC has no say, other than a right to notice, as to any sale of any of the Properties does not detract from its right per sections 10 and 11 aforesaid of mutual control or management of the enterprise of each alleged JV. Any Property sales simply would be outside the purview of "the enterprise of each alleged JC".

[29] The third argument asserted by the Respondent is that MC had no expectation of profit, or the presence of an "adventure". I do not accept this. There is no evidence to dispute that MC carried out its contractual duties in a business-like and organized manner. There is no evidence that MC's intention, reflected in its signing of the various JVAs, was other than to make a profit though management of the leases of the Properties, in a JV context. This was a profit-making scheme. There was no guarantee of profit, and MC did have its share of expenses (spoken to in section 7 of the JVAs) to recoup. Income earned annually, less applicable expenses, would be on income account not capital account. I therefore conclude that MC does meet this joint venture requisite, worded from 1959 in now dated language, that MC did at all appropriate times have an

expectation of profit, or the presence of "adventure". The Respondent has not established otherwise.

[30] The fourth argument that the Respondent advanced is that MC had no right to participate in the profits/benefits - this being the factor primarily advanced in the Reply to support the assessment/reassessment position that MC was not in receipt of income from the alleged JVs. This is addressed in paras. 73, 74 and 75 of the Respondent's Written Submissions. At para. 75 the Respondent states that it, "maintains its position that the JVAs did not grant [MC] the right to participate in the profits generated by the Properties, but also recognizes that less weight ought to be given this factor in light of the *WCI Waste Conversion v. ADI International Inc.* decision."

[31] I do not agree that MC had no right to participate in profits under the JVAs. To be precise, as shown above the JVAs in each instance gave MC and the relevant Owner(s) the right to take percentages of the GROI as specifically agreed and assigned by each JVA. MC and the relevant Owner(s) were separately responsible each for their own expenses. If the Respondent is saying that MC had no ability to share profit from sale of any of the Properties, the answer is that any sale of a Property simply was beyond the scope of the JVs as asserted in this case and as made clear by the respective JVAs. It is important to note that profits *per se* were not disbursed to the parties as would be the case for partnerships - rather, gross revenues were, that is, GROI.

[32] The Appellant, MC, raised an alternative argument; that if a joint venture construction of the JVAs cannot be found, then in any event the appealed reassessments should be vacated on the basis that the JVAs are not reflective of provision of management services by MC to the Owners, nor do they state that the Owners will pay anything to MC. Particularly, MC "owned its share of the GROI from the moment rents were paid to it by tenants." (Written Argument of Appellant, para. 60.)

[33] I do not agree with this submission. If I had not found that there was a valid joint venture structure in this case, I would have upheld the appealed reassessments on the basis that MC still received consideration, albeit in an indirect manner as provided by the alleged JVAs, in return for property management services rendered to the Owners of the Properties in respect of which tenants paid rents.

[34] I will allow the appeal and refer the appealed assessments/reassessments back to the Minister of National Revenue for reconsideration and reassessment on

the basis that at all material times MC and the Owners were operating together as joint venturers. As for costs, I adopt MC's request that the parties may have 30 days from the date of this judgment to reach an agreement on costs and alternatively to file written representations as to costs.

These Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment dated July 30, 2018.

Signed at Halifax, Nova Scotia, this 21st day of August 2018.

"B. Russell"

Russell J.

CITATION:	2018TCC157
COURT FILE NO.:	2016-953(GST)G
STYLE OF CAUSE:	MEDALLION CORPORATION AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 28, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
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DATE OF AMENDED REASONS FOR JUDGMENT:	**August 21, 2018**

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