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Tax

Ruling confirms ITC claims possible after business wind-up

By AdvocateDaily.com Staff

A recent Federal Court of Appeal (FCA) ruling provides "surer footing" to argue that a corporate registrant that incurs expenses after the windup of its business but before - or during — the winding down of the corporation itself should not be denied input tax credits (ITCs), Toronto tax litigator Adrienne Woodyard tells *The Lawyer's Daily*.

The case, an appeal of a Tax Court of Canada decision, involved a company that had been conducting business as a telecommunications firm operating in Ontario and Quebec.

According to court documents, the business was unsuccessful and in December 2008 the company announced that the telecommunications firm would be wound up and its assets sold.

The following year, it reached an agreement to sell its 100 MHz of contiguous licence spectrum and its CRTC broadcast licence. However, according to the court, shareholders opposed what they identified as excess payments to the former executives and they started an action in the Ontario Superior Court of Justice to recover the amount.

The issue on appeal related to the GST or HST paid by the telecom firm in relation to legal services provided with respect to the lawsuit against the former executives, says the decision.

The question before the court was, under rule 58 of the *Tax Court of Canada Rules* (*General Procedure*), "whether, on the facts agreed to by the Parties and any other

facts found by the Court, the Appellant is deemed to have incurred litigation costs in the course of a commercial activity pursuant to subparagraph 141.1(3)(a) of the *Excise Tax Act.*"

The FCA noted that, while applying subsection 141.1(3) of the *Excise Tax Act,* the Tax Court judge found that there was a difference between "winding down a business" and "winding down a corporation." The Tax Court, it said, found that the spectrum and license sale was part of the firm's commercial activities, but the litigation against the former executives was not.

As such, the Tax Court determined that any connection between the litigation and the winding down of the corporation was not sufficient to allow the telecom firm to claim ITCs for the GST or HST paid in relation to the legal services used against the former executives, *The Lawyer's Daily* reports.

However, on appeal, the FCA noted that the remuneration was "not personal" as it would have been paid for services rendered as part of the telecom firm's commercial activities or the termination of those activities, the article notes.

In allowing the appeal, the FCA noted that the connection between the termination of the telecom firm's commercial activity and the legal services for the litigation against the former executives is sufficient enough to permit it to claim the ITCs for the GST or HST paid in relation to those legal services.

As Woodyard, a partner with DLA Piper (Canada) LLP, explains, the decision "…also supports the argument that expenses should not be classified as 'personal' simply because the business is no longer operating at the time they are incurred, unless they relate to the collection of accounts receivable."

"A collections dispute is not the only type of litigation a business may become embroiled in after the windup of a business, and the Federal Court of Appeal's affirmation that the phrase 'in connection with' in ss. 141.1(3) must be interpreted broadly may be helpful to clients who hope to recover the GST/HST on the legal fees they incur in litigating these matters," she tells *The Lawyer's Daily.*