

Claiming Input Tax Credits against GST/HST

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630413NB Inc v The Queen, [2016 TCC 156](#)

At issue was whether the taxpayer was able to claim input tax credits (ITCs) related to certain legal fees paid.

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FACTS

The taxpayer was operating a lottery business. A number of court actions followed due to some irregularities and other matters.

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ANALYSIS

A business carrying on a commercial activity can claim ITCs so long as three conditions in subsection 169(1) of the *Excise Tax Act* are satisfied:

- A taxable supply must be acquired;
- GST/HST must be paid or payable on that supply; and
- The supply must have been acquired for consumption or use in the course of commercial activities.

The matter turned on what "commercial activity" encompasses as the phrase is defined in subsection 123(1). Commercial activity includes a business carried on by a person with a reasonable expectation of profit.

For ITCs for legal services to be claimable during the period at issue, the taxpayer must have incurred the legal fees in the course of its commercial activity carried on with a reasonable expectation of profit. Where commercial activities are no longer ongoing or where there is no longer a reasonable expectation of profit, ITCs cannot be claimed.

When determining whether a business is being conducted the TCC in *Kaye v The Queen*,^[34] observed:

[4] . . . It is the inherent commerciality of the enterprise, revealed in its organization, that makes it a business. Subjective intention to make money, while a factor, is not determinative, although its absence may militate against the assertion that an activity is a business.

[5] One cannot view the reasonableness of the expectation of profit in isolation. One must ask "Would a reasonable person, looking at a particular activity and applying ordinary standards of commercial common sense, say 'yes, this is a business'?" In answering this question the hypothetical reasonable person would look at such things as capitalization, knowledge of the participant and time spent. He or she would also consider whether the person claiming to be in business has gone about it in an orderly, businesslike way and in the way that a business person would normally be expected to do.

. . .

[7] Ultimately, it boils down to a common sense appreciation of all of the factors, in which each is assigned its appropriate weight in the overall context. One must of course not discount entrepreneurial vision and imagination, but they are hard to evaluate at the outset. Simply put, if you want to be treated as carrying on a business, you should act like a businessman.

In answering the question of fact of whether an activity may be considered commercial activity, one must look at the relevant facts and circumstances. In the facts of this case a number of factors combined to lead the court to conclude that NO commercial activities were being carried out at the relevant time:

- No prior experience in the field of activity, including costs and potential financial outcome;
- No prior financial projections or business plan for a business he lacked experience in; and
- The matters did not make financial sense.

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