Docket: 2014-1088(IT)G

BETWEEN:

EDISON TRANSPORTATION, LLC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 29, March 1, 2, 21 and 24, 2016, at
Vancouver, British Columbia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Joel A. Nitikman
Counsel for the Respondent:	David Everett

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2010 taxation year is dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 6th day of April 2016.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2016 TCC 80
Date: 20160406
Docket: 2014-1088(IT)G

BETWEEN:

EDISON TRANSPORTATION, LLC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] The Appellant is a corporation incorporated in Florida on December 22, 2008 that was specifically formed for and operated under an extra-provincial licence in British Columbia to carry on the business of leasing, managing and operating transit buses with drivers for the 2010 Winter Olympic and Paralympic Games (the "Games") held in Vancouver in February and March of 2010. The Appellant was denied business expenses totalling $2,238,550 for its 2010 taxation year ($2,100,000 US of the $2,500,00 US claimed) on the basis such expenses were not incurred for the purpose of gaining or producing income pursuant to subsection 18(1)(a) of the *Income Tax Act* (the "*Act*"), or, in the alternative, that if such expenses were so incurred that they were not reasonable pursuant to section 67 of the *Act*; the consequence of which is the Appellant was reassessed as having net income for such year of approximately $1,923,331 instead of a loss of $891,806.

[2] More specifically, the Minister of National Revenue (the "Minister") assumed that these specific funds, received as income from Gameday Canada Inc. ("Gameday") for providing its services to the Games were transferred to another Florida corporation, iTransit Inc., ("iTransit") pursuant to an arrangement to effectively pay for shares sold from the previous sole shareholder of the Appellant, one Mr. M. Pouncey ("Pouncey") to the next sole shareholder, one Mr. R. Hill

("Hill") as will be more fully canvassed later, or in the alternative, that these funds were not expended for the purpose of gaining or producing income.

[3] The Minister assumed in paragraph 26 of its Reply, the following relevant facts, *inter alia*, pertaining to these issues:

…

i) on April 30, 2009, Pouncey transferred ownership of the Appellant to Hill, who then became the sole shareholder of the Appellant;

j) in particular, Hill agreed to pay US$2,100,000 to Pouncey to purchase his interest in the Appellant;

…

s) Pouncey established the Appellant and secured the Gameday Agreement before Hill's involvement with the Appellant;

t) iTransit did not secure the Gameday Agreement for the Appellant, and did not provide any services to the Appellant in respect of the securing of the Gameday Agreement;

…

bb) on May 4, 2009, the Appellant and iTransit entered into an agreement respecting the Gameday Agreement, which provided for payment of US$2,500,000 by the Appellant to iTransit;

cc) the Appellant paid US$400,000 to iTransit in exchange for iTransit providing the Appellant with personnel management, office support and onsite support in Vancouver, B.C. (the "Support Services");

dd) the Appellant also purported to pay US$2,100,000 to iTransit for iTransit's purported assistance to secure a busing services contract with Gameday (the "Purported Commission");

…

hh) of the total operating expenses claimed for the 2009 and 2010 taxation years, the Appellant's claim for professional fees included Support Services and the Purported Commission together totalling US$2,500,000;

ii) with respect to the Support Services, the Appellant incurred US$200,000 as an expense in each of its 2009 and 2010 taxation years;

jj) the Appellant did not incur expenses in excess of US$200,000 in each of the 2009 and 2010 taxation years with respect to the Support Services for the purpose of gaining or producing business income;

kk) the Appellant did not incur expenses with respect to the claimed Purported Commission in the amount of US$2,100,000 (i.e. CDN$2,238,550) in the 2010 taxation year for the purpose of gaining or producing business income.

…

[4] The parties entered as an Exhibit AR1, a Partial Statement of Agreed Facts and Issues attached hereto as Schedule 1. From such statement and the evidence not in dispute between the parties, I intend next to set out the background to the dispute in issue.

I. Background

[5] Mr. Anthony Vitrano ("Vitrano"), a Florida resident was the sole shareholder of Gameday Connection, Inc. ("Gameday US"), a Florida corporation in the business of providing transportation and traffic logistics for large sporting events such as the Super Bowl, the Daytona 500, professional sports games and the Olympics, essentially being hired by the organizers of these events to "move people to, from and around the events" as counsel for the Appellant put it in opening argument. After moving to an Orlando street in 2005 Vitrano met his neighbour, Pouncey, and the two discovered as they got to know each other over the ensuing few years that both were involved in the bus business in some manner, with Pouncey having experience working for companies that bought and sold buses or for restaurants arranging for bus tours to eat there.

[6] Vitrano agreed to invest in a new company proposed by Pouncey that would have the distribution rights and be involved in manufacturing a new bus with characteristics involving a shorter length and lower profile to ease access and egress from the bus for the benefit of wheel chair and other users that would benefit from such design, which was being designed by a former engineer from Daimler Chrysler, called the "Brevi Bus". In addition, the new corporation would buy older buses and refurbish them, a business having few competitors and, due to a need identified by Vitrano, would also act as a procurement contractor for

Gameday US, essentially contracting with motor coach companies to supply buses and drivers for Gameday US's contracted events. As Vitrano testified, this procurement involved often approaching 10, 20 or 30 motor coach companies to supply their motor coaches, a time consuming ordeal that he preferred to subcontract out to third parties known as "bus brokers" but with whom he was experiencing quality and pricing problems. The new Florida corporation incorporated by Pouncey in 2007 was iTransit, and for an investment of $350,000 Vitrano became a 30 percent shareholder while Pouncey retained 70 percent. While the Brevi Bus manufacturing goal was not realized, iTransit did in fact go on to buy and refurbish older buses and effectively became the procurement arm for Gameday US in supplying motor coaches with drivers and mechanics as needed for such Gameday's contracted events.

[7] In 2007 Vitrano began negotiating with the Vancouver Olympic Organizing Committee ("Vanoc"), charged with organizing the 2010 Winter Olympics and Paralympics in Vancouver, to provide transportation and traffic logistics and, after being short listed as a bidder, was advised he was to be awarded the contract for same. Consequently, Vitrano caused Gameday Management Group, Inc. to be incorporated in March 2008 in Canada ("Gameday Canada") which entered into the contract with Vanoc in July of that year. Although initially only involving the supply of motor coaches to move the dignitaries, athletes and officials, Vanoc was concerned it would not meet its commitments to the International Olympic Committee ("IOC") to have about 85 percent of its transit bus requirements in place by the end of 2008, which normal transit buses were used to move spectators and security personnel, and so, after further negotiations, Gameday Canada agreed to assume such role as well within a budget agreed to with Vanoc.

[8] Since neither Gameday US, Gameday Canada nor iTransit were in the business of running an operational full-fledged bus company, that involved leasing buses and insuring, licensing and maintaining them as well as hiring drivers, Pouncey incorporated the Appellant to do so as sole shareholder and employed Hill who clearly had past experience in not only operating a coach company but in starting one from scratch as well as experience in operating in past Olympic games. Vitrano had a contact, Shuttle Bus Leasing, a Riverside California based entity ("SBL") that owned a large number of buses that had supplied his needs in a previous Olympics and could provide the roughly 300 transit type buses that would be needed for Vanoc, although a few other suppliers were tapped as well.

[9] The Appellant entered into two separate agreements with Gameday Canada for a total gross income of about $21,000,000 dated December 29, 2008 for

Vanoc's transit needs and dated November 13, 2009 for busing RCMP security personnel; the latter which Gameday Canada had agreed to provide as a subcontractor to another corporation. Notwithstanding that the Appellant was only incorporated on December 22, 2008 in Florida, the evidence is that Pouncey, Vitrano and one of Vitrano's staff, Don Jordan, had been negotiating such contract in the Appellant's name since October, 2008, which was the explanation given by the Appellant's witnesses as to why the Appellant's name appeared on a draft contract dated October, 2008, before the Appellant's incorporation; an explanation that seems credible and within the ambit of normal business practices in my view.

[10] The other relevant contract in the dispute involves a contract between the Appellant and iTransit dated May 4, 2009 (the "iTransit Agreement") pursuant to which the Appellant purportedly agreed to pay iTransit the sum of $2,500,000; primarily, according to the evidence of Pouncey, to cover iTransit's substantial costs incurred in providing support services to the Appellant or for its benefit before, during and after the Games and to some extent to compensate it for its assistance in helping it obtain the Gameday contracts. It is this contract and more so the payment required thereunder that forms the basis for the main dispute between the parties and the Minister's assumptions above referred to.

[11] Gameday Canada paid installments to the Appellant throughout 2009 and 2010 as "deposits" which under the respective contracts was not considered earned until the services were supplied, thus the reason the Appellant claimed a reserve in 2009 and took the entire amount into income in 2010. There is no dispute as to the validity of such reserve.

[12] After completion of the Games however, Gameday Canada and Vanoc were in dispute over the quality and cost of the contracted services, of which approximately $3,900,000 related to services of the Appellant and entered into mediation regarding amounts owed to it. As a result, Gameday Canada settled on a reduction of amounts owed to it from Vanoc which left Gameday Canada not in a position to pay the full contractual sums owed to the Appellant pursuant to the Gameday contracts. Consequently, the Appellant settled with Gameday Canada for a reduction in the payment owing to it of about $700,000 which together with its purported losses of $600,000 on its inability to cancel buses leased from SBL after Gameday cancelled the need for them with the Appellant; its purported costs of about $400,000 in extra cost incurred to repaint buses damaged from removal of Vanoc decals on the transit buses, as well as other unforeseen costs, the Appellant experienced $2,000,000 - $2,500,000 of unexpected lost revenue. Consequently, the Appellant was not able to pay the entire amount of $2,500,000 purportedly

owing to iTransit pursuant to the iTransit Agreement, who ended up subsequently writing off about $333,0000.

[13] The Appellant purported to pay the roughly $2.17M sum to iTransit by offsetting so called "loans" made by it to iTransit over the 2009 and 2010 period, although the characterization of these payments or transfers to iTransit is questionable. As Mr. Lewis Robbins ("Robbins"), who essentially acted in the capacity of Chief Financial Officer in charge of all bookkeeping and accounting for both entities explained, these were not payments that were expected to be repaid nor to bear interest, but were logged as "loans" in their records on their accountant's advice.

II. The Law

[14] There is no dispute as to the interpretation of the *Act's* sections in play in this matter, namely section 9, subsection 18(1)(a) and section 67 which read as follows:

> **Income or Loss from a Business or Property**
> **Basic Rules**
> **SECTION 9**
>
> **(1) Income.** Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.
>
> **(2) Loss.** Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.
>
> **(3) Gains and losses not included.** In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.
>
> **Deductions**
> **Section 18:**
>
> **(1) General limitations.** In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

> (a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;
>
> …
>
> **Rules Relating to Computation of Income**
> **SECTION 67: General limitation re expenses.**
> In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.

[15] It should be noted that there is really no dispute as to the applicability or legal interpretation of these provisions. There is no dispute that section 9 requires the inclusion of profits or losses into a taxpayers income from business or property and hence amounts that are deductible in computing profit under generally accepted business principles are generally deductible in computing business income for income tax purposes subject to the prohibitions against such deduction otherwise set out in Part I of the *Act*, predominantly pursuant to sections 18 and 67, as a consequence of the "Subject to this Part" (language that starts off subsection 9(1) above). See *Canderel Ltd. v The Queen*, [1998] 1 SCR 147 at paragraph 53 and *Canadian Imperial Bank of Commerce v The Queen*, 2013 FCA 122, 2013 DTC 5098 at paragraphs 27-28.

[16] There is also no dispute that an expense may result in a loss as explained in paragraph 57 of *Symes v The Queen*, [1993] 4 SCR 695, 94 DTC 6001 and so in the context of this case, the fact the Appellant claimed a $891,000 loss after claiming the expenses in dispute is not determinative of the deductibility of such expenses. It is also not disputed that the test to determine whether an expense is deductible derives specifically from the wording of paragraph 18(1)(a) itself, namely whether the expense was incurred for the purpose of gaining or producing income and as the Appellant has pointed out, relying on *Ludco Enterprises Ltd v* The Queen, [2001] 2 SCR 1082 and *Symes* above, a taxpayer need only have an ancillary purpose of earning income, a gross concept, and such "purposes is ultimately a question of fact to be decided with due regard for all the circumstances" as set out in paragraph 68 of *Symes*:

> **68** As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, ex post facto or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for

> objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances. For these reasons, it is not possible to set forth a fixed list of circumstances which will tend to prove objectively an income gaining or producing purpose….

[17] There is also no dispute that finders fees or commissions laid out to secure or induce a party to enter into a contract such as a lease or debenture purchase have been found to be deductible business expenses pursuant to paragraph 18(1)(a) where the Courts have found such expenses were incurred for the purpose of gaining or producing income. See *Canderel*, *Canada Permanent Mortgage Corp. v MNR*, 71 DTC 5409 and *Befega Inc. v MNR*, [1972] FCJ No. 23, 72 DTC 6170.

[18] With respect to the interpretation of section 67, there is no dispute that such section works to deny a deduction that is otherwise permitted under section 9 and not prohibited under paragraph 18(1)(a) to the extent it is unreasonable, either due to its quantity or type in relation to the taxpayers business. The test of reasonableness enunciated by the Supreme Court decisions in *Gabco Limited v MNR*, 68 DTC 5210, is whether "a reasonable business man would have contracted to pay such amount having only the business consideration of the appellant in mind", an objective test of reasonableness that is not intended to second guess the business acumen of a business person but rather place the reasonable businessman into the shoes of the businessman being questioned.

[19] As indicated, the application and interpretation of the applicable law above is not generally in dispute between the parties who both agree the issues to be decided will be determined on the findings of fact.

III. Position of the Parties

[20] The Appellant takes the position that it had a contractual obligation with iTransit to pay it a fee of $2,500,000 US pursuant to the iTransit Agreement, did in fact pay it by offsetting $2,166,324 against amounts it claims were owed by iTransit to it, and that this amount was a fee for the support services rendered to it by iTransit pursuant to such contractual obligations, that included assistance to it in obtaining the first Gameday contract. Moreover, the Appellant argues that there was no agreed upon breakdown of such $2.5M fee between $400,000 for support services and $2,100,000 for commission to secure the Gameday contract as assumed by the Respondent. Specifically, the Appellant denies any portion of the amount was to fund a $2.1M purchase price for shares in the Appellant transferred

by Pouncey to Hill as assumed by the Respondent, arguing there were no funds paid for such share transfer by the Appellant for the benefit of Pouncey.

[21] The Respondent takes the position that the deduction denied represents the purchase price for the shares in the capital stock of the Appellant transferred by Pouncey to Hill disguised as a commission payable by the Appellant to iTransit for the benefit of Pouncey and hence were not funds expended for the purpose of gaining or producing income. In the alternative argues the Respondent, if such funds did not represent a share purchase payment for the benefit of Mr. Pouncey, nor more than $400,000 was expended to compensate iTransit for any services it provided to the Appellant during the period in question.

[22] I will discuss the issue of whether any portion of the denied deduction represents a share purchase price paid by the Appellant for the benefit of Pouncey and thereafter whether the denied amount reflects actual and reasonable compensation for support services provided by iTransit to the Appellant.

1. The Share Purchase

[23] The evidence supports the fact that Pouncey transferred his shares in the Appellant to Hill sometime in 2009 although the exact dates and reasons therefore are not entirely agreed upon between those parties. Both Pouncey and Hill testified of such transfer and that Pouncey resigned as managing director of the Appellant. The Appellant submitted documentary evidence of the resignation of Pouncey as a member and managing member dated December 23, 2008, the day after incorporation, as well as an Operating Agreement for the Appellant dated December 22, 2008 which was signed by Hill and which shows Hill as the initial member having 100 shares for a contribution of $1.00. It is clear from the evidence of Hill and Pouncey that Hill was not even employed by or agreed to join the Appellant until the end of the first week or so of February, 2009 so he could not have signed any documentation on December 22 and 23 2008, respectively. While Pouncey did not have explanation for why the documents were dated so early, there was no dispute by either of them that they were backdated and not signed on the indicated dates. Moreover, filings of Articles of Amendment signed April 28, 2009 and an annual report signed July 21, 2009 by Hill for the State of Florida indicate both of them were listed as managing members at least until July 21, 2009. Hill testified he became the sole member or shareholder sometime after that and would have signed the backdated documents put before him by Pouncey because he was his boss and requested him to do so. This propensity to backdate documents is evident with respect to the main contract between the Appellant and iTransit for

the $2.5M fee in issue and frankly leads me to question the credibility of the Appellant and its witnesses.

[24] Dates aside, while Pouncey suggested the purpose of the transfer was to give Hill, who had been hired for his experience in building and running an operating bus company, a sense of ownership amongst other reasons, none of which were satisfactorily explained, he also admitted that he had not disclosed this ownership sentiment to Hill which frankly makes his assertions incredulous. Frankly, his testimony on this issue was vague and unconvincing. Hill's testimony was more direct and credible and I accept his reasons for the transfer as being that he accepted the shares and managing member position solely at Pouncey's request to comply with his boss's desire and because Pouncey had indicated he did not wish to be seen to be the owner of the Appellant before Vanoc out of concern it be perceived as a possible conflict of interest.

[25] Moreover, I am satisfied that there was essentially no intention to unconditionally transfer full legal and beneficial ownership of the shares or membership to Hill nor for any consideration as the parties executed a Membership Agreement dated December 30, 2009 made between the Appellant, Hill and Pouncey that contained the following recitals:

> Whereas, for certain business purposes and other reasons known to the Parties, Hill is currently the sole Member of Edison Transportation, LLc; and
>
> Whereas, for certain business purposes and other reasons known to the Parties, Hill agrees that upon Pouncey's written demand Hill shall transfer all membership interest in Edison to Pouncey;
>
> Whereas it is the intention of the Parties that any profits or losses generated by Edison shall ultimately flow to Pouncey.

[26] The Membership Agreement provides that Pouncey hold harmless and indemnifies Hill from any potential liability arising out of Hill's management, ownership and operation of Edison, including from related income taxes generated by Edison, employment taxes and other taxes, actions, suits, debts or any other matter other than gross negligence and provides that Hill will transfer all membership interest in Edison to parties or entities designated by Pouncey. There was no consideration mentioned in the agreement and both Hill and Pouncey testified there was to be none because no consideration was paid in the first place. The "business reasons and purposes known to the parties" mentioned in the recitals for the share ownership and transfer back to Pouncey was to effectively hide

Pouncey's interest in the Appellant from Vanoc to avoid perceptions of conflict of interest as Hill credibly testified. The fact Vanoc may have known Vitrano and Pouncey had interests in iTransit and so there was nothing to hide from Vanoc does not prove Vanoc knew Edison was really owned by Pouncey and it would be then senseless for Pouncey to have taken steps to transfer his shares to Hill and cause initial corporate documents to be backdated to show Hill as the initial member and director if that were the case. I further accept as credible Hill's testimony that it was he who wanted the protection of the Membership Agreement, particularly the indemnity for agreeing to be shown as the sole member, in order to protect himself due to concerns he expressed about the financial impact and possible insolvency the transfer of funds from the Appellant to iTransit or related companies was having on the Appellant.

[27] Whatever moral or legal consequences relate to Pouncey's avoidance of disclosing his interest in the Appellant to Vanoc or any other party for that matter is frankly not relevant to the issues to be decided in this appeal; save as they relate to Pouncey's credibility or determining the issue as to whether a share price was paid or payable to Pouncey for his shares.

[28] In my opinion the backdating of documents and the terms of the Membership Agreement confirm that the transfer of shares by Pouncey to Hill was nothing but window dressing to hide Pouncey's involvement in the Appellant before Vanoc and no consideration was paid or was payable by Hill to Pouncey, who could demand their return for basically no consideration. Moreover, if an arm's length transfer had occurred, it would make no sense for Hill to be expecting to be indemnified for his actions as owner. Finally, the evidence is clear that Hill considered Pouncey his boss having final word on all matters throughout the entire period of his relationship with the Appellant, i.e. before, during and after the Olympic games and needed his or Robbins permission to make large expenditures.

[29] Accordingly, the evidence does not support the Respondent's assumptions found in paragraph 26(j) above that Hill agreed to pay $2.1M for the shares to Pouncey. Although the assumption there was a transfer is proven, such assumption has no bearing on the issue of whether the expenses claimed by the Appellant are valid, which I will discuss later on.

[30] Let me add at this point that the Minister had good cause to reasonably assume the sum of $2.1M was to compensate Pouncey for his shares. The evidence is clear that Mr. Bryan Hubbell, the Canadian accountant for the Appellant hired to deal with the Canada Revenue Agency ("CRA") during the audit, confirmed in

writing to the auditor, in correspondence dated December 17, 2011 that enclosed a memorandum wherein the Appellant answered questions posed by the CRA auditor that included the following statement:

> …Full ownership of Edison Transportation, LLC was transferred to Mr. Hill. In exchange, iTransit would charge a 10% of the gross value of the contract as a commission for not only securing the contract, but for giving Mr. Hill the opportunity to create a bus company from scratch that would have instantaneous credibility of having worked as part of an Olympic event….

[31] The words "in exchange" clearly refer to the transfer of ownership to Hill, and can possibly be interpreted to suggest such funds were consideration for such transfer. Moreover, Hill himself made admissions on discovery that suggested the purpose of those funds was to pay for the shares, notwithstanding that he and all the other Appellant's witnesses contradict that in their testimony at trial.

[32] However, viewing the evidence and documentation on the whole, I cannot conclude the payment of $2.1M US represents a payment for shares. The inconsistencies in evidence clearly suggest however that the Appellant and its witnesses seemed quite willing to adapt their explanation from time to time to suit their needs.

2. <u>The Deductibility of the $2.5M Claimed Expenditure</u>

[33] The Appellant claims a total deduction of $2.5M for total support services and commissions reflected as professional fees paid by the Appellant in 2010. While the Appellant denies that there was any breakdown of that total fee; specifically as $400,000 for support services and $2,100,000 for commissions as assumed by the Respondent, it is clear that regardless of any purported characterization or allocation of same, the Appellant did not pay a total of $2.5M to iTransit. The Appellant's own evidence is that $2,166,324 was offset against amounts iTransit owed to the Appellant and that the balance of $333,000 was never paid because of the earlier mentioned shortfall of contractual funds paid by Gameday Canada to it. Apart from the claimed set off there is no evidence the balance of the fee was paid. Accordingly, the maximum claim of the Appellant for the denied expenses in issue in this appeal must be reduced accordingly as a starting point, there being no determinative evidence before me that such difference was adjusted for after 2010.

[34] With respect to the deductibility issue, counsel for the Appellant has argued that in order to find for the Respondent in this appeal, the Court must either find

that there was no valid agreement for the Appellant to pay iTransit $2,500,000 or that iTransit did not procure the Gameday contract for the benefit of the Appellant and hence would not be entitled to any payment, be it a finder's fee or commission, for same.

a) Validity of iTransit Agreement

[35] The Appellant's main argument and evidence in favour of the deduction is based on the testimony of Pouncey and to some extent, of Robbins, the effective financial officer of both the Appellant and iTransit, that on or about May 4, 2009 they met with their lawyers and accountants together with Hill and discussed the fee to be paid by the Appellant to iTransit. Pouncey's testimony was clear that the amount primarily reflected the cost to iTransit in providing support services to the Appellant, before, during and after the Games and thereafter to recognize the assistance granted in helping the Appellant secure the contract with Gameday Canada. An agreement dated May 4, 2009 was executed between the parties with the Appellant agreeing to pay a $2,500,000 fee and setting out the supporting role iTransit was to provide in return for same in rather broad, boiler plate- like and very general terms.

[36] Specifically, the Appellant argues that the Respondent admitted both in its pleadings and assumed in its Reply that this agreement was effective May 4, 2009 and so cannot deny its validity. Specifically the Respondent in paragraph 1 of its Reply admits the facts stated in paragraph 1.38 of the Notice of Appeal, which reads as follows:

> 1.38 Effective May 4, 2009, Edison entered into a written agreement with iTransit (the "iTransit Agreement").

[37] Similarly, paragraph 26(bb) contains the following assumption:

> bb) on May 4, 2009, the Appellant and iTransit entered into an agreement respecting the Gameday Agreement, which provided for payment of US$2,500,000 by the Appellant to iTransit;

[38] I am not prepared to find that the iTransit Agreement was effective May 4, 2009 nor that it is valid and reflects the agreement between the parties based on such pleadings accepted by the Minister or the above assumption in the Reply alone for two main reasons.

[39] Firstly, the Respondent, pursuant to paragraph 2 of its Reply, specifically denies the facts contained in paragraphs 1.39, 1.40 and 1.41 of the Notice of Appeal, which facts read as follows:

> 1.39. Under the iTransit Agreement, iTransit was required to assist Edison with securing the Gameday Agreements and with providing the services Edison was required to perform under the Gameday Agreements.
>
> 1.40 iTransit performed the services required of it under the iTransit Agreement.
>
> 1.41 In particular, iTransit performed at least the following services for Edison:
>
> • Assisting in obtaining one or both Gameday Agreements….

[40] It is clear to me that the Respondent did not admit the terms of the iTransit Agreement from such denial so in such context could not have admitted the validity of such Agreement. At best, I can only conclude the Respondent was agreeing such Agreement was executed on May 4, 2009 regardless of its validity.

[41] Moreover, the evidence from the CRA auditor is also clear that she was not made aware by the Appellant, of the fact of such *ex post facto* signing and thus had no reason to assume it was signed on any other date. It follows that not having been informed otherwise by the Appellant during audit or before preparing its Reply, and the fact the Agreement was backdated and only signed in late 2010, that there was no reason to plead the Agreement was a sham as the Appellant suggests the Respondent should have.

[42] Secondly, and more importantly, this Court is not bound by false facts pleaded by the Appellant. In *Hammill v The Queen*, 2005 FCA 252, 2005 DTC 5397, Noel J.A., in refuting the submission by the appellant's counsel therein that the Court was bound by the facts as admitted, stated at paragraph 31:

> 31 In an appeal against an assessment under the Act, the outcome does not belong to the parties. Public funds are involved and the Tax Court is given, in the first instance, the statutory mandate to confirm or vary the assessment based on the facts, proven or admitted. In this respect, while the Court will not generally look behind a formal admission, the parties cannot by agreement dictate the outcome of a tax appeal. The Tax Court is not bound by an admission which is shown, through properly tendered evidence, to be contrary to the facts.

[43] The evidence is clear and not disputed by the Appellant that this Agreement was not prepared until sometime in 2010 and not executed until late in 2010, several months after the completion of the Games and the start of correspondence with the CRA regarding a Regulation 105 (withholding taxes) audit but several months before the Appellant was formally notified by the CRA of the T4 audit to commence against it that led to this matter.

[44] However the Appellant argues that despite any backdating of the Agreement, the parties effectively honoured the terms thereof and so their actions give effect to the late signed Agreement and support its validity. The Appellant also argues that the parties were occupied with the demands of the business and it was not unusual as we have seen to execute documents later than their purported dates so such late preparation and execution does not derogate from the fact their actions carried out the Agreement.

[45] No explanation was given as to why it took so long to prepare and execute an Agreement that was to reflect what was described as a meeting around May 4, 2009 with the Appellant's lawyers, accountants and Hill to address compensation for the costs iTransit had expended in support of the Appellant's contractual duties other than an unconvincing argument by counsel that they habitually signed or backdated documents as a matter of course and abided by its terms and so no adverse inference should be made as to such backdating.

[46] Both Vitrano and Pouncey testified that the draft agreement between Gameday Canada and the Appellant dated October, 2008 was in contemplation of the Appellant being formed and the final agreement signed in December, 2008 after its incorporation and surely after prior negotiation. A second bus provider agreement was signed with Gameday Canada in November of 2009 for the RCMP security transit needs prior to the provision of such services. The Appellant signed employment and consulting agreements with certain of its employees, including Ryan Bradley and Cullen, Scahill & Company for their services in 2009, as well as a membership agreement with Robert Hill in 2009. A napkin agreement with Hill was even prepared to engage his services as VP of operations for the Appellant in January of 2009 before the start of his employment in February of 2009 notwithstanding that it was never formalized. In all the Appellant seemed adept and experienced at preparing and executing agreements to reflect its business dealings in advance, not after the fact, yet with respect to an agreement to pay out $2.5M to iTransit, it seems to have waited until close to the end of its 2010 fiscal year. When one considers the amount of the $2.5M fee referred to in the iTransit Agreement was fairly close in amount to its projected profit from the Olympic

Games, it seems incredible to me that it would not have been front and centre prior to the provision of services if in fact a large payment or commission was intended. I am not satisfied it was. It would appear to me to be an afterthought, something to legitimize the payment of amounts that had been made to iTransit for over two previous years to fund its operations, payments of which caused Hill to express concern over the solvency of the Appellant and protect himself through the execution of a Membership Agreement granting him an indemnity as earlier mentioned. Frankly, I fail to see how the backdating of corporate documentation showing Hill to be the initial shareholder and member of the Appellant in December of 2008, more than a month before he was even hired, should be considered documents the parties honoured. It is clear their intention was to hide or deceive the reality of ownership. It would seem to me that it would be more appropriate to suggest such backdating was for an ulterior purpose and does not give Pouncey or iTransit any real credibility to argue the iTransit Agreement was not backdated for similar purposes.

[47] It seems incredulous that iTransit officials and their professional advisors, together with the Appellant's representative, Hill, would meet to determine and confirm such compensation on or about May 4, 2009 and yet took over a year to ink an agreement void of any details relating to the formulation and calculation of the $2,500,000 fee they met to discuss when they would have been in a position to know almost all the details that formed the basis of that amount. Again, Pouncey's testimony was clear that the amount primarily reflected the cost to iTransit in providing support services to the Appellant, before, during and after the Games and to thereafter recognize the assistance granted in helping the Appellant secure the contract with Gameday Canada and so at the time of preparation and signing of the Agreement in late 2010 the details of such reimbursable costs would have been known. What is even more incredulous however is that during this trial absolutely no documentary evidence by way of receipts, vouchers , credit card statements or other supporting documentation was tendered in support of any expenses for which iTransit was seeking reimbursement.

[48] Finally, the said agreement does not break down what portion was contemplated for support services versus what portion was for its assistance in securing the Gameday Canada contract and most of the Appellant's witnesses deny there was any such allocation. On the one hand the Appellant argues that a finder's fee or commission would be a totally acceptable expense, relying on court decisions in support of such assertion which were not disputed, yet there is no effort in a purported $2.5M agreement to set out on what basis of such finder's fee or commission would be calculated let alone its final amount, not even almost two

years after the agreement was supposedly found or secured by iTransit and iTransit would be aware of its financial position.

[49] The Appellant argued that a finder's fee or commission is deductible relying on cases such as *Canderel* and *Canada Permanent Mortgage Corp*. earlier discussed and is not required to correlate to the Appellant's profit or source of income in reliance on former Chief Justice Bowman's decision in *Bush Associates Ltd. v The Queen*, 2010 TCC 159, 2010 DTC 1160, at paragraph 34. Even though *Bush* dealt with the payment of bonuses to individual shareholders and not to finders fees or commissions and so is distinguishable, I do not take issue with the Appellant's argument that a finder would not be expected to take a reduced finder's fee or commission simply because through no fault of his, the operator lost money; this in the context of addressing the auditor's reasons for not finding there was a commission payable since it was not subject to adjustment. Such argument however presumes there was an agreed commission or finder's fee to begin with, at least a formula, consistent with the facts in *Canderel* or *Canada Permanent Mortgage Corp*. I am not swayed by the Appellant's argument that treatment of finder's fees or commissions should be equated with the payment of discretionary bonuses to shareholders usually made after the company's year-end to reward shareholders or officers and directors for past service; however, notwithstanding my disagreement with such analogy, even if I accept payment can be made for past services, there must at least be some agreement as to the quantum or calculation of such fee or commission in advance in the context of business in order to characterize such payments as such. It is in the very nature of these types of payments that they are calculable on some objective basis and not merely discretionary. Frankly, the Appellant seems to be inconsistent on this matter. Pouncey and Robbins testified so as to deny there was any set amount payable for commissions, thus rendering its very concept in doubt, so much so that they took issue with Hubbell's correspondence to the CRA with respect to characterizing any portion of the alleged fixed $2.5M fee as commissions of $2.1M. Whatever characterization one may give to the fee in question or one may draw from the evidence, what is clear is that the Appellant has not met the onus of demolishing the Minister's assumption found in paragraph 26(kk) of the Reply:

> kk) the Appellant did not incur any expenses with respect to the claimed Purported Commission in the amount of US$2,100,000 (i.e.CDN$2,238,550) in the 2010 taxation year for the purposes of gaining or producing business income;

[50] Aside from the lack of details, I note an inconsistency between agreed upon facts and the terms of the iTransit Agreement. Section IV of the said Agreement deals with compensation and contains the following terms:

> ... Edison agrees to pay ITransit the sum of Two million five hundred thousand dollars ($2,500,000). **During the course of this contract**, Edison may from time to time make payments to iTransit.…(Emphasis added)

[51] It is clear from the plain wording of the agreement that payments would be made during the "**course of this contract**", which would run from May 4, 2009 onwards as its term. Notwithstanding this, the parties agreed in paragraph 1.67 of the Partial Statement of Agreed Facts and Issue that:

> …Edison recorded, for accounting purposes, the $US 2.5 million as an accrued account payable, payable to iTransit on the following dates:
>
> **30 January 2009** $US 250,000
>
> **…**

as well as three other payments of $US 500,000, $1,125,000 and $625,000 on November 30, 2009, January 15, 2010 and April 30, 2010.

[52] It is clear that both the invoice of January 30, 2009 is prior to the date of the Agreement which makes no reference to existing credits on account, and that all the payments were allegedly invoiced as of April 30, 2010, about 6 months or so before the Agreement was signed, yet no mention of such being made therein, notwithstanding the fact the parties had clear knowledge of the such facts.

[53] There was evidence of many transfers of funds from the Canadian and American bank accounts of the Appellant to iTransit but there is no correlation in amounts between the above referred to invoices and these payments that might assist in linking the two. When one considers Hill's testimony that he expressed concerns funds being transferred to iTransit might affect the ability of the Appellant to conduct its contracted obligations, it seems clear there was no connection between these payments and invoices. If these were expected and agreed upon payments, Hill would have had no justification for concern.

[54] Moreover, Hill, who was present throughout the testimony of all other witnesses for the Appellant, testified that he was neither present at the purported meeting between Pouncey, Robbins, the lawyer and accountant nor had any role in

determining the amount of such fee, obviously in contradiction to the evidence of Pouncey and Robbins. Hill testified he signed the May 4, 2009 agreement in late 2010 because he was asked to sign it, just as he had done with the backdated share documentation above referenced. Notwithstanding that counsel for the Appellant has argued that since Robbins was a mere employee and had no interest in the outcome of this matter that his testimony should be believed over that of Hill, the evidence is clear that Hill was nothing more than an employee of the Appellant who reported to Pouncey and at times to Robbins and I am inclined to find his testimony more credible than that of Robbins whose other testimony contradicted the representations of Hubbell to the CRA, when there was evidence he either prepared such representations or was involved in their preparations, as will be discussed in greater detail later. Moreover, Hill was the representative of the Appellant at the trial, was clearly charged with the day to day running of its operations during the relevant period and was a witness of the Appellant as well. It speaks little of the overall credibility of the Appellant's assertions when its own witnesses testify in such a contrary manner regarding the iTransit Agreement and its terms.

[55] The Appellant also argues that iTransit booked the $2.5M fee into its income based on the evidence of a profit and loss statement spanning two years from January 1, 2009 to December 31, 2010, as well as Pouncey's evidence that he took iTransit's taxable income into his own income in his US tax returns due to the fact iTransit was an "S" type corporation that for US tax purposes would flow its profits to its shareholders. This evidence was given chiefly in response to addressing the CRA auditor's expressed concerns in its audit report that Edison was set up as a tax avoidance entity. The Respondent suggested the CRA auditor made no effort to follow up on these assertions that the $2.5M fee was accounted for in iTransit's financial statements and tax returns and thus had no reasonable basis for the tax avoidance concern she expressed. The problem I have with this evidence is that no explanation was given as to why a profit and loss statement, with an indication it was printed out in 2011, would span a two year period rather than individual December 31 yearend that was in evidence for iTransit, nor why the booked $2.5M fee had no ledger number attached to it in such statement when each of the other entries, for each other income and expense type had one, suggesting there was no such ledger. No financial statements of iTransit showing such inclusion or taxes to be paid as a result are in evidence. Moreover, Pouncey, whose overall evidence I did not find very credible, made a bold assertion that he included the fee in his income without submitting any evidence such as the tax returns he alluded to to corroborate his evidence. Pouncey's assertion is also inconsistent with the fact Vitrano owned 30 percent of iTransit, and this one

wonders why he would include it all in his income. Moreover, there is no evidence whether iTransit had any profits for 2010 to include in his income; it could just as easily have had losses to offset such income inclusion. We are left to speculate or to connect the dots without any factual underpinnings for same. I place little weight on this evidence but more importantly, the inclusion of amounts for US tax purposes does not determine their treatment for Canadian tax purposes. Even if that were the case, such would not be determinative of the issue herein of whether the payment was incurred in order to gain or produce income or that it was reasonable.

[56] From the Appellant's perspective, no signed financial statements of the Appellant were put into evidence other than what appear to be profit and loss statements printed out in 2011 that disclose detailed expense accounts for a multitude of items but not specifically for any reimbursable expenses to iTransit, although entries for professional fees amounted to approximately $700,000 in 2009 and $1,800,000 in 2010 without any explanation or notes what these are for. A spreadsheet submitted into evidence for the two year period suggests professional fees of $2.5M were booked. Accordingly, iTransit refers to them as consultant's fees in its records, while the Appellant books them as professional fees paid, notwithstanding that both entities were financially overseen by Robbins acting for both entities, while Pouncey described the fees as being primarily reimbursement for iTransit's cost of supplying services.

[57] There are in addition a multitude of entries in the Appellant's 2009 and 2010 ledger showing transfers to iTransit of "loans" which Robbins testified were not really loans and never intended to be repaid, all adding further confusion to this hodge-podge approach to accounting. If such amounts did not reflect obligations to be repaid to the Appellant from iTransit, then on what basis would the Appellant have offset its obligation to pay the $2.5M contractual fee against such amounts? If they were not intended to be repaid, is it not logical to assume they represented a distribution of profits in some form?

[58] The Appellant admitted they failed to keep proper records as explanation for the lack of details. That may be the case, but to suggest, as Pouncey did, that the $2.5M figure was arrived at a meeting with his financial officer, Robbins, and his accountant and lawyer with Hill present as an amount to reflect primarily reimbursement for costs and some profit, would suggest there was some background information to justify these costs. None was proffered and neither was their accountant called to testify in support of such evidence.

[59] Based on the above, I cannot find that the parties actions and the factual evidence support the Appellant's contention that there was a valid agreement for the Appellant to pay iTransit $2.5M US in place on or effective on May 4, 2009, either in writing or by action of the parties other than an *ex post facto* agreement made in late 2010 to which I can give no weight, consistent with the Federal Court of Appeal's decision in *Bomag (Canada) Limited v The Queen*, [1984] FCJ No. 608, 84 DTC 6363, where that Court gave no legal effect to an agreement purportedly entered into between a taxpayer and its parent corporation to justify the characterizing what was found to be a capital outlay into an expense. At pages 6368 to 6369, Urie J. stated:

> The learned Trial Judge found the agreement to be self-serving and of no probative value. I agree. It is obviously a document which was designed, after the fact, to put the best possible light for tax and other purposes on the transaction entered into between Bomag Germany and its subsidiary, the Appellant. It may be safely ignored. The true nature of the transaction can be derived from the valid documentation and evidence adduced….

[60] In this case, the iTransit Agreement is an *ex post facto* agreement with vague terms, unrealistically so in light of the knowledge of the parties at the time of its execution, and inconsistent with the actions of the parties throughout the period of its alleged duration.

b) Whether iTransit Secured the Gameday Contract for the Appellant

[61] The Appellant's main argument is based on the assertion that iTransit secured the first Gameday contract in December of 2008 due to Pouncey's attendance at meetings with Vanoc and Gameday in his capacity as owner of iTransit and his involvement while wearing his "iTransit hat" before such time in negotiating a draft agreement in October of 2008 on behalf of the Appellant even before it was incorporated which lead to the December 23, 2008 Gameday Agreement signed.

[62] It should be noted that one of the main reasons the Respondent relied upon taking the position iTransit did not secure this agreement with Gameday was that the iTransit Agreement was dated May 4, 2009, 5 months after the Gameday Agreement was signed and so it could not have secured this contract. The Respondent admitted is was not aware of the fact a draft agreement dated October 2008 with the Appellant's name on it, before its incorporation, was being negotiated, however still argues and assumes that Pouncey and not iTransit secured the Agreement.

[63] The Appellant seems to raise a paradox with this issue. On the one hand it argues that a pre-incorporation contract can be negotiated before a corporation comes into existence by others on its behalf, yet takes issue with the Respondent's argument that any such pre-incorporation contract could only have been negotiated by Pouncey while wearing his "Edison" hat since he was the initial officer, director and shareholder of the Appellant. In effect says the Appellant, there was only one hat Pouncey could wear, his iTransit hat, since Edison was not yet in existence. Otherwise stated, it appears the Appellant is arguing that a contract can be negotiated on behalf of a corporation before its formal existence, but that its ultimate directors or shareholders cannot do so on its behalf as they had no hat to wear yet, a position I find frankly without merit and illogical. I take judicial notice of the fact that most pre-incorporation contracts are in fact negotiated by the planned shareholders or directors of a corporation, since they are the people having an interest therein.

[64] It is of course, ultimately a question of evidence as to who secured the first Gameday contract for the Appellant. I find that the evidence clearly points to Pouncey having secured that contract on behalf of the future Edison for several reasons:

1. There is no determinative evidence that Pouncey attended the December 2, 2008 meeting with Vanoc in any other capacity other than as part of the Gameday contingent. The agenda for such meeting lists him as a representative of Gameday. His own evidence is that he was there on behalf of iTransit to assist Gameday in light of the fact iTransit was Gameday's procurement arm for motor coaches, which seems reasonable. There is no evidence he attended to represent iTransit for the purpose of acting on behalf of Edison to be incorporated. Moreover, the evidence is that although Vanoc gave the go ahead to Gameday to secure transit buses from SBL on its behalf on December 2,2 008 that lead to the Gameday agreement with Edison after its incorporation, the evidence is clear the parties were talking about this much sooner and in fact Pouncey and Gameday were negotiating a draft agreement on behalf of Edison as early as October, 2008, which counsel for the Appellant considered the most important document in this trial. It is clear to me Pouncey was wearing his Edison hat in negotiating that contract on behalf of Edison.

2. In evidence and in argument, the Appellant admitted that Pouncey stated to Vitrano that neither iTransit nor Gameday were in a position to operate a full-fledged bus operation and that "I can provide the solution". It

was not iTransit can do it, but "I". This must either be Pouncey acting for Pouncey or for the corporation he discussed setting up to run that operation with Vitrano, i.e. Edison. In my opinion, he was clearly advocating for Edison to be the bus operator through his efforts and was logically wearing his Edison hat.

3. The evidence of Vitrano and Pouncey is that neither iTransit nor Gameday were in a position to operate a full-fledged bus company as such business was not the business of either. If iTransit was not in a position to operate a bus company needed, why would Pouncey be wearing an iTransit hat after specifically disavowing iTransit's availability to involve itself in such operation.

[65] In my opinion, the evidence is more compatible with Pouncey using his efforts on behalf of Edison, a corporation specifically targeted for incorporation to run the bus operations as its "raison d'etre" as the Appellant has argued, rather than indirectly for Edison through iTransit. At the very least, I cannot say the Appellant has demolished the Minister's assumption in this regard found in 26(t) above.

[66] Based on my findings above and having regard to the argument of the Appellant that if I did not accept that there was a valid agreement pursuant to which the Appellant was obliged to pay iTransit $2.5M, or if I did not accept that iTransit secured the first Gameday contract for the Appellant, that this appeal would be lost; I must dismiss the appeal of the Appellant and it would not be necessary for me to determine whether the amounts claimed were reasonable pursuant to section 67 of the *Act*; however, I wish to make some comments on same.

c) Reasonableness of Expenditures

[67] There is no dispute that iTransit did supply some support services to the Appellant. Clearly, iTransit and the Appellant shared office space in Orlando and shared some staff for bookkeeping and accounting as the services of both Robbins and an assistant were made available to both companies. Clearly, the evidence confirms that Pouncey and Robbins urgently went to Vancouver to take over Hill's management role of the operations when Hill became seriously ill in December of 2009 and stayed at least a few weeks. Clearly, iTransit staff accompanied the Appellant to Chicago to hold fairs to attract drivers for the buses they would be using for the Olympics. There is no doubt Pouncey accompanied Vitrano to Vancouver to pursue and gain the bid for Gameday US, through Gameday Canada,

to supply the transportation and logistics services to Vanoc, from which ultimately flowed the need to create a bus operations company, the Appellant, and hire Hill to run it, probably at iTransit's expense since the Appellant was not yet in existence.

[68] There is also no doubt Hill was hired to run the operations of the Appellant at a salary of $125,000 per year plus benefits and performance bonuses linked to the Appellant's profitability from the Games, because each of Vitrano and Pouncey agreed that he had the necessary experience to do so and was needed for that purpose. There is no doubt from the W-2 US compensation summaries issued by the Appellant and put into evidence that both Pouncey and Robbins were employed by the Appellant and received some salary in 2009. There is also no doubt that the Appellant also employed a R. Bradley, S. Brumfield and G. Scahill (through her consulting company) to provide operational and general skills, supervisory, office and human resources services to the Appellant for the Olympic operations while sharing some staff in Orlando within offices it shared with iTransit, including the service of Robbins, who, as earlier referred to, acted as *de facto* chief financial officer of both companies and A. M. who worked under him. It seems clear that the Appellant not only had the experienced executives in Hill and Mr. Brumfield as his director of operations, but had hired the necessary office and human resources talent that allowed it to operate and at one point have over 700 employees in its hire during the peak Olympic Games schedule. On the face of it, it seems entirely reasonable to conclude that the Appellant was sufficiently and expertly staffed to enable it to run the full-fledged bus operations it was intended and created to run. In fact, in argument, the Appellant agrees it was able to do so, only argues at the same time could not have done so without the assistance of iTransit.

[69] There is also no doubt that funds were transferred, both ways between the Appellant and iTransit. In fact, the evidence of the Appellant's bank records indicate that at least $1.4M was transferred in the relevant period from the Appellant's U.S account to iTransit and $36,000 directly to Pouncey. However, Hill, together with Robbins confirmed that transfers went both ways clearly suggesting the close relationship between the two entities. Having regard to the fact that the Appellant made an accounting entry dated December 31, 2010 offsetting $2,166,324 owed by iTransit to it clearly evidences that the flow of monies went far more from the Appellant to iTransit, suggesting the financial support at least was from the Appellant to iTransit rather than vice versa.

[70] The simple fact is the Respondent has assumed that no more than $400,000 was paid to iTransit for the support services it provided and the onus is on the Appellant to justify a higher amount and that any such amounts were expended for

the purpose of gaining or producing income and if so, that they were reasonable. The Appellant has not remotely come close to demolishing the Minister's assumptions. The Appellant has not provided any credible advice that it received support services greater than $400,000, let alone any specific amount. The Appellant has not tendered into evidence receipts, complete signed financial statements or any other reasonable evidence detailing what services were received from iTransit and at what cost that would form the basis of the reimbursement Pouncey alluded to earlier. All we have is an agreement dated May 4, 2009, prepared and signed long after that date, more than a year, that contains a total $2.5M fee, at a time when the Appellant and iTransit would be in a position to know exact amounts of the cost of any services provided. Recalling the evidence of Pouncey himself who indicated that the fee reflected primarily the cost of the services iTransit supplied to the Appellant, and was arrived at after a meeting with the company lawyer and accountant as well as Hill who denied being present, one would expect some corroborating evidence in support of that. As earlier mentioned, in the circumstances, I gave this agreement little weight.

[71] I have no concrete and reliable evidence before me from which I can conclude the fee of $2.5M was related primarily to the costs iTransit incurred in supplying support services, let alone even confirm $400,000 was spent to do so. The Appellant has not met the onus of demonstrating it spent more than the $400,000 assumed by the Respondent.

[72] Moreover, there is evidence from the Appellant's side that only $400,000 was spent. In dealing with the CRA, Hubbell, the accountant for the Appellant, sent responses and made representations to the affect that the fee essentially consisted of $400,000 for support services and $2.1M for commissions. Pouncey specifically denies he gave any such instructions to Hubbell and disagrees with his own representatives representations to the CRA. Moreover, he and Robbins specifically deny any specific allocation of the $2.5M specifically for commissions notwithstanding that the evidence shows Robbins prepared or was at least involved in the preparations of such representations that were given to Hubbell for disclosure to the CRA. I find it incredulous to expect me to believe their own accountant made errors in representations to the auditor in writing and then not even call him as a witness to testify to same. I am inclined to accept Hubbell's written representations to the CRA on their face value that $400,000 was the agreed fee for support services provided particularly since this information is found in a memorandum he forwarded from his client, which the evidence shows was either prepared by Robbins or reviewed by him, and this is no doubt the basis of the Respondent's assumptions of fact in this regard. If Hubbell was not providing

information he received from his client then the Court is essentially being asked to assume he made it up, which is not credible. The Appellant could have called him as a witness to clarify the matter but did not, so I must infer Hubbell based his representation on information obtained from his client, the Appellant and accepted it on face value.

[73] Considering there is evidence iTransit did supply some support services and some evidence that it was worth $400,000 as above, it seems reasonable for the CRA to have agreed to allow such amount for expenses reimbursed by the Appellant. The fact it did so without requiring further documentary proof does not mean the Respondent was acknowledging the iTransit Agreement to be valid in any way as counsel for the Appellant seems to have argued. The Respondent did not rely on such agreement as the basis for allowing the amount of $400,000 since it makes no mention of any amount. The Respondent based its decision on the evidence of the support services iTransit appears to have supplied to the Appellant that was predominantly able to fulfill its obligations on its own.

[74] Regardless of how competent and skillful counsel for the Appellant may be in argument, there must be foundational evidence to support the facts he presumes to take as true. I do not find the Appellant has met the onus of demolishing the Minister's assumptions that no more than $400,000 was paid to iTransit for any support services provided.

[75] Accordingly, the appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 6th day of April 2016.

"F.J. Pizzitelli"

Pizzitelli J.

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COURT FILE NO.:	2014-1088(IT)G
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