Docket: 2009-1737(GST)I

BETWEEN:

PARADIGM VENTURES, INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 17 and August 30, 2010
at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

Agent for the Appellant:	Glen Mulcahy
Counsel for the Respondent:	Whitney Dunn

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act* (GST Portion) for the reporting period from January 1, 2006 to December 31, 2006 is allowed, without costs, for the reasons set out in the attached Reasons for Judgment, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that only $53,103 of the supplies the Appellant made to the non-resident clients in 2006 was not zero-rated.

Signed at Ottawa, Canada this 20th day of December 2010.

"J.E. Hershfield"

Hershfield J.

Citation: 2010 TCC 646
Date: 20101220
Docket: 2009-1737(GST)I

BETWEEN:

PARADIGM VENTURES, INC.,

Appellant,

and

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REASONS FOR JUDGMENT

Hershfield J.

[1] The Appellant appeals an assessment respecting GST collectable under the *Excise Tax Act* (GST Portion) (the "*Act*") for the period from January 1, 2006 to December 31, 2006.

[2] The Notice of Appeal identifies the Appellant as a manufacturer agency acting as a sales agent for non-resident companies. It is asserted that services performed by the Appellant are zero-rated supplies. The Appellant pleads that the assessment relied on section 23 of Part V of Schedule VI of the *Act* (hereinafter referred to simply as "section 23") and asserts that such section does not apply to exclude its services from being zero-rated supplies.

[3] The Reply to the Notice of Appeal does not take issue with respect to the particular section of the *Act* relied on in making the assessment but it does set out the following assumptions:

…

c) the Appellant is a manufacturer's agency and represents companies based in the United States by selling their products in Canada to retail and wholesale customers;

d) the Appellant arranged for, procured or solicited orders in Canada for non-resident companies;

e) the Appellant carried out the above mentioned services in Canada;

f) the Appellant earned commission income from the sale of products on behalf of non-resident companies in Canada;

g) the Appellant was registered under Part IX of the *Act*, effective August 22, 2001;

h) the Appellant was required to file annual GST returns;

i) at all material times, the Appellant was involved in commercial activities;

j) at all material times, the Appellant did not make zero-rated supplies;

k) at all material times, the Appellant made taxable supplies in Canada;

l) at all material times, the Appellant was required to collect GST on the taxable supplies at the rate of 7% from January 1, 2006 to June 30, 2006 and 6% from July 1, 2006 to December 31, 2006; and

m) the Appellant reported sales of $257,940.00, but did not collect or remit GST collectible of $16,766.10 for the Period.

[4] Section 23 sets out advisory services that are zero-rated supplies but excludes certain agency services. The relevant part of the provision reads as follows:

> **23. [Professional, advisory or consulting service]** – A supply of an advisory, professional or consulting service made to a non-resident person, but not including a supply of
> …
>
> (d) a service of acting as an agent of the non-resident person or of arranging for, procuring or soliciting orders for supplies by or to the person.

[5] The Appellant asserts that section 23 is not the operative provision of the *Act*. The Appellant asserts that section 5 of Part V of Schedule VI of the *Act* (hereinafter referred to simply as "section 5"), which deals expressly with agents is the operative section. That section reads as follows:

> **5. [Agent's or representative's service]** – A supply made to a non-resident person of a service of acting as an agent of the person *or of arranging for, procuring or soliciting orders for supplies by or to the person, where* the service is in respect of
>
> (a) a supply to the person that is included in any other section of this Part; or
>
> (b) a supply made outside Canada by or to the person.
>
> [Emphasis Added.]

[6] This section was amended in 1997. It formerly read as follows:

> **5.** A supply made to a non-resident person of a service of acting as an agent of that person, to the extent that the service is in respect of
>
> (a) a supply to that person that is included in any other section of this Part; or
>
> (b) a supply made outside Canada by or to that person.

[7] Notwithstanding that the Reply makes no mention of section 5, Respondent's counsel does not deny that it is the operative section and places, in effect, no significance on the pre-assessment correspondence to the Appellant referring to section 23. In fact, as will be noted below, the Appellant was told of the section 5 basis to assess during the appeal process prior to the Minister of National Revenue (the "Minister") confirming the assessment. It is clearly the application of section 5 then that the Court is dealing with not section 23. To fit into section 5, the Appellant has to demonstrate the supply it made was to: (a) a non-resident whose supply is zero-rated or, (b) the supply by the non-resident was made outside of Canada.

[8] There has been no assertion or suggestion that the Appellant's clients fit under paragraph 5(*a*). Respondent's counsel, therefore, focused his argument on the requirement in paragraph 5(*b*). In doing so he has looked at the deeming provisions of what will constitute a supply made outside of Canada and has argued

that the evidence brought by the Appellant is insufficient to meet the requirements imposed by those provisions.

[9] Whether a supply is made outside of Canada is a question of fact subject to the deeming provisions referred to by Respondent's counsel. No evidence was brought that might assist the Court except in relation to the deeming provisions. Supplies are deemed to be inside or outside Canada under subsections 142(1) and (2) of the *Act*. Subsections 142(1) and (2) provide as follows:

> **142.(1) [Place of supply] General Rule – in Canada** – For the purposes of this Part, subject to sections 143, 144 and 179, a supply shall be deemed to be made in Canada if
>
> (a) in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available in Canada to the recipient of the supply;
>
> (b) in the case of a supply of tangible personal property otherwise than by way of sale, possession or use of the property is given or made available in Canada to the recipient of the supply;
>
> (c) in the case of a supply of intangible personal property,
>
> (i) the property may be used in whole or in part in Canada, or
>
> (ii) the property relates to real property situated in Canada, to tangible personal property ordinarily situated in Canada or to a service to be performed in Canada;
>
> (d) in the case of a supply of real property or of a service in relation to real property, the real property is situated in Canada;
>
> (e) [Repealed.]
>
> (f) the supply is a supply of a prescribed service; or
>
> (g) in the case of a supply of any other service, the service is, or is to be, performed in whole or in part in Canada.
>
> **(2) [Place of supply] General rule – outside Canada** – For the purposes of this Part, a supply shall be deemed to be made outside Canada if
>
> (a) in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available outside Canada to the recipient of the supply;
>
> (b) in the case of a supply of tangible personal property otherwise than by way of sale, possession or use of the property is given or made available outside Canada to the recipient of the supply;
>
> (c) in the case of a supply of intangible personal property,
>
> (i) the property may not be used in Canada, or

> (ii) the property relates to real property situated outside Canada, to tangible personal property ordinarily situated outside Canada or to a service to be performed wholly outside Canada;
>
> (d) in the case of a supply of real property or a service in relation to real property, the real property is situated outside Canada;
>
> (e) [Repealed.]
>
> (f) the supply is a supply of a prescribed service; or
>
> (g) in the case of a supply of any other service, the service is, or is to be, performed wholly outside Canada.

[10] As expressly stated in subsection 142(1), it is subject to section 143 which deems certain supplies to be made outside Canada. That is, subsection 142(1) will not apply in respect of a supply if section 143 applies to deem that supply to be outside of Canada. Section 143 reads as follows:

> **143.(1) Supply by non-resident** - For the purposes of this Part, a supply of personal property or a service made in Canada by a non-resident person shall be deemed to be made outside Canada, unless
>
> (a) the supply is made in the course of a business carried on in Canada;
>
> (b) at the time the supply is made, the person is registered under Subdivision d of Division V; or
>
> (c) the supply is the supply of an admission in respect of a place of amusement, a seminar, an activity or an event where the non-resident person did not acquire the admission from another person.
>
> **(2)** [Repealed.]

[11] The analysis that Respondent's counsel suggests is essentially as follows:

> Is the Appellant's service in respect of the supply of goods made outside Canada? If so, the supply of the service is zero-rated.
>
> Paragraph 142(2)(*a*) deems the Appellant's service, in respect of goods sold by a non-resident, to be outside Canada if those goods were delivered outside Canada. The Appellant did not demonstrate that any of the goods in respect of which he provided services to non-residents were delivered outside Canada. Further, the Appellant did not satisfy the burden of proof to match its services to any payment for a particular supply by a particular non-resident.

> Paragraphs 143(1)(*a*) and (*b*) provide that a supply made by a non-resident is deemed to be made outside of Canada unless (a) it is made in the course of a business carried on in Canada or (b) it is made by a person registered under the *Act.*
>
> Two of the non-resident suppliers identified by the Appellant were registered under the *Act* during the subject period. They also had corporate accounts for income tax purposes. A third non-resident supplier identified by the Appellant maintained a corporate account with the Canada Revenue Agency ("CRA") for income tax purposes. All the fees earned in respect of these supplies are therefore said not to be deemed to be made outside of Canada under section 143.
>
> And lastly, and in any event, the matching of payments to any supplies, and the Appellant's records, were so wanting that regardless of the deeming rules, the appeal had to be dismissed. It is asserted that no reliable evidence was provided either to the CRA or the Court. There is nothing to support the Appellant's late-in-the-day tendered list of non-residents to whom he asserts he provided services. There are no reliable accounting records of the amounts, if any, he earned in respect of his services to any of these listed non-residents. There are no contracts, invoices, order forms or shipping documents or other evidence that tied any particular service or goods to a payment.

[12] The factual setting as described by the Appellant is that it provided its non-resident clients with introductions to prospective Canadian buyers and was paid a fee or commission if the introduction resulted in a sale. The Appellant's representative (the owner and operator of the Appellant) asserted that the sales were for the delivery of goods outside Canada and the buyer would be responsible for bringing them into Canada. He asserted that the amendment made to the *Act* in 1997, that was lobbied for by the Canadian Professional Sales Association (CPSA), was intended to deem services to non-residents, as provided by the Appellant, as zero-rated supplies. He even presented evidence that prior to the amendments, there was a moratorium on assessments of Canadian companies serving non-resident suppliers. He referred me to published material and correspondence that confirmed that commissions earned in respect of supplies made by non-residents outside Canada were zero-rated. He asserts that is what the Appellant's commissions are for and that that should be the end of it. In effect, he seems to

believe that the facts of his situation speak for themselves in the context of the intended relief that the amendment to section 5 promised.

[13] Clearly, in a general sense, the facts of his situation have not been disputed. The Minister has agreed in the assumptions noted above, that the Appellant earned commission income from non-resident manufacturers in respect of product sales, arranged, procured or solicited by him on behalf of such non-residents, to customers in Canada.

[14] Given the background to the amendment and the assurances he received, the Appellant's representative earnestly believes, in effect, that this acknowledgment of what the Appellant does is a sufficient basis for me to allow its appeal. My repeated cautions to him that such belief may not be a sufficient basis for me to allow the appeal made little impression on him. The provisions of the *Act*, as amended, regardless of all else, require that I be satisfied as to whether the Appellant's client's supplies were made outside Canada pursuant to subsection 142(2) or fit under section 143. The general picture of the Appellant's services would not be sufficient if the provisions of the *Act* that prescribe when his services are zero-rated have not been met.

[15] Section 142 deems supplies to be inside or outside Canada. The Respondent's position seems to be that unless the Appellant can establish that it meets the requirements of subsection 142(2), then subsection 142(1) would apply deeming the Appellant's clients' supplies to be inside Canada. That is not necessarily true unless the Minister assumed that the non-resident supplies were made in Canada or assumed that one of the requirements for the deeming provision in subsection 142(1) has been met. Paragraph 142(1)(*a*) deems the sale of tangible personal property to be made in Canada if the property is, or is to be, delivered or made available in Canada to the recipient of the supply. The assumption of the Minister is that the Appellant's clients sold their products *in Canada* to retail and wholesale customers. That assumption in and by itself may not be sufficient, in my view, to place the burden on the Appellant to establish that the goods being sold were not in fact delivered or made available in Canada. However, I have in evidence the detailed CRA diary/logs kept at the appeal stage prior to the confirmation of the assessments and, as well, the appeals officer testified at the hearing. There is no doubt that the Appellant's representative and its accounting representative were told that for his services to be zero-rated, he needed to establish that the goods that they related to were delivered to the Canadian buyers outside of Canada as required by subsection 142(2). This tends to favour a finding that the actual assumption made by the Minister in confirming the assessment was

that the subject deliveries were not made outside Canada. That is, the Appellant has the burden of proof here to establish that the deeming provision in subsection 142(2) applies. Failing that, the Appellant must rely on the deeming provision in section 143.

[16] It is this burden of proof that the Appellant had difficulty accepting. My repeated cautions about it seemed only to frustrate him more and caused the hearing to lose its focus at times. He argued that he could not provide certain information either because he had no access to it or because it was confidential and if disclosed it would jeopardize his business with his non-resident clients. He had not even provided the CRA or Respondent's counsel with the names and addresses of his clients. When the hearing of the Appeal opened in March he advised the Court he could not provide the Court with confidential third party information. At that point, I suggested that if the Respondent was correct on the application of sections 5, 142 and 143 then it did not appear possible that he could succeed unless he made better disclosure. The March hearing was adjourned to allow him time to consider how to proceed and what evidence he could bring forward. When the hearing re-convened in August, Respondent's counsel advised that the Appellant's representative had provided the names of the 5 non-resident clients that had paid Appellant commissions in 2006. With the list of names the Respondent was able to determine the status of the non-resident suppliers in respect of the application of section 143. As noted above, 2 of the non-resident clients were registered under the *Act*. Additional information was then provided at the re-convened hearing under what Appellant's representative referred to as "duress". Still, the information he provided was minimal.

[17] Before reviewing that additional evidence, I want to address the Appellant's argument relating to the initial audit bringing up questions under section 23. This has no relevance to the appeals. The Appellant asserts that no determination was made as to whether section 23 applies. While I made no ruling on it at the hearing, the Appellant's representative's own testimony was that the services provided were excluded under paragraph 23(*d*) from being zero-rated. The Crown places no reliance on that section. As noted above, I am satisfied that the Appellant was told that for his services to be zero-rated, it needed to rely on section 5 and that required it to establish that the goods to which its services related, were delivered outside of Canada as required by subsection 142(2). The Appellant knew full well the basis for confirming the assessment. In any event, the basis of the assessment as confirmed is clearly before me. Section 23 is a red herring.

[18] As well, I note that the numerous discussions between the Appellant's representatives, as reflected in the CRA diary/logs and correspondence to them, should have alerted the Appellant to the futility of the argument that the amendment to section 5, allowing the types of services the Appellant provided to be zero-rated, was not unconditional. The CRA's construction of the various sections mentioned above was clearly explained. Indeed some of his own exhibits, such as an excerpt from what is asserted to be a national chartered accounting firm publication, suggests the same construction and noted the difficult evidentiary burden on persons like the Appellant. It warns that missing documentation as to the goods being supplied outside Canada could lead to the CRA deciding that the zero-rating did not apply. His pleas then for the Appellant's appeal to succeed on the basis of what he essentially says was the spirit of the amendment, are simply unrealistic. The amendment was understood by most, it seems, as coming with conditions and burdens of proof.

[19] On the other hand, the evidence of the pre-confirmation concerns of the CRA make it clear to me that there were no issues relating to amounts earned or his records. The assumptions and the record shows that the only concern was identifying the non-residents and other documentation as would allow a determination of whether the delivery requirement of section 142 was met.

[20] To underline this singular focus and general acceptance of all else, it is helpful to refer to the transcript of the appeals officer's testimony. He acknowledged that he had accepted the explanations of the Appellant's representative and had recommended vacating the assessment. However, he went on to testify that his team leader, and then a technical adviser, led him to raise the question of "whether the supplies were made outside Canada or inside Canada". That was the information requested of the Appellant. The Appellant had no documentation as would answer that inquiry or if it did, its representative was obviously concerned about surrendering it. Hence, his frustration.

[21] In any event, I will now consider the nature of the conditions statutorily imposed in order to determine whether the Appellant's supplies are zero-rated.

[22] In spite of what seemed to me to be occasional suggestions that section 143 overrode subsection 142(2), I wish to make it clear that they each afford the Appellant a basis for claiming that its supplies are zero-rated. If a supply is deemed to be outside Canada under subsection 142(2), it does not lose the benefit of that provision just because it is not deemed to be outside of Canada under section 143 and if a supply is deemed to be outside Canada under section 143, it does not lose

the benefit of that provision just because it is not deemed to be outside of Canada under subsection 142(2). Once a supply is deemed to be outside Canada, the existence of another deeming provision is irrelevant where neither is subject to the other.

[23] That being the case, the Appellant need not be concerned about the conditions imposed by section 143 if he can establish that the delivery of the goods in respect of which he was paid by non-resident sellers was made outside Canada. That will qualify the service as outside Canada under subsection 142(2) and thereby be zero-rated under section 5. Failing that, he must establish that his services are, nonetheless, still zero-rated by virtue of the deeming provision in section 143.

[24] This statutory approach for zero-rating supplies to agencies in Canada serving non-resident suppliers underlines the benefit afforded by the amendment to section 5 to persons such as the Appellant who may not be true agents in a legal sense.[1] The section as it read prior to the amendment applied to "agents". The amendment added persons "arranging for, procuring or soliciting orders". The Minister's assumptions in this appeal acknowledge the Appellant as this latter type of person.[2] The Appellant's representative seems to believe that the amendment did more. It did not. It simply gave the Appellant the same zero-rating *opportunity* as given to true legal agents. Like in the case of true agents, however, to realize on that opportunity there are conditions. In this case the condition is proving that the goods ordered for Canadian purchasers were delivered outside Canada. By being included in section 5 this way allows for what might be a simpler method for persons like the Appellant and their non-resident clients to stay out of the chain of supplies that require GST payments. A Canadian, as importer, would get ITCs in respect of the importation of the goods instead of forcing a non-resident to register and claim ITCs. It is a simpler, revenue neutral, way to approach this activity or so it seems to me and it avoids the potential difficulties associated with section 143.

[25] In any event, looking first at subsection 142(2), the burden on the Appellant is to establish that the goods in respect of which he earned commissions were delivered outside of Canada. To do that, the Appellant must tie his commissions to goods delivered outside of Canada. This is no longer as general an enquiry as the appeals officer might have intimated in his early discussions with the Appellant's

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[1] See Department of Finance Technical notes July 1997.

[2] The assumptions do refer to appellant as a "manufacturer's agency" but the more explicit assumption is that the supplies in issue were "arranging for, procuring or soliciting orders".

representative. It is, as Respondent's counsel asserted, an exercise that normally requires tracing the delivery terms of each order and matching it to a particular commission receipt. To the Appellant, this is, in practical terms, both an impossibility given his role which does not include being in the loop as to delivery and transportation documentation, and an accounting nightmare.

[26] As to the evidentiary problems relating to delivery, the Appellant is in a difficult position. While it might be possible to get evidence from a Canadian buyer of where delivery of certain goods was made, that would not in itself be sufficient to tie a payment by the non-resident seller to those goods. Inevitably then, it will be easiest for agents in the Appellant's circumstance to encourage, or insist that, their clients assist them in identifying, in respect of each commission payment, the particular order it relates to and the delivery terms respecting that order. This Court cannot readily dictate how exacting the tracing requirement might be from an administrative point of view, but, on a case by case basis, the exercise might be very exacting when it comes before this Court.

[27] As to the accounting problem, development of an accounting system that matches a payment from a particular non-resident to a particular order should not be as challenging as made out by the Appellant. This is fairly standard, straightforward record keeping which can be adopted by the Appellant even as it appears to carry on business.

[28] However, the Appellant still feels abused by this regime. He complains that he has no ability to force his clients to enter formal contracts and that he is totally at their mercy as to what he is paid. He never sees the goods, never handles any aspect of the order or transport of them and never knows what goods have actually been acquired and paid for which entitle him to be paid. He cannot even send an invoice.[3] He relies on his clients to pay as the circumstances require. He has no ability to audit. Arrangements are lax but he has no control over them. As well, he admitted that his income reporting might have mixed cash and accrual methods and that he had difficulty with exchange rate conversion differences between the two methods. These unsolicited admissions in a way underlined his candor. I accept him, as did the CRA, as honest and credible but clearly in need of some better professional accounting advice. In any event, he said he was unaware of the requirements now

[3] The letter from the client referred to later in these Reasons as "WindChaser", confirmed there were no invoices in its case. The Appellant was paid according to the accounts in their receivable departments.

being imposed. There were no precedents. He feels he is being penalized for his reliance on standard practises and lack of knowledge of what the CRA and this Court are now expecting of him.

[29] This Court can provide no assistance in respect of these concerns. If clients or customers of clients will not provide satisfactory delivery evidence in respect of a particular supply, GST liability is at the agent's risk. A sale or purchase or shipping document between his client and the customer would almost certainly have an identifying order or reference number that could, if recorded properly, be linked to a payment and a shipping or importation record. Such documentation cannot be regarded as confidential if section 5 is to be relied on.

[30] What then is the evidence of deliveries outside of Canada in the case at bar?

[31] In the case of one client ("Gale") I was shown only one order document dated in 2006. There is, as well, a signed representative contract that links the Appellant to that client. The order document shows shipping as FOB China but there is no dollar amount shown on the order. A trial balance printout of the Appellant's income for the 2006 year shows income from that client as $37,260.21. There is no evidence that the trial balance amount relates specifically to the order put in evidence. It is impossible to attribute a dollar amount to this delivery made outside of Canada. Further, it cannot serve as an example that warrants a finding that all deliveries from that client were made outside Canada.

[32] In the case of a second client ("LOA"), I was shown two invoices relating to that non-resident's supplies to the same Canadian purchaser. The one relating to 2006 has a dollar amount specified that the Appellant's representative testified gave rise to a commission of some $700 US. However, it provides no information as to place of delivery. It is a faxed copy sent to a number that is presumably that of the Appellant. The other invoice, also a faxed copy, relates to the 2010 year and shows the importer of record as the Canadian buyer and there is an e-mail that connects that supply to the Appellant. Such documentation would be sufficient evidence that the supplier client of the Appellant made *that* delivery outside Canada in 2010. There is a purchase order number on it and a payment could readily be linked to that order by any form of confirmation record of the payment referring to that purchase order number. However, even if that record existed, that together with the invoice and an e-mail in respect of the 2010 order, is not evidence at all with respect to the point of delivery of the transaction in 2006. Nor can it serve as an example that warrants a finding that all deliveries from that client to that purchaser were made outside Canada in 2006.

[33] Lastly, I was shown a letter from a third client supplier ("WindChaser") that said only a small percentage of the goods it sold to Canadian customers in 2006, whose business was procured by the Appellant, was delivered in Canada. While there are obvious weaknesses to this evidence, and with the trial balance printout evidence provided by the Appellant to connect his client's service with a specific dollar amount of commissions[4], it is open to me to allow a percentage of the $94,458.00 shown on the trial balance as attributable to supplies made outside of Canada in respect of this client. I note, however, that if I were to allow these earnings as relating to a zero-rated supply, I would need to ascribe a percentage to what was described as a "small %". The Appellant suggested that it was 2.6% based on his representation of freight summaries. There is no evidence supporting this freight summary. I note here, as well, that this non-resident supplier is one of the suppliers that was registered under the *Act* in 2006. That does not prevent the Appellant's supply from being zero-rated under subsection 142(2).

[34] A fourth client was a company in Mexico ("Aly"). The Appellant's representative's testimony was that this had nothing to do with Canadian purchases. Aly procured sales in Mexico and the Appellant found manufacturers in China through an agent in Taiwan. Commissions were split. There is no collaborating evidence of this. There are no banking records that show receipts from a Mexican source. Still, even Respondent's counsel was, at one point in the proceeding, willing to accept this testimony if it could be incorporated as part of an overall settlement. Admittedly, such concession was on a without prejudice basis.

[35] No mention of the fifth client was made at the hearing.

[36] As to the deeming provision in section 143, the Appellant, as noted above, only provided the names of his non-resident clients after the adjournment of the

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[4] I have considered the reliability of this hearsay evidence and the last minute production of a trial balance which was a printout of an accounting program detailing debit and credit totals for the period ending December 31, 2006. The detail includes total revenues for the period for each client. Even the Appellant had some difficulty attesting to its accuracy and the concept of a "trial" balance in itself recognizes the possibility of error. However, this appeal was conducted under the Informal Procedure. The Respondent could have elected to proceed under the General Procedure and required discovery of documents and relied more heavily on compliance with the rules of evidence. I am not condemning the Crown in any way or being critical. I make this observation as it is yet another illustration of my impression that the CRA was not in the least interested or concerned about this aspect of the assessment. I do not wish to impose a burden on the Appellant in this case that does not recognize this lack of concern.

initial hearing. That enabled the CRA to determine whether the conditions of section 143 were met. Of the 5 clients, 2 were registered: LOA and WindChaser. That takes the commissions from both those companies out of the zero-rating protection of section 143.

[37] The next question is whether any of the three remaining companies carried on business in Canada. If they did, that would take the commissions from these companies out of the zero-rating protection of section 143. The appeals officer testified that he checked whether any of these three companies had accounts with the CRA. He found that one company, Gale, had a corporate account and an import account in 2006 and that it was registered under the *Act* in 2008. The Appellant offered no information concerning whether Gale or any other of its non-resident clients carried on business in Canada. Indeed, I believe it is fair to say he knew nothing of the accounts or registrations introduced into evidence.

[38] Based on the account information pertaining to Gale, I am urged by Respondent's counsel to find that it carried on business in Canada. That, I will not do.

[39] Certainly, the CRA is in a position to know more, if there is more. If the non-resident filed returns in Canada showing that they were carrying on business in Canada, the CRA would have to have said so. Further, if there was activity on these accounts it should have been introduced into evidence. To the contrary, when asked if the import account or corporate account showed any activity in 2006, the appeals officer testified that he did not know, he did not look.

[40] In holding, as I do now, that the bar to zero-rating under section 143 that is imposed where the non-resident carries on business in Canada does not apply to any of the Appellant's clients, I rely not only on the general rule that the onus on the taxpayer to prove something does not extend to facts that are particularly within the Minister's knowledge, but on the rule that the taxpayer is only required to prove that a determinative assumption made by the Minister in making the assessment is wrong.[5] In the case at bar, the only thing the Appellant might be

[5] Both these rules are succinctly set out at paragraph 21 in *Anchor Pointe Energy Ltd. v. The Queen*, 2006 TCC 424. This very passage was approved by Létourneau J.A. of the Federal Court of Appeal decision overturning the trial court decision in that case, on other grounds. As well, I note that while it is not necessary for me to endorse the possibility, in *Gestion Yvan Drouin Inc. v. The Queen*, [2001] 2 CTC 2315, Justice Archambault of this Court suggests, at paragraph 108, the possibility that the onus on a taxpayer to prove facts that he does not have possession of, shifts to the Crown.

required to prove if appropriate assumptions were made, would be whether its representation alone was such as would support a finding that the non-resident was carrying on business in Canada. In the case at bar, there are no assumptions relating to the question of whether the Appellant's clients were carrying on business in Canada. There are no assumptions made that imply the Appellant's representation had that effect.[6] It is assumed that the Appellant arranged for, procured or solicited orders. That suggests to me that no assertion is being made that the nature of the "agency" with the Appellant is not such as would attract a finding that its clients carried on business in Canada by virtue of that relationship. Indeed, as might be expected given the testimony of the appeals officer, the assumptions of the Minister relating to the application of section 143 are essentially non-existent. Assumptions (j) to (m) are conclusions of law that need to be proven. They cannot be assumed.

[41] In the case at bar then, one might say the Appellant is fortunate that its services to only two of its clients were excluded from section 5 treatment under section 143 by virtue of being registered under *Act*. Even a considerable amount of due diligence and assurances from clients might not have saved it from the risk that its services would not be zero-rated under that deeming provision. Therefore, the opportunity to have its services zero-rated under the umbrella of subsection 142(2) might, again, be seen as a welcomed opportunity. However, as stressed above, that opportunity comes with conditions.

[42] As it turns out then, in the case at bar, being relieved of the onus of proof in respect of the application of the deeming provision of section 143, the Appellant has the benefit of it except in the case of LOA and WindChaser who were both registered under the *Act* in 2006.

[43] I have already reviewed the evidence concerning these services. It should be apparent that I find the evidence in respect of LOA is insufficient. Accordingly, I find that the Appellant is liable as assessed in respect of supplies to that client in the amount of $34,212.00.

[44] As to the evidence concerning WindChaser it is marginal at best. Indeed, his tracing and accounting would likely be fatal in most cases. However, given the

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[6] An assumption that the Appellant concluded contracts for his clients, for example, might require the Appellant to bring evidence as whether that was the case. Indeed, the Respondent's counsel did attempt to read one contract given in evidence as doing just that. In fact, that contract was ambiguous at best.

background of this appeal, the appeals officer's testimony and a lenient finding of the balance of probability, I am satisfied that the small percentage of deliveries inside Canada would not be more than 20%.

[45] Accordingly, the appeal is allowed, without costs, on the basis that only a total of $53,103 of the supplies that the Appellant made to the non-resident clients in 2006 was not zero-rated.

Signed at Ottawa, Canada this 20th day of December 2010.

"J.E. Hershfield"

Hershfield J.

CITATION:	2010 TCC 646
COURT FILE NO.:	2009-1737(GST)I
STYLE OF CAUSE:	PARADIGM VENTURES, INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 17 and August 30, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF JUDGMENT:	December 20, 2010

APPEARANCES:

Agent for the Appellant:	Glen Mulcahy
Counsel for the Respondent:	Whitney Dunn

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada