Docket: 2013-1150(GST)G

BETWEEN:

INTERNATIONAL HI-TECH INDUSTRIES INC.
by its Secured Creditors, Receivers in part and Lawful Attorneys,
IHI INTERNATIONAL HOLDINGS LTD.,
GARMECO INTERNATIONAL CONSULTING ENGINEERS S.A.L.,
GARMECO CANADA INTERNATIONAL CONSULTING ENGINEERS LTD., IHI HOLDINGS LTD. AND
EARTHQUAKE RESISTANCE STRUCTURES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 28 to 30, 2017, at Vancouver, British Columbia. Submissions filed by the Appellant on January 3, 2018 and by the Respondent on January 5, 2018.

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Andrew G. Sandilands
Counsel for the Respondent:	Matthew W. Turnell
	Jamie Hansen

AMENDED JUDGMENT

These Appeals are allowed, and the reassessments that are the subject of these Appeals are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that, as conceded by the Respondent, the Appellant is entitled to succeed to the extent of $19,200.77, as explained in more detail in the attached Reasons.

If the Parties are unable to agree on costs, they may file written submissions in respect of costs, each submission to be no longer than five pages, within 90 days of this Judgment.

This Amended Judgment is issued in substitution of the Judgment dated November 30, 2018.

Signed at Ottawa, Canada, this **10th** day of **December** 2018.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2018 TCC 240
Date: 20181130
Docket: 2013-1150(GST)G

BETWEEN:

INTERNATIONAL HI-TECH INDUSTRIES INC.
by its Secured Creditors, Receivers in part and Lawful Attorneys,
IHI INTERNATIONAL HOLDINGS LTD.,
GARMECO INTERNATIONAL CONSULTING ENGINEERS S.A.L.,
GARMECO CANADA INTERNATIONAL CONSULTING ENGINEERS LTD., IHI HOLDINGS LTD. AND
EARTHQUAKE RESISTANCE STRUCTURES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals instituted by International Hi-Tech Industries Inc. ("IHI") (as represented by its secured creditors, receivers in part and lawful attorneys, being Garmeco International Consulting Engineers S.A.L., Garmeco Canada International Consulting Engineers Ltd., IHI Holdings Ltd., and Earthquake Resistance Structures Inc. (collectively, the "Garmeco Group"))[1] against certain reassessments (the "Reassessments") issued by the Canada Revenue Agency (the "CRA") on behalf of the Minister of National Revenue

[1] Although IHI International Holdings Ltd. is shown in the style of cause as a secured creditor, receiver in part and lawful attorney, at the hearing of these Appeals, the Court was advised that International Hi-Tech Industries Inc. (defined above as "IHI," which was the abbreviation used by the Parties at the hearing) was not, and is not, indebted to IHI International Holdings Ltd., with the result that the latter corporation is not a secured creditor, receiver in part or lawful attorney of IHI and is not a member of the Garmeco Group.

(the "Minister") in respect of most of the quarterly reporting periods in 2006 and 2007, as follows:

Reporting Period	Abbreviation	Adjustment
2006/01/01 to 2006/03/31	Q1-06	$23,288.26
2006/07/01 to 2006/09/30	Q3-06	11,012.50 Cr
2006/10/01 to 2006/12/31	Q4-06	22,869.62
2007/01/01 to 2007/03/31	Q1-07	50,771.16
2007/04/01 to 2007/06/30	Q2-07	2,643.85
2007/07/01 to 2007/09/30	Q3-07	20,168.41
2007/10/01 to 2007/12/31	Q4-07	29,030.93
Total		$137,759.73

[2] On January 14, 2011, the CRA issued to IHI a ten-page reassessing document.[2] The first page of that document is entitled "Notice of (Re)Assessment," and contains the statement, "This notice explains the results of our audit (re)assessment of return(s) you have or may have previously filed." This suggests that there may have been only one composite reassessment for all seven quarterly reporting periods. However, each of pages 2 through 8 of that document also contains the title "Notice of (Re)assessment" and each has a different seventeen-digit reference number, suggesting that each of those pages represents a separate reassessment, corresponding to the seven reporting periods in issue. If there was a single reassessment, these proceedings presumably constitute only one Appeal. However, if there were seven reassessments, the Notice of Appeal filed by IHI represents multiple Appeals.[3] Without reaching a definitive conclusion, I will simply assume that there were multiple Reassessments and that there are multiple Appeals.

---

2 Exhibit A-1, Tab 4.

3 Section 25 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") provides that a party may generally join in a notice of appeal all assessments (or reassessments) under appeal. See also *3488063 Canada Inc. v The Queen*, 2016 FCA 233, ¶47. In that case, the Federal Court of Appeal indicated that, where, in the context of the *Income Tax Act*, there is more than one assessment, there is a separate appeal for each assessment; see paragraphs 51 and 53 of that decision.

II. ISSUES

[3] The issues in these Appeals are:

a) When IHI sold certain land in Q1-06, was IHI required to collect the goods and services tax (the "GST") from the purchaser?

b) Was IHI entitled to claim input tax credits ("ITCs") in respect of consideration paid by IHI to its patent agent for legal services, filing fees and related expenses?

c) Was IHI entitled to claim ITCs in respect of three payments made to its accountants in Q3-07 and Q4-07?

d) Was IHI entitled to claim ITCs in respect of two payments, made pursuant to two letters of credit, to Canadian Natural Resources Limited ("CNRL") in Q2-07?

e) Was IHI entitled to claim ITCs in respect of various payments made to its lawyers in Q3-07 to the extent that those payments exceeded the amount of the ITCs conceded by the Crown?

III. FACTUAL BACKGROUND

[4] During the reporting periods that are the subject of these Appeals, IHI was a public corporation, whose President and Chief Executive Officer was Roger Abou-Rached. Little evidence was provided concerning the ownership of IHI; however, it seems that the most significant shareholder of IHI at that time was the mother of Mr. Abou-Rached and that other members of his family also owned shares of IHI. While there was little evidence concerning the leadership of IHI, it appears that, in addition to Mr. Abou-Rached, other members of his family also held positions of responsibility in IHI.[4]

[5] The business of IHI included the construction of buildings using completely manufactured prefabricated panels made of special reinforced concrete, rigid foam and cold-formed metals. Robotic machinery was used to manufacture the panels. It

---

[4] For additional non-evidentiary background information concerning Mr. Abou-Rached and IHI, see *Garmeco Canada International Consulting Engineers Ltd. v The Queen*, 2015 TCC 194, ¶5-7.

appears that the robotic machinery did not always operate as intended in 2006 and 2007.

IV. CONCESSIONS AND ADMISSIONS

A. Concessions by the Crown

[6] During the opening statement made by counsel for the Crown, he indicated that IHI had provided documentation to support its claims for ITCs in respect of amounts paid to a law firm, Steele Urquhart, for legal services. As well, the Crown acknowledges that the amount assessed by it as additional GST collectible for Q4-07 should be $12,653.14, rather than $25,289.20. In other words, the Notice of Reassessment for Q4-07 was excessive to the extent of $12,736.06 (i.e., $25,289.20 − $12,653.14). Consequently, the Crown concedes that IHI is entitled to succeed to the extent of the following amounts:

Period	Description	Amount
Q1-07	ITCs re: payments to Steele Urquhart	$801.47
Q2-07	ITCs re: payments to Steele Urquhart	4,158.48
Q3-07	ITCs re: payments to Steele Urquhart	1,504.86
Q4-07	Reduction in GST collectible	12,736.06
Total		$19,200.77

Thus, the Crown acknowledges that IHI is entitled to succeed in these Appeals to the extent of $19,200.77.[5]

[7] In respect of Q3-07, IHI claimed ITCs in the aggregate amount of $2,126.10. The ITCs conceded by the Crown for Q3-07 (i.e., $1,504.86) represent the amount for which proper supporting documentation was ultimately provided by IHI. As the Crown is of the view that IHI has not provided proper supporting documentation in respect of the remaining ITCs in Q3-07 (i.e., $621.24), those ITCs are still in issue.

B. Admissions by IHI

[8] On September 25, 2017, pursuant to subsection 130(1) of the *Rules*, counsel for the Crown served on counsel for IHI a Request to Admit, a copy of which is attached as Schedule A. IHI did not respond to the Request to Admit within the fifteen-day period contemplated by subsection 131(1) of the *Rules*, with the result

---

[5] Respondent's Opening Statement and Summary of Issues and Concessions, p. 6, ¶19.

that, by reason of subsection 131(2) of the *Rules*, IHI is deemed, for the purposes of these Appeals, to admit the truth of the facts and the authenticity of the documents mentioned in the Request to Admit. IHI has not subsequently withdrawn the deemed admission.[6]

V. ANALYSIS

A. Sale of Lots

(1) Background

[9] In 1996, IHI acquired two vacant parcels of land, located in Langley, British Columbia, and civically described as Lot 1 Fraser Hwy, Langley, BC, PID 003-772-560 ("Lot 1") and Lot 2 Fraser Hwy, Langley, BC, PID 003-774-074 ("Lot 2"). Lot 1 and Lot 2 (together, the "Lots") were acquired by IHI to accommodate the then owner of the Lots, who was a friend of a significant shareholder of IHI and who was willing to receive shares of IHI as consideration for the sale of the Lots. The Lots were not located conveniently close to the business premises of IHI and were not required to carry on that business.

[10] When IHI acquired the Lots, no GST was exigible, as the vendor was an individual and the supply of the Lots apparently came within section 9 of Part I of Schedule V to the *ETA*.

[11] On March 30, 2006, IHI sold the Lots for an aggregate price of $240,000 (being $130,000 for Lot 1 and $110,000 for Lot 2). As a cost-saving measure, IHI used a notary public, rather than a lawyer, to document and implement the sale transaction, as did the purchaser (the "Purchaser"), who was an individual and who was not a registrant for the purposes of the *ETA*. Apparently, the notary acting for the Purchaser was of the understanding that the exemption in section 9 of Part I of Schedule V to the *ETA* applied to corporations, as well as to individuals and personal trusts. It seems that the notary acting for IHI held a similar view. Mr. Abou-Rached testified that, because no GST had been payable by IHI when it acquired the Lots in 1996, he assumed that no GST would be exigible when IHI sold the Lots in 2006. In any event, the notary for the Purchaser provided two documents, each entitled "Goods & Services Tax Certificate," which indicated that the sale of the Lots was an exempt supply. The operative portion of each certificate stated, "The above sale is exempt from GST because it is … [a] sale of personal-

---

6 See section 132 of the *Rules*.

use land by an individual or Trust or Company that is a sale not in the course of business."[7] The notary acting for IHI reviewed those certificates and apparently approved them, and Mr. Abou-Rached signed them on behalf of IHI.

[12] As Mr. Abou-Rached (on behalf of IHI) and the Purchaser, as well as their respective notaries, were of the understanding that the sale of the Lots was an exempt supply, no GST was collected by IHI.

[13] When the CRA audited IHI in respect of 2006 and 2007, the auditor realized that no GST had been collected in respect of the sale of the Lots, with the result that the Reassessment for Q1-06 assessed GST in the amount of $9,100 in respect of the supply of Lot 1 and $7,700 in respect of the supply of Lot 2.

(2) Statutory Provision and Analysis

[14] In support of its submission that the sale of the Lots was an exempt supply, IHI is relying on subsection 9(2) of Part I of Schedule V to the *ETA*. The Notice of Appeal states that the Lots were acquired as capital property but were never used, nor intended to be used, in the business of IHI. Thus, it appears that the Appellant was most concerned about showing that the sale of the Lots did not come within paragraphs V-I-9(2)(a) and (b) of the *ETA*.

[15] The difficulty faced by the Appellant is that the opening portion of subsection 9(2) of Part I of Schedule V to the ETA reads as follows:

> A supply of real property made by way of sale by an individual or a personal trust, other than….

IHI is a corporation, and not an individual or a personal trust. As noted above, the Goods & Services Tax Certificates signed by Mr. Abou-Rached on behalf of IHI incorrectly suggested that an exempt supply may occur where there is a sale of personal-use land by an individual, trust or company otherwise than in the course of a business. However, the wording of those certificates did not conform with the wording of the statutory exemption. An incorrectly drafted certificate cannot create an exempt supply that does not come within the wording of the applicable legislation. Therefore, the exemption in subsection V-I-9(2) of the *ETA* is not available.

---

[7] Exhibit A-1, Tab 8, p. 1-2. As will be discussed below, the wording of the certificate did not accurately track the wording of the opening line of subsection 9(2) of Part I of Schedule V to the *ETA*.

[16] I am not aware of any provision in Schedule V to the *ETA* that would result in the sale of the Lots being an exempt supply, nor did IHI refer me to any provision other than subsection V-I-9(2).

[17] As the sale of the Lots was a taxable supply, IHI was required, pursuant to subsection 221(1) of the *ETA*, to collect the GST payable by the Purchaser in respect of that supply. The exceptions set out in subsection 221(2) of the *ETA* were not available, given that:

a) IHI was a resident of Canada by reason of paragraph 132(1)(*a*) of the *ETA*, and not by reason only of subsection 132(2) of the *ETA*;

b) the Purchaser was not registered under Subdivision d of Division V of Part IX of the *ETA*;

c) IHI and the Purchaser did not make an election under section 2 of Part I of Schedule V to the *ETA*; and

d) the Purchaser was not a prescribed recipient.

Accordingly, IHI was required to collect GST in the amount of $16,800 from the Purchaser.

B. Payments to Patent Agent

(1) Background

[18] In the 1990s or thereabouts, Mr. Abou-Rached, while employed by Garmeco International Consulting Engineers S.A.L., developed certain technology (the "Technology") relating to a building construction process using completely manufactured prefabricated panels made of special reinforced concrete, rigid foam and cold-formed metals. Ultimately, pursuant to one or more transfers, all rights to the Technology were acquired by R.A.R. Consultants Ltd. ("RAR"), which was a corporation initially owned by Mr. Abou-Rached, but subsequently owned directly or indirectly by other members of his family.

[19] RAR applied for and acquired various patents around the world. Mr. Abou-Rached testified that the Technology included eight inventions and seventy-two patents, which were registered in 180 countries and 115 languages. In 2006 and 2007, IHI held a licence granted by RAR, pursuant to which IHI was permitted to

design, market, distribute and erect products in Canada based upon the Technology.

[20] According to Mr. Abou-Rached, the "mother company" (which was a reference to IHI) was responsible for payment of all costs to acquire and maintain the patents. The foregoing arrangement was summarized in a letter dated June 17, 1996 from IHI to RAR. The operative provisions of the letter are as follows:

> This letter is to confirm that International Hi Tech Industries Inc. (IHI) will continue to be responsible for all legal and filing fees regarding the patents/claims etc., that are related to RAR Consultants Ltd., their agents and associates.
>
> IHI will continue to pay its sole obligation, as per agreement, for costs incurred directly or indirectly on behalf of above patents/claims.
>
> Any GST charged on the above applicable invoices, and paid by IHI, IHI will be the sole party to claim the Input Tax Credits.[8]

During his testimony, Mr. Abou-Rached seemed to indicate that the above arrangement was set out in a licence agreement (presumably between RAR and IHI), but he did not produce a copy of any such agreement at the hearing. In fact, during the examination for discovery of Mr. Abou-Rached, IHI refused to provide to the Crown copies of (as described by the Parties) the Canadian licence agreement and the international licence agreement, on the basis that those agreements were not relevant to IHI's claim for ITCs.[9]

[21] In 2006 and 2007, the patent agent used by Mr. Abou-Rached and his related corporations was Fetherstonhaugh & Co. ("Fetherstonhaugh"). From December 8, 2005 to January 30, 2007, Fetherstonhaugh issued 84 invoices in respect of the

---

8 Exhibit A-1, Tab 9.

9 Respondent's Discovery Read-Ins, Tabs A-D (Tabs B and D contain excerpts from a letter dated October 7, 2016 from counsel for IHI to counsel for the Crown). In an exchange between counsel for IHI and counsel for the Crown at the examination for discovery of Mr. Abou-Rached, both counsel and Mr. Abou-Rached referred to a document described as "Canadian Licence Agreement among RAR Consultants, Canadian Hi-Tech and Roger A. Rached dated March 16th, 1993." In the excerpt from the transcript of that examination for discovery that was read into evidence, there was no indication as to whether the term "Canadian Hi-Tech," as used at the examination for discovery, was a reference to IHI (as defined in these Reasons) or was a reference to some other corporation. It is not clear whether the agreement referenced in the examination for discovery is the same agreement that was apparently referenced in the above-quoted letter of June 17, 1996.

Patents, showing aggregate legal fees and charges in the amount of $290,235.73 and aggregate GST in the amount of $19,144.42.[10] All of the invoices were addressed by Fetherstonhaugh to RAR,[11] but were paid by IHI, rather than by RAR, as RAR did not have a source of revenue and as, according to Mr. Abou-Rached, the fee-payment arrangement summarized above required IHI to make those payments.

[22] Six of the above-mentioned invoices related to Canadian patents, while the balance of the invoices related to foreign patents or to patents in countries that were not specified in the invoices. The invoices relating to Canadian patents are described below:

Date	First Line of Caption	Fees	GST
December 8, 2005	Canadian patent file no.: 2176481	$475.00	$15.75
December 8, 2005	Canadian patent file no.: 2257661	475.00	15.75
December 8, 2005	Canadian patent file no.: 2257660	475.00	15.75
December 8, 2006	Canadian patent file no.: 2176481	485.00	14.10
December 8, 2006	Canadian patent file no.: 2257661	485.00	14.10
December 8, 2006	Canadian patent file no.: 2257660	485.00	14.10
Total		$2,880.00	$89.55

[10] Exhibit A-1, Tab 12.
[11] Exhibit A-1, Tab 13.

(2) Statutory Provision and Analysis

[23] The statutory provision that permits the claiming of an ITC is subsection 169(1) of the *ETA*, the relevant portion of which states:

> 169(1) Subject to this Part, where a person *acquires* … property or a service … and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply … becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:
>
> A Ч B
>
> where
>
> A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and
>
> B is
>
> …
>
> (c) … the extent (expressed as a percentage) to which the person *acquired* … the property or service … for consumption, use or supply in the course of commercial activities of the person. [*Emphasis added.*]

[24] For the purposes of these Appeals, the above provision of the *ETA* sets out three conditions that must be satisfied by a person to be eligible to claim an ITC, as follows:

a) the claimant must have acquired property or a service;

b) GST must have been payable or paid by the claimant in respect of the supply; and

c) the claimant must have acquired the property or service for consumption, use or supply in the course of its commercial activities.[12]

---

[12] *General Motors of Canada Limited v The Queen*, 2008 TCC 117, ¶30; *aff'd*, 2009 FCA 114, ¶30.

[25] In the context of IHI's claim for ITCs in respect of its payments to Fetherstonhaugh, the above conditions may be worded as follows:

a) IHI must have acquired the patent-agent services of Fetherstonhaugh;

b) GST must have been payable or paid by IHI in respect of the supply of those services; and

c) IHI must have acquired those services for consumption, use or supply in the course of its commercial activities.

It is acknowledged that it was IHI, and not RAR, that paid the GST set out in Fetherstonhaugh's invoices, and that IHI had commercial activities. However, based on the evidence, it was not clear that IHI acquired the services provided by Fetherstonhaugh or that IHI consumed, used or supplied those services in the course of its commercial activities. Rather, based on the invoices, it appears that it may have been RAR (and not IHI) that acquired the services provided by Fetherstonhaugh.

[26] It is the position of the Crown that RAR, and not IHI, acquired the services provided by Fetherstonhaugh, with the result that IHI was not entitled to claim ITCs in respect of those services. It is the position of IHI that, pursuant to the legal obligation referenced in the above-quoted letter of June 17, 1996, IHI was required to pay for the services provided by Fetherstonhaugh. However, as noted, IHI did not provide a copy of any agreement between IHI and Fetherstonhaugh or between IHI and RAR that required IHI to make those payments. Furthermore, at the examination for discovery of Mr. Abou-Rached, IHI seemed to take the position that the licence agreements between IHI and RAR were not relevant to this issue.[13]

---

[13] As indicated above, it is not precisely clear that the licence agreement discussed at the examination for discovery was the agreement that was the subject of the letter of June 17, 1996, but it seems that such was the case.

[27] The Crown relies on a statement made by the Federal Court of Appeal in *Telus Communications* to the effect that only the recipient of a supply may claim an ITC.[14] The Crown submits that, in the context of the services provided by, and the payments made to, Fetherstonhaugh, IHI did not come within the meaning of the term "recipient," which is defined as follows in subsection 123(1) of the *ETA*:

> "recipient" of a supply of property or a service means
>
> *(a)* where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
>
> *(b)* where paragraph (*a*) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and
>
> *(c)* where no consideration is payable for the supply, …
>
> (iii) in the case of a supply of a service, the person to whom the service is rendered,
>
> and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply….[15]

[28] To claim an ITC, a claimant must be contractually liable to pay the supplier for the property or service that is the subject of the particular supply.[16] Furthermore, such contractual liability should be based on a contract between the supplier and the recipient, rather than a contract between the recipient and one of its related corporations.[17]

---

[14] *Telus Communications (Edmonton) Inc. v The Queen*, 2009 FCA 49, ¶27 & 29; see also ¶17 & 21. In ¶30-31 the Federal Court of Appeal indicated that a person who makes a payment on account of someone else's GST is not entitled to a rebate under subsection 261(1) of the *ETA*.

[15] The opening portion of subsection 169(1) of the *ETA* refers to a person who acquires a property or service, which may be read as a reference to a person to whom a supply is made, which, in turn, by reason of the concluding portion of the definition of "recipient," may be read as a reference to the recipient of the supply. In essence, this was the reasoning applied in *Telus Communications*, *supra* note 14, ¶17.

[16] *Garmeco*, *supra* note 4, ¶31. See also *PDM Royalties Limited Partnership*, 2013 TCC 270, ¶21; *Y.S.I.'s Yacht Sales International Limited*, 2007 TCC 306, ¶57; and *RAR Consultants Ltd. v The Queen*, 2016 TCC 206, ¶21.

[17] *Garmeco*, *supra* note 4, ¶45.

[29] IHI provided the oral evidence of Mr. Abou-Rached to the effect that IHI paid the fees of Fetherstonhaugh. However, IHI did not provide any evidence to establish that IHI (rather than RAR) acquired the services provided by Fetherstonhaugh (so as to come within the wording of subsection 169(1) of the *ETA*), nor did it provide any evidence of an agreement or other contractual arrangement between IHI and Fetherstonhaugh that required IHI to pay for those services. As noted above, the agreement requiring IHI to pay Fetherstonhaugh's fees should be between IHI and Fetherstonhaugh, and not between IHI and RAR.[18]

[30] The only evidence provided by IHI to show that IHI was liable to pay for Fetherstonhaugh's services was Mr. Abou-Rached's oral testimony and the letter of June 17, 1996 concerning an alleged agreement between IHI and RAR, which agreement IHI failed or refused to produce. That evidence is insufficient to establish that IHI was contractually liable (by reason of a contract between IHI and Fetherstonhaugh) to pay the fees invoiced by Fetherstonhaugh.

[31] Mr. Abou-Rached testified that, in previous reporting periods, the CRA had allowed IHI to claim ITCs in respect of the fees which it had paid to Fetherstonhaugh for services provided in those earlier periods. IHI took the position that, as the CRA had allowed IHI to claim ITCs in those previous reporting periods, the CRA should continue to allow ITCs to be claimed in the current reporting periods. However, if the CRA determines that its previous assessing treatment of a particular registrant was not in accordance with the *ETA*, the CRA is not precluded from changing its assessing practice on a go-forward basis, so as to assess the registrant in accordance with the CRA's current understanding of the applicable legislative provisions.

[32] Each of the 84 invoices put into evidence was addressed to RAR and described RAR as the patent owner or as the applicant for a patent. In particular, the invoices rendered by Fetherstonhaugh indicated that a significant portion of the services provided by Fetherstonhaugh related to foreign patent applications in which RAR (and not IHI) was the applicant. Other invoices related to issued foreign patents, in which RAR was shown as the owner of the patent. Each of the six invoices pertaining to Canadian patents described the services as:

---

[18] *Ibid.*

Maintaining docket regarding maintenance fee, with notice to you:

Attending to payment of maintenance fee and reporting to you:

It appears that many of the patent-agent services provided by Fetherstonhaugh related to the annual maintenance of various patents owned by RAR and that those services were provided for the benefit of RAR in that capacity. It appears that some of the other patent-agent services related to the application for RAR's foreign patents. Accordingly, it is my understanding, based on the invoices, that RAR acquired the services provided by Fetherstonhaugh for consumption or use in the course of RAR's commercial activities. I was not provided with any documentary evidence to indicate that the services of Fetherstonhaugh were acquired by IHI for consumption or use in IHI's commercial activities. As noted in *Garmeco*, to qualify for ITCs, a claimant "must demonstrate … that it acquired the goods and services for consumption or use in the course of its *own* commercial activity [*emphasis added*]."[19]

[33] For the reasons set out above, IHI was not entitled to claim ITCs in respect of the fees paid by it to Fetherstonhaugh.

C. Payments to Accountants

(1) Background

[34] In mid-2007, IHI engaged the accounting firm of Dale Matheson Carr-Hilton LaBonte LLP (operating under the trade name "DMCL Chartered Accountants") ("DMCL"), to prepare and audit the financial statements of IHI for the fiscal year ended December 31, 2006 and the period ended March 31, 2007.[20] On August 29, 2007, DMCL and IHI entered into a letter agreement, in which DMCL indicated that its fees would be determined on the basis of time spent on the engagement at its standard charge-out rates for public company engagements, plus disbursements and applicable GST.[21] In the letter, DMCL requested a retainer of $25,000 to be paid before the commencement of any work, with a further payment of $20,000 on or before September 10, 2007, and the balance to be paid upon release of the

---

19 *Ibid.*

20 At the time, IHI was contemplating a change in its year-end from December 31 to March 31.

21 Exhibit A-1, Tab 15. Only the last page, being numbered as page 5, was put into evidence. The first four pages of the document were not produced.

financial statements. On August 29, 2007, two members of IHI's Audit Committee approved and signed the letter agreement on behalf of IHI.

[35] On August 24, 2007, a partner of DMCL had previously sent an email to Mr. Abou-Rached and his brother, René Abi-Rached,[22] setting out an estimate that the audit fee would be approximately $60,000 to $70,000.[23] However, by mid-November 2007, DMCL had done work on the preparation and audit of the financial statements corresponding to an unbilled fee in excess of $129,000.[24] On or about December 7, 2007, DMCL and IHI reached a new agreement, setting the fee for the audited financial statements at $130,000, with the proviso that an additional $35,000 (over and above the $45,000 that had already been paid) was to be paid within a week and that a further $50,000 was to be paid by means of five consecutive payments of $10,000 each, commencing February 29, 2008 (the frequency, e.g., monthly, weekly or something else, was not specified).[25]

[36] As it turned out, IHI made payments to DMCL in the aggregate amount of $80,000, as follows:[26]

Date	Amount
August 31, 2007	$25,000
October 10, 2007	20,000
December 12, 2007	35,000
Total	$80,000

[37] As events unfolded, DMCL did not complete the financial statements and IHI did not make the five periodic payments of $10,000 each. Mr. Abou-Rached testified that IHI never did receive any invoices from DMCL. Accordingly, in preparing its GST returns, IHI treated the $80,000 paid by it to DMCL as being comprised of GST-included payments. Therefore, it treated each payment as consisting of GST and a net fee, as follows:[27]

---

22 Exhibit A-1, Tab 18 shows René's surname in this manner, but Exhibit A-1, Tab 21 shows his surname as "Abou-Rached." To make it easier to distinguish in these Reasons between the two brothers, I will refer to Roger as Mr. Abou-Rached and to René as Mr. Abi-Rached.

23 Exhibit A-1, Tab 16.

24 Exhibit A-1, Tab 20.

25 Exhibit A-1, Tab 18.

26 Exhibit A-1, Tab 21.

27 Exhibit A-1, Tab 22.

Date	Amount	GST	Net Fee
August 31, 2007	$25,000	$1,415.09	$23,584.91
October 10, 2007	20,000	1,132.08	18,867.92
December 12, 2007	35,000	1,981.13	33,018.87
Total	$80,000	$4,528.30	$75,471.70

[38] It is the position of the Crown that the three payments made by IHI to DMCL in 2007 were retainers or deposits, and that the right to claim ITCs in respect of those payments arose only when the fees and GST actually became payable to DMCL, which did not occur until DMCL issued an invoice to IHI for the audit fee.

[39] As noted, Mr. Abou-Rached testified that DMCL never did issue an invoice to IHI for the audit fee. However, during the cross-examination of Mr. Abou-Rached, which commenced in the afternoon of the first day of the hearing, he mentioned that, during the lunch break earlier that day, his counsel had received from counsel for the Crown copies of two invoices that counsel for the Crown had obtained that morning from DMCL.

[40] As the cross-examination continued, counsel for the Crown tendered the two DMCL invoices to Mr. Abou-Rached. Counsel for the Crown then explained to the Court that the previous day, after he had received some late-produced documents from counsel for IHI, he (counsel for the Crown) had telephoned one of the partners at DMCL, explained the circumstances of these Appeals, and subsequently, on the morning of the first day of the hearing, received an email, with an attachment containing copies of the two DMCL invoices.[28] No evidence was provided by the Crown as to whether the originals of the two invoices had been sent by DMCL to IHI and, if so, when the invoices were so sent.

[41] The first DMCL invoice, dated February 18, 2008, was in the amount of $2,625, and related to a report that DMCL had issued on January 23, 2008.[29] The second DMCL invoice, which was dated June 19, 2008, was described as an interim invoice for services rendered with respect to the December 31, 2006 year-

---

[28] *Transcript*, November 28, 2017, vol. 1, p. 194, lines 20-26.

[29] Exhibit R-1.

end audit of IHI,[30] without making any reference to the period ended March 31, 2007. It showed a fee in the amount of $78,452.38, plus GST in the amount of $3,922.62, resulting in a total invoice amount of $82,375.00, which was paid by funds described as having been "Received on Account." It is my understanding that DMCL insisted on a $5,000 retainer before it would issue the report dated January 23, 2008. As the cost of that report (including GST) was only $2,625, the balance of the $5,000 retainer (i.e, $2,375) was added to the $80,000 received previously, resulting in a total amount, held by DMCL, of $82,375, which was the amount (including GST) of the interim invoice dated June 19, 2008.

[42] To reiterate, Mr. Abou-Rached stated emphatically that he had never seen the invoice dated June 19, 2008, until it was shown to him during the lunch break on the first day of the hearing of these Appeals. Being aware of a breakdown in the relationship between IHI and DMCL, and knowing that DMCL had stopped working on the financial statements, without delivering those statements to IHI, IHI did not think that it would receive an invoice from DMCL, so IHI filed its GST returns for Q3-07 and Q4-07 without having first received an invoice.

[43] To summarize the Crown's position, it does not dispute that IHI was entitled to ITCs in respect of the payments made by it to DMCL. However, the Crown asserts that the ITCs could be claimed only when the GST became payable, which, according to the Crown, was in 2008. In other words, according to the Crown, IHI claimed the ITCs prematurely.

(2) Statutory Provisions and Analysis

[44] Subsection 169(1) of the *ETA* provides that an ITC is available at the time that GST becomes payable by the recipient of a supply, or is paid by the recipient without having become payable. Thus, in order to determine when the entitlement to an ITC arises, it is necessary to determine (among other things) the time at which the corresponding GST becomes payable. Subsection 168(1) of the *ETA* provides that GST in respect of a taxable supply is payable on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due. However, section 168 goes on to set out various exceptions to the general rule in subsection 168(1). In particular, subsections 168(2) and (9) state:

> (2) Notwithstanding subsection (1), where consideration for a taxable supply is paid or becomes due on more than one day,

---

30 Exhibit R-2.

> (*a*) tax under this Division in respect of the supply is payable on each day that is the earlier of the day a part of the consideration is paid and the day that part becomes due; and
>
> (*b*) the tax that is payable on each such day shall be calculated on the value of the part of the consideration that is paid or becomes due, as the case may be, on that day….
>
> (9) For the purposes of this section, a deposit …, whether refundable or not, given in respect of a supply shall not be considered as consideration paid for the supply unless and until the supplier applies the deposit as consideration for the supply.

[45] One of the issues, in the context of subsection 168(9) of the *ETA*, is determining whether a particular payment is a deposit or is a partial payment of the consideration for the supply, sometimes referred to in the jurisprudence as a "payment on account." Concerning this issue, Justice Hogan stated the following in the *Tendances et Concepts* case:

> On reading subsection 152(1) of the Act, it seems clear that the moment at which a deposit becomes a down payment cannot postdate the time of issuing of the invoice, as it is at that moment that the consideration is deemed to become due and, therefore, taxable. Consequently, the tax is generally not payable prior to invoicing in the case of a deposit and, in the case of a down payment, the tax is payable rather as soon as it is received. The two different rules illustrate the importance of properly characterizing and distinguishing the different types of payments made in advance, namely, down payments and deposits. It is important to define the concept of "deposit" (earnest) as opposed to that of "down payment," where a down payment is simply partial payment to be deducted from an amount due (partial consideration within the meaning of the Act).[31] [*Footnote omitted.*]

The *Tendances et Concepts* case involved a consideration of certain aspects of the *Civil Code of Lower Canada* and the *Civil Code of Québec*, such that it may not be directly applicable to these Appeals, where the underlying commercial-law principles are derived from common law, rather than from civil law. Furthermore, the *Tendances et Concepts* case may not carry as much weight now, given that it was based on a previous French version of the *ETA*, in which *arrhes* was used as the French equivalent for the English *deposit*.[32] The 2016 technical amendments to

---

31 *Tendances et Concepts Inc. v The Queen*, 2011 TCC 141, ¶19.

32 In *Tendances et Concepts, ibid.*, ¶20, Justice Hogan, in the context of article 1477 of the *Civil Code of Lower Canada*, said that "the French term "arrhes," [is] rendered as "earnest" in English…."

the French text of subsection 168(9) of the *ETA* replaced *les arrhes* with *un dépôt*, without making any amendment to the English text.[33]

[46] To determine when the consideration for a taxable supply becomes due, subsection 152(1) of the *ETA* states:

> 152(1) For the purposes of this Part, the consideration, or a part thereof, for a taxable supply shall be deemed to become due on the earliest of
>
> (a) the earlier of the day the supplier first issues an invoice in respect of the supply for that consideration or part and the date of that invoice,
>
> (b) the day the supplier would have, but for undue delay, issued an invoice in respect of the supply for that consideration or part, and
>
> (c) the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.

Thus, by reason of paragraph 152(1)(*a*), in many situations the date of the supplier's invoice will generally determine when the consideration for the supply becomes due.[34] However, paragraphs 152(1)(*b*) and (*c*) of the *ETA* may, in some situations, provide otherwise.

(a) *Agreement in Writing*

[47] By reason of paragraph 152(1)(*c*) of the *ETA*, if, pursuant to an agreement in writing, a recipient is required to pay the consideration, or a part thereof, for a taxable supply before the supplier issues an invoice, for the purposes of Part IX of the *ETA*, the consideration or part thereof is deemed to become due on the day stipulated in the agreement. Accordingly, it is necessary to consider the agreement

---

[33] It is my understanding that this amendment to the French text of subsection 168(9) was not retroactive, but, rather, took effect when Royal Assent was given on December 14, 2017 to Bill C-63, which contained the technical amendments first introduced on July 22, 2016, and which also implemented certain tax measures proposed in the federal budget of March 22, 2017.

[34] Paragraph 152(1)(*a*) of the *ETA*. See also David M. Sherman (editor of statutory compilation and author of notes), *Practitioner's Goods and Services Tax Annotated with Harmonized Sales Tax*, 37th ed., (Toronto: Thomson Reuters Canada Ltd., 2018), p. 208; see Notes for subsection 168(1). Although I have referred to the notes in the most recent edition of this book, in these Reasons I have quoted and otherwise considered the legislation as it read in 2006 and 2007.

that IHI had with DMCL concerning the payment of the fee for the audit of IHI's financial statements.

(i) Review of Documents

[48] It appears that on August 23, 2007 (if not earlier) Mr. Abou-Rached and Mr. Abi-Rached had discussions with Barry Hartley, who was a representative of Barry S. Hartley, Inc., which was a partner of DMCL,[35] about the amount of the fee that DMCL would charge to IHI for auditing the two sets of financial statements. On August 24, 2007, Mr. Hartley sent an email to Mr. Abou-Rached and Mr. Abi-Rached, the body of which was as follows:

> As discussed yesterday I estimate the audit fee for IHI to be approximately C$60,000–C$70,000. This amount may vary (lower or higher) depending on the quality of the working paper file provided to us and any other circumstances and issues that we may encounter.
>
> I will communicate with you should it become clear during the audit that this estimate is no longer valid. This would include supportable and valid reason for any over runs.
>
> I trust you find this acceptable. Please let me know should you have any other questions.[36]

Five days later, on August 29, 2007, DMCL and IHI signed the above-mentioned letter agreement,[37] the relevant portion of which is as follows:

> Our fees will be determined on the basis of time spent on the engagement at our standard charge out rates for public company engagements plus disbursements and applicable GST. Our terms for payment are net 30 days, interest at 1.0% per month (effective annual interest rate 12.862%) will be charged on overdue accounts. We request that a retainer of $25,000 be paid prior to commencement of our work with a payment of $20,000 by September 10, 2007 and the balance upon release of financial statements.[38]

The above letter agreement describes only the initial payment of $25,000 as a retainer (which was to be paid before work would commence), and seems to imply

---

35 See the signature block in the email sent on August 24, 2007 by Mr. Hartley to Mr. Abou-Rached and Mr. Abi-Rached; Exhibit A-1, Tab 16.

36 Exhibit A-1, Tab 16.

37 See paragraph 34 above.

38 Exhibit A-1, Tab 15.

that the payment of $20,000 and the balance were to be payments on account of the fee.

[49] As mentioned above, by mid-November 2007, the amount of work performed by DMCL, if billed at standard hourly rates, would have corresponded to a fee far in excess of the original estimate given by Mr. Hartley in his email of August 24, 2007. Discussions ensued between DMCL and IHI, which led to a new agreement concerning the amount and payment of the fee, as set out in an email, dated December 7, 2007, from Mr. Hartley to Mr. Abou-Rached and Mr. Abi-Rached. That email read as follows:

> As discussed on Monday I would like to confirm our agreement;
>
> * The fee will be fixed at $130,000;
>
> * You have paid us $45,000 to date and the balance of the $130,000 will be paid as follows: $35,000 next week followed by five consecutive paymants [*sic*] of $10,000 starting the end of February. You will give me the five post dated cheques upon delivery of the signed financial statements for December 2006 and March 2007;
>
> * The June 2007 financial statements will no longer be audited;
>
> * During January 2008 we will provide you with a budget for the March 2008 audit together with a list of all the items that we need your staff to prepare for the March 2008 audit;
>
> * We will commence the audit on Monday December 10, 2007.
>
> I would appreciate it if you can authorize me to take the $35,000 payment, on the credit card previously used for our payment, on Monday December 10, 2007.[39]

The above email simply stated that IHI had paid $45,000 to date, without describing any part of that amount as a retainer, and then went on to set out the schedule for the payment of the balance of the fee, again without making any reference to a retainer. In particular, the above email did not suggest that the $35,000 that was to be paid shortly thereafter was to have the character of a retainer. Thus, it appears that, by reason of the agreement confirmed in the email of December 7, 2007, each payment, already made or yet to be made, by IHI to DMCL was characterized or recharacterized as a payment on account of DMCL's

---

[39] Exhibit A-1, Tab 18.

fee. In particular, it seems that the character of the initial $25,000 payment had changed from a retainer to a payment on account of DMCL's fee.

[50] As requested in the concluding paragraph of the email of December 7, 2007, Mr. Abou-Rached or Mr. Abi-Rached authorized the requested credit card payment in the amount of $35,000. On December 11, 2007, Mr. Hartley sent a short email to Mr. Abou-Rached, which stated:

> Thank you VERY much for the fax authorizing payment, much appreciated.[40]

(ii) Jurisprudence

[51] In the trial decision in *North Shore Power*, Justice Bocock described certain contracts for the purchase and installation of a series of solar panels. Upon signing the contracts, the purchaser paid 50% of the purchase price. The balance of the price was to be paid upon delivery of the panels. Justice Bocock described the contractual arrangement as follows:

> There can be little dispute the contracts, once executed, were binding obligations at law for both Menova [the vendor] and North Shore [the purchaser]. There was no payment of earnest money to guarantee the completion of the contracts. The sizable partial payments were meant to fund the considerable costs connected with the solar panels. The Contracts, although describing the moneys paid as deposits were nonetheless structured as partial payments, half due on execution and the balance due on delivery. Quite conclusively, through such characteristics, the sums paid were partial payments.[41]

Although the Federal Court of Appeal overturned the decision of Justice Bocock, the Federal Court of Appeal did not disagree with his view that the initial 50% payments under each of the contracts were partial payments, rather than deposits. In fact, it appears that Justice Woods took a view similar to that of Justice Bocock, as she stated the following:

> 11. This appeal concerns contracts that North Shore had with Menova Energy Inc. for the sale and installation of solar panels. The contracts required North Shore to pay one-half of the purchase price, including HST, up front with the balance payable on delivery….

---

40 Exhibit A-1, Tab 19.

41 *North Shore Power Group Inc. v The Queen*, 2017 TCC 1, ¶24.

> 13. The up front amounts paid by North Shore with respect to the cancelled contracts were $2,987,785 on account of the purchase prices and $388,412 on account of HST….[42]

[52] Thus, in *North Shore Power*, the up-front payments, even though described in the contracts as deposits, were found to be partial payments on account of the purchase prices. This might suggest that the $25,000 payment made by IHI to DMCL on August 31, 2007, even though described as a retainer, could be implicitly recharacterized by the parties as a partial payment on account of DMCL's fee.

[53] There is, however, a notable difference between *North Shore Power* and these Appeals. The agreed facts in *North Shore Power* clearly distinguished between the amounts paid on account of the purchase prices and the amounts paid on account of harmonized sales tax, whereas no evidence was produced in respect of these Appeals to indicate that the payments made by IHI included GST. Therefore, *North Shore Power* may not have any significant application to these Appeals.

---

[42] *North Shore Power Group Inc. v The Queen*, 2018 FCA 9, ¶11 & 13. The reversal by the Federal Court of Appeal of the lower-court decision was based on an interpretation of the word "credit," as used in section 232 of the *ETA*.

(iii) Application

[54] However, notwithstanding the distinction noted in the preceding paragraph, the payment structure set out in Mr. Hartley's email of December 7, 2007 has a broad similarity to the payment structure in *North Shore Power*. Accordingly, it may be arguable that, by December 11, 2007, the three payments made by IHI to DMCL may have been contractually characterized or recharacterized as payments on account of DMCL's fee.

[55] The ledger maintained by DMCL, which was dated December 10, 2007, indicated that work having a fee equivalent of $129,059.28 was then unbilled.[43] The indication on the ledger that the fee was unbilled and the fact that DMCL had not yet rendered an invoice for that work does not negate the agreement described in Mr. Hartley's email of December 7, 2007. The juxtaposition of paragraphs 152(1)(*a*) and (*c*) of the *ETA* and the phrase "shall be deemed to become due on the earliest of" in the opening portion of subsection 152(1) of the *ETA* make it clear that a recipient may be contractually required to pay all or part of the consideration for a supply before the supplier issues an invoice for that consideration or part.

[56] In summary, by reason of the agreement between DMCL and IHI, as set out in Mr. Hartley's email of December 7, 2007, IHI's entitlement to ITCs in respect of the three fee payments which it made to DMCL may have arisen in Q4-07. However, it is not necessary for me to make a definitive decision in respect of this point, given the conclusion that I have reached below in respect of subsection 169(4) of the *ETA*.

(b) Undue Delay

[57] In determining whether there has been undue delay in issuing an invoice, a question that has arisen is whether an objective test or a subjective test is to be applied. It appears that the original intention of the Department of Finance, in drafting paragraph 152(1)(*b*) of the *ETA*, was that undue delay would be determined by reference to the usual invoicing practices of the particular supplier.[44]

---

43 Exhibit A-1, Tab 20.

44 Department of Finance, *Good and Services Tax: Technical Paper* (August 8, 1989), online: http://publications.gc.ca/collections/collection_2016/fin/F2-85-1-1989-eng.pdf. See also David Sherman's Analysis, section 152, in Taxnet Pro (Thomson Reuters Canada Limited, 2018).

[58] Another issue that arises is whether undue delay is to be determined by reference to the supplier's conduct or the recipient's conduct. In this regard, Justice Lamarre (as she then was) stated the following in *DHM Energy*, which dealt with the transitional provisions relating to services provided before 1991 (when the GST took effect) but invoiced after April 19, 1991:

> I am of the view that since it is the recipient of the services who ultimately must pay the tax, it seems logical that if the supplier unduly delays the issuance of an invoice, the recipient should not have to bear the burden of a tax he would not otherwise have had to pay. In that sense, I understand that the undue delay must originate from the supplier and not from the recipient. On the other hand, if it is at the request of the recipient that the supplier has postposed billing after April 1991, I do not see why GST should not be charged.[45]

Although *DHM Energy* dealt with the transition that arose when the GST was first introduced, the principles enunciated therein may have some application (although perhaps in reverse) to these Appeals, which deal with work performed and consideration paid in 2007, followed by a decrease on January 1, 2008 in the GST rate from 6% to 5%.

[59] The phrase "undue delay" has not been judicially defined. However, in *Spur Oil* the Federal Court of Appeal indicated that, in an income tax context, the word "undue" should be given its dictionary meaning of "excessive."[46]

[60] The Federal Court of Appeal has confirmed that, even in a situation where the performance of a contractual supply is only partially completed, it is possible for the issuance of an invoice to be unduly delayed, given that paragraph 152(1)(*b*) of *ETA* speaks of an invoice being issued in respect of a supply for particular consideration or a part thereof.[47]

[61] In determining whether DMCL unduly delayed the issuance of its invoice for the preparation and audit of the financial statements of IHI, it is noteworthy that on February 18, 2008, DMCL issued an invoice to IHI in respect of a report that DMCL had issued on January 23, 2008.[48] In other words, the invoice was issued only 26 days after the report was issued. On the other hand, it appears that DMCL

---

45 *DHM Energy Consultants Ltd. v The Queen*, [1995] GSTC 3 (TCC), ¶12.

46 *Spur Oil Ltd. v The Queen*, [1981] CTC 336, 81 DTC 5168 (FCA), ¶12.

47 *The Queen v Lacroix, representing Canadevim Ltée*, 2011 FCA 128, ¶32. The statutory phrase is "in respect of the supply for that consideration or part."

48 The report related to the good standing of the General Security Agreement given by IHI to certain members of the Garmeco Group.

stopped working on the audit of IHI's financial statements in November or December 2007, but did not issue an invoice until June 19, 2008, a delay of approximately five or six months.

[62] Sometime in late 2007 or early 2008 there was a breakdown in the relationship between IHI and DMCL.[49] It is possible that the breakdown may have had an impact on DMCL's billing schedule.

[63] However, as IHI did not pursue this argument and as there was insufficient evidence as to whether there was undue delay on the part of DMCL in issuing its invoice for the audit fee, I will not make any decision in respect of this question.

(3) Documentation Requirement

[64] The Crown has taken the position that, with respect to the ITCs related to IHI's payments to DMCL, IHI has failed to comply with subsection 169(4) of the *ETA* and with paragraph 3(c) of the *Input Tax Credit Information (GST/HST) Regulations* (the "*ITCI Regulations*"). Paragraph 169(4)(*a*) of the *ETA* requires a registrant, before filing a return in which an ITC is claimed for a reporting period, to obtain "sufficient information in such form containing such information as will enable the amount of the [ITC] to be determined, including any such information as may be prescribed." In turn, section 3 of the *ITCI Regulations* states that, for the purposes of paragraph 169(4)(*a*) of the *ETA* and in the context of these Appeals, the following information is prescribed information:

Provision	Prescribed Information
3(a)(i)	the name of the supplier;
3(a)(ii)	where an invoice is issued in respect of the supply, the date of the invoice;
3(a)(iii)	where an invoice is not issued in respect of the supply, the date on which there is tax paid or payable in respect thereof;
3(a)(iv)	the total amount paid or payable for the supply;

[49] For instance, see Exhibit A-1, Tab 17 (the email in this exhibit was admitted merely to show that it had been sent, and not for the truth of its contents), and *Transcript*, vol. 1, p. 183, lines 2-6; p. 186, line 25 to p. 187, line 5; p. 188, lines 26-27; p. 189, lines 6-8, p. 190, lines 12-23; p. 191, line 19 to p. 193, line 17.

3(b)(i)	the GST registration number of the supplier;
3(b)(iii)	where the amount paid or payable for the supply does not include the amount of tax paid or payable in respect thereof, the amount of tax paid or payable in respect of the supply;
3(b)(iv)	where the amount paid or payable for the supply includes the amount of tax paid or payable in respect thereof, a statement to the effect that tax is included in the amount paid or payable for the supply and an indication of the applicable rate of GST;
3(c)(ii)	the recipient's name;
3(c)(iii)	the terms of payment; and
3(c)(iv)	a description of the supply sufficient to identify it.[50]

[65] Section 2 of the *ITCI Regulations* defines the term "supporting documentation" as meaning "the form in which information prescribed by section 3 is contained…." The information required by subsection 169(4) of the *ETA* need not be contained in a single document; rather, it may be contained collectively in multiple documents.[51] However, to constitute supporting documentation, a particular document must be issued or signed by the supplier.[52] A document prepared by the recipient does not qualify as supporting documentation.[53]

[66] The documents put into evidence, in the context of DMCL, that come within the definition of "supporting documentation" were the email of August 24, 2007 from Mr. Hartley,[54] the letter agreement dated August 29, 2007,[55] the email of December 7, 2007 setting out the new fee agreement,[56] the DMCL ledger dated December 10, 2007,[57] the email of December 11, 2007 from Mr. Hartley,[58] the

---

50 The numbers and letters in the left-hand column of the above list of prescribed information refer to the applicable subparagraphs of the *ITCI Regulations*.

51 *Westborough Place Inc. v The Queen*, 2007 TCC 155, ¶32.

52 Paragraph 2(h) of the *ITCI Regulations*. See also *Westborough Place*, *ibid.*, ¶34, in which Justice Paris stated that, to qualify as supporting documentation, a document "must originate from or be signed by the registrant [i.e., supplier]."

53 *Ibid.*, ¶35.

54 Exhibit A-1, Tab 16.

55 Exhibit A-1, Tab 15.

56 Exhibit A-1, Tab 18.

57 Exhibit A-1, Tab 20.

58 Exhibit A-1, Tab 19.

DMCL invoice dated February 18, 2008,[59] and the DMCL invoice dated June 19, 2008.[60] The document prepared by an employee or advisor of IHI, for the purpose of calculating the claimed ITCs (on the premise that the three payments, totalling $80,000 and paid by IHI to DMCL, included GST),[61] does not constitute supporting documentation, as it was not issued or signed by DMCL.[62]

[67] The supporting documentation produced by IHI in Exhibit A-1 clearly provides the names of the supplier and the recipient (i.e., DMCL and IHI, respectively), the total amount paid in 2007 for the supply of the audit services (i.e., $80,000, less any included GST), the dates on which the GST was paid (i.e., August 31, 2007, October 10, 2007 and December 12, 2007, assuming that GST was included), the terms of payment (as set out in the email dated December 7, 2007), and the description of the services supplied (as set out in the letter agreement of August 29, 2007 and the DMCL ledger). Thus, subparagraphs 3(a)(i), 3(a)(iv), 3(c)(ii), 3(c)(iii) and 3(c)(iv) of the *ITCI Regulations*, as listed in paragraph 64 above, have been satisfied.

[68] To claim an ITC, paragraph 169(4) of the *ETA* requires that a registrant must obtain evidence containing the required information before filing the GST return in which the ITC is claimed.[63] Based on the filing and assessing history relating to the subject matter of these Appeals, supporting documentation issued or signed by DMCL after 2007 may have been available to IHI when it claimed the ITCs in respect of the payments made by it to DMCL in 2007. It is my understanding that IHI did not claim the ITCs in respect of the payments to either DMCL or Fetherstonhaugh when it filed its original GST returns for the reporting periods in 2006 and 2007 or when the CRA undertook its audit in 2009 and 2010. Apparently, IHI claimed the ITCs sometime later, in the course of the objection or appeals procedures.[64]

---

59 Exhibit R-1.

60 Exhibit R-2.

61 Exhibit A-1, Tab 22.

62 See paragraph 2(h) of the *ITCI Regulations* and *Westborough Place*, *supra* note 51, ¶34-35.

63 Subsection 169(4) of the *ETA*. See also *Key Property Management Corporation v The Queen*, 2004 TCC 210, ¶14.

64 Respondent's Discovery Read-Ins, Tab J, p. 249, line 19 to p. 250, line 12; and Respondent's Response to the Appellants' Further Written Submissions dated January 5, 2008, ¶7.

[69] As explained above, by reason of the interplay between subsections 152(1) and 168(1) of the *ETA*, pursuant to an agreement in writing, the consideration for a taxable supply may become due and the GST in respect of that supply may be payable before the supplier issues an invoice in respect of the supply. I am of the view that, in such a situation, the invoice may be considered as a source of the GST registration number of the supplier and, depending on the circumstances, other information prescribed for the purposes of subsection 169(4) of the *ETA*, even though the invoice is not determinative of the time when the consideration becomes due or the GST is payable. Thus, if DMCL issued its invoice for the audit services on the date stated thereon, i.e., June 19, 2008, and if DMCL sent a copy of that invoice to IHI shortly thereafter, IHI would have had information concerning DMCL's GST registration number (as it is shown on the invoice), so as to satisfy subparagraph 3(b)(i) of the *ITCI Regulations*.

[70] Subparagraphs 3(a)(ii) and (iii) of the *ITCI Regulations* are disjunctive; subparagraph 3(a)(ii) applies if an invoice was issued in respect of a particular supply, whereas subparagraph 3(a)(iii) applies if an invoice was not issued. In these Appeals, given the uncertainty as to when DMCL prepared the invoice dated June 19, 2008 and whether it sent that invoice to IHI, difficulty arises in determining whether subparagraph 3(a)(ii) or (iii) is the applicable provision.

[71] In determining whether the DMCL invoice was issued, it is helpful to consider the meaning of the word "issue." *Black's Law Dictionary* gives numerous meanings for that word; in the context of these Appeals, the word "issue" means "To send out or distribute officially."[65] *The New Shorter Oxford English Dictionary* provides the following as some of the many meanings of the word "issue" (which are the meanings most applicable for the purposes of these Appeals):

> Give or send out authoritatively or officially; publish, emit, put into circulation.…
> Give (something) out officially to (a person); supply (a person) officially *with*.[66]
> [*Italics in original.*]

The above meanings suggest that, in order to issue an invoice, not only must the invoice be created, but it must also be sent to the client or customer.

---

65 Bryan A. Garner (editor in chief), *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004), p. 850.

66 Lesley Brown (editor), *The New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993), vol. 1, p. 1428.

[72] As noted, Mr. Abou-Rached was adamant that he did not see the invoice of June 19, 2008 until it was shown to him on the first day of the hearing of these Appeals. If such was the case, it is arguable that, even though the invoice may have been created on June 19, 2008, it was not issued at that time, in which case subparagraph 3(a)(iii), rather than subparagraph 3(a)(ii), of the *ITCI Regulations* would be applicable. While the supporting documentation makes it clear that IHI made three payments to DMCL in 2007, the supporting documentation does not actually specify the dates on which those payments were made. Rather, that information is set out in the copies of the monthly credit card statements of Mr. Abi-Rached.[67] Thus, if subparagraph 3(a)(iii) of the *ITCI Regulations* was the applicable provision (i.e., if the invoice was not issued), that provision was not satisfied.

[73] If DMCL not only created the invoice of June 19, 2008, but also mailed or otherwise sent it at about the same time to IHI, but the invoice was received and handled by an employee of IHI other than Mr. Abou-Rached, subparagraph 3(a)(ii) of the *ITCI Regulations* would have been applicable, and would have been satisfied, as the date of the invoice is stated thereon.

[74] Subparagraphs 3(b)(iii) and (iv) of the *ITCI Regulations* are another pair of disjunctive provisions. Subparagraph 3(b)(iii) applies if the GST is not included in the amount paid or payable for the supply, whereas subparagraph 3(b)(iv) applies if the amount paid or payable includes the GST. Dealing with subparagraph 3(b)(iv) first, if it is accepted that the three payments made in 2007 by IHI to DMCL included GST, as IHI submits, that subparagraph actually poses a hurdle for IHI, given that there is no supporting documentation containing a statement to the effect that GST was included in those three payments and setting out the rate of the applicable GST.

[75] On the other hand, if GST was not included, such that subparagraph 3(b)(iii) of the *ITCI Regulations* was the applicable provision, that provision required IHI to have information concerning the amount of GST paid or payable in respect of the supply. This raises a different problem, given that the only supporting documentation showing the amount of GST paid or payable was DMCL's invoice, but the amount of GST set out in that invoice was calculated at the rate of 5%, whereas IHI claimed ITCs on the premise that it had paid GST at the rate of 6%.[68]

---

67 Exhibit A-1, Tab 21. As noted above, these statements show Mr. Abi-Rached's surname as being "Abou-Rached."

68 The GST rate dropped from 6% to 5% on January 1, 2008.

Furthermore, because the invoice was prepared on the basis that $2,375 had been paid by IHI to DMCL in 2008, in addition to the $80,000 paid in 2007, the amount of the consideration and the amount of the GST, as set out in the invoice, do not correspond with the respective amounts used by IHI in claiming the ITCs.

[76] Although IHI needed to show that it complied with either subparagraph 3(b)(iii) or (iv) of the *ITCI Regulations*, IHI has not complied with either provision. Accordingly, I am of the view that IHI has not fully complied with subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*. Therefore, IHI is not entitled to the ITCs that it claimed in Q4-07 in respect of the three payments made by IHI to DMCL.

[77] It might be arguable that, even though IHI has not fully complied with subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*, it has substantially complied, such that it should not fail in its claim for ITCs merely because it may not have possessed, at the time when it claimed the ITCs, supporting documentation setting out all of the prescribed information, particularly a statement from DMCL to the effect that the $80,000 paid in 2007 included GST. However, the Courts have consistently taken the position that section 3 of the *ITCI Regulations* is to be strictly applied. In *Systematix Technology*, the Federal Court of Appeal stated:

> [4] We are of the view that the legislation [i.e., subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*] is mandatory in that it requires persons who have paid GST to suppliers to have valid GST registration numbers from those suppliers when claiming input tax credits.
>
> [5] We agree with the comments of Bowie J. in the case of *Key Property Management Corp. v. R.* [2004] G.S.T.C. 32 (T.C.C.) where he stated:
>
> > "The whole purpose of paragraph 169(4)(a) and the *Regulations* is to protect the consolidated revenue fund against both fraudulent and innocent incursions. They cannot succeed in that purpose unless they are considered to be mandatory requirements and strictly enforced. The result of viewing them as merely directory would not simply be inconvenient, it would be a serious breach of the integrity of the statutory scheme [*emphasis added by the FCA*].
>
> [6] We also agree with the comments of Campbell J. in *Davis v. R.* [2004] G.S.T.C. 134 (TCC):

> "Because of the very specific way in which these provisions are worded, I do not believe they can be sidestepped. They are clearly mandatory and the Appellant has simply not met the technical requirements which the *Act* and the *Regulations* place upon him as a member of a self-assessing system [*emphasis added by the FCA*].[69]

[78] In *Oak Ridges Lumber*, which was a case in which the appellant took the position that certain payments included GST but there was insufficient documentation to support that position, Chief Justice Bowman stated:

> I think it is fair to say that none of these types of documents [i.e., the types of documents listed in the definition of "supporting documentation" in section 2 of the *ITCI Regulations*] has been produced, either to the Canada Revenue Agency or to the Court. The requirement for documentation is not unreasonable nor indeed is it particularly onerous. It is, in any event, a requirement under the *ETA*.[70]

Chief Justice Bowman then quoted the following statement, which he had made previously in *Helsi Construction Management Inc.*:

> The main reasons [*sic*] for the disallowance was that the suppliers' GST numbers were not shown on the invoices. This is a requirement under section 3 of the *Input Tax Credit Information Regulations*. While there may be some justification in certain cases for treating technical or mechanical requirements as directory rather than mandatory … that is not so in the case of the GST provisions of the *Excise Tax Act*.[71]

[79] Accordingly, as IHI has not fully complied with subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*, I regretfully conclude that IHI is not entitled to ITCs in respect of the payments made by it to DMCL in Q4-07.

D. Payments to CNRL

(1) Background

---

69 *Systematix Technology Consultants Inc. v The Queen*, 2007 FCA 226, ¶4-6. See also *Services d'Entretien L.C. Inc. v The Queen*, 2013 TCC 46, ¶12; and *Comtronic Computer Inc. v The Queen*, 2010 TCC 55, ¶24-33.

70 *Oak Ridges Lumber Corp. v The Queen*, 2008 TCC 259, ¶11.

71 *Helsi Construction Management Inc. v. The Queen*, [2001] GSTC 39, ¶11. See also *Oak Ridges Lumber, ibid.*, ¶11.

[80] In 2006, CNRL and IHI entered into seven contracts pertaining to the construction of plant offices, a warehouse and a skills development centre at CNRL's site near Fort McMurray, Alberta. Only the contract pertaining to the main warehouse facilities (the "Warehouse Contract") was put into evidence in its entirety;[72] it was dated effective as of March 10, 2007, although it was executed on June 28, 2006.[73] IHI also produced the first five pages of the contract pertaining to the plant offices (the "Offices Contract").[74] To secure its performance under the contracts, IHI arranged for two letters of credit to be issued by the Royal Bank of Canada ("RBC") in favour of CNRL.[75]

[81] In 2007, CNRL became concerned that IHI would not be able to complete the contracts within the time specified in the contracts; therefore, in May 2007, CNRL sent letters to IHI, advising that the contracts were terminated and that CNRL would be drawing down the letters of credit.[76] It appears that CNRL drew down $1,836,711 against the letters of credit and hired another contractor to complete IHI's obligations under the contracts.[77]

---

72 Exhibit A-1, Tab 24. The number assigned by CNRL to the Warehouse Contract was 400922.

73 Although the Contract Cover Document (which immediately follows the table of contents) of the Warehouse Contract states that the effective date of the contract was March 10, 2007, it is not absolutely certain that the year was stated correctly. The title page (i.e., the initial page) of the contract shows the date "March 2006." The second page, which is the signature page, of the Contract Cover Document was typed so as to show that the contract was "executed as of the day of March, 2006 and effective as of the Effective Date [which, as indicated, was stated to be March 10, 2007]." The two letters of credit that were provided by IHI to secure its obligations to CNRL, although not produced, were apparently dated May 16, 2006. Therefore, there is a possibility that the effective date of the Warehouse Contract was intended to be March 10, 2006 (rather than 2007). Neither Party raised any concern or issue concerning the effective date of the contract. Accordingly, I do not think that anything in these Appeals turns on the uncertainty concerning the effective date.

74 Exhibit A-1, Tab 25. The number assigned by CNRL to the Offices Contract was 400936.

75 Although copies of the letters of credit were not put into evidence, some of the details concerning the letters of credit can be derived from the bills of exchange (sight drafts) that were issued when CNRL drew down funds under those letters of credit. See Exhibit A-1, Tab 27.

76 Exhibit A-1, Tab 26; and *Transcript*, vol. 1, p. 150, lines 11-23. IHI produced a copy of only one of those letters, which was dated May 24, 2007 and related to the Offices Contract.

77 Exhibit A-1, Tab 27; and *Transcript*, vol. 1, p. 170, lines 23-25. The amounts drawn under the two letters of credit were $1,086,419 and $750,292 respectively. Although it is

[82] It is the position of IHI that the contracts between it and CNRL authorized CNRL to draw against the letters of credit and to use those funds to hire another contractor to complete IHI's obligations under the contracts. In particular, paragraph 46.2(ii) of the Warehouse Contract permitted CNRL to terminate the contract and complete the work itself, at the contractor's cost and risk.[78] According to IHI, when CNRL hired another contractor to complete the construction, CNRL was supplying to IHI a service (i.e., the completion of IHI's obligations under the contracts), for which CNRL was entitled to receive consideration from IHI (which was paid by drawing against the letters of credit).[79]

(2) Statutory Provisions and Analysis

[83] The statutory provisions that are particularly germane to IHI's claim for ITCs in the context of the amounts drawn down by CNRL under the letters of credit are subsections 169(1) and (4) of the *ETA*, together with section 3 of the *ITCI Regulations*. As those provisions have been discussed above, in the context of Fetherstonhaugh, the discussion will not be repeated here.

[84] Applying the analysis set out in *General Motors*,[80] the conditions that must be satisfied in order for IHI to be eligible to claim ITCs are:

a) IHI must have acquired services, presumably from CNRL, but possibly from the third-party contractor hired by CNRL to do the remedial work;

b) GST must have been payable or paid by IHI in respect of the supply of those services; and

c) IHI must have acquired those services for consumption, use or supply in the course of its commercial activities.

In addition, IHI must prove that, when it claimed the ITCs, it had obtained the information required by paragraph 169(4)(*a*) of the *ETA*.

---

not clear, it appears that the amount of $1,086,419 related to the Offices Contract and the amount of $750,292 related to the Warehouse Contract.

78 Exhibit A-1, Tab 24, p. 61, paragraph 46.2(ii).

79 *Transcript*, vol. 2, p. 279, lines 25-27.

80 *General Motors*, *supra* note 12, ¶30 (in both the TCC and FCA reasons). See also paragraph 24 above.

[85] Dealing with the first requirement, i.e, that IHI must have acquired services from CNRL or possibly from the third-party contractor, the only evidence provided by IHI in respect of those services was the oral testimony of Mr. Abou-Rached to the effect that CNRL hired another contractor to complete the work that was to have been done by IHI under the Warehouse Contract and the Offices Contract. IHI did not provide any evidence concerning the name of the contractor, a description of the actual work done by the contractor, an indication as to whether IHI is suggesting that the services were provided to it by CNRL or by the contractor, and the mechanism whereby IHI actually acquired those services. Thus, IHI has not provided sufficient evidence to prove on a balance of probabilities that IHI acquired services, that CNRL or the other contractor made a supply of services to IHI, or that the amounts drawn by CNRL under the letters of credit represented consideration for such supply.[81]

[86] Turning to the next requirement, i.e, that IHI prove that it paid GST in respect of the supply of the alleged services, IHI has taken the position that the aggregate amount (i.e., $1,836,711) paid to CNRL pursuant to the letters of credit included GST, which IHI calculated to be $103,964.77 (i.e, $^{6}/_{106}$ ч $1,836,711). However, IHI has admitted that it did not pay any GST in respect of the letters of credit.[82] It is not clear from the wording of this particular admission, as set out in the Request to Admit, whether IHI admitted that it did not pay any GST in respect of whatever consideration was paid by it to RBC to obtain the letters of credit or whether IHI did not pay any GST in respect of the funds drawn by CNRL under the letters of credit. Regardless of the precise meaning of the admission, IHI did not produce any evidence to show that it paid any GST in respect of whatever consideration, if any, it paid to CNRL for the alleged supply of services to IHI.[83]

---

81 It might be arguable that the amounts paid to CNRL pursuant to the letters of credit represented, or were a substitute for, damages payable by IHI to CNRL. If such was the case, the situation would not have attracted the application of subsection 182(1) of the *ETA*, as that provision applies where there is a breach of a contract between an intended supplier and an intended recipient and damages are paid by the recipient to the supplier, but does not apply where damages are paid by the supplier to the recipient. Generally, damages paid by a supplier (such as IHI) to a recipient (such as CNRL) are considered to be compensatory, rather than consideration for a supply, such that the damages are generally not subject to GST; see the CRA's GST/HST Policy Statement P-218R, "Tax Status of Damage Payments, Whether or not Within Section 182 of the *Excise Tax Act*," August 9, 2007, Example No. 4. See also *Surrey City Centre Mall v The Queen*, 2012 TCC 346, ¶34 & fn 10, which set out an argument made by the appellant in that case.

82 Request to Admit, p. 4, ¶30. See paragraph 8 above.

83 See *R 171 Enterprises Ltd. v The Queen*, 2004 TCC 36, ¶23.

[87] Insofar as the third requirement is concerned, in *Garmeco*, Justice V. Miller explained that, when claiming an ITC, a registrant "must demonstrate … that it acquired the … services for consumption or use in the course of its own commercial activity."[84] I accept that, if the remedial work done by the third-party contractor or the efforts of CNRL to arrange for that remedial work to be done constituted services provided to IHI (which, as noted above, has not been proven), those services may arguably have pertained to IHI's commercial activity, but it is not precisely clear, and IHI has not shown, how those services were consumed or used by IHI in the course of that commercial activity.

---

[84] *Garmeco*, *supra* note 4, ¶45.

(3) Jurisprudence

[88] It might be arguable that the *Bondfield* and *Bokrika* cases support IHI's position.[85] Each case dealt with a construction contract that had been breached by the original contracting supplier, after which the original contracting recipient hired a third party to perform remedial work that was paid for by the original contracting recipient and then charged back to the original contracting supplier. While the general fact patterns of *Bondfield* and *Bokrika* bear some similarity to the facts of these Appeals, there are also distinctions, as well as criticisms of those two decisions.

[89] In *Bondfield*, if a subcontractor's work was deficient, Bondfield hired a second subcontractor to remedy the work. When the second subcontractor invoiced Bondfield, Bondfield paid the invoice and claimed ITCs in respect of both the amount paid to the original subcontractor and the amount paid to the second contractor. Bondfield's accounting department recorded a back-charge, in the sub-ledger kept for the original subcontractor, equal to the amount of the second subcontractor's invoice (including GST). The amount that Bondfield paid to the original subcontractor was reduced by the amount of the back-charge. Bondfield then sent to the original subcontractor a copy of the second subcontractor's invoice, together with a letter notifying the original subcontractor of the back-charge. If the original subcontractor challenged the back-charge successfully, such that the back-charge was reversed, no GST issue arose by reason of Bondfield having claimed an ITC in respect of the second subcontractor's invoice. However, if the original subcontractor accepted the back-charge (which included the GST paid by Bondfield to the second subcontractor), Justice Campbell was of the view that Bondfield's reduction in the amount that it paid to the original subcontractor, in essence, permitted Bondfield to transfer to the original subcontractor the liability for both the consideration and the GST paid by Bondfield to the second subcontractor. However, Bondfield did not adjust its ITC claims so as to recognize that, in a sense, it had been reimbursed or compensated by the original subcontractor for the GST paid by Bondfield to the second subcontractor. Justice Campbell found that, in those circumstances, Bondfield was not entitled to claim the ITCs. Thus, *Bondfield* actually dealt with a claim by a recipient for ITCs, rather than a claim by a supplier for ITCs, such that the case is distinguishable from these Appeals.

---

[85] *Bondfield Construction Company (1983) Limited v The Queen*, 2005 TCC 78; and *Bokrika Inc. v The Queen*, 2006 TCC 301.

[90] However, there are some comments in the concluding portion of Justice Campbell's reasons that might possibly have some application to these Appeals:

> [123] Thus, we must determine who was "ultimately" liable to pay for the supply. In the present case, where a subcontractor's work was deficient, it was common practice for the Appellant [i.e., Bondfield] to hire a second subcontractor to remedy the work. The Appellant would then attempt to recover its costs for this remedial work from the original subcontractor through a back-charge, that is, by seeking a price reduction on the original contract equal to the amount paid to the second subcontractor (including the GST paid). By accepting this back-charge, the original subcontractor acknowledged its responsibility for the work deficiencies and assumed liability for the invoice. Although the Appellant's name appeared on the face of the invoice, it was the original subcontractor, not the Appellant, that accepted ultimate liability for the invoice including the GST on that invoice.
>
> [124] There was also evidence that it was open to a subcontractor to contest the back-charge, and in some instances, the Appellant would reverse the back-charge. However, those cases are not at issue in the present case. Rather, what is at issue are those cases were the Appellant claimed ITCs on remedial work invoices even though its liability for those invoices was successfully transferred to a subcontractor. In these latter instances, I find that this subcontractor is the recipient and, accordingly, the Appellant is not entitled to claim the ITCs….
>
> [126] … Where a subcontractor receives a notification letter (including the invoice) and elects to accept the back-charge without amending the original contract (through the issuance of a credit note), it is clear that the subcontractor is accepting liability for that particular invoice.[86]

[91] Justice Campbell indicated that an original subcontractor, by accepting a back-charge, acknowledged its responsibility for the work deficiencies and assumed liability for the invoice, including the GST on that invoice. This might suggest that the original subcontractor could have claimed an ITC in respect of the GST on that invoice. However, the *Bondfield* decision is not without its critics.[87] Furthermore, the position of the original subcontractor in *Bondfield* is different from IHI's position for at least two reasons:

---

86 *Bondfield*, *supra* note 85, ¶123-124 & 126.

87 Brent F. Murray, "Deconstructing the *Bondfield Construction* Case: The Implicit Agent?" *GST & Commodity Tax*, June 2005, vol. XIX, no. 5, p. 33-35; and David Sherman, Editorial Comment re: *Bondfield Construction*, 2005 CarswellNat 1444 and Taxnet Pro, *supra* note 44.

a) It is my understanding that IHI has not acknowledged its responsibility for the work deficiencies in respect of its contracts with CNRL. I also understand that there is ongoing litigation between IHI and CNRL in respect of those contracts and IHI's alleged failure to complete the work that was the subject of the contracts.[88]

b) For each back-charge by Bondfield, Bondfield sent a notification letter and a copy of the second subcontractor's invoice to the original subcontractor. The invoice specified the amount of the GST. In the context of these Appeals, CNRL did not send to IHI copies of the invoices which CNRL received from the other contractor that did the remedial work. Thus, there is no supporting documentation to show the amount of consideration paid for the remedial work or the amount of the GST payable in respect of that consideration.

[92] In *Bokrika*, the City of Stoney Creek (the "City") hired Bokrika Inc. ("Bokrika") to install sewers, utilities, roads, sidewalks and landscaping in a residential subdivision. It appears that the amount payable to Bokrika by the City was approximately $6,000,000. Bokrika provided a letter of credit to the City to cover the costs of uncompleted work. From time to time, if Bokrika failed to complete its work in accordance with the terms of the agreement, the City would engage another supplier to do remedial work, that supplier would invoice the City, and the City would draw on the letter of credit to pay the amount of the invoice, including the portion of the GST that the City could not recover as a municipality. Bokrika took the position that it was entitled to claim ITCs in respect of the amounts paid, under the letter of credit, to the City on account of GST. Justice McArthur relied on *Bondfield* in finding in favour of Bokrika:

> [19] I apply the above reasoning [in *Bondfield*] to the present appeal because the facts are very similar to those in *Bondfield*. In both cases, a third party was hired to perform remedial work which was paid for by the original contracting purchaser (in this case Stoney Creek), and then charged back to the original contracting supplier (in this case the Appellant [i.e., Bokrika]). Even if the Respondent [i.e., the Crown] was correct in its assertion that the payments made by the Appellant to Stoney Creek were for contract breach, that is immaterial since those payments went to other suppliers for taxable supplies that resulted in ITCs in the hands of the Appellant.
>
> [20] The evidence before me indicates, as it did in *Bondfield*, that Stoney Creek entered into agreements for the remedial work directly with the new suppliers. Does that mean that Stoney Creek becomes the recipient of the supply under

---

88 *Transcript*, vol. 1, p. 129, line 18 to p. 130, line 18.

> subsection 123(1)? Justice Campbell posed that question in *Bondfield*, and I agree with her conclusion that "we must determine who was 'ultimately' liable to pay for the supply".
>
> [21] Stoney Creek was not liable to pay the amounts it was charged by third parties to complete the work on the subdivision. At all times, the City knew that it could draw on the Appellant's Letter of Credit and proceeded to do so. In fact, it sent invoices to the Appellant to account for all the funds it used, and in that respect the relationship between Stoney Creek and the Appellant was similar to that of an agent and its principal.[89]

Like *Bondfield*, *Bokrika* has been criticized.[90]

[93] In these Appeals, IHI did not produce any evidence to suggest that, when CNRL drew under the letters of credit and made payments to the other contractor, CNRL was acting as the agent of IHI. Furthermore, there was no evidence to suggest that CNRL sent invoices to IHI in respect of the payments made by CNRL to the other contractor. In the absence of such invoices or other supporting documentation, subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations* have not been satisfied.

(4) Summary

[94] As IHI has failed to prove on a balance of probabilities that it paid any GST in respect of the payments made to CNRL under the letters of credit, and as IHI has failed to provide supporting documentation to satisfy subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*, IHI was not entitled to the ITCs that it claimed in respect of the payments drawn by CNRL under the letters of credit.

E. Payments to Lawyers

[95] As indicated in paragraph 7 above, in Q3-07, IHI claimed ITCs in the aggregate amount of $2,126.10 in respect of fees paid by it to Steele Urquhart for legal services. The CRA and the Crown have conceded that IHI has established a claim to ITCs in the amount of $1,504.86 in Q3-07. The remaining ITCs claimed in Q3-07 (i.e, $621.24) are still in issue.

---

89 *Bokrika*, *supra* note 85, ¶19-21.

90 David Sherman, Editorial Comment re: *Bokrika*, 2006 CarswellNat 1671 and Taxnet Pro, *supra* note 44; also published in *GST & HST Case Notes*, no. 137, September 2006.

[96] At the hearing of these Appeals, IHI did not present any evidence in respect of the payments which it made to Steele Urquhart in Q3-07, nor did IHI (or its counsel) make any submissions in respect of the $621.24 of ITCs that the Crown has not conceded. Accordingly, IHI's claim for additional ITCs in the amount of $621.24 in Q3-07 is dismissed.

VI. CONCLUSION

[97] These Appeals are allowed and the Reassessments are referred back to the Minister for reconsideration and reassessment on the basis that, as conceded by the Crown,[91] IHI is entitled to succeed to the extent of $19,200.77, itemized as follows:

Period	Description	Amount
Q1-07	ITCs re: payments to Steele Urquhart	$801.47
Q2-07	ITCs re: payments to Steele Urquhart	4,158.48
Q3-07	ITCs re: payments to Steele Urquhart	1,504.86
Q4-07	Reduction in GST collectible	12,736.06
Total		$19,200.77

In all other respects, the Reassessments are upheld.

[98] If the Parties are unable to agree on costs, they may file written submissions in respect of costs, each submission to be no longer than five pages, within 90 days of this Judgment.

Signed at Ottawa, Canada, this 30th day of November 2018.

"Don R. Sommerfeldt"

Sommerfeldt J.

---

[91] See paragraph 6 above.

SCHEDULE A

2013-1150(GST)G

TAX COURT OF CANADA

BETWEEN:

INTERNATIONAL HI-TECH INDUSTRIES INC.
by its Secured Creditors, Receivers in part and Lawful Attorneys,
IHI INTERNATIONAL HOLDINGS LTD., GARMECO INTERNATIONAL CONSULTING, GARMECO CANADA INTERNATIONAL, IHI HOLDINGS LTD. AND EARTHQUAKE RESISTANT STRUCTURES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REQUEST TO ADMIT

YOU ARE REQUESTED TO ADMIT, for the purposes of this proceeding only, the truth of the following facts:

Legal names of the Secured Creditors and Lawful Attorneys

1. The correct legal names of the Secured Creditors and Lawful Attorneys listed above in the style of cause are or should be:

   a) IHI International Holdings Ltd.;

   b) Garmeco International Consulting Engineers S.A.L.;

   c) Garmeco Canada International Consulting Engineers Ltd.;

d) IHI Holdings Ltd.; and

e) Earthquake Resistance Structures Inc.

International Hi-Tech Industries Inc.

2. At all material times, International Hi-Tech Industries Inc. ("IHI") was a GST registrant, and was required to file GST returns on a quarterly basis.

3. During the material period, IHI was a public corporation.

4. On November 19, 2010, IHI made an assignment in bankruptcy.

5. At all material times, Roger About-Rached was the President of IHI.

IHI's business

6. The principal focus of the business of IHI was the development and commercialization of a building construction process that uses completely manufactured prefabricated panels made of special reinforced concrete, rigid foam and cold formed metals (the "Technology").

7. Mr. Rached developed the Technology and the related product designs over a period of 10 years during his employment with Garmeco International Consulting Engineers S.A.L. ("Garmeco").

8. All rights to the Technology were transferred by Garmeco and Canada International Consulting Engineers Ltd. to RAR Consultants Ltd. (a company controlled by Mr. Rached's family).

9. In May 1993, IHI purchased from Mr. Rached 65% of the equity of Canadian Hi-Tech Manufacturing Ltd. ("Canadian Hi-Tech"). The principal asset of Canadian Hi-Tech was a license from RAR Consultants Ltd. to design, market, distribute and erect products in Canada based upon the Technology.

10. At all material times, IHI International Holdings Ltd. had an exclusive license to use the Technology in all countries of the world other than Canada.

11. Throughout the material period, RAR Consultants Ltd. was the owner and licensor of the Technology.

GST Reporting History

12. IHI filed its quarterly GST returns for the quarterly reporting periods between January 1, 2006, and December 31, 2007, as set out in Schedule "A" on the dates set out in that schedule, and reporting net GST as set out on the schedule.

Sale of Land

13. Prior to March 30, 2006, IHI owned the following real properties:

    a) Lot 1 Fraser Hwy, Langley, BC, PID 003-772-560 ("Lot 1"); and

    b) Lot 2 Fraser Hwy, Langley, BC, PID 003-774-074 ("Lot 2", together with Lot 1, the "Properties");

14. As at March 30, 2006, both Lot 1 and Lot 2 were vacant land.

15. The size of Lot 1 was 0.237 acres.

16. The size of Lot 2 was 0.165 acres.

17. On March 30, 2006, the Appellant sold Lot 1 to an individual (the "Buyer") for proceeds of $130,000.

18. On March 30, 2006, the Appellant also sold Lot 2 to the Buyer for proceeds of $110,000.

19. The Buyer was not a GST registrant at the time of the sale.

20. The Appellant claimed input tax credits of $1,092.70 in respect of the disposition of the Properties in its GST return for the period ending September 30, 2006.

21. The Appellant did not report any GST collectible on the sale of the Properties.

22. The GST collectible in respect of the sale of Lot 1 was $9,100 (7% * $130,000).

23. The GST collectible in respect of the sale of Lot 2 was $7,700 (7% * $110,000).

24. The Appellant had unreported GST collectible of $16,800 for the Q1-06 reporting period.

Canadian Natural Resources Limited

25. IHI and Canadian Natural Resources Limited (CNRL) entered into contracts in 2006 whereby IHI, as the contractor, agreed to design and build facilities and equipment for CNRL's oil sands project in the Fort McMurray area (the "Design and Build Contracts").

26. Pursuant the Design and Build Contracts, IHI was obligated to provide letters of credit to CNRL as security for IHI's performance of its obligations under the contract and in lieu of CNRL providing holdbacks under the *Builders' Lien Act* (Alberta).

27. In May 2006, IHI International Construction Inc. provided two letters of credit to CNRL in the amounts of $750,292 and $1,086,419 (the "Letters of Credit").

28. In April 2007, CNRL provided notice of default under the Design and Build Contracts.

29. In May 2007, CNRL terminated the Design and Build Contracts and realized upon the Letters of Credit.

30. IHI did not pay any GST in respect the Letters of Credit.

Issues

31. With respect to paragraph 8(d) of the Notice of Appeal, input tax credits of $1,092.70 in respect of notary services respecting the sale of the Properties were

claimed and allowed in the September 30, 2006, reporting period, and therefore are no longer an issue in this appeal.

32. With respect to paragraph 10(a) of the Notice of Appeal, the $6,000 adjustment was reversed by CRA Appeals on February 4, 2013, and is therefore no longer an issue in this appeal.

33. With respect to paragraphs 12(a), 13(a) and 14(a) of the Notice of Appeal, those input tax credits were allowed by CRA and are therefore no longer issues in this appeal.

34. GST on project revenue of $12,653.14 was received by the Appellant and not reported as GST collectible in the Appellant's GST return for the period ending December 31, 2007 (as described in paragraph 14(b) of the Notice of Appeal). Accordingly, with respect to paragraph 14(b) of the Notice of Appeal, the Appellant only disputes $12,736.06 of the $25,389.20 adjustment made by CRA in the quarterly reported period ending December 31, 2007.

YOU ARE REQUESTED TO ADMIT, for the purposes of this proceeding only, the authenticity of the following documents:

	Description	**Date**	
	Returns, Notifications and Reports		
1.	CRA Printouts Retrieve Regular Return Activity and attachments (10 pages)	April 30, 2009	R1
2.	Audit Report	January 7, 2011	R2

3.	Copy of Notice of (Re)Assessment Goods and Services Tax/Harmonized Sales Tax (GST/HST) in the name of International Hi-Tech Industries Inc. for 2006/01/01 to 2006/03/31, 2006/07/31 to 2006/09/30, 2007/01/01 to 2007/03/31, 2007/04/01 to 2007/06/30, 2007/07/01 to 2007/09/30, and 2007/10/01 to 2007/12/31	January 14, 2011	R3
4.	Copy of Notice of Objection, with attached Certificate of Appointment in respect of the bankruptcy of International Hi-Tech Industries Inc.	April 4, 2011	R4
5.	Letter from John D. McEown, CA, CIRP, of Boale Wood & Company Ltd., to Harriet Li, Business Audit, CRA, Re: In the Matter of the Bankruptcy of International Hi-Tech Industries Inc ("IHI")	April 4, 2011	R5
6.	Report on Objection	February 29, 2012	R6
7.	Copy of Notice of Confirmation	March 9, 2012	R7
8.	Copy of Notice of (Re)Assessment Goods and Services Tax/Harmonized Sales Tax (GST/HST) in the name of International Hi-Tech Industries Inc. for 2006/10/10 to 2006/12/31	March 12, 2012	R8
	Correspondence		
9.	Copy of letter from Stephen D. Wortley, Lang Michener LLP, to Roger Rached, International Hi-Tech Industries Inc., Re: International Hi-Tech Industries Inc. ("IHI") – Statement of Account, with attached statements of account for 2006 to 2008	May 7, 2009	R11
10.	Copy of letter from Harriet Li, Business Audit Section, to Ruohan Dong, CGA, Subject: International Hi-Tech Industries Inc. Goods and Services Tax Returns for the periods from January 1, 2006 to December 31, 2007	August 9, 2009	R13
11.	Copy of faxed letter from Harriet Li, Business Audit Section, to Douglas S. Bencze, International Hi-Tech Industries Inc., Re: : International Hi-Tech Industries Inc. ("IHI Tech"), with attachments	September 29, 2010	R19

12.	Copy of faxed letter from Harriet Li, Business Audit Section, to Douglas S. Bencze, International Hi-Tech Industries Inc., Re: : International Hi-Tech Industries Inc. ("IHI Tech"), with attachments	October 1, 2010	R23
13.	Copy of letter from Douglas S. Bencze, International Hi-Tech Industries Inc., to Sidhu & Associates, Subject: International Hi-Tech Industries Inc. – Sale of Lot 1 & Lot 2, with handwritten note from Terry Sidhu, enclosing copy of September 30, 2010, letter	October 18, 2010	R25
14.	Copy of letter from Harriet Li, Business Audit Section, to Douglas S. Bencze, International Hi-Tech Industries Inc., Subject: International Hi-Tech Industries Inc. ("IHI Tech")	October 18, 2010	R28
15.	Copy of letter from Harriet Li, Business Audit, CRA, to Roger A. Rached, International Hi-Tech Industries Inc., Subject: International Hi-Tech Inc., BC 120682349 RT0001, Goods and Services Tax Return for the periods from January 1, 2006 to December 31, 2007	November 10, 2010	R35
16.	Copy of letter from Melissa Plante, Boale, Wood & Company Ltd., to Harriet Li, Vancouver Tax Services Office, Re: In the Matter of the Bankruptcy of International Hi-Tech Industries Inc., with enclosed creditor's package	December 10, 2010	R36
17.	Copy of letter from Harriet Li, Business Audit Section, to Roger A. Rached, International Hi-Tech Industries Inc., Subject: International Hi-Tech Industries Inc. Goods and Services Tax Return for the periods from January 1, 2006 to December 31, 2007	January 13, 2011	R37
18.	Copy of letter from John D. McEown, CA, CIRP, Boale, Wood & Company Ltd., Re: In the Matter of the Bankruptcy of International Hi-Tech Industries Inc. with attachments	January 18, 2012	R44
19.	Copy of letter from Cindy Yip, Appeals Division, to John McEown, Boale, Wood & Company Ltd., Re: GST Notice of Objection for International Hi-Tech Industries Inc. BN 12068 2349 RT0001	February 9, 2012	R46

Audit Materials and Working Papers

20.	Working paper, Adjustments to Input Tax Credits	Undated	R54
21.	Copy of Contract of Purchase and Sale of Lot 2 Fraser Hwy between International Hi-Tech Industries and Surjit S. Gill	January 26, 2006	R65
22.	Copy of Contract of Purchase and Sale of Lot 1 Fraser Hwy between International Hi-Tech Industries and Surjit S. Gill	January 26, 2006	R66
23.	Statement of Audit Adjustment with respect to International Hi-Tech Industries Inc. for the 2006 and 2007 taxation years	January 7, 2011	R89
24.	Copy of article from the Globe and Mail, "Dawn of the prefab condo" (3 pages)	April 21, 2006	R90
25.	Copy of Order under sections 30(1)(a), 30(1)(b) and 32(1) Real Estate Development Marketing Act (9 pages)	September 14, 2007	R91
26.	Reproduced copy of Notice of Reassessment for period from 2006-10-01 to 2006-12-31 (2 pages)	March 12, 2012	R92
27.	Reproduced copy of letter from CRA to International Hi-Tech Industries Inc. c/o Boale Wood & Co re objection for 2006-10-01 to 2006-12-31 period (2 pages)	July 5, 2012	R94
28.	Report on objection for period between 2006/10/01 to 2006/12/31 (3 pages)	January 29, 2013	R95
29.	Copy of Notice of Confirmation for period between 2006/10/01 to 2006/12/31 (2 pages)	January 30, 2013	R96
30.	Reproduced copy of Notice of Reassessment for period from 2006-10-01 to 2006-12-31 (2 pages)	February 4, 2013	R97

IHI Public Documents

31.	Audited annual financial statements (amended), as at December 31, 2001 and 2000	May 13, 2001	R99
32.	Audited annual financial statements (amended), as at December 31, 2002 and 2001	May 5, 2003	R100

33.	Audited annual financial statements (amended), as at December 31, 2004 and 2003	April 15, 2005	R101
34.	Management information circular, as at May 15, 2006	May 15, 2006	R102
35.	Annual report (amended), Form 20-F, for year ended December 31, 2005	July 19, 2006	R103
36.	Interim financial as at September 30, 2006 (Unaudited)	November 22, 2006	R104
	Documents provided during discovery		
37.	Copy of Officers' Certificates signed by officers of Canadian Natural Resources Limited and Bills of Exchange (4 pages)	June 14, 2007	Documents provide in response to request #14
	CNRL Documents		
38.	Copy of Design and Build Contract 400922 between Canadian Natural Resources Limited and International Hi-Tech Industries Inc. (86 pages)	March 2006	
39.	Copy of letter from Canadian Natural Resources Limited to International Hi-Tech Industries Inc. re Notice of Default of contract #400936 (1 page)	April 19, 2007	
40.	Copy of letter from Canadian Natural Resources Limited to International Hi-Tech Industries Inc. re Notice of Default of contract #400922 (2 0ages0	April 19, 2007	
41.	Copy of letter from Canadian Natural Resources Limited to International Hi-Tech Industries Inc. re Notice of Termination for Default of contract #400936 (2 pages)	May 24, 2007	

YOU MUST RESPOND TO THIS REQUEST by serving a response to request to admit in Form 131 WITHIN FIFTEEN DAYS after this request is served on you. If you fail to do so, you will be deemed to admit, for the purposes of this proceeding only, the truth of the facts and the authenticity of the documents set out above.

DATED at the City of Vancouver, the Province of British Columbia, this 25th day of September, 2017

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, British Columbia
V6Z 2S9
Fax: (604) 666-2214

Per: Matthew W. Turnell
Jamie Hansen
Tel: (604) 666-0212 / 666-2097
Email: matthew.turnell@justice.gc.ca / jamie.hansen@justice.gc.ca

Solicitors/counsel for the Respondent

TO: Andrew G. Sandilands
Dumoulin & Boskovich
Barristers and Solicitors
Box 52, Pacific Landmark Bldg
Suite 1800 - 1095 West Pender Street
Vancouver, British Columbia
V6E 2M6

Schedule "A"
GST Reporting History

	Reporting Periods			Received				
	From	To	Due Date	Date	Supplies	GST	ITC	Net Tax
Q1-06	1/1/2006	3/31/2006	5/1/2006	6/7/2006	8,478	554.51	($11,652.88)	($11,098.37)
Q2-06	4/1/2006	6/30/2006	7/31/2006	9/13/2006	23,273	996.07	($38,395.90)	($37,399.83)
Q3-06	7/1/2006	9/30/2006	10/31/2006	12/28/2006	0	12,104.76	($27,520.79)	($15,416.03)
Q4-06	10/1/2006	12/31/2006	10/31/2006	12/28/2006	0	11,200.29	($16,030.43)	($4,830.14)
Q1-07	1/1/2007	3/31/2007	4/30/2007	11/21/2007	226,243	66,918.19	($69,052.05)	($2,133.86)
Q2-07	4/1/2007	6/30/2007	7/31/2007	5/4/2009	0	0.00	($22,818.76)	($22,818.76)
Q3-07	7/1/2007	9/30/2007	10/31/2007	5/4/2009	0	0.00	($12,152.21)	($12,152.21)
Q4-07	10/1/2007	12/31/2007	1/31/2008	5/5/2009	0	0.00	($8,066.86)	($8,066.86)
					$257,994	$91,773.82	($205,689.88)	($113,916.06)

CITATION:	2018 TCC 240
COURT FILE NO.:	2013-1150(GST)G
STYLE OF CAUSE:	INTERNATIONAL HI-TECH INDUSTRIES INC. by its Secured Creditors, Receivers in part and Lawful Attorneys, IHI INTERNATIONAL HOLDINGS LTD., GARMECO INTERNATIONAL CONSULTING ENGINEERS S.A.L., GARMECO CANADA INTERNATIONAL CONSULTING ENGINEERS LTD., IHI HOLDINGS LTD. AND EARTHQUAKE RESISTANCE STRUCTURES INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATES OF HEARING:	November 28 - 30, 2017
FILING DATES OF SUBMISSIONS:	January 3, 2018 (Appellant) January 5, 2018 (Respondent)
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF **AMENDED** JUDGMENT:	**December 10**, 2018

APPEARANCES:

Counsel for the Appellant:	Andrew G. Sandilands
Counsel for the Respondent:	Matthew W. Turnell **Jamie Hansen**

COUNSEL OF RECORD:

For the Appellant:

Name:	Andrew G. Sandilands
Firm:	DuMoulin & Boskovich
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada