Docket: 2011-1872(GST)G

BETWEEN:

SALAISON LÉVESQUE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 3 and 4, 2013, at Montréal, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant:	Louis Tassé Marie-Claude Marcil
Counsel for the respondent:	Eric Labbé

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (R.S.C. 1985, c. E-15) for the period from August 7, 2006, to August 29, 2009, notice of which is dated April 13, 2010, is allowed, and the assessment is vacated, with costs in favour of the appellant.

Signed at Ottawa, Canada, this 4th day of February 2014.

"Alain Tardif"

Tardif J.

Translation certified true
on this 12th day of August 2014
François Brunet, Revisor

Citation: 2014 TCC 36
Date: 20140204
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REASONS FOR JUDGMENT

Tardif J.

[1] The appellant is appealing an assessment based on sections 165, 169, 280, 285 and 298 of the *Excise Tax Act* (the ETA)[1] in respect of the periods from August 7, 2006, to August 29, 2009. The Minister of National Revenue (the Minister) is claiming the amount of $20,430.32, including interest and penalties.

[2] The respondent submits that the appellant was not entitled to claim input tax credits (ITCs) under subsection 169(4) of the ETA in respect of the amounts paid to Agencies Alina, Production Plus inc. and Entreprises A. Bustos, alleging that the regulatory provisions for claiming the ITCs in question were not complied with.

[3] To begin with, the respondent's position is nebulous. On the one hand, she submits that the disputed invoices are false invoices. On the other hand, she admits that the work matching the description on those same invoices was indeed performed.

[1] R.S.C. 1985, c. E-15.

[4] To reconcile these two theories, the respondent seems to be arguing that the persons who performed the work were not the persons who prepared and submitted the invoices to the appellant.

[5] To avoid any misinterpretation of the respondent's position, it appears pertinent to me to reproduce the respondent's submissions as set out in the Reply to the Notice of Appeal at the following paragraphs:

> [TRANSLATION]
>
> (d) The amount of $12,443.34 was assessed for the disallowed ITCs relating to the invoices of convenience;
>
> (g) The respondent disallowed the ITCs claimed because she believed that the subcontractors in question provided invoices of convenience and that the work was not performed or was not performed by those subcontractors;
>
> (j) The accommodating subcontractors do not have the capacities, expertise or material, financial and human resources to provide the workforce relating to the payments that were made to it;
>
> (n) With the exception of certain invoices, no other evidence showing that the workforce was subcontracted;

[6] The respondent contends that the condition requiring that the supplier's name be indicated on the invoices was not met, given that they contain only the names of the Agencies.

[7] According to the respondent, the Agencies in question did not have the capacities, expertise or material, financial and human resources to provide the workforce relating to the payments that were made to them. Consequently, the respondent argues that the services were not rendered by the Agencies but by other subcontractors, and that their names should have been indicated on the invoices instead of the Agencies'.

[8] Despite certain inconsistencies, the burden is on the appellant to show that the invoices related to the ITCs claimed meet the mandatory requirements prescribed by the *Input Tax Credit Information Regulations* (the Regulations)[2] and, specifically, that there were, in fact, *bona fide* commercial transactions between it and the Agencies.

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[2] SOR/91-45.

Applicable law

[9] The following are the sections of the ETA and the Regulations that are relevant to understanding the dispute:

> **165(1) E.T.A.** Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.
>
> **221(1) E.T.A.** Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.
>
> **169(4) E.T.A.** A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,
>
> > (*a*) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed;
>
> **S. 3 of the Regulations** For the purposes of paragraph 169(4)(*a*) of the Act, the following information is prescribed information:
>
> > (*a*) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is less than $30,
> >
> > (i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business,
> >
> > (ii) where an invoice is issued in respect of the supply or the supplies, the date of the invoice,
>
> . . .
>
> > (iv) the total amount paid or payable for all of the supplies;
>
> (*b*) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $30 or more and less than $150, where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $30 or more and less than $150:

(i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business, and the registration number assigned under subsection 241(1) of the Act to the supplier or the intermediary, as the case may be,

. . .

(c) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $150 or more,

(i) the information set out in paragraphs (*a*) and (*b*),
(ii) the recipient's name, the name under which the recipient does business or the name of the recipient's duly authorized agent or representative,
(iii) the terms of payment, and
(iv) a description of each supply sufficient to identify it.

225(1) E.T.A. Subject to this Subdivision, the net tax for a particular reporting period of a person is the positive or negative amount determined by the formula

A – B

where

A is the total of

(*a*) all amounts that became collectible and all other amounts collected by the person in the particular reporting period as or on account of tax under Division II, and

. . .

B is the total of

(*a*) all amounts each of which is an input tax credit for the particular reporting period or a preceding reporting period of the person claimed by the person in the return under this Division filed by the person for the particular reporting period,

. . .

280(1) E.T.A. Subject to this section and section 281, if a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay interest at the prescribed rate on the amount, computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

285 E.T.A. Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which is in this section referred to as a "return" made in respect of a reporting period or transaction is liable to a penalty of the greater of $250 and 25% of the total of

(a) if the false statement or omission is relevant to the determination of the net tax of the person for a reporting period, the amount determined by the formula

A – B

where

A is the net tax of the person for the period, and

B is the amount that would be the net tax of the person for the period if the net tax were determined on the basis of the information provided in the return,

. . .

298(4) E.T.A. An assessment in respect of any matter may be made at any time where the person to be assessed has, in respect of that matter,

(a) made a misrepresentation that is attributable to the person's neglect, carelessness or wilful default;

(b) committed fraud

(i) in making or filing a return under this Part,

(ii) in making or filing an application for a rebate under Division VI, or

(iii) in supplying, or failing to supply, any information under this Part;

…

Facts

[10] The appellant is a registrant in accordance with the provisions under Part IX of the ETA.

[11] The appellant is a family business, founded in 1967, that specializes in the production of ham under multiple aspects and presentations. In relation to its operations, it has a certificate in "Hazard Analysis Critical Control Point –

[TRANSLATION] Method and Principles of Food Safety Management". Since its establishment, it has never been the subject of a food recall even though production is extremely sensitive and vulnerable with respect to safety. This shows the extent to which the business is alert and prudent in terms of quality control.

[12] The appellant's products are sold in a number of Canadian supermarkets as well as internationally. Its annual sales are between $15 and $18 million.

[13] The appellant's business operates year-round, but there are certain times of the year where demand is higher, such as major holidays like Christmas and Easter. Since the products that the appellant processes and sells are perishable, its customers require very short delivery deadlines sanctioned by substantial penalties for any delay.

[14] The appellant's business employs around 75 people full time; at peak periods, roughly four per year, the appellant has to significantly increase its workforce.

[15] To fill the periodic workforce shortage, it first tried to recruit the required staff directly by regularly advertising in newspapers.

[16] All the initiatives failed, and the expectations never produced the desired results. To address this desperate need for a periodic workforce, the appellant had to use employment agencies whose services it retained or whose offers of service it accepted. The appellant also indicated that he had used the Internet (Jobboom) and the Yellow Pages.

[17] Throughout the periods at issue, the appellant retained the services of four employment agencies: Placement Tout Azimut, Alina, Production Plus inc. and Entreprises A. Bustos (the Agencies).

[18] The appellant paid the Agencies the following amounts in total:

Period	**Amount**
2005	$83,494
2006	262,778
2007	242,611
2008	188,787
Total	**777,767**

[19] The appellant retained the Agencies' services for the following periods:

Name of Agency	Period
Placement Tout Azimut	October 8, 2005, to August 30, 2008
Alina	April 7, 2007, to October 3, 2008
Production Plus inc.	September 2008 to May 2009
Entreprises A. Bustos	September 2008 to August 2009

[20] Generally, as for its operations, the majority of the appellant's expenditures for the Employment Agencies were accepted by the respondent.

[21] The business relationship with the Agencies unfolded as follows:

(a) One of the appellant's representatives contacted the selected employment agency to negotiate the personnel contract: in particular, the hourly rate and method of payment were discussed (there was a written contract with Production Plus inc. only);
(b) Once there was an agreement between the appellant and the Agency, the appellant's foreman contacted the Agency to confirm the number of employees required at a given date and time on the appellant's business premises (the same day or the following day);
(c) The Agency's employees (composed essentially of immigrants) showed up at the appellant's reception area at the designated date and time;
(d) They were not asked for their Social Insurance Number or a piece of identification;
(e) All the workers received mandatory training on health and safety standards, and they signed a form stating that they had received this training. This enabled the appellant's controllers to follow up on those who had already taken the training and to see who might need an update;
(f) Agency employees had to punch a time card when entering and leaving the factory;
(g) Every week, by facsimile or email, the Agency sent the appellant a list of the employees who had worked the preceding week, to validate the name and hours worked by each Agency employee;
(h) The Agency subsequently issued an invoice to the appellant, which was paid by cheque.

[22] Some cheques issued to the Agencies were cashed at cheque-cashing centres; however, they were the exceptions because most of them transited through the regular process.

[23] Prior to retaining the services of an employment Agency, the appellant always verified the accuracy and truth of the GST registration numbers with the authorities.

[24] All the Agencies had a valid GST registration number during the periods at issue except Placement Tout Azimut, which indicated on its invoices that it would obtain its GST registration number shortly. Logical and consistent, the appellant then decided to not pay the taxes on those invoices and moreover did not claim the related ITCs.

[25] The appellant did not verify the Agencies' status with Quebec's Registraire des entreprises; it did not obtain a compliance letter from the CSST in respect of these Agencies. The appellant never visited the Agencies' places of business or asked for references.

[26] It communicated with the officers of the Agencies by telephone, facsimile or email. It also met Aristide Bustos of Entreprises A. Bustos personally.

[27] The hourly rate charged by the Agencies was on average $12 an hour for straight time and $18 an hour for double time (Entreprises A. Bustos: $11 an hour, Placement Tout Azimut: $9.50 an hour, Production Plus inc.: $12 an hour and Alina: $14.25 an hour).

[28] The hourly wage paid to the Agencies was substantially the same as the salary the appellant paid to his own employees.

[29] The profit margin achieved by the Agencies was somewhat marginal if we assume that the businesses in question were paying the minimum wage on the one hand; on the other hand, in the event that they were complying with the minimum wage, which is highly unlikely, the businesses obviously diverted the taxes collected for their own benefit, which enabled them to take advantage of the situation to the detriment of very vulnerable workers and the state.

[30] Occasionally, the appellant recruited some workers from the Agencies who subsequently became permanent employees.

[31] During rather summary audits, the respondent made the following findings:

> [TRANSLATION]
> Placement Tout Azimut inc.

- This company was created in 2004;
- The majority shareholder is Youcef Balmed, who is also President of the company;
- In each year at issue, he and his company reported modest incomes;
- The company had no real place of business beginning in 2008;
- The address on the invoices was not the same as the one on the cheques;
- The cheques were sometimes dated the day after the invoice date;
- The company said that it had not yet obtained a tax number, but in fact it had one that was valid from December 2, 2004, to July 1, 2008. The company was doing business with five different clients and gave its tax number to some but not others;
- It was impossible for Revenu Québec to trace the employees reported on the time sheets (no Social Insurance Number);
- The company did not report most of its income for the period from 2005 to 2008. Accordingly, it did not report the correct amount of taxes or wages;
- Mr. Balmed declared bankruptcy shortly after the audit of his company began. It was therefore impossible to recover the money owed to the state either from the company or its director, despite assessments to that effect;
- When the person auditing the company contacted the appellant for clarification on their business relationship and the appellant then contacted the company to ask what was going on, no Agency employees subsequently showed up to work.

Entreprises A. Bustos

- This company was created in 2007;
- The majority shareholder is Bustos Aristides, who is also President of the company;
- This company was audited as a result of the appellant's audit;
- The company has a place of business;
- The company did not have a payroll deduction number and did not report any employees prior to January 2008;
- The company did not report the correct amount of wages;
- The company is registered for taxes but has almost never filed a tax return;
- Mr. Bustos told the Revenu Québec auditor that he had hired his first employee on January 16, 2008;
- Mr. Bustos also admitted paying his employees under the table and said that he had no contact information for his employees, that the appellant had it;
- Mr. Bustos claimed that the appellant knew he did not have a payroll deduction number and that that did not bother it;
- Mr. Bustos contended that the appellant could contact his agency's employees directly without going through him;
- Mr. Bustos said that he would prepare an invoice based on the hours the appellant sent (it told him who had come to work[3]) and send it to the appellant by Internet. Then, he would go the same day to the appellant's office to obtain the cheque,

[3] On the other hand, Mr. Bustos also stated that the appellant did not know the number and names of the employees who had come to work for it during the week and that it was always asking him for this information after the fact. His statements are therefore inconsistent.

cashed it to obtain cash and paid his employees in cash in the appellant's parking lot or cafeteria;
- Subsequently, Mr. Bustos could not be found;
- It was impossible for Revenu Québec to trace most of the employees declared on the time sheets. Soledad Segoviano Trujillo was contacted and stated that she had worked for the appellant in 2008. She said that Mr. Bustos had paid her in cash and that one of the appellant's officers was aware of the situation. She also said that the appellant could contact her directly to go to work;
- Ms. Trujillo did not report her income from the agency;
- Although assessments were issued to the company and Mr. Bustos for uncollected and unremitted amounts, the respondent was never able to recover these amounts.

Production Plus inc.
- A search in the REQ [enterprise register] revealed four different enterprises using that name;
- 9195-7753 Québec inc. was selected and was audited prior to the appellant;
- When the appellant was contacted by the person auditing the company and subsequently asked the company for its employees' Social Insurance Numbers, the company did not return its call, and therefore the appellant ceased all business dealings with it;
- The majority shareholder and director of the company is Mélina Sandoval;
- The company has a place of business (there was a waiting room, a secretary-receptionist in one office and Ms. Sandoval in another office);
- The company was collaborating with people whom the respondent recognized as providers of invoices of convenience;
- The company was registered for taxes, but its number was revoked from November 26, 2008, to February 19, 2009, because it had provided no evidence of commercial activity;
- It filed its tax returns in 2008 but not in 2009;
- It reported its salaries in 2008 but not in 2009;
- The company never reported any income;
- There was a contract between the company and the appellant, but the address on the contract is not the same as the one on the invoices;
- The cheques bear the same date as the invoices;
- Revenu Québec was unable to trace the employees reported on the time sheets;
- The company was assessed for unremitted, uncollected amounts, but the respondent was unable to recover these amounts from the company or its director.

Alina
- This company was created in 2006;
- The majority shareholder is Ricardo Hernandez, and he is also the President of the company. Yorge Luna is the company's Vice-President;
- The company was audited as a result of the appellant's audit;
- The company has a place of business;

- The company did not declare most of its income even though it filed returns from 2006 to 2008;
- It reported its taxes and salaries from 2006 to 2009, but the amounts reported are not consistent with the business income;
- Invoices issued by the company were paid within a week;
- Revenu Québec was unable to trace the employees reported on the time sheets;
- The company declared bankruptcy shortly after the audit began;
- It was therefore impossible for the respondent to recover the amounts owed by the company despite having assessed it and its directors to that effect.

[32] In the light of these multiple findings, it appears reasonable to me to conclude that it was obvious that the businesses were unreliable and dishonest, genuine fraudsters whose sole objective was to enrich themselves to the detriment of society and undoubtedly exploiting vulnerable, defenceless persons.

[33] In such a context, any information coming from these businesses was neither reliable nor credible; indeed, the *modus operandi* required the absence of data, information and documents. These businesses, by virtue of their approach, had a vested interest in not having records, documents or other material that could incriminate them.

[34] It is astonishing and quite disturbing that the respondent, who has such strong powers, merely conducted a minimal, superficial audit. It is even more astonishing that the respondent made such farfetched and outlandish findings that the lack of payroll and employee records showed or proved that the Agencies actually had no workers in their employment. Moreover and clearly, the respondent also assumed that the Agencies in question paid their employees the minimum wage.

[35] According to the auditors - and this Court considered very carefully their arguments - the parasitic businesses under investigation provided credible information regarding the lack of workers. The respondent assumed that certain data were plausible and reasonable, data that were entirely dubious and unreliable, in establishing the bases of the assessments that are the subject of the appeal.

[36] Instead of pursuing her investigation and taking certain penal, even criminal actions, the respondent chose the easy, quick route by attacking the appellant. Moreover, the ETA sets out very clearly, in subsection 329(1), measures that can delay if not curtail the enthusiasm of these crooks.

[37] Realizing that she could not recover the amounts owed by the Agencies, the respondent decided to assess the appellant. First, she began by disallowing the

business expenses related to the payments made to the Agencies and subsequently accepted most of them.

[38] She then assessed the appellant for not making source deductions on the assumption that the Agencies' employees were the appellant's own employees.

[39] Later, she acknowledged that services were indeed rendered to the appellant, and consequently the assessment was, again, vacated.

[40] Last, the respondent assessed the appellant for the reasons set out in the file that is the subject of the appeal, i.e. failing to remit the appropriate amount of net tax because the ITCs claimed on the payments made to the Agencies were disallowed, although there was absolutely nothing in the evidence submitted by either side that showed collusion between the appellant and the employment agencies in question.

[41] The business relationships were normal and entirely consistent with standard practices. This same evidence did not show anything that could cast doubt on the appellant's good faith or even any negligence. In the type of commercial activities that the appellant engaged in, it was normal, appropriate and wise to proceed as it did.

[42] A number of Quebec businesses require the services of employment agencies to meet their workforce needs, and the demand is increasing.[4] The respondent is aware of this reality, hence the importance of and even the urgency for implementing the necessary tools to ensure strict compliance with the provisions of the ETA.

[43] Revenu Québec imposes certain obligations on employment agencies;[5] the industry was for the most part unregulated, and a number of them took advantage of the situation to enrich themselves without regard to their tax liabilities.

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[4] [TRANSLATION]"According to Statistics Canada, the operating revenues of Agencies increased by 42% in Canada between 2001 and 2007, from $5.1B to $8.9B, and by 34% in Quebec, from $0.8B to $1.2B, in the same period": reference taken from Nicolas Simard, A*gences de placement – diverses questions juridiques et fiscales*, on-line: Spiegel, Sohmer http://www.spiegelsohmer.com/documents/simard/1747636.pdf, 9 pages, at page 1.

[5] As of January 2011, employment agencies must not only, as employers, withhold Québec income tax as well as Québec Pension Plan (QPP) contributions and Québec parental insurance plan (QPIP) premiums from the remuneration paid to their employees but must also regularly remit insurance premiums for the CSST to Revenu Québec. In addition, they must remit to Revenu Québec their employer contributions to the QPP, QPIP, health services fund, Workforce Skills Development and Recognition Fund (WSDRF) and to the financing of the Commission des normes du travail. Lastly, they must keep records for their business as well as all supporting documents, especially those concerning employee management. In their records, they must enter the name of their employees, their date of birth, address, occupation and social insurance number: REVENU QUÉBEC, *Obligations of Employment Agencies*, Tax News, November 29, 2011, on-line: http://www.revenuquebec.ca/en/salle-de-presse/nouvelles-fiscales/2011/2011-11-29.aspx.

[44] The case law regarding companies doing business with employment agencies identifies four situations that justify disallowing their ITCs:

- there was no real service provided to the client company (thus an accommodation invoice was provided which, according to the traditional definition, implies that the client company did not pay the taxes on the alleged service received but nonetheless claimed the related ITCs;
- the GST registration number was not indicated on the invoice, the GST registration number was usurped or the GST registration number was not valid during the period at issue;
- the invoice did not contain an adequate description of the supply; and
- the supplier's name indicated on the invoice was not correct (for example, because the client company agreed to pay a third party at the Agency's direction, and that party was not involved in the supply).

[45] Any reference to the case law requires caution but also and above all consideration of the specific facts of each case and their context. As Justice Archambault stated in *Systematix Technology Consultants Inc. v. The Queen*, a case involving a GST registration number, is not relevant in a case where the name of the supplier is at issue.[6]

[46] First, the respondent submits that the Agencies that the appellant dealt with were not carrying on a commercial activity given that they did not have the capacities, expertise or material, financial and human resources to provide the workforce relating to the payments that were made to them by the appellant.

[47] This argument is without merit particularly since the respondent herself recognized that the Agencies engaged in a commercial activity because prior to assessing the appellant, she first assessed the Agencies for uncollected, unremitted sales taxes and unreported income.

[48] If the employment agencies in question were not operating a business, why were they initially assessed? In this regard, counsel for the appellant submits a very pertinent nuance by stating that there is a clear distinction between the concept of a lack of resources and that of unreported resources.

[49] In the light of the numerous findings made during the audit of the Employment Agencies, it became clear that they were delinquent businesses whose only objective was to maximize profits to the detriment of its own employees, by undoubtedly

[6] 2006 TCC 277, at para. 23, aff. on appeal: 2007 FCA 226.

paying them a ridiculous salary, and of the state by pocketing the QST and GST that had been paid to them.

[50] In view of this obvious state of affairs, why was the respondent not more determined, strict and aggressive? On the contrary, it assumed, in the absence of records, that their employees were paid the minimum wage and, which is even more implausible, that there were simply no employees because there were no records.

[51] In addition, it is equally surprising that the respondent initially assessed the Agencies for unremitted source deductions. Having failed in its attempt to recover the amounts owed, she then assessed the appellant on the pretext that the employees in question worked for it.

[52] On the very face of the facts, the appellant was assessed essentially because the respondent was unable to recover the amounts owed from the Agencies.

[53] The respondent's arguments must be consistent. The flagrant lack of consistency means that the appellant has succeeded in establishing *prima facie* that the respondent's assumptions underlying the assessment were false. She cannot adjust the grounds for an assessment, based not on actual facts but on the ultimate goal, which was to recover the assessed amount.

[54] The respondent's evidence regarding her claims that the invoices issued by the Agencies to the appellant were invoices of convenience because the supplier's name on the invoices was not correct does not pass the preponderance test. Indeed, the respondent herself recognized that the Agencies did in fact make the supplies to the appellant and not other unidentified subcontractors because she assessed them for uncollected, unremitted taxes, undeclared income and unremitted source deductions.

[55] Accordingly, they are not invoices of convenience except for the business that prepared them given that the ultimate goal was to divert the taxes collected from the appellant to its own profit and benefit. The illegal scheme cannot be imputed directly or indirectly to the appellant, which, firstly, did not know about it and secondly, always acted in good faith.

[56] The respondent's argument that it was not the Agencies that made the supplies in question but unidentified subcontractors of the Agencies does not change my conclusion since paragraph 3(*a*) of the Regulations provides that the name on the invoice can be the name under which the supplier or its **intermediary** does business.

The respondent cannot therefore argue that the subcontractor that invoices the work must have performed the work.

[57] The concept of intermediary is not defined in the ETA or the Regulations,[7] and there is no case decided by the Federal Courts on this issue. Justice Lamarre stated that where the name of the intermediary appears on the invoice, the invoice must specify that it was acting as such.[8] With respect, regarding this interpretation, I question this position given that this condition is not in the Regulations; moreover, in tax matters, taxpayers cannot be required to do more than the obligations the Act imposes on them.[9]

[58] The respondent accepted the business expenses inherent in the payments that the appellant made to the Agencies; consequently, it is logical to accept the ITCs the appellant claimed with respect to the tax paid on those same supplies, all of which is in accordance with Parliament's objectives.

[59] Indeed, the impact analysis that accompanied the *Regulations Amending the Input Tax Credit Information Regulations* stated that enacting the new regulatory conditions would have a minor impact because the documents used to support ITC claims would be the same receipts and invoices currently retained by businesses to support expense deductions under the *Income Tax Act*.[10]

[60] Certainly, the respondent established very clearly that the Agencies were high-level tax offenders in that they did not remit the taxes they collected, maintained no records and did not keep anything that could be audited in this matter.

[61] With respect to this issue, the tax laws on the GST do not contain any specific provision allowing the tax authorities to hold a business liable for the tax fraud of one of its suppliers unlike, for example, section 316 of the *Act Respecting Industrial Accidents and Occupational Diseases*,[11] which clearly and specifically provides that a business may be held liable for contributions to the CSST that were not made by one of its subcontractors.

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[7] However, the word "intermediary" is defined in section 201R1 of the *Regulation respecting the Québec sales tax*, R.S.Q., chapter T-O.1 and R.1, which provides as follows: the intermediary of a person means, in respect of a supply, a registrant who, acting as a mandatary for the person or under an agreement with the person, causes or facilitates the making of the supply by the person.

[8] *Filotech c. La Reine*, File No. 2010-1583 (GST)I.

[9] *Système intérieur G.P.B.R. Inc. c. A.R.Q.*, 2013 QCCQ 12689.

[10] SOR 2000-180, *Canada Gazette*, 1991 *Part II*, Vol. 125, No. 2, 957 p., at pages 199 and 201.

[11] R.S.Q., chapter A-3.001.

[62] If Parliament had intended that a taxpayer doing business with a delinquent subcontractor would be held solidarily liable for the amounts the subcontractor owes to the state, it would have expressly stated that as the legislator did for contributions owed to the CSST. It is not for the Court to usurp the function of Parliament.

[63] In the absence of specific measures, a taxpayer cannot be held responsible for the tax liabilities not met by a tax partner, unless obviously there has been collusion with that partner. It seems that the tax authorities have a tendency to assume that a certain degree of negligence or even a lack of vigilance amounts to collusion. In other words, the respondent would like to impose a burden or a liability that translates into a real obligation to inquire or investigate for businesses that deal with others.

[64] The primary mission of a business is to generate revenues that result in profitability, not to act as taxation police.

[65] In *Orly Automobiles Inc. v. Canada*, the Federal Court of Appeal pointed out that a registrant cannot claim to be entitled to reimbursement if it knows or cannot ignore the false statements on the supporting documentation provided by its supplier or if the registrant has colluded in the fictitious transactions.[12]

[66] In this case, the evidence adduced does not support a finding that the appellant was in collusion with the Agencies. Indeed, the respondent did not question the truthfulness of the identities on the time sheets or forms signed by the Agencies' employees stating that they had received the required training. She essentially noted that the appellant did not have any information about the workers that the Agencies referred to it, including their real names, addresses and Social Insurance Numbers.

[67] The same evidence shows that the appellant did not benefit from the failure of the Agencies to satisfy their tax liabilities. The appellant's evidence established unquestionably that it was a very well-structured business with a reputation and credibility beyond reproach. Over the years, it became so well-known that it was surprising and completely unreasonable to conclude that it had jeopardized such a reputation through gross carelessness by associating itself with a questionable scheme.

[68] The appellant had to deal with the resources that the employment Agencies sent in order to meet its periodic workforce needs. It acted normally in the course of business by ensuring that the GST numbers on the invoices were valid. In addition, it refused to pay the GST to a business that did not have a valid number.

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[12] 2005 FCA 425.

[69] Moreover, this approach is comparable to the one adopted in *9088-2945 Québec Inc. v. The Queen*[13] by my colleague, Justice Paris.

[70] Despite this, the respondent maintains that the appellant was not diligent enough; according to the respondent, if the appellant had been prudent and vigilant, it would have noted certain irregularities, even falsehoods, in some of the supporting documentation regarding supplies. This evidence is not persuasive because the falsehoods that the respondent refers to stem from her perception and her interpretation; the facts do not support such a conclusion.

[71] Nothing in the ETA provides that a business must act as a police officer or investigator to ensure that the business whose services have been retained complies with the ETA.

[72] In addition to verifying the validity of the Agencies' GST registration numbers and contacting the Agencies' officers or directors, the respondent would like the appellant to have

- verified their legal existence with the REQ;
- gone to the head office of the Agencies to see if there were actual commercial activities;
- exchanged contract documents with all the Agencies;
- asked all the Agencies' employees who came to work for it to provide identification and their Social Insurance Numbers;
- obtained compliance letters from the CSST to ensure that the hours worked by the Agencies' employees were reported;
- verified whether the Agencies had vehicles registered with the Société d'assurance-automobile du Québec (SAAQ);
- analyzed the reverse side of cheques issued as payment to find out which ones were cashed at cheque-cashing centres;
- verified that invoices from the same Agency followed a numerical sequence;
- analyzed the price differences invoiced to ascertain the [TRANSLATION]"fake" Agencies from the [TRANSLATION] "real" ones; and
- paid attention to the handwriting on the invoices to try to detect differences between the invoices from the same Agency.

[73] Indirectly, the respondent would like the appellant to do her own work. One of the auditors who had acted in the appellant's file and who testified at the hearing, Diane Deluga, even said that businesses that deal with employment agencies have

[13] 2013 TCC 58, para. 12.

more resources and powers than the respondent to ensure that agencies are complying with the Act and its Regulations.

[74] The Agence du revenu du Québec (ARQ) not only has access to the Agencies' confidential information, which is not the case for the appellant, but also has numerous resources. *Inter alia*, it has sophisticated audit software that enables it to cross-reference information contained in various records. It has the tools, staff and technical and material resources to uncover and sanction fraudsters.

[75] It also has competent employees whose work consists essentially in auditing businesses. It cannot require a simple small or medium-size, or even a large business, to do the same thing.

[76] That would simply not be realistic and could destabilize the entire financial market especially since it was shown that the appellant was hiring between 700 and 800 subcontractors at that time. Moreover, the use of subcontractors is becoming increasingly common in all fields.

[77] It is true that the GST registration number was not on the invoices issued by the Agence Placement Tout Azimut. At first, the Agency stated that it was in the process of obtaining its number but it never had it month after month, thus demonstrating a real problem.

[78] The respondent criticizes the appellant for not following up thoroughly. I do not share this position because it was shown that the appellant had never paid any taxes to that Agency and that, consequently, it had never claimed the related ITCs. Accordingly, I do not see how the respondent was prejudiced by this situation given that the effect was neutral; yes, the appellant did not pay taxes with respect to those supplies but it would have, in any event, been fully reimbursed for the taxes it paid if it had paid them. There again, it seems that the tax authorities want businesses that retain the services of subcontractors to interfere in the affairs of other businesses.

[79] The respondent submits that the appellant should have been suspicious of the Agencies notably because of the hourly rate charged: the profit may have been quite marginal, assuming that the Agencies were complying with the *Minimum Wage Act*, which is questionable.

[80] I do not accept this argument; the definition of commercial activity in section 123 of the ETA clearly states that, in the case of a business carried on by a

corporation, it is not necessary to prove that there was a reasonable expectation of profit to find that the corporation was carrying on a commercial activity:

> "commercial activity" of a person means
>
> (*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals) . . .
>
> (*b*) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals) . . . .

[81] The respondent faults the appellant for not calling the employment Agencies' employees and officers as witnesses. Indeed, the onus of proof was on the appellant, but the respondent could have also compelled the same individuals to testify, especially since their evidence would have shed light on the confusion created by some allegations in the Reply to the Notice of Appeal. In addition, the auditors themselves referred to the difficulties, if not the impossibility, of contacting those persons. There again, the respondent would like to impose on the appellant an obligation to contact the individuals involved when, despite her exceptional resources, she was unable to find most of them.

[82] On the other hand, in view of the evidence, I am convinced that their contribution or testimony would not have been reliable or credible. Indeed, it is very surprising that the auditors believed the information obtained during the audits of the offending businesses.

[83] The appellant is a serious business, and the evidence did not impugn the credibility of the testimony given by its representatives; it has been recognized that a taxpayer's credible testimony may sometimes be sufficient to successfully rebut the accuracy of the presumption.[14]

[84] In support of her criticisms of the appellant's conduct, the respondent blames the appellant for not obtaining CSST compliance letters concerning the Employment Agencies; the appellant's duty under the *Act Respecting Industrial Accidents and Occupational Diseases* is set out in section 316 of the Act is another matter.

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[14] *Système intérieur G.P.B.R. Inc. c. A.R.Q., supra* at note 9.

> 316. The Commission may demand payment of the assessment due by a contractor from the employer who retains his services.
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> In the case of the first paragraph, the Commission may establish the amount of the assessment according to the proportion of the price agreed upon for the work corresponding to the cost of labour, rather than the wages indicated in the statement made according to section 291.
>
> The employer who has paid the amount of the assessment is entitled to be reimbursed by the contractor concerned and the employer may retain the amount due out of the sums that he owes the contractor.
>
> If an employer proves that he is retaining the services of a contractor, the Commission may inform the employer whether an assessment is due by that contractor.

[85] The appellant dealt directly with the Agencies' directors and communicated regularly with them. It could see that the Agencies were performing the services because their employees came to its business premises at the designated dates and times. It paid the taxes owing on the supplies it received. It verified the validity of their GST registration number, and for the Agency that had not yet obtained one, it did not pay or claim the corresponding ITCs. All this shows that it was sufficiently diligent in its relationships with the Agencies; lastly, it had no ground to believe that they were tax offenders.

[86] The respondent notes that the recent case law on disallowing ITCs increases the duty of verification on the part of companies doing business with employment agencies and that now it is the taxpayer or the party that contracts out work that must bear the risks of its subcontractors' fraud or other unlawful acts; that is an interpretation that must be nuanced.

[87] First, it is appropriate to put the cases that the respondent cites in context. In some cases, the supplies were not delivered. In that kind of situation, it is completely normal to disallow a registrant's ITC claim when it knows very well that it never paid the GST on the supplies it alleges it received because it was part of a false invoicing scheme.

[88] In the instant case, both parties acknowledge that the services were indeed provided. It follows that these authorities are not relevant.

[89] Secondly, it is also highly relevant to consider two authorities in particular, *Systematix Technology Consultants Inc. v. The Queen*[15] and *9088-2945 Québec Inc. v. The Queen*.[16] These cases address the validity of GST and QST registration numbers; several hypotheses are possible, such as the number is invalid, it simply does not exist or, worse, it is a usurped number that was issued in the name of another business. Through a simple verification with the appropriate authorities, it is possible to quickly and inexpensively discover this type of irregularity.

[90] In such a situation, it appears to me entirely appropriate to disallow a taxpayer's ITC claim; moreover, the Federal Court of Appeal in *Systematix Technology Consultant Inc.*, above, was very clear that these situations do not comply with subsections 169(4) and 241(1) of the ETA or with the conditions prescribed by the Regulations:

- no registration number appears on the invoices;
- the invoices contain a registration number that was valid only before the relevant period because the Minister had revoked it prior to that period;
- the invoices contain a registration number in the supplier's name that was valid, but the validity date was subsequent to the relevant period; and
- the registration number indicated on the invoices is not valid because it was not in the Minister's database.[17]

[91] This is the case where a taxpayer does business with a subcontractor that appropriated not only the commercial identity of another company but also its GST registration number; in such a situation, the taxpayer will not be able to claim the ITCs related to the supplies it received even if it paid the GST on those supplies.

[92] Indeed, in that situation, it cannot be said that the supplier's name on the invoice is correct because it was not that company that provided the service. It also cannot be said that it did business with an authorized intermediary because the subcontractor that stole its identity was neither its principal nor its agent.

[93] For this, it would have at least had to know that the fraudulent subcontractor was using its identity and its number or that it had engaged in actions suggesting to a *bona fide* third party that the subcontractor in question was its representative.

[94] In the absence of evidence confirming this situation, one cannot conclude that there was an apparent mandate, as defined in article 2163 of the *Civil Code of*

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[15] *Supra* at note 6.
[16] *Supra* at note 13.
[17] The Federal Court of Appeal cited with approval the trial judge's statements in this case at paragraphs 4 to 7 of its decision.

Québec.[18] In my view, that is what Justices Lamarre-Proulx and Boyle of this Court meant in *Ribkoff v. The Queen*[19] and *Comtronic Computer Inc. v. The Queen*[20] when they stated that the risk of fraud by subcontractors, in this context, is borne by the taxpayer/company that contracts out work.

[95] Lastly, the respondent refers to certain cases that address the same issue as the one raised herein, which are favourable to taxpayers. They hold that if the taxpayer verified the employment agency's GST registration number and had no reason to believe that the agency did not have the resources to provide the services received, the taxpayer was sufficiently diligent to claim the ITCs related to the receipt of these services.[21]

[96] The appellant contacted the Employment Agency and verified that the number on the invoicing was accurate. In exchange, the Agencies answered the call by directing the number of employees required to the premises where they performed the work to the appellant's satisfaction.

[97] Nothing in the evidence supports a finding of bad faith, negligence, carelessness, recklessness or even imprudence on the appellant's part.

[98] Also, it is true that the ARQ, in one of its interpretation bulletins, stated that a registrant that has an invoice issued by an accommodator in support of its ITC claim could be denied the right to its ITC if it was not acting in good faith.[22] The ARQ generally considers that a registrant "was not acting in good faith . . . [if] he could not, as a reasonable, diligent and informed person in his field of activity legitimately believe that the person who issued the invoice was the true supplier of the property or services acquired by the registrant";[23] there is no such requirement anywhere in the ETA or the Regulations. The ARQ enacted this, and this body does not have the power to turn administrative policies into laws.

[99] We are operating in a society where the primacy of the rule of law is all-pervasive. Taxpayers must be able to rely on statutes and regulations to determine

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[18] R.S.Q., chapter C-1991.
[19] 2003 TCC 397 at para. 95.
[20] 2010 TCC 55 at para. 33.
[21] *Système intérieur G.P.B.R. Inc. c. A.R.Q., supra* at note 9; *9188-7646 Québec Inc. v. The Queen, 2013 TCC 85, 9183-2899 Québec Inc. v. The Queen,* 2013 TCC 8; *Bijouterie Almar Inc. v. The Queen*, 2010 TCC 618; *Vêtement de sport Chapter One Inc. c. S.M.R.Q.*, 2008 QCCA 598; *Sport Collection Paris Inc. v. The Queen*, 2006 TCC 394.
[22] T.V.Q. 201-1/R2, Input Tax Refund — Insufficient Information and False Invoicing — Documentary Requirements, cancelled on June 30, 2010.
[23] *Ibid.*, para. 9.

what they can and must do. In such a context, the role of the courts is to interpret and apply the statutes and regulations, not to create or enact new ones.

[100] The business world is subject to multiple rules and regulations that often have the effect of burdening the administration and generating enormous costs, all of which directly and significantly affects productivity but also cost effectiveness.

[101] To succeed and hope for growth in a market that transcends borders and where fierce competition is coming from everywhere, it is absolutely essential and fundamental to reduce operational costs that do not relate to the purpose of the business.

[102] This is not a doctrinal approach but a reality that generally concerns all stakeholders.

[103] The approach of the respondent is precisely at odds with this reality: she wants to impose duties that Parliament did not contemplate on the one hand and, on the other hand, to impose a heavy and expensive duty to investigate the solvency and reliability of their suppliers, as well as the legality of their actions.

[104] The gratuitous mandate imposed on businesses must be able to count on the structure that has the expertise, resources and above all the power to support the mission that the state imposes on businesses.

[105] The tax authorities appear to impose duties on their agents that are not set out in the statute. Moreover, this is an approach that is completely contrary to the rules in the *Civil Code of Québec*.

[106] Certainly, agents have duties, in particular to act in good faith and to be a good fiduciary with obligations to account. In return, the principal, i.e. the respondent in this case, also owes duties to the agents.

[107] The first duty is certainly to facilitate the agent's work especially since the mandate is gratuitous.

[108] This duty is all the more important because the principal has the staff and the technical, material and financial resources to implement, follow up and monitor in a way that facilitates the work of the agent whose primary focus is operating a business, not collecting taxes for the state.

[109] In addition, everyone, which obviously includes agents, is presumed to be of good faith under article 2805 of the *Civil Code of Québec*. The tax authorities cannot conclude, on the basis of speculations and interpretations, that the agent was in bad faith and assess it on the basis of essentially hypothetical grounds. Bad faith, complicity, negligence and/or wilful blindness cannot be presumed; they must be proved, and the burden is on the respondent.

[110] In this case, the evidence is that the appellant always acted in good faith and acted properly in its relationships with the subcontractors.

[111] In the light of the answers obtained from the auditors in this case, it seems clear to me that the respondent would like to force businesses to invest in that direction. If that is the case, they will have to convince Parliament to adopt provisions imposing such a burden on businesses.

[112] The Supreme Court of Canada has been very clear on this point. For example, in *Ludmer v. M.N.R.*,[24] it said that "when interpreting the *Income Tax Act* courts must be mindful of their role as distinct from that of Parliament. In the absence of clear statutory language, judicial innovation is undesirable". Instead, promulgating new rules of tax law must be left to Parliament. Accordingly, it is not for the courts to strengthen the provisions of the statute when it is open to Parliament to be specific about preventing wrongdoings.

[113] As stated above, if Parliament had intended to impose liability on a company that does business with a tax offender for the tax frauds it committed without the company's knowledge, it would have said so expressly, as it did with respect to CSST contributions.

[114] Also, the fact that it strengthened the reporting requirements for employment agencies possibly shows that this industry was not adequately regulated.

[115] Lastly, why would Parliament have enacted rules addressing publicity and opposability in the *Act Respecting the Legal Publicity of Enterprises*[25] and the *Business Corporations Act*,[26] which codifies the common law concept of indoor

[24] [2001] 2 S.C.R. 1082, para. 38.
[25] Section 98. R.S.Q., chapter P-44.1.
[26] Section 13. R.S.Q., chapter S-31.1.

management[27] in Quebec civil law, if it did not want taxpayers to rely on public records?

[116] If a business were to be held responsible for its partner's tax fraud when the business did not collude with it or have any reason to suspect that it was a tax offender, this would completely change Canadian taxation principles. Indeed, since small and medium-size businesses do not have the resources for an internal auditing and risk management office, they will no longer want to take the risk of paying taxes to a Crown agent hoping that it will then remit them to the Crown. Instead, they will want to self-assess as is permitted for importation.[28]

[117] In 2009, the Supreme Court of Canada clearly explained the nature of the GST:

> [10] The GST, which was implemented in 1990 by legislation that amended the *ETA* (S.C. 1990, c. 45), replaced the former federal manufacturers' sales tax. The GST can be regarded as a value-added tax. It is collected at every stage of the manufacturing and marketing of goods and services and is payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown (s. 165 *ETA*). However, the supplier is responsible for collecting and remitting the tax (s.221(1) *ETA*). The supplier is deemed to hold the amounts so collected in trust for Her Majesty (s. 222(1) and (3) *ETA*) and must periodically file returns and make remittances. In addition, the Act establishes a system under which input credits can be claimed, at each step of the marketing and supply of the good, in respect of the taxes the supplier has had to pay to his or her own suppliers (ss. 141.01 and 169(1) *ETA*). The ultimate recipient bears the full burden of the tax (R. Brakel & Associates Ltd., *Value-Added Taxation in Canada: GST, HST, and QST* (2nd ed. 2003), at pp. 2-3). This Court has confirmed this as a valid exercise of the Parliament of Canada's taxing power (*Reference re Goods and Services Tax*, 1992 CanLII 69 (SCC), [1992] 2 S.C.R. 445). [29]

[118] Accepting or agreeing with the respondent's arguments and submissions would have the effect of denying or disregarding that doctrine of the Supreme Court of Canada.

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[27] [TRANSLATION] This concept generally exempts businesses from investigating their co-contractors prior to entering into a contract with them, in the interest of expediting business transactions and preventing them from being unduly disrupted by an expensive, impractical investigation process: definition from a paper by Paul Ryan on employment agencies at the 2012 Association de Planification fiscalet et financière Convention, Montréal, at p. 1.

[28] See sections 217 and ff. ETA.

[29] *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286.

[119] When the GST regime was established, Parliament's objective was to target the consumer or the final purchaser of a product as the payer of the GST owed to the state; the GST must be paid at every stage of the production chain; it is reimbursed when the final consumer purchases the product.

[120] It is a tax based on the [TRANSLATION] "destination" versus [TRANSLATION] "the origin". In other words, it is the destination of the goods and services that determines the imposition of the tax.

[121] For all these reasons, I find that the appellant has shown that it provided the ARQ with all the information prescribed by the ETA and the Regulations in order to be entitled to the disputed ITCs; it cannot lose those same ITCs simply because it dealt with employment agencies that proved to be tax offenders. The appeal is therefore allowed, and the assessment is vacated.

[122] The appellant submitted that it wanted to make comments if this Court allowed its appeal. On this point, there is no doubt that the purpose of such a request was to obtain a higher amount than what the tariff provides for in a case of this class under subsection 147(3) of the *Tax Court of Canada Rules (General Procedure)*.

[123] First, I recognize that this case has been the subject of unusual interest, which is no doubt reflected in a greater number of hours than normal; as for the arguments before the Court, again the work was absolutely impeccable.

[124] On the respondent's side, it is clear that her arguments were based on an interpretation of the case law that seemed to support her position.

[125] In such circumstances, I do not believe that this is a special case that warrants a higher costs award than what is provided. The award of a lump sum or of any other increase to the statutory tariff requires circumstances and an exceptional context where the history of the case shows elements of abuse, frivolousness and/or bad faith.

[126] In this case, certainly this judgment exposes the respondent's approach; on the other hand, that approach was not frivolous in that her theories were advanced on the basis of the jurisprudential doctrine.

[127] For these reasons, I do not believe that this case warrants an award of costs other than those set out in the applicable tariff, which are, moreover, awarded to the appellant.

Signed at Ottawa, Canada, this 4th day of February 2014.

"Alain Tardif"

Tardif J.

Translation certified true
on this 12th day of August 2014

François Brunet, Revisor

CITATION:	2014 TCC 36
COURT FILE NO.:	2011-1872(GST)G
STYLE OF CAUSE:	SALAISON LÉVESQUE INC. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
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