

Docket: 2005-2224(GST)I

BETWEEN:

9010-9869 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 13 and June 14, 2006, at Sherbrooke, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Guy Plourde

Counsel for the Respondent: Robert Poupart

JUDGMENT

The appeal from the assessment of Goods and Services Tax under Part IX of the *Excise Tax Act*, notice of which is dated March 30, 2005, and bears the number 4-17-5126, for the period from November 1, 1996, to October 31, 2000, is allowed in part, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment having regard to the admissions made in the table entitled [TRANSLATION] "Correction to Tupper Purchases (1999)" (Exhibit I-3), in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of July 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 17th day of August 2007.

Brian McCordick, Translator

Citation: 2007TCC365
Date: 20070710
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from an assessment made under the *Excise Tax Act* ("the Act") in respect of Goods and Services Tax (GST), bearing the number 4-17-5126 and dated March 30, 2005, for the period from November 1, 1996, to October 31, 2000.

[2] The Respondent framed the issues as follows:

- (i) the amount of tax on unreported sales (purchases plus mark-up), the Respondent having determined that this amount was \$79,338; and
- (ii) the amount of input tax credits (ITCs) that are disqualified because of the definition of "recipient", the Respondent having determined that this amount was \$84,318.

[3] The Appellant operates a business that sells and rents videocassettes and electronic games. The Appellant also acts as a kind of wholesaler to several small businesses in the neighbourhood. The Appellant also leased commercial buildings.

[4] In the course of its business, the Appellant engaged in numerous transactions, several of which had characteristics specific to this field. It purchased, resold, and rented out movies and video game cartridges. The prices varied widely, notably based on quality, but also based on the customers and the equipment. Moreover, there were discounts, free cassettes and various promotions to stimulate sales.

[5] In view of the number and wide variety of different transactions, it would have been helpful and perhaps even essential to have an adequate accounting system allowing all transactions to be properly identified.

[6] The Appellant argued emphatically that it had implemented such accounting, and that the information thereby entered was sufficient to answer all questions reliably, not only in order to meet its obligations as a GST collection agent, but also in order to allow it to claim and obtain the ITCs to which it was entitled.

[7] According to the Notice of Appeal, the Appellant's accounting system was beyond reproach. I shall reproduce, *inter alia*, paragraphs 4, 5, 8 and 20 of the Notice of Appeal.

[TRANSLATION]

(4) The justifications and supporting documents supplied by the Appellant should have been satisfactory to the auditor and should have convinced him not to employ this alternative method.

(5) Indeed, the supporting documents and/or invoices that were required for his audit have always existed and always been available.

...

(8) In point of fact, the Appellant kept such records, and retained such documents in support of the information in those records, as would enable the auditor to determine, corroborate or correct the amounts to be deducted, withheld, collected or paid under tax legislation.

...

- (20) The accounting procedure used by the Appellant was supervised and approved by a tax auditor, who spent nine (9) months in the business during the year 1996.

[8] The same Notice of Appeal discusses another reality, however:

- (6) Actually, the auditor provides another justification for relying on this method: He says that he noticed that there were several invoice numbers missing, because, insofar as his other observations were concerned (such as calculation errors, invoices entered twice, mistakes in adjusting entries or retractions, or omissions) the auditor was able to trace them and correct them, thereby resulting in his determination that the Appellant had remitted too much tax.
- (7) And yet, after the Appellant provided explanations and supporting documents, the auditor was able to see that what was missing were invoice numbers, not actual invoices, and that these numbers had never been used for the purpose of billing anything at all.

[Emphasis added.]

[9] The Notice of Appeal refers to grievances, errors or lapses attributable to the Respondent. Consistent with its Notice of Appeal, the Appellant devoted most of its energy at the hearing to efforts aimed at proving that the auditor was responsible for numerous lapses and mistakes during his audit. In fact, a reading of the Notice of Appeal makes this very clear:

[TRANSLATION]

- (3) First of all, the Appellant objects to the tax auditor's use of an alternative method, described in subparagraph 2(a), for reconstructing the sales through the use of purchases. The Appellant considers this decision unjustified and adds that it is faulty because the results obtained were erroneous, unreasonable and unrealistic.

...

- (8) In point of fact, the Appellant kept such records, and retained such documents in support of the information in those records, as would enable the auditor to determine, corroborate or correct the amounts to be deducted, withheld, collected or paid under tax legislation.

- (9) The auditor certainly cannot fault the Appellant on its inventory-keeping, considering that he personally determined that the rental and consignment returns, and several buybacks, were later sold in batches for next to nothing due to their rapid depreciation.
- (10) Moreover, upon analysing the auditor's work in determining the profit margins that were used to mark up the purchases in accordance with his alternative method, one sees that the auditor made several mistakes and takes no account of the reality of the Appellant's business for the following reasons:
- (a) The auditor uses the cost of buybacks to increase the Appellant's profit margins, and at the same time, its sales, whereas those buybacks should be applied to reduce sales, and, naturally, reduce the profit margin.
 - (b) The auditor uses movie rentals to increase profit margins when in fact they cause the Appellant a substantial loss.
 - (c) The sampling used by the auditor is in no way representative of the Appellant's true situation, as it does not take account of the fact that, for the years in issue, 57-64% of the sales are made to customers at a heavy discount which yielded profit margins below 3% (e.g., Accommodation Tupper, 1%).
 - (d) The use of samples which do not reflect the true situation of the Appellant's business produces biased results.
 - (e) The small sample size results in imprecise estimates which, in turn, lead to profit margin calculations that are appreciably off the mark.
 - (f) The auditor did not take into consideration the fact that films not sold within a short time of their release dates are systematically discounted. After just one week, new movies depreciate by almost 30% of the price set by distributors.
 - (g) The Appellant accounts for his sales and expenses on a net basis in relation to the cost of the goods sold.
 - (h) Rental and consignment revenues are accounted for when the customer pays. The movies are entered as expenses.

- (i) Since the selling price of movies is controlled by the major distributors, it is unrealistic to impute such large profit margins to the Appellant, especially since, as the auditor was able to see, all the purchase invoices were available.

All of these points compromise the auditor's assessment and confirm that it is unreasonable to found a claim on such work given the mistaken premises on which it is based.

- (11) During the audit, the Appellant showed the auditor that his approach was biased by taking each of the invoices, coding them and grouping them by category in order to create a sample structure that was representative of his business. Although this work showed the auditor that the results he arrived at were erroneous, the auditor did not see fit to consider this work done by the Appellant.
- (12) The profit margins established by the auditor are simply illusory and inconsistent with reality, especially since they would represent more than one million dollars in additional sales, a completely unrealistic and unthinkable figure, as the auditor was undoubtedly able to see.
- (13) The auditor's findings with respect to the profit margins are quite simply based on methodology that is too weak to be relied upon.
- ...
- (15) The Objections Directorate of the tax authority says that it realizes that the results obtained are probably different from reality.
- ...
- (19) The tax authority's inconsistency is certainly flagrant in that, on the one hand, the Appellant's sales are marked up by using purchases and yet, on the other hand, those same purchases are disallowed because the Appellant does not meet the definition of "recipient".

[10] For her part, the Respondent said that it was not possible to conduct an audit using the traditional and direct method, which consists of obtaining all the relevant data and documents, analysing them, and arriving at a valid, reliable and probative result.

[11] The Respondent made the following arguments, among others, to justify resorting to the alternative method:

- The Appellant's accounting system was so deficient that it did not allow total sales to be determined.
- The Appellant's accounting system was also deficient in that there was no way to ensure that all invoices were entered because the audit showed that some invoices were entered twice and that a great many invoices were never entered.
- The accounting system was deficient because it did not reflect all of the Appellant's business activities.
- There were more than 15 irregularities, some major. These irregularities made it impossible to do an accounting that was in keeping with standard practices.

[12] This lack of an adequate accounting system that conformed to standard practices is, in fact, quite well borne out by the testimony given by the auditor on June 13, 2006, and recorded at pages 21 to 23 of the transcript at questions 31 *et seq.*:

[TRANSLATION]

Q. So we may come back to that in detail. But for now, with respect to the accounting system, you had a few problems with the accounting system. Is that right?

A. Well, I saw that instead of using a standard accounting method, that is to say, a method where each of the invoices is systematically entered when produced, I saw right away that Mr. Boudreau was entering sales in the books by batch. So Mr. Boudreau explained to me that he transcribed invoice amounts and numbers into a Lotus spreadsheet program ... um, the amounts and invoice numbers appearing on the sales invoice.

Then, for each month, he totalled what he had compiled. Mr. Boudreau told me that in order to do this work, he used the invoices that Mr. Veilleux gave him. He explained to me that Mr. Veilleux only gave him the invoices that had been paid in full.

He also explained that his system, the work method used by Distribution Vidéo Québec, also involved pre-sales of movies and video games. This

meant that, in the week prior to placing its own orders, it had pre-sold things to its customers. And those pre-sales were already entered in a computer system at the registrant's place of business. This, um, allowed it to issue most of its invoices directly from its computer system.

So he explained to me that he kept a lot of statistics and that this computerized data bank was quite complete. So then I asked him right away, at the beginning of the audit, for a copy of that data bank. It would enable me to have a copy of the invoices that had been produced by the computer system.

Q. If I understand correctly, Mr. Maltais, these were pre-orders?

A. The pre-orders that become ... when they receive their own orders, they're filed with the pre-order invoice, which becomes the sales invoice. They use the pre-order invoice to ... Well, all it does is that, when they physically issue it, it becomes the actual sales invoice of the business.

Q. What happened with that?

A. Two or three days after I made my request, Mr. Boudreau told me that the computer systems specialist had come to their premises and erased the data bank because it took up too much space in their computer system. So at that point ... I, for my part, was pretty disappointed, because it would have allowed me to more easily corroborate the registrant's true sales to see if the method that Mr. Boudreau used to account for his invoices matched the actual sales that passed through the registrant's computer system.

...

[13] In order to illustrate the situation, I believe it is helpful to reproduce certain excerpts:

[TRANSLATION]

Transcript, June 13, 2006, at pages 28 and 29:

The list of the registrant's duplicate invoices ... with this particular issue, what I had to do, in the course of my work, was to corroborate the invoices entered in the Excel spreadsheet by Mr. Boudreau. And one of the parts had been entered directly in the books, one invoice at a time.

Q. Let me stop you right there. If I understand correctly, there were two accounting systems?

A. Yes. I believe that this was due to the effects of the registrant's computer system crashing several times, or to a change in its accounting method. However, at the beginning of the year, he had begun entering one invoice at a time in his accounting system. Then, at a certain point, he stopped doing that and used a spreadsheet to compile the invoices on external sheets, so to speak, and took the sum of those invoices to report the total of the invoices compiled in those accounting records.

...

[14] The auditor explained that he devoted a few months of full-time work to the audit; before he resorted to an alternative method, he tried to proceed based on the traditional approach, but he quickly realized that this would be totally impossible.

[15] The auditor said that he discovered 16 major errors, the vast majority of which involved a wanton disregard for elementary accounting practices. In light of this, the auditor concluded that, overall, the Appellant's accounting would not provide reliable and probative results.

[16] With respect to the many anomalies that he found, the auditor explained and described the work he had done. Among other things, he said that he told Mr. Veilleux and his accountant Jean-Paul Boudreau about several irregularities involving missing vouchers. The vouchers were supposed to be given to him in each of these instances, but they never were.

[17] He also testified that several hundred invoices were missing and that some invoices bore exactly the same number; the Appellant's explanation for this was that invoice pads were stolen.

[18] The Appellant's evidence consisted primarily of the testimony of Jean-Guy Veilleux and his accountant Jean-Paul Boudreau. Both men totally contradicted the auditor and insisted that all the identified errors were corrected as soon as they were noticed during the audit; they firmly maintained that all vouchers had been made available to the auditor.

[19] Repeatedly, Mr. Veilleux and Mr. Boudreau asserted unequivocally that all useful, relevant and necessary documents, and all the appropriate information and

explanations, were always available, and added that everything was in keeping with standard practices and was supported by all the documents needed to give a full accounting for both GST and ITC purposes.

[20] The Appellant's director blamed the print shop for the absence of invoices bearing hundreds of numbers, and promised to obtain the print shop's written explanations, but he never did.

[21] Another time, Mr. Veilleux, still attempting to explain the absence of documents essential to a traditional auditing approach, spoke of a theft. Once again, the auditor was not given a copy of the police report or a list of the stolen property, even though he was supposed to receive the documents pursuant to formal undertakings given by the Appellant or its representatives, a director and an accountant.

[22] There was another reference to an outright theft of invoice booklets by a customer who was left alone for a brief moment at one of the establishments. The implication was that such a misdeed made several theories possible.

[23] Upon being asked to explain another anomaly, Mr. Veilleux stated that a former employee of the Appellant's, who had left to start up his own business, probably used invoices belonging to his former employer, the Appellant, in his new business.

[24] Mr. Veilleux said that the Appellant made sales outside the country, and that the sales in question were not subject to GST. When asked to provide credible supporting documents in this regard, he simply said that he did not have them.

[25] The numerous contradictions are not a matter of interpretation or perception, but are brought out by even a cursory analysis of many exhibits and documents.

[26] Despite the evident shortage and unreliability of supporting documents, and certain rather outlandish and questionable explanations, Mr. Veilleux and his accountant once again submitted that all supporting documents were available and that they answered all the auditor's questions — assertions, obviously, that the auditor formally denied.

[27] Despite the complexity of the activities carried on by the Appellant's business, Mr. Veilleux, the only person in authority, never consulted a competent person about the implementation of a system that would meet requirements.

[28] What is more, several times he challenged the competence and expertise of the auditor with respect to the type of business that he ran, thereby acknowledging its special nature. However, despite the special nature of the business, he entrusted this heavy responsibility to Jean-Paul Boudreau, over whom he obviously held considerable sway, and who, moreover, had neither the knowledge nor the experience to take on such duties.

[29] In addition to all the evidence that totally contradicted the contention that everything was available and in order, there were a whole series of details that showed unequivocally that the Appellant's accounting system was not as clear as Mr. Veilleux and Mr. Boudreau claimed.

[30] I am referring, among other things, to the numerous sales invoices that were used not for sales, but rather to record goods placed on consignment. I am also referring to the duplicate sales entries, to certain completely arbitrary reductions and to certain sales-related numbers.

[31] Not only did the evidence show that an alternative audit method was appropriate, but I am entirely convinced that such an approach was the only possible one. Indeed, it is not only the auditor's explanations concerning several irregularities, but also the attitude and conduct of Mr. Veilleux and his accountant and the numerous breaches of undertakings, that justify the decision to use an alternative method.

[32] The method that was selected consisted in collecting data from a sample that was likely to yield a probative result. To ensure the quality of the process, the auditor first had a statistical expert with the Department validate his work.

[33] One detail that is truly astonishing is that Mr. Veilleux implicitly acknowledged the legitimacy of such a method during meetings with the auditor. He even tried to convince the auditor to rely primarily on the figures from his main customers, who, he said, accounted for the largest share of his sales, but also the least profitable because the profit margins for those large customers were close to nil.

[34] The evidence showed very persuasively, on a balance of probabilities, that the Appellant's accounting system was deficient and totally unsatisfactory, thereby warranting the use of an alternative method, which, in the instant case, consisted in using a sample that would enable probative findings to be made.

[35] The Respondent and the Appellant both relied on expert witnesses to support their respective positions. The expert witnesses that they recognized were Claude Boivin for the Appellant, and Bernard Collin for the Respondent.

[36] The Respondent called Bernard Collin to testify in order to validate both the work that was done and the assessment under appeal.

[37] As for the Appellant, it retained the services of Claude Boivin as an expert. Mr. Boivin essentially asserted that the reliability of a result obtained from a sample is directly correlated to the quality of the sample, and that, ideally, all the data should be used. The Court agrees entirely with these assertions.

[38] Based on this axiom, the Appellant's expert expressed certain reservations about the quality of the auditor's work, arguing primarily that the sample that was used could and should have been larger; the Court agrees with this as well, since anything that provides greater reliability is obviously preferable.

[39] The issue in the case at bar is as follows: must the auditor's work, which is clearly imperfect, be rejected or disregarded? If the Court reaches this conclusion, it will have to determine what the assessment should have been, based on the evidence available.

[40] Claude Boivin was called upon to justify the statistical method on which the assessment was based. He explained that he performed various checks to verify the quality of the samples that were selected. He concluded that the method used made it possible to obtain a probative, and, most certainly, very reasonable result. He acknowledged without hesitation that the larger the sample is, the more probative the findings will be, and that the ideal situation is to use all the data.

[41] As for the Appellant's expert, his main assertion was that he felt that the size of the sample was too small — so small, in fact, that it affected the result. He was not able to submit his own statistical study, as his purview was limited to a critical appraisal of the Respondent's expert's work.

[42] He did not persuasively show any specific failures or blatant errors. His testimony essentially consisted in expressing reservations and concerns about the quality of the data taken into consideration. He did not reject the approach; essentially, he testified about the connection between the reliability of the sample data and their quality and quantity.

[43] He asserted that the quality and reliability of the conclusions drawn from a statistical approach depend directly on the sample size, and the Court endorses this opinion without reservation.

[44] In the case at bar, the ideal approach was a possibility and could have been used, if only the Appellant had implemented an adequate accounting system that was in keeping with standard practices. If the Appellant had done so, the traditional and direct audit method could have been used and the alternative method would have been inappropriate and unjustified.

[45] Instead, the Appellant chose to entrust the important matter of its accounting to a person who clearly had neither the knowledge nor the skills required. Moreover, its director himself acted in an uninterested manner — in fact, some would say with great negligence — in the management of the Appellant's affairs, because he had no genuine desire to keep an acceptable accounting. Perhaps he believed that confusion and ambiguity would better serve the interests of the Appellant; what is certain is that there was no true accounting system in place.

[46] As agents of the state, all GST registrants must comply with the provisions of the Act in order to properly carry out this task and ensure that an audit capable of producing reliable findings can be conducted at any time.

[47] Good faith, excuses, ignorance and incompetence can neither explain nor justify a total or even partial absence of an appropriate accounting system that is in keeping with standard practices.

[48] When a person must register to collect taxes in the course of his activities, the person must implement a true accounting system. Otherwise, he is liable to suffer what could be very serious consequences, in terms of tax, interest and penalties.

[49] Indeed, unless there is adequate accounting and all vouchers are available, an alternative audit method will have to be used, and it is a foregone conclusion that such a method cannot be as reliable as a direct audit method, which is made possible by an accounting system that follows standard practices and the provisions of the Act.

[50] Following the use of some alternative method, it is very easy for a registrant who is a party to a tax dispute to point to errors, bring up various grievances and

attack both the quality of the alternative method and the auditing work thereby performed. It is also easy to claim that the alternative method selected was imperfect and unreliable.

[51] However, the registrant's chances of success will be very slim, especially if the work was done in good faith, judiciously and within reasonable parameters.

[52] Thus, unless the registrant can show that the approach used was abusive and vindictive, that it was not serious, and that it was tainted by arbitrariness and unacceptable work methods, the registrant will have to live with the financial consequences, however painful they may be.

[53] In the case at bar, the Respondent began by justifying the use of an alternative method. She also listed the numerous facts that led her to resort to such a method.

[54] Admittedly, some of these elements were less determinative than others. The question whether it is legitimate to resort to an alternative accounting method has nothing to do with the number of errors found; it is essentially tied to the seriousness of those errors or of the lack of information and documentation.

[55] Thus, a registrant who has no supporting documents in his possession certainly cannot claim that the use of an alternative method is inappropriate; this error alone would be amply sufficient to justify resorting to an alternative method.

[56] In the case at bar, I find that the fact that the auditor noted several significant and determinative flaws amply justifies the use of an alternative method.

[57] A taxpayer who has been assessed by means of an alternative method and wishes to contest the merits of the assessment must preferably prove that the use of such a method was inappropriate under the circumstances because the available vouchers were sufficient to permit an assessment to be made using a traditional and direct method.

[58] In fact, during the hearing, I told the Appellant's representative that I found it quite strange that he had expended no effort or money on preparing a case for what the assessment should have been, especially since this was a simple, realistic and extremely reliable exercise given that he and the accountant insistently asserted that everything was in order and that all supporting documents were available.

[59] In other words, if all the vouchers and records were available, why was no adequate evidence prepared to show what the assessment should have been? Not only was no such evidence adduced, but all the Appellant's efforts consisted essentially in criticizing the audit work.

[60] In tax cases, explanations that are essentially oral and are aimed at discrediting the auditors' work have little or no chance of being accepted, barring the most exceptional circumstances.

[61] It is not that bad faith is to be presumed; rather, essentially, it must be understood that in a system based on self-assessment, it is entirely normal and legitimate to expect that the person who is acting as an agent for the State be able, at any time, to provide an accounting based on certain elementary rules that permit a reliable result to be achieved.

[62] I do not accept the allegation that all the documents were available and complete and that a reliable result could be achieved with them; that explanation was outlandish, totally implausible, and wholly inconsistent with the evidence adduced. The mere fact that a very large number of invoices were missing and that some invoices bore the same number totally refutes this allegation made by the Appellant's director and accountant.

[63] Accepting the essentially oral and completely implausible explanations (theft, loss, error by the print shop, computer problem, complexity of operations, etc.) would have the effect of approving aberrations that are totally irreconcilable not only with the provisions of the Act, but also with basic common sense.

[64] In fact, if all the documents and vouchers were available and the accounting was adequate, why were they not submitted to a competent accountant so that he could produce an expert report consistent with the Appellant's arguments? Why did the Appellant not submit a result drawn from a valid sample by its own expert?

[65] The Appellant preferred to give the Court the report of an expert who asserts that the reliability of the auditor's findings was doubtful given the quantity of data taken into consideration.

[66] Is this sufficient to discredit the work that the Respondent did to justify the assessment? I find that it is not, and there is added support for my conclusion in the fact that the Appellant's evidence on the subject does not permit one to conclude

that the approach was unreasonable and that the auditing and analysis work that was done was of poor quality.

[67] I did not understand why there was no direct evidence of what Mr. Veilleux and Mr. Boudreau said was complete in terms of both quality and quantity; in fact, I said so at the hearing.

[68] It would have been easy, and above all more reliable, to submit direct evidence substantiated by various witnesses. Why was no such evidence adduced? The Court has but one explanation: under the circumstances, such evidence was impossible to adduce given the absence of documents and the numerous administrative inconsistencies.

[69] The burden of proof was on the Appellant. This does not release the Respondent from the duty to make a case of good quality using methods that generate reasonable and plausible results or findings.

[70] The fact that the Appellant managed to show certain lacunae and even a significant omission — a fact that the Respondent actually acknowledged from the outset — does not have the effect of discrediting the auditor's work. If it did, this would be quite surprising, since alternative methods are, by their very nature, less reliable and more vulnerable, and produce more questionable results.

[71] The Appellant did not meet its statutory obligations under section 286 of the Act, which reads:

- (1) Every person who carries on a business or is engaged in a commercial activity in Canada, every person who is required under this Part to file a return and every person who makes an application for a rebate or refund shall keep records in English or in French in Canada, or at such other place and on such terms and conditions as the Minister may specify in writing, in such form and containing such information as will enable the determination of the person's liabilities and obligations under this Part or the amount of any rebate or refund to which the person is entitled.
- (2) Where a person fails to keep adequate records for the purposes of this Part, the Minister may require the person to keep such records as the Minister may specify and the person shall thereafter keep the records so specified.
- (3) Every person required under this section to keep records shall retain them until the expiration of six years after the end of the year to which they relate or for such other period as may be prescribed.

- (3.1) Every person required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period set out in subsection (3).
- (3.2) The Minister may, on such terms and conditions as are acceptable to the Minister, exempt a person or a class of persons from the requirement in subsection (3.1).
- (4) Where a person who is required under this section to keep records serves a notice of objection or is a party to an appeal or reference under this Part, the person shall retain, until the objection, appeal or reference and any appeal therefrom is finally disposed of, every record that pertains to the subject-matter of the objection, appeal or reference.
- (5) Where the Minister is of the opinion that it is necessary for the administration of this Part, the Minister may, by a demand served personally or by registered or certified mail, require any person required under this section to keep records to retain those records for such period as is specified in the demand.
- (6) A person who is required under this section to keep records may dispose of the records before the expiration of the period in respect of which the records are required to be kept if written permission for their disposal is given by the Minister.

[72] Since the Appellant adduced no direct evidence and was essentially content to criticize and make certain complaints about the work that was done, the Court can obviously not conclude that the Appellant met its burden of proof.

[73] However, the quality of the evidence that the Respondent submitted was adversely affected by the poor quality of the available data. Considering the numerous constraints that this file involved, the evidence has shown that the colossal work was done in an amply acceptable manner and that the conclusion on which the assessments were based was reasonable; thus, the Court has no reason to discard them.

[74] As for the ITCs, analysis of the invoices showed that the vouchers (purchase invoices) did not meet the requirements of the Act, notably because several purchase invoices were issued to third parties.

[75] The definition of the term "recipient" in subsection 123(1) of the Act reads as follows:

"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,

(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,

(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(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;

[76] The Appellant did not meet this definition and was not entitled to the ITCs for the invoices in respect of which it did not come within the Act's definition of the term "recipient".

[77] The Respondent refused to allow certain ITCs on the ground that the invoices were not adequate because they did not meet the requirements provided for in the Act. Those requirements are contained in section 169 of the Act, which reads:

169. (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in 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:

$A \times B$

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

(a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year;

(b) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

(1.1) Where a person acquires or imports property or a service or brings it into a participating province partly for use in improving capital property of the person and partly for another purpose, for the purpose of determining an input tax credit of the person in respect of the property or service

(a) notwithstanding section 138, that part of the property or service that is for use in improving the capital property and the remaining part of the property or service are each deemed to be a separate property or service that does not form part of the other;

(b) the tax payable in respect of the supply, importation or bringing in, as the case may be, of that part of the property or service that is for use in

improving the capital property is deemed to be equal to the amount determined by the formula

$$A \times B$$

where

A is the tax payable (in this section referred to as the “total tax payable”) by the person in respect of the supply, importation or bringing in, as the case may be, of the property or service, determined without reference to this section, and

B is the extent (expressed as a percentage) to which the total consideration paid or payable by the person for the supply in Canada of the property or service or the value of the imported goods or the property brought in is or would be, if the person were a taxpayer under the Income Tax Act, included in determining the adjusted cost base to the person of the capital property for the purposes of that Act; and

(c) the tax payable in respect of that part of the property or service that is not for use in improving the capital property is deemed to be equal to the difference between the total tax payable and the amount determined under paragraph (b).

(2) Subject to this Part, where a registrant imports goods of a non-resident person who is not registered under Subdivision d of Division V for the purpose of making a taxable supply to the non-resident person of a commercial service in respect of the goods and, during a reporting period of the registrant, tax in respect of the importation becomes payable by the registrant or is paid by the registrant without having become payable, the input tax credit of the registrant in respect of the goods for the reporting period is an amount equal to that tax.

(3) No amount shall be included in determining an input tax credit of a person in respect of tax that becomes payable by the person under subsection 165(2) or section 212.1 while the person is a selected listed financial institution unless

(a) the input tax credit is in respect of

(i) tax that the person is deemed to have paid under subsection 171(1), 171.1(2), 206(2) or (3) or 208(2) or (3), or

(ii) an amount of tax that is prescribed for the purposes of paragraph (a) of the description of F in subsection 225.2(2); or

(b) the person is permitted to claim the input tax credit under subsection 193(1) or (2).

(4) 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; and

(b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax payable in respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

(5) Where the Minister is satisfied that there are or will be sufficient records available to establish the particulars of any supply or importation or of any supply or importation of a specified class and the tax in respect of the supply or importation paid or payable under this Part, the Minister may

(a) exempt a specified registrant, a specified class of registrants or registrants generally from any of the requirements of subsection (4) in respect of that supply or importation or a supply or importation of that class; and

(b) specify terms and conditions of the exemption.

[78] The auditor admitted that a mistake was made, notably in the purchases listed in the table entitled [TRANSLATION] "Correction to Tupper Purchases (1999)" (Exhibit I-3), where the file for the 1999 taxation year was not accepted. Since the admission had the effect of reducing the assessment that gave rise to this appeal, the appeal should be allowed in order to permit the relevant corrections to be made.

[79] Since the assessment under appeal will have to be amended, I must allow the appeal, even though the requisite correction will have a marginal effect on the assessment.

[80] There shall be no costs.

Signed at Ottawa, Canada, this 10th day of July 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 17th day of August 2007.

Brian McCordick, Translator

CITATION: 2006TCC365

COURT FILE NO.: 2005-2224(GST)I

STYLE OF CAUSE: 9010-9869 QUÉBEC INC.
AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Sherbrooke, Quebec

DATES OF HEARING: June 13 and 14, 2006

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

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