Citation: 2008TCC5
Date: 2008**0310**
Docket: 2003-1066(GST)G

BETWEEN:

TELUS COMMUNICATIONS (EDMONTON) INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Hershfield J.

I. Introduction

[1] This appeal concerns supplies paid for by the Appellant pursuant to an assumption of liabilities made as part of an acquisition by the Appellant of the local telephone exchange business formerly carried on by Edmonton Telephones Corporation (Ed Tel) a wholly owned subsidiary of the City of Edmonton. The acquisition was effective March 10, 1995.

[2] The supplies were contracted for by Ed Tel and made by suppliers before the acquisition of the business but had not been paid for at the time of the acquisition. The Appellant assumed the liability to pay for these supplies and did in fact pay for them after the acquisition, including the GST payable in respect of them. The Appellant then claimed **input** tax credits (ITCs) in respect of such GST payments.

[3] In a nutshell, the Respondent says that the Appellant was not the recipient of the supplies and cannot claim the ITCs notwithstanding that it paid the GST as a party liable to pay for the supply. The Respondent argues that the Appellant's liability was to pay Ed Tel the purchase price of the business acquired and that the assumption of Ed Tel's liabilities was in payment of that liability. There was no contractual privity between the suppliers and the Appellant – the liability was not to the supplier. Liability to the supplier is argued to be a requirement for the Appellant to be the recipient of the supplies in respect of which ITCs can be

claimed. As well, there is a secondary issue raised by the Respondent that relates to asserted invoice deficiencies should I find that the Appellant was the recipient of the subject supplies.

[4] In a nutshell, the Appellant argues that it meets the requirements of the relevant provisions of the *Excise Tax Act* (GST Portion) (the "*Act*") to be treated as the recipient by virtue of its liability to pay for the supplies. Failing that, the Appellant argues that it is entitled to a rebate and/or reduction of its net tax payable having paid GST without a liability under the *Act* to pay it. As well, the Appellant takes issue with the assessing methodology employed in determining the quantum of ITCs denied in respect of small transactions. The method employed in respect of small transactions, supplies with GST payments of less than $10,000, was to extrapolate from selected sample invoices paid in a given month what percentage of ITCs claimed in respect of that month were for supplies made prior to March 10, 1995. The percentage determined by the sampling was applied against the entire small transaction ITC claims for the month and the product of that calculation was the amount of the ITC claim denied for that month. While the assessment period covered March 1, 1995 to December 31, 1995, the sampling results obtained did not justify going further than May, 1995. In the case of large transactions where the ITC claim was over $10,000, each invoice was examined. Based on such examination there were no ITCs denied in respect of supplies paid for after May, 1995. That is, the ITC claims in dispute are only those in respect of which supplies were paid for between March 10, 1995 and the end of May, 1995.

II. The Acquisition

[5] The transactions that gave rise to these issues are set out in the Partial Agreed Statement of Facts appended to these Reasons. There were a series of transactions and transfers completed by way of an arrangement under the *Canada Business Corporations Act* (the "Arrangement"); however, that series only distracts from the central issues before me. Counsel for the parties effectively agreed that treating the series as if there was a direct acquisition by the Appellant of the local telephone exchange business formerly carried on by Ed Tel would produce the same result as tracing the consequences through every step in the series. That is the approach I will take. I am satisfied that doing so facilitates the analysis without distorting or prejudicing it.

[6] Taking this approach, I am satisfied that the following facts can be accepted as setting the proper framework for my deciding the issues before me. They are:

- The Appellant acquired all of the undertaking, property, assets and rights of Ed Tel, including goodwill, of the local telephone exchange business formerly carried on by Ed Tel (the "Business") effective March 10, 1995 (the "Cut-off Date") pursuant to the Arrangement;

- Joint elections were made under subsection 167(1) of the *Act*;

- Prior to the acquisition, Ed Tel had contracted for supplies in the normal course of carrying on the Business. All the supplies relevant to this appeal (the "Supplies") are those supplies that were so contracted and that were made by suppliers before the Cut-off Date;

- None of the Supplies had been paid for at the time of the acquisition;

- The purchase price for the Business acquired was payable on the effective date by the Appellant by the issuance of shares and debt instruments of the Appellant and by the assumption of liabilities of the vendor, Ed Tel, including the liability of Ed Tel to pay for the Supplies;

- Ed Tel was not released of its liability to suppliers under the contracts comprising the Arrangement;

- There was no contractual relationship between the suppliers of the Supplies and the Appellant;

- Pursuant to its undertaking, the Appellant paid for the Supplies after March 10, 1995 in the ordinary course of operating the Business acquired from Ed Tel including GST invoiced in respect of the Supplies;

- The Appellant claimed ITCs in respect of such GST payments.

III. Arguments and Analysis

The Recipient Issue

[7] I will deal firstly with the principal position of the Respondent. The Respondent says that the Appellant is not the "recipient" of the Supplies and therefore cannot claim ITCs pursuant to subsection 169(1).

[8] Section 123 of the *Act* defines “recipient” as follows:

> "**recipient**" – “recipient” of a supply of property or a service means
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> (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
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> (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;

[9] ITCs are provided for in subsection 169(1) of the *Act* which reads as follows at the relevant time:

> **169. (1) General rule for [input tax] credits** -- Subject to this Part, where property or a service is supplied to or imported by a person and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply or importation becomes payable by the person or is paid by the person without having become payable, the input tax credit of the person in respect of the property or service for the period is the amount determined by the formula:
>
> $$A \times B$$
>
> where
>
> A is the total of all tax in respect of the supply or importation 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 or imported 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 for consumption, use or supply in the course of commercial activities of the person.

[10] The Respondent argued that only the recipient can claim ITCs even though subsection 169(1) makes no express reference to a "recipient". However, the wording of the provision is to allow an ITC where "property or a service is supplied to or imported by a person". The suffix to the definition of "recipient" includes "any reference to a person to whom a supply is made". The Supplies in the case at bar were to Ed Tel so the reference in subsection 169(1) to a person must be read as a reference to Ed Tel as the recipient.

[11] I agree then with the conclusion that Ed Tel was a recipient as that term is defined to the extent that matters. Regardless, Ed Tel meets the ITC requirements of 169(1) as the person to whom the Supplies were supplied. That is, the express language of the subject provision confirms that ITCs in respect of a particular taxable supply transaction were, as the *Act* read in 1995, available to persons to whom property was supplied pursuant to that transaction. That was Ed Tel, not the Appellant, in the case of the transactions providing for the Supplies. The Appellant acquired the supplies that had been the Supplies made to Ed Tel but they were, in relation to the Appellant, supplies made under a second non-taxable transaction, namely the conveyance provided for pursuant to the Arrangement. Still, accepting that "recipients" *per se* are entitled to ITCs under subsection 169(1), I will go on to consider the Appellant's argument that it is a "recipient" of the Supplies by virtue of its liability to pay for them and as such is entitled to the ITCs claimed.[1]

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[1] That "recipients" per se are entitled to ITCs has been held to be the case in several decisions of this Court and is not a position with which the Respondent took issue. See for example *Bondfield Construction Co. (1983) Ltd. v. R.*, [2005] G.S.T.C. 110 (T.C.C.) at paragraph 121. While the Respondent conceded that "recipients" are entitled to ITCs it did not concede that the Appellant was a "recipient". One argument made by the Respondent was that to be the "recipient", the invoice for the supply must be in the name of that person. Except for comments made later in these Reasons in respect of regulatory requirements for claiming ITCs, these Reasons do not dwell on this argument. It is simply an argument without merit. No claim has been made by the Appellant that it was a party to any agreement with any person that could have resulted in that person invoicing the Appellant as the recipient. I do not give that fact any weight in determining the issue of who the recipient of the Supplies was. Indeed, even the Respondent wants to take that position when it suits it to do so.

[12] The Appellant argued that it was a "recipient" of the Supplies as defined in the *Act* on the basis that it was, as set out in paragraph (a) of the definition, liable under an agreement to pay the consideration for the Supplies. In effect, the Appellant argues either that there is no bar to there being more than one "recipient" of a supply as the term is defined (since Ed Tel was liable under agreements with suppliers, it too would be a "recipient") or that the assumption and payment of a liability substitutes one recipient for another. Allowing such construction of the *Act* would give way to a number of tenuous possibilities not the least of which would be to allow a non-registered exempt supplier to transfer ITCs to a registered supplier. Such construction would also have the effect of blurring or transferring the liability to pay GST under section 165 and impacting the Crown's right to collect it under section 296.[2] Such construction then is not, in general terms, a tenable one in my view. The Crown's right to collect GST from the recipient (although secondary to its right to collect from suppliers[3]) is a right that must, as a general rule, be limited to the person from whom the supplier can enforce payment where that person is the recipient by virtue of that liability. Further, even if there are two persons against whom the supplier could enforce payment (say the person acquiring a supply and that person's guarantor) it seems there would only be one "recipient". The "recipient" by definition is the person liable to pay "that consideration". That person, in my view, must be the person making the payment *as* consideration for the particular supply to which the term "recipient" relates. The recipient of a supply is not a person required to pay the supplier an amount equal to the consideration payable on account of a liability of that person which arose as a consequence of a separate supply between that person and that recipient.

Where the Appellant was named in one invoice as the recipient, the Respondent did not regard it as the recipient of that supply because other evidence (of who contracted for and who received and who was liable to pay for that supply) revealed that it was not the recipient which is to admit that the name on the invoice was determinative of nothing. The only issue then in determining whether the Appellant was a recipient of the Supplies is whether its liability to pay for them makes them a "recipient" as that term is defined in the *Act*. The definition of "recipient" puts first emphasis on the person who is liable to pay for the supply. See *West Windsor Urgent Care Centre Inc. v. R.*, [2005] G.S.T.C. 179 at paragraph 26.

[2] Recipients are liable for tax under section 165 and assessable under paragraph 296(1)(*b*). If there was more than one recipient there would be potential for double tax on the one hand and a collection problem on the other hand given the restriction in subsection 278(2) as discussed in *Royal Bank v. R.*, 2007 TCC 281; [2007] G.S.T.C. 122 (T.C.C.).

[3] See subsection 278(2) and *Royal Bank v. R.*, at paragraphs 68-72.

[13] In any event, where there is an agreement between a supplier and the person to whom the supply is made for that person's benefit (Ed Tel in the case at bar), there is only one paragraph of the definition of "recipient" that can apply; namely paragraph (a). I see little room to argue in this case that the agreement referred to in paragraph (a) of the definition of "recipient" can be any other than *that* agreement – the agreement between the supplier and the party or parties contracting with the supplier for the supply to be made. It cannot be another agreement such as the assumption agreement in the case at bar.

[14] I note here that this view is not intended to be conclusive of all circumstances that may arise. Indeed, different factual circumstances have led this Court to afford "recipient" status, and status to claim ITCs, to persons who have paid the GST for supplies made to another even where the other person had, under an agreement, a liability to pay for those supplies. The Appellant naturally relies on these cases. However, I am of the view that they can and must be distinguished.

[15] In *163410 Canada Inc. v. Canada*[4] a bankrupt contractor retained to construct a seniors' residence had been paid for work not yet completed and was indebted to subcontractors. To save the project, fresh money was required. The appellant was the promoter of the project and arranged with the project lender for the advance of fresh funds to it for dedicated project purposes. Such funds were held in trust for the appellant's use. According to the agreements in place when the funds were set aside, the project lender's lawyers were paid out these set aside funds for services performed both before and after the rescue of the project was undertaken. Regarding the issue as to whether or not the appellant was the "recipient" of the legal services, this Court found that because the appellant was liable to pay for the services out of funds set aside for it, it was the "recipient". Although it is suggested at paragraph 11 that this conclusion was not dependent on the appellant being the law firm's client, the suggestion at paragraph 8 is that the Court found and relied on there being an agreement between the law firm as the supplier and the appellant as the party liable to pay for the supplies. This distinguishes the case at bar. In the case at bar there is no agreement between the Appellant and the suppliers. As well, the Court in *163410 Canada Inc*. found that the agreement under which the appellant paid for the supply was the governing agreement for the purposes of paragraph (b) of the definition of "recipient" which was to find that there was no other agreement pursuant to which the law firm could

[4] [1999] G.S.T.C. 44 (Eng.) (T.C.C.); 1998 CarswellNat 3000 (T.C.C.).

impose a liability for its fees on the project lender. The Court regarded the rescue agreement as prevailing over, if not replacing, any such agreement between the law firm and the project lender so as to, in effect, frustrate the operation of paragraph (a) of the definition of "recipient". I can make no such findings in the case at bar.

[16] Another construction of *163410 Canada Inc.* is that in determining the application of paragraph (a) or (b) of the definition of "recipient", one does not only look to the existence of a liability to pay for a supply but rather one must look to the person who is ultimately liable to pay and who in fact makes the payment. This was how *163410 Canada Inc.* was applied in *Immeubles Sansfaçon Inc. c. R.*.[5] At paragraphs 33 and 34 this Court held that the person ultimately liable to pay was the "recipient" not the person who paid nothing notwithstanding a liability to pay. This approach was adopted in *Bondfield Construction Co. (1983) Ltd. v. R.*[6]

[17] However, the facts of these cases are distinguishable on the same basis that *163410 Canada Inc.* is distinguishable.

[18] In *Bondfield* the appellant incurred a liability for a supply under an agreement with a supplier. The appellant paid for the supply, but was reimbursed by a third party whose faulty work created the need for the supply in question. The appellant was treated as an intermediary or conduit through which the third party incurred the liability to the supplier. Although there was no privity of contract between the supplier and the third party, it was the third party's money that was spent. The third party was the "recipient". In the case at bar, it was Ed Tel's money that was being spent (its proceeds of disposition from the sale of the Business). The Appellant was the conduit though which Ed Tel ultimately paid its suppliers.

[19] In *Immeubles Sansfaçon Inc.* the appellant agreed to pay a municipality's infrastructure costs on a land development project. The municipality contracted with suppliers who invoiced the municipality. The municipality passed on the invoices to the appellant. The municipality in that case was the conduit through which the appellant became liable and it paid with its money, not money owed to the municipality for a different supply. The appellant therefore prevailed. In the case at bar, the Appellant wrote the cheque with Ed Tel's money and cannot prevail.

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[5] 2000 CarswellNat 3179; [2001] G.S.T.C. 10 (Eng.) (T.C.C.).

[6] 2005 TCC 78; [2005] G.S.T.C. 110 (T.C.C.).

[20] The Appellant also relies on this Court's decision in *Bokrika Inc. v. R.*.[7] In that case a municipality became liable to pay third parties to remedy deficiencies arising under a contract with the appellant. The appellant's funds (via the appellant's line of credit) were used by the municipality to pay for deficiency remedying supplies. The appellant was found to be the "recipient" even though it was not a party to the agreement to make those supplies. Again the municipality was merely the conduit using the "recipient's" money. That is the inverse of the events in the case at bar.

[21] Accordingly, I do not find these cases, relied on by the Appellant, to be of assistance to it.

[22] Before turning to the Appellant's alternative arguments, I note that the Appellant argued that the amendment to the *Act* effective in 1997 helps make its point that a contractual connection between the supplier and the person to whom the property was supplied was not required under the provision as it read prior to that amendment. The Appellant argued that effective April 1, 1997 the input tax credit provision in subsection 169(1) was tightened by ensuring that only the person who "acquires" the supply (as opposed to the person to whom the property was supplied) can get the ITC. The argument is that although the Appellant did not acquire the supplies, it could still be a recipient as the *Act* read at the relevant time. It seems to me that this ignores a requirement in subsection 169(1) as it read in 1995 that the Supplies had to be supplied to them. In my view, Ed Tel was both the person who acquired the Supplies and the person to whom the Supplies were supplied. In any event, I do not find the Appellant's argument helpful. That there may have been an anomaly or uncertainty in the *Act* prior to the 1997 amendment respecting property brought into a province that needed to be clarified does not persuade me to accept that amendment as assisting the Appellant's argument.[8]

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[7] 2006 TCC 301; [2006] G.S.T.C. 78 (T.C.C.).

[8] The Technical Notes (July 1997) in respect of the April 1997 amendment explain the reason for the amendment as follows:

> "Subsection 169(1) sets out the general rules for determining an input tax credit of a person in respect of property or a service. The existing subsection refers only to property or a service "supplied to or imported by" the person. The subsection is amended to also make reference to property brought into a participating province (as newly defined in subsection 123(1)) since that is another occurrence that could result in tax becoming payable by the person (under new Division IV.1) for which an input tax credit would be sought (see commentary on clause 205).
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> Subsection 169(1) is also restructured to define "an" input tax credit in respect of property or a service for a reporting period instead of "the input tax credit, to take account of the possibility

[23] In my view, the sole "recipient" of the Supplies was Ed Tel. It contracted for the Supplies for its benefit on its own behalf and paid for them with funds due to it on the sale of its Business. There is no second, fresh or substituted "recipient". To find otherwise would simply run contrary to the scheme of the *Act*.
[24] Accordingly, the Appellant cannot prevail in respect of its ITC claims at least in respect as its argument that it was a "recipient" or a person to whom a supply was made.

The Extrapolation Methodology Issue

[25] That takes me to consider the Appellant's alternative argument relating to the calculation of the ITCs denied in respect of GST paid on lower dollar value Supplies. That calculation, relating to approximately 25% of the Supplies (as ultimately determined), was done by a monthly analysis of a fraction of the lower dollar supply invoices paid for by the Appellant after the Cut-off Date to determine what portion of that group of supplies were Supplies (i.e. supplies in respect of which Ed Tel was the recipient) and then extrapolating the results to arrive at the portion of the total ITC claims, in respect of that group of supplies, that were for Supplies. The Appellant objected to this calculation methodology. It is an arbitrary approach to calculating a tax liability. The Appellant argues that the calculation and assessment cannot be so arbitrary.

[26] To better respond to the argument, I will briefly describe the methodology.

[27] The auditor divided his analysis in two parts. The first part, dealing with about 75% of the ITCs, related to transactions where, according to the Appellant's general ledger, the ITC amount claimed was over $10,000. Considering the entire assessment period from March 1, 1995 to December 31, 1995 there were

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that a person might have more than one input tax credit in respect of the same property for the same reporting period. This could occur, for example, if tax became payable in the period both on the purchase of the property and upon bringing the property into a participating province. Tax might also become payable with respect to more than one deemed acquisition of the property under the new section 136.1, which deems a separate supply by way of lease, licence or similar arrangement for each lease interval (as defined in that section) that falls in the reporting period. The registrant might not be entitled to an input tax credit to the same extent with respect to each of these amounts of tax that become payable at different times in the same reporting period since, from one time to the next, the intended use of the property of service might change. For that reason, the formula under subsection 169(1) applies separately to each amount of tax that becomes payable with respect to each taxable event - an acquisition, an importation or a bringing in of the property."

approximately 28,500 transactions, worth approximately $20MM, where GST was paid. About $15MM of these related to individual, or readily bundled, transactions in respect of which there were ITC claims in amounts over $10,000. These large transactions were audited individually. There were 116 such transactions (i.e. 116 invoices to review individually).

[28] The auditing of individual transactions required recovery of microfiche records of supplier invoices. Of the 116 transactions reviewed after recovering such records, 13 were in respect of Supplies (i.e. supplies made to Ed Tel) paid for by the Appellant. Payment for these Supplies, were all made in the months of March and April. In March, 9 invoices, identified as being in respect of Supplies, were paid. ITCs were disallowed in respect of these Supplies in the amount of $298,932. In April, 4 invoice payments were identified as being in respect of Supplies. These 4 payments gave rise to ITC claims of $1,014,118 all of which were denied. With respect to May there were no large transaction invoices identified as having been paid in respect of Supplies. Accordingly, all ITCs claims in respect of transactions greater than $10,000 and paid for in May were allowed. As well, all claims in respect of invoices paid after May 1995 were allowed without further audit.

[29] With respect to smaller transactions, where ITC claims were less than $10,000, the auditor used a computer system to randomly select transactions. It was not possible to review some 28,400 individual supply transactions in this group included in an electronic data base in respect of which microfiche records would have to be retrieved. Even looking at March, April and May there were about 8,700 such transactions. Again, it was felt that it would not be possible to review such number of transactions. A sample audit was felt to be the only feasible approach. The approach was to take sufficient samples to derive a 90% confidence level as determined by the program used. That required selection of only 100 samples. Doubling the sample would only increase the confidence level by 2%, so 100 samples were audited in the interest of expediency. Microfiche records were obtained in relation to these 100 transactions and an audit was done in respect of these transactions in the same way that it was done in the case of large transactions. The March sample was 34 out of 2,563 transactions in respect of which ITCs were claimed. 24 of the 34 invoices audited were invoices for Supplies (i.e. issued to someone other than the Appellant prior to the Cut-off Date).[9] The

[9] The invoices if not to Ed Tel were to other related entities whose businesses were transferred to the Appellant in the course of implementing the Arrangement.

percentage of ITCs claimed (in dollar amounts) in respect of these 24 invoices relative to the total amount claimed for all 34 invoices was calculated to be some 86% (the "error percentage"). As a result, 86% of the ITC claims under $10,000 for the entire month of March were denied. This resulted in $401,830 of ITCs being denied.[10]

[30] The same methodology was applied to April and May. In April, 33 transactions were reviewed and 9 were found to be in respect of Supplies. The extrapolation gave rise to $120,370 in ITCs being denied. The number of invoices for the period was 2,331 and the error percentage was some 25%. For May, there were 33 out of 3,903 transactions reviewed and only one was found to be in respect of Supplies. That single invoice had a GST amount of $130.71 which was 2% of the total GST relating to the 33 transactions reviewed. Applying that percentage error, the ITC amount denied was $13,971. The auditor concluded that further testing would be unnecessary and he therefore assumed that beyond May 1995 all the ITCs were properly claimed.

[31] Like the Appellant, I have questions as to the methodology used: Why not do a second sampling of another 100 invoices to test the confidence level predicted by the program used? Why not weigh the sample more to March or do a second sampling for March of another 34 samples? Why undertake an extrapolation for May when the detailed audit revealed that there were no Supplies in May and when the further random samples provided only a single, negligible error? Like the Appellant, I have reservations in trusting the reliability of the methodology employed; however, unlike the Appellant I have no burden to bring evidence that does more than simply raise questions. Clearly, the Canada Revenue Agency ("CRA") based the assessment on the assumption that GST in the amount assessed ($1,849,230) was the amount payable in respect of supplies acquired by Ed Tel. This assumption gives mathematical certainty to the quantum of Supplies in respect of which the ITCs were denied. The burden is on the Appellant to disprove this sum which is to disprove the quantum of Supplies upon which the assumption is based. The Appellant brought no evidence to disprove the quantum of Supplies in respect of which the ITCs were denied. It is not enough to simply raise questions as to the quantum at issue. The assumption as to the quantum at issue must be disproved or at least brought into doubt by evidence as opposed to rhetorical argument even where that very argument has some intuitive appeal.

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[10] Calculating the error percentage on a transaction basis as opposed to a dollar basis would result in an error percentage of only 70.59% and an ITC denial of $328,843 as opposed to the $401,830 denied using the 86% error percentage.

[32] This would likely have required a comparative analysis using a different methodology or employing the same program with further random sampling. It may have required expert evidence. In any event, I draw a negative inference from the fact that the Appellant called no evidence to rebut the testimony of the auditor who spoke of the reliability of the computer program and its use in audits as approved by the Canadian Institute of Chartered Accountants (CICA). I see no reason why the Appellant could not have employed or scrutinized the program so as to give evidence of its reliability and adequacy.

[33] Nonetheless, the Appellant relied on the decision of this Court in *Huyen c. R.*[11] in arguing that extrapolations cannot take the place of a complete audit where records are available as they were in the case at bar. That case, however, did acknowledge at paragraph 10, that the burden on the Respondent was to proceed according to "reasonable minimal standards" which allow for a credible conclusion. Such standards will vary with the circumstances. In the case at bar, the sampling and extrapolations may have been "minimal" but they were not unreasonable. The approach employed afforded the CRA a reasonable basis to estimate of the quantum of small transaction Supplies that were made before the Cut-off Date at least for the purpose of making the assumption that was in fact made. With one reservation, this is sufficient in my view to put the burden on the Appellant to adduce evidence to rebut the accuracy of the estimate produced by the extrapolation methodology employed by the Respondent. The Appellant failed to meet this burden.

[34] However, that does not prevent this Court from exercising some discretion in making adjustments for the benefit of the taxpayer where it appears likely that the "estimate" methodology employed by the CRA does not give sufficient benefit of doubts to the taxpayer. While I understand the statistical underpinnings of extrapolations, my comfort level with relying on such methodology to compute a tax liability might have been buoyed somewhat by further tests or by giving some benefit of any doubt to the taxpayer. Such benefit might have included using an error percentage based on the relative number of transactions where doing so favours the taxpayer or abandoning the extrapolation methodology where the incidence of "error" falls considerably below the confidence level in that methodology which is what happened in respect of the May transactions. While the Appellant made no plea for any such concessions, I am nonetheless going to make a small allowance to appease my own reservations. I will allow 10% of the small transaction ITC amounts

[11] [1997] G.S.T.C. 42 (Eng.) (T.C.C.); 1997 CarswellNat 526 (T.C.C.).

denied on the basis that the CRA used a program to produce a result that it was only 90% satisfied was right. The probability that the assumed amount is wrong is 100%. The probability that it is 90% correct has in effect been attested to without rebuttal evidence. That is the amount then that I will disallow which is to say that I will allow the Appellant additional ITCs of $52,355 being 10% of the ITCs denied by the extrapolation approach employed by the CRA.

[35] Given my acceptance of the Respondent's principal argument, it is not necessary for me to consider a further argument made by the Respondent; namely that most of the invoices supporting the ITC claims had information deficiencies so as to warrant denial of the ITCs claimed. Nonetheless, a brief comment seems in order. The alleged deficiencies relate to information required to be provided pursuant to **subsection** 286(1) **of the *Act*** and **section 3** of the *Input Tax Credit Information Regulations*. All but a few of the asserted deficiencies were in the failure to provide the name of the Appellant as the recipient. If the Appellant was the recipient by virtue of having paid or being liable to pay the subject invoices, it strikes me that the supporting documentation made available to the CRA was sufficient to satisfy the objectives of these *Regulations*. My inclination then is to say that if a determination was required as to whether there were deficiencies under the *Input Tax Credit Information Regulations*, my finding would be that the ITCs could not be denied on that basis. The contracts showing the liability of the Appellant to pay for the Supplies and the underlying documentation, retrieved from microfiche records submitted as requested, together, sufficiently document who the asserted recipient was. If that assertion (that the Appellant was the recipient) had prevailed, the deficiency argument would in my view have failed.[12] To further support this conclusion, I note that in cases like *Bokrika Inc*. (where there was no privity of contract between the supplier and the "recipient") it seems likely that the documentary evidence of the "recipient" that enabled the appellants in those cases to win their appeals was not found in the invoices or statements issued by the supplier. It seems reasonable then to suggest that the Respondent's argument here should not be given judicial sanction so as to give the Minister the

[12] I note, as well, that reliance on deficiencies is asserted by the Appellant to have been a response to the Appellant's rebate argument and was not the basis for the assessment at all. There was no assumption stated in the Reply to have been made in respect of documentation deficiencies other than in respect of some $68,000 that the Appellant conceded at the outset of the hearing. If there is a shifting of the burden of proof in respect of this point, arguably the Respondent has not met that burden. It does appear from the record however that during the objection stage the document deficiency concerns went beyond this $68,000 amount.

means to appropriate funds from persons who are, in fact, “recipients” and who are otherwise entitled to ITCs.

[36] A further point that merits mention is that at trial the CRA auditor testified that some of the Supplies may have been exempt supplies as they were made by a municipality or para-municipality. The suggestion was that this should be another reason to deny the ITCs claimed. In my view, the possibility that some of the Supplies were exempt cannot stand as a reason to deny the ITCs claimed. There were no assumptions made as to exempt supplies. Indeed when asked at the examination for discovery if there would be exempt supplies in this case, the auditor said that in the normal course of business there would be none.

[37] It might still be asked whether the *possibility* of the Supplies being exempt is a further reason not to allow the transfer of recipient status in determining entitlements to ITCs. I think not. In determining whether a supply is exempt, so as to disentitle ITC claims, it is the supplier’s status and the supplies themselves that must be examined regardless of who the recipient is.[13] Still, considering the transfer issue in more general terms, I note that early in the audit it was suggested that Ed Tel should make the ITC claims. Apparently, this was not of interest to Ed Tel. This might have been because it had no contractual obligation to the Appellant to claim the credit and further it likely had nothing to gain having conveyed the Business to the Appellant. Clearly, a better contractual approach might have been taken from the outset had the GST issues been properly considered prior to finalizing the Arrangement. In any event, by the time the Appellant began pressing the CRA to allow Ed Tel to claim the ITCs, such claims were statute barred. Unless the rebate provisions apply, this is a roadblock preventing the Appellant from achieving a result that it might otherwise deserve. After all, as Appellant’s counsel argued, the Appellant is not the ultimate consumer of the Supplies and should not suffer the GST. Having paid the GST, it needs the ITCs or it will be penalized and the treasury (fisc) will be unjustly enriched – the Appellant will be treated like the ultimate consumer who added no further value to the stream of consumer supplies. However, the system contemplated by the *Act* would not have so penalized the Appellant if it had arranged the transactions in a way that would, or if it had received the covenants from Ed Tel necessary to, ensure the correct result. That Ed Tel did not seek the ITCs on a timely basis might result in a

[13] This point ties to the rebate issue as well. If a related para-municipality that was exempt had made a supply to Ed Tel then any GST paid for that supply by Ed Tel on behalf of the Appellant should be eligible for a rebate. The issue then would be whether the Appellant is the person with standing to ask for and receive it.

windfall for the fisc is not something a Judge can remedy unless the terms of the *Act* provide such a remedy.

The Rebate Issue

[38] This takes me to consider the Appellant's argument that if it is not entitled to the ITCs claimed on the basis that it is not the "recipient", then it is entitled to a rebate and/or reduction to net tax pursuant to subsections 261(1) and 296(2.1) in the full amount assessed. These subsections provide as follows:

> **261. (1) Rebate of payment made in error** -- Where a person has paid an amount
>
> (a) as or on account of, or
>
> (b) that was taken into account as,
>
> tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.
>
> **296 (2.1) Allowance of unclaimed rebate** -- Where, in assessing the net tax of a person for a reporting period of the person that the person was required to remit under this Part on or before a particular day or any other amount that became payable by a person under this Part on a particular day, the Minister determines that
>
> (a) an amount (in this subsection referred to as the "allowable rebate") would have been payable to the person as a rebate if it had been claimed in an application under this Part filed on the particular day,
>
> (b) the allowable rebate was not claimed by the person in an application filed before the day notice of the assessment is sent to the person, and
>
> (c) the allowable rebate would be payable to the person, if it were claimed in an application under this Part filed on the day the notice of the assessment is sent to the person or would be disallowed if it were claimed in that application only because the period for claiming the allowable rebate expired before that day,
>
> the Minister may apply all or part of the allowable rebate against that net tax or other amount as if the person had, on the particular day, paid or remitted the amount so applied on account of that net tax or other amount.

[39] The allowance for the unclaimed rebate provided for in subsection 296(2.1) simply allows for a proper rebate claim to be made notwithstanding certain restrictions or deadlines that are otherwise imposed such as under subsections

261(2) and (3). While it may be too late for Ed Tel as the recipient eligible to claim the ITC to make *that* claim in respect of the Supplies, the Appellant argues that it is not too late for any other party who has paid GST on the Supplies to claim a rebate of that GST if that other party was not liable under the *Act* to make the payment. The time limitation relief in respect of rebates ensures that the fisc is not unjustly enriched when a payment is made in error. No such relief is afforded, however, to recipients such as ED Tel when they are beyond deadlines to apply for ITCs.[14]

[40] The Appellant argues that the rebate must be allowed not only by virtue of the express language of subsection 261(1) which it argues permits it, but by virtue of the fact that the fisc will otherwise be unjustly enriched. The counter argument to the enrichment argument is that the enrichment arises from the failure of Ed Tel to make a timely ITC claim not from any error made by the Appellant in paying the liabilities incurred by it on the acquisition of the Business.

[41] On that basis, the express language of subsection 261(1) needs to be examined to see whether it meets the rebate requirements as asserted by the Appellant. Clearly my finding that the Appellant was not the recipient of the Supplies results in the Appellant not being liable *under section 165* (i.e. under the relevant Part of the *Act*) to pay the GST it paid. **Clearly** then the amount paid by the Appellant on account of GST was not an amount payable by it *under the Act.* It was paid under the terms of the Arrangement which is "otherwise" than being payable *under the Act*. Literally read then, the express language of subsection 261(1) must be taken to apply to entitle the Appellant to a rebate of the amount assessed.

[42] The essence of the Respondent's argument is that the subject provision cannot be read without recognizing that the liability of the "recipient" Ed Tel pursuant to subsection 165(1) of the *Act,* was meant to be extinguished by the payment made by the Appellant. In that respect it must be recognized that the Appellant made the payment on behalf of Ed Tel. It was the intermediary making the payment, in law and fact, on behalf of Ed Tel. Clearly the Respondent accepted the payment from the suppliers who remitted the GST paid by the Appellant as payment of Ed Tel's liability under the *Act* for taxable supplies. Ed Tel was eligible for ITCs so neither it, nor its intermediary, can claim a rebate. The GST

[14] The Respondent did not take issue with any timing issues relating to the rebate claim. Hence, there was no discussion of the relevance of the Appellant's reliance on a reference to subsection 296(2.1) which came into force on July 1, 1996.

paid was paid on account of a GST liability payable *under the Act*. A rebate cannot be claimed on the basis that such payment was made in "error".

[43] The difficulty I have with the Appellant's argument is that to permit rebates where the liability of recipients under the *Act* has been paid by a non-recipient of the supply who undertook to pay it, would require the Minister to scrutinize the source of every remittance to ensure that the amount remitted in respect of a supply would not have to be returned as a rebate before the recipient was assessed. Failing the exercise of such impossible scrutiny, GST could be avoided by all recipients of taxable supplies whether or not ITCs were claimable. That is, the literal construction advanced by the Appellant would lead to absurd results. That an absurd result does not occur in the case at bar (because Ed Tel is not the end user of the Supplies and could have received the ITC had it made a timely claim) does not resolve this inherent difficulty with the literal construction of the rebate provision urged by the Appellant.

[44] **Clearly** the intent of the Arrangement was that Ed Tel would be released of its payment liability under the *Act* upon the Appellant making the payment on Ed Tel's behalf. The payment made by the Appellant was of a liability under the *Act* that the Appellant intended to extinguish. The ITC mechanism provided for in the *Act* must be the only route intended by Parliament for such payments to be reconciled. The ITC claim mechanism set out in subsection 225(1) in respect of the Supplies was there for Ed Tel to employ by timely reporting. Ed Tel never made such claim. At the end of day, all that has happened is that Ed Tel has not cooperated with the Appellant to give it the relief it should have secured under the Arrangement had it been properly structured.

[45] That, regrettably, is, in my view, the context in which subsection 261(1) must be construed. The person referred to in that subsection as the person who made the payment is not the person who writes the cheque or transfers the funds. It is the person on whose behalf the payment is made. That, in the case at bar, was Ed Tel. Neither Ed Tel nor the Appellant are entitled to a rebate.

IV. Conclusion

[46] At this point, I would normally conclude that for all these Reasons the appeal is dismissed except for the allowance of $52,355 as referred to above. However, there were issues that were the subject of the appeal that were resolved in favour of the Appellant prior to trial. I agreed to incorporate those resolutions into my Judgment. Accordingly, the terms of my Judgment making reference to the

appeal being allowed is a reference to the following agreed allowances in addition to the $52,355 amount just referred to:

1. With respect to the “Imaged Invoices Issue”, the amount of net tax assessed will be reduced from $199,427 to $99,500.

2. With respect to the “Miscellaneous Issues”, the amount of net tax assessed will be reduced from $98,392.86 to $10,785.79. The amount of the reduction ($87,607.07) relates to the amounts referred to in paragraphs 38(b) and 25(cc) of the Reply to the Amended Amended Notice of Appeal.

[47] In other respects the appeal is dismissed with costs to the Respondent.

This Amended Reasons for Judgment is issued in substitution for the Reasons for Judgment dated on February 13th, 2008.

Signed at Ottawa, Canada, this **10th** day of **March**, 2008.

"J.E. Hershfield"

Hershfield J.

2003-1066 (GST)G

TAX COURT OF CANADA

BETWEEN:

TELUS COMMUNICATIONS (EDMONTON) INC.

Appellant,

-and-

HER MAJESTY THE QUEEN

Respondent.

PARTIAL AGREED STATEMENT OF FACTS

The parties, through their respective solicitors, hereby agree to the following facts and documents provided that the agreement is made for the purpose of this appeal only and may not be used against either party on any other occasion or by any other party.

A. BACKGROUND

1. Prior to March 10, 1995, Edmonton Telephones Corporation ("ETC") carried on the telecommunications carrier business in Edmonton, including the local telephone exchange business, the telephone directory business, and the cellular, paging and other mobile communications businesses. At all material times, ETC was a wholly owned subsidiary of The City of Edmonton, a municipal corporation under the laws of the Province of Alberta.

2. ED TEL Inc. ("ETI") was, at all material times, a corporation incorporated under the *Business Corporations Act* of Alberta ("ABCA"). Prior to March 10, 1995, all of the shares of ETI were held by ETC.

3. ED TEL Communications Inc. ("ETCI") is a corporation incorporated under the ABCA. At all material times, all of the shares of ETCI were held by ETI. ED TEL Communications Inc. was later renamed TELUS Communications (Edmonton) Inc., which is the Appellant in the instant matter.

4. ED TEL Directory Inc. ("ETDI") is a corporation incorporated under the ABCA. At all material times, all of the shares of ETDI were held by ETI.

5. ED TEL Mobility Inc. ("ETMI") is a corporation incorporated under the ABCA. At all material times, all of the shares of ETMI were held by ETI.

6. At all material times, the Canadian Radio-television and Telecommunications Commission ("CRTC") regulated the telecommunications business in Canada.

7. Pursuant to a directive of the Governor General in Council dated October 25, 1994, the CRTC approved the reorganization of ETC (the "Reorganization") as follows:

   (a) by the transfer by ETC of its telecommunications assets and related businesses to ETI, and;

   (b) subsequently, by the transfer by ETI of the telecommunications assets and related businesses to ETCI, ETDI and ETMI.

   A copy of the Transfer Agreement between ETC and ETI is located at Tab 2 of the Joint Book of Documents. The Transfer Agreements between ETI and ETCI, ETI and ETDI and ETI and ETMI are located at Tabs 3, 4 and 5 of the Joint Book of Documents respectively.

8. The Reorganization was completed by way of an arrangement made under the *Canada Business Corporations Act* and was effective March 10, 1995. A copy of the Arrangement Agreement is located at Tab 1 of the Joint Book of Documents.

9. After completion of the Reorganization, the business formerly carried on by ETC were carried on as follows:

   (a) the local telephone exchange business was carried on by ETCI;

   (b) the local telephone directory business was carried on by ETDI; and

   (c) the cellular, paging and other mobile communications businesses were carried on by ETMI.

10. Immediately following the Reorganization, ETC sold all of the issued and outstanding shares of ETI to TELUS Corporation. A copy of the Amended Share Purchase Agreement between the City of Edmonton, Edmonton Telephone Corporation (ETC) and TELUS Corporation is located at Tab 6 of the Joint Book of Documents.

11. During the period in issue, the Appellant calculated and reported net tax for purposes of the Act and filed GST returns under Part IX of the Act.

12. The Canada Revenue Agency ("CRA"), formerly the Canada Customs and Revenue Agency undertook an audit of these returns and such audit gave rise to certain adjustments made by the Minister which are the subject of dispute in this Appeal, namely:

    (a) the Minister disallowed ITCs claimed by the Appellant in the amount of $1,849,230.75 (the "ED TEL Cutoff Issue");

    (b) Agreed to be deleted;

    (c) Agreed to be deleted;

    (d) Agreed to be deleted;

B. ASSESSMENTS IN ISSUE

13. The Minister of National Revenue (the "Minister") assessed the Appellant by Notice of Assessment No. 00000001690 dated October 22, 1999, for the reporting periods March 1, 1995 to December 31, 1995 for net tax of $14,442,335.78, net interest of $605,793.00 and penalty of $768,169.55, in respect of GST returns for the period in issue. In the assessment the Minister made the following adjustments:

(a)	Clerical Error in posting GST paid to General Leger	$ 9,909.22
(b)	Input tax credits claimed by registrant on purchases where the registrant is not the recipient	1,849,230.75
(c)	Input tax credits claimed by the registrant for which no supporting documentation is present	68,780.12
(d)	GST posting variance between the billing system ("BOA") and General Ledger	251,319.33
(e)	Supplies for which the registrant failed to charge and report GST	98,392.86
	TOTAL	**$ 2,277,632.28**

A copy of the Notice of Assessment and Audit Adjustments are located at Tab 8 and 9 of the Joint Book of Documents.

14. The Appellant files a Notice of Objection on January 19, 2000 in respect of all issues except the clerical error issue in the amount of $9,902.22. A copy of the Notice of Objection is located at Tab 10 of the Joint Book of Documents.

15. The Minister issued a Notice of Decision to the Appellant in respect of its Notice of Objection dated January 20, 2000 on May 25, 2000 and on the same date reassessed the Appellant by Notice of Assessment No. 10BT-116854811 for net tax of $14,390,443.45, net interest of $363,022.80 and penalty of $449,068.12, in respect of GST returns for the period in issue. In the reassessment the Minister made the following adjustments.

(a)	Clerical Error in posting GST paid to General Ledger	$ 9,909.22
(b)	Input tax credits claimed by the registrant on purchases where the registrant is not the recipient	1,849,230.75
(c)	Input tax credits claimed by the registrant for which no supporting documentation is present	68,780.12
(d)	GST posting variance between the billing system ("BOA") and General Ledger	199,427.00
(e)	Supplies for which the registrant failed to charge and report GST	98,392.86
	TOTAL	**$ 2,225,739.95**

A copy of the Notice of Decision and Notice of Reassessment are located at Tab 11 and 12 of the Joint Book of Documents.

16. The Appellant filed a Notice of Objection on August 22, 2000 in respect of all issues except the clerical issue in the amount of $9,902.22. A copy of the Notice of Objection is located at Tab 13 of the Joint Book of Documents.

17. By Notice of Decision dated December 9, 2002, the Minister confirmed the reassessment. A copy of the Notice of Decision is located at Tab 14 of the Joint Book of Documents.

CITATION:	2008TCC5
COURT FILE NO.:	2003-1066(GST)G
STYLE OF CAUSE:	TELUS COMMUNICATIONS (EDMONTON) INC. AND HER MAJESTY THE QUEEN
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DATE OF **AMENDED** JUDGMENT:	**March 10th**, 2008

APPEARANCES:

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