Docket: 2016-3232(GST)G

BETWEEN:

1378055 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals called for hearing on May 1, 2018, at Toronto, Ontario,
followed by written submissions by the Appellant on
July 12, 2018 and by the Respondent on July 13, 2018, and
by a case management conference on June 17, 2019.

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	James N. Aitchison
Counsel for the Respondent:	Devon E. Peavoy

JUDGMENT

After considering the evidence presented at the hearing, and after reviewing the submissions made by counsel, IT IS ADJUDGED that:

1. The Appeals in respect of the quarterly reporting periods ending on December 31, 2013, June 30, 2014 and March 31, 2015 are allowed, and the reassessments in respect of those reporting periods are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to input tax credits ("ITCs") for those reporting periods as set out below:

Period Ended	ITCs
December 31, 2013	$17,452.50
June 30, 2014	5,655.00
March 31, 2015	14,722.50
Total	$37,830.00

2. The Appeals in respect of the quarterly reporting periods ending on September 30, 2014 and December 31, 2014 are dismissed.

3. The Appellant and the Respondent (the "Parties") shall have 30 days from the date of this Judgment to reach an agreement on costs and to so advise the Court, failing which the Appellant shall have a further 30 days to file written submissions on costs, and the Respondent shall have yet a further 30 days to file a written response. Any such submissions shall be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement on costs and no submissions are received from the Parties, no costs shall be awarded.

Signed at Ottawa, Canada, this 16th day of July 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2019TCC149
Date: 20190716
Docket: 2016-3232(GST)G

BETWEEN:

1378055 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals instituted by 1378055 Ontario Limited ("137ON") in respect of reassessments (the "Reassessments") issued by the Canada Revenue Agency (the "CRA") on behalf of the Minister of National Revenue (the "Minister"), under the *Excise Tax Act* (the "*ETA*"),[1] in respect of the quarterly reporting periods from October 1, 2013 to March 31, 2015 (other than the period ending March 31, 2014).

II. ISSUES

[2] The issues in these Appeals are:

a) Were the services which are the subject of these Appeals acquired by 137ON for consumption or use in the course of its commercial activities, and, if so, to what extent?

b) Were the documentation requirements of subsection 169(4) of the *ETA* and section 3 of the *Input Tax Credit Information (GST/HST) Regulations* (the

[1] *Excise Tax Act*, R.S.C. 1985, c. E-15, Part IX, as enacted by S.C. 1990, c. 45, and as subsequently amended.

"*ITCI Regulations*") satisfied by the invoices that are the subject of these Appeals?

III. FACTS

A. Persons, Properties and Relationships

[3] 137ON is a corporation that carries on a residential-rental-property business and a land-development business in and around Oshawa, Ontario. During the reporting periods in question, the land-development business had three components:

a) developing the ten-acre parcel of land described in the next paragraph;

b) providing real estate development and planning/administration services; and

c) sourcing and acquiring properties for future development.[2]

[4] During the reporting periods in question, 137ON owned ten rental properties, with approximately 50 to 60 units in total, which are occupied by residential tenants.[3] One of those rental properties, a house, is located on a ten-acre parcel of land situated in north Oshawa and municipally described as 1590 Stevenson Road North (the ten-acre parcel is referred to as the "Subject Property"). The house is located near the east boundary of the Subject Property, close to the road. The lease agreement between 137ON and the tenant provides that the tenant may occupy the house and may use the land around the house. However, the lease agreement covers only the land around the house, such that the tenant does not have the use and enjoyment of the entire 10-acre parcel. The western portion of the Subject Property is near a tributary of Oshawa Creek and is part of a conservation area, such that it is not developable.

[5] When 137ON purchased the Subject Property in 1993, 137ON intended to develop it as a residential subdivision, as it was then designated and zoned for residential use. However, sometime later the Region of Durham re-designated the Subject Property as "employment areas" or "employment lands,"[4] meaning that it

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2 Exhibit A-1, Tab 15, p. 1; and Tab 18, p. 1.

3 Exhibit A-1, Tab 21, third page.

4 The Preliminary Comments by the Region of Durham Planning Division used the term "Employment Areas" (Exhibit A-1, Tab 8, p. 4), whereas Mr. Foley used the term "employment lands" (*Transcript*, p. 6, line 9).

could thereafter be used only for industrial, commercial or other non-residential purposes. The City of Oshawa has zoned the Subject Property as "urban residential," but it will no longer permit new residential buildings to be constructed on the Subject Property. The existing house on the Subject Property is a legal nonconforming use. If it were to be demolished, it could not be replaced with another residential building.[5]

[6] Since 137ON acquired the Subject Property in 1993, it has been endeavouring to develop it, first as a residential subdivision, and subsequently (after the change of designation) as a commercial site. However, 137ON has encountered several roadblocks, as the various governmental authorities and agencies, including the Region of Durham, the City of Oshawa and the Central Lake Ontario Conservation Authority ("CLOCA"), carried out numerous reviews, assessments and studies.

[7] No specific evidence was adduced concerning the ownership of 137ON. However, it seems that it is owned by members or affiliates of the Foley family, which appears to be extensively involved in development, construction, leasing and property management in the Oshawa area. The only witness to testify at the hearing was Mark Foley,[6] who is the general manager of 137ON. Mark's wife, Deborah Foley, works for 137ON, providing general office administration services. During some or all of the relevant reporting periods, Cole Foley, the son of Mark and Deborah, apparently provided planning, administration, consulting and management services to 137ON.

[8] Additional family relationships were also described at the hearing. Mark and Deborah have four sons, Cole, Brent and two others, who were not named at the hearing. Cole provided services to 137ON, most likely in 2012. Brent is a real estate broker. Mark's brother, Michael Foley, operates a business known as Woodland Durham, which constructs new houses. Mark's and Michael's mother, Betty Foley, owns the building in which 137ON, Woodland Durham and Brent have their offices. Some or all of that building is leased by Betty to Lanmark Management Limited ("Lanmark"), which apparently is owned by one or more

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5 *Transcript*, p. 32, line 22 to p. 23, line 7; and p. 44, lines 17-20.

6 In these Reasons, I will, depending on the context, sometimes refer to Mark Foley as "Mark" or "Mr. Foley" and to Deborah Foley as "Deborah" or "Ms. Foley."

family trusts and is somehow connected to the Foley family.[7] Mark is the president of Lanmark.

B. Rental Operations

[9] Based on the rent rolls produced at the hearing, in 2015 137ON owned nine houses in or near Oshawa; the houses were leased to residential tenants. As well, 137ON owned an apartment building, which contained 48 units.[8]

C. Development Activities

[10] The documentary evidence adduced at the hearing provided an indication of some of the activities undertaken by 137ON to develop the vacant portion of the Subject Property. With the aid of maps and aerial photographs,[9] Mr. Foley explained that the parcel of land immediately north of the Subject Property was used as an open-storage facility for recreational vehicles, boats and the like, and the parcel of land immediately south of the Subject Property was used as a storage site for transport trucks (semitrailers).[10] Mr. Foley testified that, after the possibility of developing a residential subdivision was eliminated by the re-designation, he explored the idea of constructing self-storage units on the Subject Property. However, he subsequently focused on an alternative proposal of developing the Subject Property as a storage site for portable storage containers or pods.[11]

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7 *Transcript*, p. 70, lines 2-25. There was no evidence as to the precise ownership of Lanmark or its relationship to the Foley family.

8 Exhibit A-1, Tab 21, third to fifth pages.

9 Exhibit A-1, Tabs 1-4 & 6.

10 *Transcript*, p. 10, lines 17-22.

11 While there was no oral evidence concerning this point, it appears that 137ON's ability to construct a building or buildings on the Subject Property may have been adversely impacted by *Ontario Regulation 42/06*, which provided that no grading, filling or other site alteration, including the construction of structures, could be undertaken in the absence of a permit from CLOCA; see email dated August 27, 2015 in Exhibit A-1, Tab 8, p. 1. An undated document prepared by the Region of Durham Planning Division contains the following comment:

> The [Durham Regional Official Plan (ROP)] illustrates that the property contains Key Natural Heritage and/or Hydrologic Features (KNHHF). Development or site alteration is not permitted within a KNHHF. The ROP also illustrates a future realignment of Stevenson Road North through the subject property.

[11] Some of the activities and efforts undertaken by Mr. Foley are summarized by documents entered into evidence. The minutes of a meeting of the Development Services Committee held on May 28, 2012 contain the following statement:

> Mark Foley, on behalf of the Foley Group[,] addressed the Committee in opposition to Attachments 3, 4 and 5 to Report DS-12-175 as they relate to the company's property at 1590 Stevenson Road North. Mark Foley requested staff look at reducing the amount of land to be designated "open space" as it relates to the subject property, noting a prior external study indicated that only 10% of the property should be designated open space, with the remainder being designated industrial.[12]

The above excerpt from the Development Services Committee Minutes indicates that in mid-2012, Mr. Foley was actively engaged, on behalf of the Foley Group (which presumably includes 137ON), in pursuing the development of the Subject Property.

[12] A report submitted by the Commissioner of the Oshawa Development Services Department to the Development Services Committee, on November 13, 2012, presumably in anticipation of a meeting on November 19, 2012, indicates that "The Owner of 1590 Stevenson Road North requested that staff look at reducing the amount of land proposed to be designated as Open Space and Recreation in the area in general and at 1590 Stevenson Road North in particular."[13]

[13] A letter dated November 29, 2012 from Warren Munro, the Principal Planner in the Development Services Department of the City of Oshawa, confirms that Mr. Foley had been engaged in 2012 in discussions with Mr. Munro to obtain approval to develop the Subject Property. The letter from Mr. Munro indicated that

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> Provided that the applicant [i.e., 137ON] can demonstrate to the satisfaction of the Region that the proposed development will not negatively impact existing KNHHF on the subject property (in consultation with the Region of Durham and the Central Lake Ontario Conservation Authority) and that it will not prevent the future realignment of Stevenson Road North, the applicant's proposal to permit a public outdoor storage facility maybe [*sic*] considered under the ROP. [Exhibit A-1, Tab 8, p. 4.]

[12] Exhibit A-1, Tab 10 (bearing three page numbers: 15 at the top middle of the page, 414 in the upper right-hand corner of the page and 121 at the bottom of the page).

[13] Exhibit A-1, Tab 10; the particular page bears two page numbers: 4 at the top of the page and 99 at the bottom of the page.

City Council was in favour of replacing the Special Study Area "A" designation that applied to the Subject Property and adjoining properties with "Industrial and Open Space and Recreation designations." However, the letter went on to indicate that various reports would be required, including a report in respect of stormwater management, a report in respect of regional services, a report concerning revisions to the Northwood Industrial Park Concept Plan, a public meeting report and a recommendation report on the associated Zoning By-law amendment.[14]

[14] Further documents indicate that the development efforts and activities continued into 2015. For instance, in April 2015 Mr. Foley communicated with Mr. Munro (of the Oshawa Development Services Department) concerning the use of the Subject Property as "a storage yard for portable on demand storage bins."[15] On August 17, 2015, Mr. Foley received from D.G. Biddle & Associates Limited, consulting engineers and planners, a Concept Plan, showing a configuration on the developable portion of the Subject Property of a storage container site for approximately 430 containers.[16] The next day, Mr. Foley forwarded the Concept Plan to Mr. Munro and others.[17] On September 14, 2015, Mr. Foley received from Valery Hendry, a planner working for the City of Oshawa, an email setting out the issues to be resolved before a rezoning application could be made.[18]

[15] When it was pointed out to Mr. Foley at the hearing that the documents that he had produced related to 2012 and mid-2015, which fell on either side of the reporting periods in question, he explained that throughout the time that he has been endeavouring to develop the Subject Property (and certainly between 2012 and 2015), he has met with planning and other government officials, attended numerous committee and other meetings with them, attended several public hearings and otherwise taken steps to advance the development.[19] Mr. Foley also stated that, over the course of each year (including those that are in issue), in investigating various sites for potential development, he reviewed official plan documents and zoning documents and had conversations with CLOCA to determine the intended uses for the particular sites.[20]

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14 Exhibit A-1, Tab 10, p. 1-2.
15 Exhibit A-1, Tab 5, p. 1.
16 Exhibit A-1, Tab 7.
17 Exhibit A-1, Tab 8, p. 2-3.
18 Exhibit A-1, Tab 8 (fourth page from the back of the documents behind that tab).
19 *Transcript*, p. 30, lines 17-22; p. 43, lines 18-27; p. 46, lines 14-22; p. 70, line 26 to p. 74, line 1; and p. 79, lines 9-19.
20 *Transcript*, p. 27, line 16 to p. 28, line 13.

D. Claimed ITCs

[16] The ITCs that are in issue in these Appeals fall into the following quarterly reporting periods:[21]

Table 1

Period Ended	ITCs
December 31, 2013	$26,437.88
March 31, 2014	n/a
June 30, 2014	17,905.91
September 30, 2014	48.52
December 31, 2014	166.92
March 31, 2015	20,577.84
Total	$65,137.07

[17] At the hearing on May 31, 2018, 137ON produced copies of the invoices received by it from Mark Foley, Deborah Foley, Cole Foley and Lanmark for substantial portions of the ITCs claimed in the fourth quarter of 2013 and the first quarter of 2015. However, 137ON did not produce any documents to support the ITCs claimed in the second, third or fourth quarters of 2014. When I pointed out to counsel for 137ON that 137ON's book of documents (Exhibit A-1) did not contain copies of the invoices to support the ITCs claimed in 2014,[22] he expressed surprise and noted that there were three groups of invoices in that book (behind Tabs 11, 16 and 21). When I indicated that the invoices behind Tab 21 were the original invoices dated March 31, 2015 and the invoices behind Tab 16 were the revised invoices (as requested by the CRA), bearing the same date but prepared sometime thereafter, he explained that, in compiling the book of documents before the hearing, he had seen that it contained three groups of invoices and had inadvertently assumed that the invoices for all three years had been included. Given that the invoices for 2014 were not in Exhibit A-1, counsel for 137ON decided to withdraw the claims for the ITCs in the third and fourth quarters of 2014, as those amounts are relatively modest (i.e., $48.52 and $166.92 respectively). However, counsel for 137ON requested an opportunity to submit, after the hearing, supporting documentation for the ITCs claimed in the second

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[21] The total of the ITCs claimed in 2014 was $18,121.35 (i.e., $17,905.21 + $48.52 + $166.92).

[22] See subsection 138(2) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688, as amended (the "*Rules*").

quarter of 2014, in the amount of $17,905.91. Counsel for the Crown opposed that request.

E. Services

(1) 2013 Invoices

[18] Mark Foley stated that he is the general manager of 137ON, and that he performs various activities on behalf of 137ON. He also stated that he provided services in his own right to 137ON. The invoice dated December 31, 2013 by Mr. Foley indicated that he provided administration, consultation and management services, with no further description of those services.[23] The fee for those services was $42,000 and the HST was $5,460. During his testimony, Mr. Foley indicated that it was his role, when acting in his personal capacity and not on behalf of Lanmark, to investigate properties for potential acquisition by 137ON.[24] Mr. Foley also explained that, once 137ON made a decision to acquire a particular property, any services needed to develop the property were provided by Lanmark.[25]

[19] Effective as of December 31, 2013, Lanmark issued to 137ON an invoice charging a fee of $110,000 for administration, consultation and management services, and HST in the amount of $14,300.00. As indicated above, Lanmark was the lessee of a building owned by Betty Foley. Lanmark subleased portions of that building to various subtenants, including 137ON. As well, Lanmark provided an "office package," which included not only the premises, but also supplies and basic services. Lanmark provided premises and related services to 137ON and to the other subtenants. The portion of the $110,000 fee charged by Lanmark to 137ON for the premises and related services was $53,000.[26]

[20] The other $57,000 (i.e., $110,000 − $53,000) of the total fee related to development-property search services. Mr. Foley explained that Lanmark provided to 137ON the service of searching for sites to be developed by 137ON.[27] Based on Mr. Foley's explanation of the services that he personally provided to 137ON and his description of the services that Lanmark provided to 137ON, it appears that both Mr. Foley and Lanmark were providing development-property search services

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23 Exhibit A-1, Tab 11, p. 1.

24 *Transcript*, p. 51, lines 3-4; p. 75, lines 1-15; and p. 76, lines 9-17.

25 Exhibit A-1, Tab 21, p. 2. *Transcript*, p. 27, lines 6-8; p. 30, lines 19-22, p. 45, lines 13-17; and p. 51, lines 4-8.

26 *Transcript*, p. 23, lines 21-27.

27 *Transcript*, p. 22, line 14 to p. 23, line 10; and p. 24, lines 11-13.

to 137ON. It is my understanding that many, if not most, of the services provided by Lanmark were actually performed by Mr. Foley on behalf of Lanmark. No explanation was given by Mr. Foley as to how, for invoicing purposes, the services that he provided were allocated between those that he provided in his personal capacity and those that he provided as an employee of Lanmark.

[21] Notwithstanding that Lanmark provided both premises and related services (for a fee of $53,000) and development-property search services (for a fee of $57,000) to 137ON, the invoice that it issued on December 31, 2013 merely referred to "Administration, Consultation, Management Services"[28] and showed an aggregate fee of $110,000 and HST of $14,300.

[22] Deborah Foley's primary role was to look after the rental properties and the rental activities of 137ON. She was the individual who generally interacted with the tenants of 137ON. The invoice provided by Ms. Foley, and dated December 31, 2013, described her services as "Administration, Consultation, Management Services."[29] The heading at the top of the invoice reads "DEBORAH M. FOLEY – RENTAL INCOME."[30] The fee charged for her services was $24,000, and the HST was $3,120.

[23] Each of the invoices dated December 31, 2013, and rendered by Mark Foley, Lanmark and Deborah Foley respectively, shows the invoice number as being "2012". Mr. Foley was unable to explain why all three invoices had the same number. At one point in his testimony, he seemed to be of the view that "2012" was a date, rather than an invoice number.[31] It appears that the members of the Foley family had a practice of issuing invoices in a particular year for services rendered in the previous year. Therefore, it seems that the number "2012" shown on the invoices dated December 31, 2013 might refer to the year in which the services were provided. I am of the view that the number "2012" is the year in which the services were provided, and not the invoice number.

[24] Cole Foley issued an invoice to 137ON, a copy of which was produced at the hearing, in conjunction with the three above-described invoices that were dated December 31, 2013 and that were issued by Mark Foley, Deborah Foley and

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28 Exhibit A-1, Tab 11, p. 3; and Tab 21, p. 1.

29 Exhibit A-1, Tab 11, p. 2; and Tab 21, p. 1.

30 The capitalization of all the letters in the heading is in the original.

31 *Transcript*, p. 62, line 3, to p. 63, line 7. As noted above, each of those three invoices was dated December 31, 2013.

Lanmark to 137ON. The suggestion, in support of 137ON's claim for an ITC, was that the services provided by Cole Foley may have been rendered in 2013. However, the description of the services on the invoice states that the invoice was "For 2012 planning, administration, consulting & management services."[32] The invoice submitted by Cole Foley does not contain a date; therefore, there is nothing to indicate that the described services were invoiced in 2013, rather than 2012. The amount of the fee invoiced by Cole was $20,000 and the HST was $2,260.

[25] None of the four invoices rendered by Mark Foley, Deborah Foley, Lanmark and Cole Foley to 137ON, and submitted by 137ON in support of the ITCs claimed by it for 2013, shows the GST registration number of the person who provided the services.

[26] The four invoices described above were the only invoices submitted in support of the claim for ITCs in respect of 2013. The HST charged on those invoices is tabulated as follows:

Table 2

Service Provider	HST
Mark Foley	$5,460
Lanmark	14,300
Deborah Foley	3,120
Cole Foley	2,260
	$25,140

(2) 2014 Invoices

[27] As noted above, after the hearing on May 1, 2018 (and before the stipulated deadline), 137ON submitted to the Court, with copies to the Crown, photocopies of three invoices issued in the second quarter of 2014. For reasons that are set out below, I admitted those three documents into evidence.

[28] On May 6, 2014, Mark Foley issued to 137ON an invoice for a fee in the amount of $50,000, with HST of $6,500. The invoice indicated that the fee related to administration, consultation and management services rendered in the period

[32] Exhibit A-1, Tab 11, p. 4.

ending December 31, 2013. The invoice showed Mr. Foley's HST registration number.

[29] On May 6, 2014, Deborah Foley issued an invoice to 137ON for a fee in the amount of $24,000, with HST of $3,120. The invoice indicated that the fee was for administration, consultation and management services rendered for the period ending December 1, 2013. The invoice showed Ms. Foley's HST registration number.

[30] On June 30, 2014, Lanmark issued to 137ON an invoice for a fee in the amount of $62,000, with HST of $8,060. The invoiced amount is not described in any manner, so it is not clear whether it was a fee or something else. There is no description of the services provided by Lanmark. The invoice does not contain an HST registration number.

[31] The total of the HST set out in the three invoices issued in the second quarter of 2014 is tabulated as follows:

Table 3

Service Provider	HST
Mark Foley	$6,500
Deborah Foley	3,120
Lanmark	8,060
	$17,680

(3) 2015 Invoices

[32] On March 31, 2015, Mark Foley, Deborah Foley and Lanmark submitted invoices to 137ON for services provided in 2014. Each of those invoices described the services as "Management, Planning & Administration for 2014."[33] When the CRA indicated to Mr. Foley or one of his associates that the invoices did not have sufficient detail, revised invoices, also dated March 31, 2015, were provided.[34] The revised invoice submitted by Deborah Foley continued to describe her services as "Management, Planning & Administration for 2014," but went on to provide the following breakdown:

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[33] Exhibit A-1, Tab 21, p. 24-26.

[34] Exhibit A-1, Tab 16, p. 2-4.

Table 4

Description	Amount
General Accounting (payables, banking, consultant payments)	$ 8,400
General office & administration	10,800
Mail service (pickup & distribution) and general deliveries to municipalities and government agencies	4,800
	$24,000

Ms. Foley's revised invoice showed HST of $3,120.

[33] The revised invoice submitted by Lanmark described its services as generally being "management, planning & administration for 2014" and then provided this breakdown:

Table 5

Description	Amount
Rent, Utilities, Office Equipment	$53,000
Planning & development services for 1590 Stevenson Road North, Oshawa (meetings with consultants, municipal officials, CLOCA) Review of development alternatives, etc.	$30,000
	$83,000

The revised invoice of Lanmark showed HST of $10,790.

[34] The revised invoice provided by Mark Foley described the services as "2014 Planning and Development Services" and then provided a further description,

being "Assessment Review of Potential Development Projects," below which the following list of properties was set out:[35]

- 2452 Nash Road, Bowmanville – development lands
- 3253 Liberty St. N., Bowmanville – development lands
- 3145 Meanrs [*sic*] Ave. No., Bowmanville – development lands
- 2212 Trulls Rd., Courtice – development lands
- 5264 Liberty St. N., Bowmanville – development lands
- 3640 Liberty St. N., Bowmanville – development lands
- Liberty St. North & Taunton Rd., Bowmanville – development lands
- 306 Admiral Rd., Oshawa – double unit home
- 1595 Nash Rd., Courtice – development lands
- 1608 Nash Rd., Courtice – development lands
- 2455 Nash Rd., Courtice – development lands
- 377 Taunton Rd. East, Oshawa – commercial development
- 940 Taunton Rd. East, Whitby – commercial development
- Live Oak St., Oshawa – vacant building lot
- 2002 Rossland Rd. East, Whitby – 43 unit apartment site
- Orillia, Ontario – development lands
- 2770 prestonvale [*sic*] St., Courtice – development lands
- 1410 Stevenson Rd. North, Oshawa – development lands
- Multiple apartment, townhome & duplex sites (GTA)

The fee charged by Mark Foley for the services described above was a global amount of $50,000, with HST of $6,500.

[35] The total of the HST set out in the three above-described invoices dated March 31, 2015 is tabulated as follows:

Table 6

Service Provider	HST
Mark Foley	$6,500
Deborah Foley	3,120
Lanmark	10,790
	$20,410

[35] The capitalization, punctuation and abbreviations of the original invoice have been preserved in the above list.

[36] In claiming ITCs on its GST/HST returns for the fourth quarter of 2013, the second quarter of 2014 and the first quarter of 2015, 137ON based its claim on the full amount of HST shown on the invoices discussed above. At the hearing of these Appeals, Mr. Foley acknowledged that the services provided by Deborah Foley and Lanmark should have been allocated between the rental activities and the development activities of 137ON. Mr. Foley stated that he had conversations with 137ON's accountant (or perhaps comptroller-accountant) and they concluded that 75% of Ms. Foley's services pertained to 137ON's residential rental activities and 25% of her services pertained to 137ON's commercial development activities.[36]

[37] Mr. Foley referred to the large volume of papers accumulated by 137ON in respect of its development activities and seemed to suggest that the area of the rented premises used by 137ON for its development activities was greater than the area used for its rental activities. Immediately after that comment he stated that "the square footage of the office isn't going to change for either the residential or the commercial side, but the volume of work is greater, much greater on the commercial side than it is on the residential side."[37] Based on that explanation, Mr. Foley indicated that the fee of $53,000 charged for rent, utilities and office equipment for 2014 should have been allocated to the commercial activities to the extent of 75% and to the residential rental activities to the extent of 25%.[38] The $30,000 fee charged for planning and development services was, according to Mr. Foley, allocable entirely to the commercial activities.[39]

[38] Mr. Foley took the position that all of the services provided by him to 137ON pertained exclusively to commercial activities. I have doubts concerning that statement, given that Mr. Foley was the general manager of 137ON and, as residential rental activities were its only revenue-generating activity in 2013, 2014 and 2015, I expect that at least a portion of the services provided by Mr. Foley to 137ON would have related to those residential rental activities. Furthermore, one of the properties described in the revised invoice of Mr. Foley, dated March 31, 2015, was a single-family house at 306 Admiral Road, Oshawa, which was in the process of being converted to a two-unit house,[40] and which, if it had been acquired by 137ON, I think may possibly have had potential use as a residential rental

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36 *Transcript*, p. 25, line 7-13; p. 26, lines 20-27; p. 65, lines 7-8; p. 77, lines 7-15; and p. 78, lines 3-10.

37 *Transcript*, p. 25, lines 21-25.

38 *Transcript*, p. 25, line 26 to p. 26, line 3; and p. 78, line 26 to p. 79, line 4.

39 *Transcript*, p. 77, lines 16-24.

40 *Transcript*, p. 67, lines 25-28.

property.[41] Accordingly, I am of the view that at least 25% of the services provided by Mr. Foley to 137ON would have related to the residential rental activities. In other words, only 75% of the fees charged by Mr. Foley to 137ON were, in my view, allocable to commercial activities.

F. Listing of Subject Property for Sale

[39] At some point in time, likely in 2015 or thereabouts, 137ON listed the Subject Property for sale.[42] If the Subject Property had been sold, the sale would have constituted a commercial activity.[43]

IV. ANALYSIS

A. ITCs and Commercial Activity

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

> 169(1) Subject to this Part, where a person acquires … property or a service … and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply … becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:
>
> A Ч B
>
> where
>
> A is the tax in respect of the supply … 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*) …,

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41 As it turned out, 137ON did not acquire the property at 306 Admiral Road; however, Brent Foley (Mark Foley's son), who is a real estate broker, showed that property to one of his clients, who was looking for a two-unit dwelling. See *Transcript*, p. 68, line 10 to p. 69, line 10; and p. 76, line 18 to p. 77, line 2.

42 A summary of the listing particulars was entered as Exhibit R-1. See also *Transcript*, p. 57, line 2 to p. 60, line 17.

43 See paragraph (c) of the definition "commercial activity" in subsection 123(1) of the *ETA*.

> (*b*) where the property or service is acquired … 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 … by the person, and
>
> (*c*) in any other case, the extent (expressed as a percentage) to which the person acquired … the property or service … for consumption, use or supply in the course of commercial activities of the person.

[41] For the purposes of these Appeals, subsection 169(1) of the *ETA* sets out three conditions that must be satisfied by a person to be eligible to claim an ITC, as follows:

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

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

c) the claimant must have acquired the property or service for use in improving capital property used in its commercial activities or for consumption, use or supply in the course of its commercial activities.[44]

[42] The term "commercial activity" is defined in subsection 123(1) of the *ETA*, as follows:

> "commercial activity" of a person means
>
> > (*a*) a business carried on by the person …, except to the extent to which the business involves the making of exempt supplies by the person,
> >
> > (*b*) an adventure or concern of the person in the nature of trade …, except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
> >
> > (*c*) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply….

As indicated in the above definition, the making of exempt supplies does not come within the definition of the term "commercial activity."

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

[43] Subsection 123(1) of the *ETA* states that the term "exempt supply" means a supply included in Schedule V to the *ETA*. Paragraph (a) of section 6 of Part I of Schedule V to the *ETA* indicates that a supply "of a residential complex or a residential unit in a residential complex by way of lease, licence or similar arrangement for the purpose of its occupancy as a place of residence or lodging by an individual," for a period of at least one month by the same individual, is an exempt supply. Accordingly, the residential rental activities carried on by 137ON were not commercial activities.

[44] Having considered the testimony of Mr. Foley and the documentary evidence, I am of the view that the efforts of 137ON to develop the Subject Property and to find additional development properties constituted commercial activities. Furthermore, those commercial activities extended over a period of many years, including 2013, 2014 and 2015. However, as indicated in the previous paragraph, the residential rental activities of 137ON were not commercial activities.

[45] Subsection 169(1) of the *ETA* requires an apportionment. An ITC is available only to the extent (expressed as a percentage) to which the particular claimant was using the capital property in question in the course of commercial activities or acquired the particular property or service for consumption, use or supply in the course of commercial activities. Therefore, it becomes necessary to apportion 137ON's inputs (i.e., the consideration paid by 137ON for properties or services acquired) between its commercial activities and its residential rental activities.

[46] Subsection 141.01(5) of the *ETA* sets out the relevant apportionment principles as follows:

> Subject to section 141.02, the methods used by a person in a fiscal year to determine
>
> > (*a*) the extent to which properties or services are acquired … by the person for the purpose of making taxable supplies for consideration or for other purposes, and
> >
> > (*b*) the extent to which the consumption or use of properties or services is for the purpose of making taxable supplies for consideration or for other purposes,
>
> shall be fair and reasonable and shall be used consistently by the person throughout the year.

Thus, a fair and reasonable method must be used to determine the extent to which 137ON used the Subject Property in the course of its commercial activities or the extent to which 137ON acquired the services of Mr. Foley, Ms. Foley and Lanmark for consumption or use in the course of the commercial activities of 137ON.

[47] In order to perform the requisite apportionment, it is necessary to determine whether paragraph (*b*) or (*c*) in the description of factor B in subsection 169(1) of the *ETA* is the applicable provision. Paragraph (*b*) applies if the Subject Property was capital property of 137ON, if 137ON was using the Subject Property in the course of its commercial activities and if 137ON acquired the services in question for use in improving the Subject Property. Otherwise, paragraph (*c*) applies.

[48] The question of whether the Subject Property constituted capital property for the purposes of paragraph (*b*) in the description of factor B in subsection 169(1) of the *ETA* was not the focus of the evidence or the oral submissions at the hearing. In other words, the Parties did not make any submissions as to whether paragraph (*b*) or (*c*) in the description of factor B in subsection 169(1) of the *ETA* is the applicable provision for the purposes of these Appeals. The definition of "capital property" in subsection 123(1) of the *ETA* indicates that if a particular property would be capital property under the *Income Tax Act* (the "*ITA*"), it is generally capital property for the purposes of the *ETA*. Although the issue of whether the Subject Property was capital property or inventory, for the purposes of either the *ETA* or the *ITA*, was not specifically addressed at the hearing, based on the evidence that I heard (including the length of time that the Subject Property has been owned by 137ON and the ongoing efforts of 137ON to develop the Subject Property since its acquisition), it is my view that the Subject Property constituted capital property and not inventory during the reporting periods that are the subject of these Appeals.[45]

[49] Although the Subject Property was capital property of 137ON during the reporting periods in question, as 137ON was still endeavouring to obtain the requisite approvals to construct a storage container facility on the Subject Property, it had not yet begun to use the Subject Property in the course of its commercial

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[45] This finding is made only for the purposes of these Appeals, and is not intended to have any application to a determination, for the purposes of the *ITA*, as to whether any gain or loss on a future disposition of the Subject Property will be on capital account or income account for the purposes of the *ITA*.

activities.[46] Accordingly, paragraph (*b*) in the description of factor B in subsection 169(1) of the *ETA* is not applicable, with the result that paragraph (*c*) of that description is the applicable provision. Paragraph (*c*) requires a determination of the extent (expressed as a percentage) to which 137ON acquired the services of Mark Foley, Deborah Foley, Cole Foley and Lanmark for consumption or use in the course of its commercial activities as distinct from its residential rental activities.

[50] There was nothing in the evidence that would cause me to reconsider the allocation determined by Mr. Foley and 137ON's accountant in respect of the services of Ms. Foley, i.e., 75% allocated to residential rental activities and 25% allocated to commercial development activities. Similarly, there is nothing in the evidence to suggest that the all-inclusive fee charged each year by Lanmark to 137ON for rent, utilities and office equipment should be allocated differently from the allocation determined by Mr. Foley and 137ON's accountant, i.e., 75% to commercial activities and 25% to residential rental activities. As explained in paragraph 38 above, it is my view that only 75% of the fees charged by Mr. Foley to 137ON pertained to commercial activities. There was very little evidence concerning the nature of the services provided by Cole Foley and essentially no evidence concerning the allocation of the fee for those services between commercial activities and residential rental activities.

B. ITC Documentation

[51] I will now turn to an analysis of the adequacy of the ten invoices (the "Invoices") that were presented to the Court in respect of these Appeals. Four of the Invoices (the "2013 Invoices") relate to the fourth quarter of 2013, three of the Invoices (the "2014 Invoices") relate to the second quarter of 2014, and three of the Invoices (the "2015 Invoices") relate to the first quarter of 2015.[47]

[52] To claim an ITC, a GST registrant must satisfy certain documentation requirements, as set out in subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*. In particular, paragraph 169(4)(*a*) of the *ETA* requires a registrant, before filing a return in which an ITC is claimed for a reporting period, to obtain

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[46] A review of subsections 13(26) & (27) of the *ITA* makes it clear that there is, for the purposes of the *ITA*, a distinction between acquiring a property and using the property. I am of the view that a similar distinction between the acquisition and the use of a property should be drawn for the purposes of the *ETA*.

[47] For the purposes of this portion of the analysis, I will consider the revised, rather than the original, Invoices that were dated March 31, 2015.

"sufficient information in such form containing such information as will enable the amount of the [ITC] to be determined, including any such information as may be prescribed." In turn, section 3 of the *ITCI Regulations* states that, for the purposes of paragraph 169(4)(*a*) of the *ETA*, various items of information are prescribed, as set out in three provisions (i.e., paragraphs (*a*), (*b*) and (*c*), depending on the amount paid or payable in respect of the particular supply). In the context of these Appeals, the required information may be tabulated as follows:

Provision	Prescribed Information
3(*a*)(i)	the name of the supplier;
3(*a*)(ii)	where an invoice is issued in respect of the supply, the date of the invoice;
3(*a*)(iv)	the total amount paid or payable for the supply;
3(*b*)(i)	the name of the supplier and the GST registration number of the supplier;
3(*b*)(iii)	where the amount paid or payable for the supply does not include the amount of tax paid or payable in respect thereof, the amount of tax paid or payable in respect of the supply;
3(*c*)(ii)	the recipient's name;
3(*c*)(iii)	the terms of payment; and
3(*c*)(iv)	a description of the supply sufficient to identify it.[48]

[53] Section 2 of the *ITCI Regulations* defines the term "supporting documentation" as meaning "the form in which information prescribed by section 3 is contained…." The information required by subsection 169(4) of the *ETA* need not be contained in a single document; rather, it may be contained collectively in multiple documents.[49] However, to constitute supporting documentation, a particular document must be issued or signed by the supplier.[50]

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

[49] *Westborough Place Inc. v The Queen*, 2007 TCC 155, ¶32.

[50] Paragraph 2(h) of the *ITCI Regulations*. See also *Westborough Place, ibid.*, ¶34.

[54] Although subsection 169(4) of the *ETA* requires that the supporting documentation, containing the prescribed information, must be obtained by the registrant before filing the GST return in which the credit is claimed, where such documentation is not made available to the CRA during the course of an audit, it appears to be acceptable (but not desirable) to produce the documentation at the hearing of the particular appeal.[51] Given the close relationship among 137ON, Lanmark and the members of the Foley family, I am of the view that the Invoices had been obtained by 137ON before it filed its GST returns in which it claimed the ITCs that are the subject of these Appeals. In any event, the Minister did not assume, and the Crown has not suggested, that the Invoices were not obtained by 137ON before filing the GST returns in which the ITCs were claimed.

C. Admissibility of 2014 Invoices

(1) Rule 138(1)

[55] It was the understanding of counsel for 137ON that he had included the 2014 Invoices in the book of documents that he compiled.[52] Due to an inadvertent oversight, such was not the case. This is not a situation where 137ON or its counsel failed to look for the 2014 Invoices before the commencement of the hearing. Rather, the non-inclusion of the 2014 Invoices was simply the result of a compilation error.

[56] Subsection 138(1) of the *Rules* states:

> The judge may reopen a hearing before judgment has been pronounced for such purposes and upon such terms as are just.

In considering the principles to be applied on a motion to reopen a trial, the Supreme Court of Canada (the "SCC"), in *Sagaz Industries*, referenced the two-part test enunciated in *Scott v Cook*, which the SCC summarized as follows:

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[51] For examples of cases where the supporting documentation was only made available at the hearing, see *Wing Construction Ltd. v The Queen*, [2000] GSTC 100; *Willis v The Queen*, [2000] GSTC 110; *Helsi Construction Management Inc. v The Queen*, [2001] GSTC 39, *aff'd*, 2002 FCA 358; and *603262 BC Ltd. v. The Queen*, 2011 TCC 334.

[52] The book of documents was entered as Exhibit A-1.

> First, would the evidence, if presented at trial, probably have changed the result? Second, could the evidence have been obtained before trial by the exercise of reasonable diligence?[53]

In *Sagaz*, the SCC stated that a trial judge's discretion to reopen a trial must be exercised "sparingly and with the greatest care…."[54] Nevertheless, Rule 138(1) confers a broad discretion.[55]

[57] In applying the first part of the *Scott* test, it is my view that the 2014 Invoices of Mr. Foley and Ms. Foley will change the result. Without the 2014 Invoices, subsection 169(4) of the *ETA* would preclude 137ON from obtaining the desired ITCs in respect of the fees that are the subject of those Invoices. As the 2014 Invoice of Lanmark is deficient in some respects (as will be explained below), its admission will not change the result for 2014 insofar as the fee charged by Lanmark is concerned; however, it is my view that, for the sake of completeness, all three of the 2014 Invoices should be admitted together.

[58] Turning to the second part of the *Scott* test, it is my understanding that the 2014 Invoices were obtained by 137ON before the hearing commenced. In other words, this is not a situation where 137ON or its counsel failed to prepare adequately for the hearing. Rather, it was a situation where an inadvertent oversight occurred. In my view, an innocent mistake of this type does not run afoul of the second part of the *Scott* test.[56]

[59] As noted, subsection 138(1) of the *Rules* permits a judge to reopen a hearing "for such purposes … as are just." As well, section 9 of the *Rules* states, "The Court may, where and as necessary in the interests of justice, dispense with

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53 *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, ¶20. See also *Scott v Cook*, [1970] 2 OR 769 (HC); *Benaroch v The Queen*, 2015 TCC 91; and *Freitas v The Queen*, 2017 TCC 46.

54 *Ibid.*, ¶61.

55 *The Toronto-Dominion Bank v The Queen*, 2011 FCA 221, ¶24. See also *Vander Ende v Vander Ende*, 2010 BCSC 597, ¶84.

56 In *Mitsubishi Heavy Industries Ltd. v Canadian National Railway*, 2011 BCSC 1536, ¶21, the Court implied that, where a motion is made to admit fresh evidence before the reasons of the trial judge have been released, there may be some difficulty in applying the principles set out in *Sagaz*, which dealt with a motion to admit fresh evidence after the trial judge's reasons for judgment had been released, but before the formal judgment had been entered. In *Mitsubishi*, ¶26 & 41, the Court also suggested that, in some cases, it could be unjust to deny relief to a litigant simply by reason of the oversight or slip of counsel for that party. See also *Vander Ende*, *supra* note 55, ¶84.

compliance with any rule at any time." In *Sagaz*, the SCC suggested that one of the questions to be considered is "whether, at the expense of finality, fairness dictates that the trial be reopened."[57] In my view, given the innocent and inadvertent oversight that occurred in compiling 137ON's book of documents, it would be neither just nor fair to exclude the 2014 Invoices from the evidence to be considered in deciding these Appeals.

[60] Subsection 138(1) of the *Rules* also indicates that, if a hearing is to be reopened, it should be "upon such terms as are just." It would not be just or fair to admit the 2014 Invoices into evidence without providing counsel for the Crown with an opportunity to cross-examine Mr. Foley in respect of those invoices.[58]

[61] At a case management conference convened by telephone conference call on June 17, 2019, I advised both counsel of my decision to admit the 2014 Invoices into evidence. I also said that the fees which are the subject of the 2014 Invoices of Mr. Foley and Ms. Foley would be apportioned between the commercial activities and the residential rental activities in a manner to be described in these Reasons, and that the fee which is the subject of the 2014 Invoice of Lanmark could not give rise to an ITC because that invoice is missing prescribed information that is not available from other documentary evidence before the Court. I also informed counsel for the Crown that I was providing her with an opportunity to cross-examine Mr. Foley in respect of the 2014 Invoices. After considering my comments concerning the limited extent to which I was prepared to rely on the 2014 Invoices, counsel for the Crown stated that she did not desire to cross-examine Mr. Foley in respect of the 2014 Invoices.

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57 *Sagaz*, *supra* note 53, ¶60. See *DeGroote v Canadian Imperial Bank of Commerce*, (1991) 121 OAC 327, ¶3, in which the Court noted that the reasonable diligence requirement in the second part of the *Scott* test may "be relaxed in exceptional circumstances where necessary to avoid a miscarriage of justice." See also *Lo v Ho*, 2010 ONSC 662, ¶25-26.

58 See *Mitsubishi*, *supra* note 56, ¶35-36.

(2) Rule 89(1)

[62] The 2014 Invoices were not enumerated in the List of Documents (Partial Disclosure) that 137ON prepared for the purposes of subsection 81(1) of the *Rules*.[59]

[63] Subsection 89(1) of the *Rules* states:

> 89(1) Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in evidence by a party unless
>
> (*a*) reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding,
>
> (*b*) it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or
>
> (*c*) it has been produced by a witness who is not, in the opinion of the Court, under the control of the party.

[64] Subsection 89(1) of the *Rules* has a salutary objective, which is to reduce the possibility of taking the other party by surprise.[60] Hence, the general rule is to exclude from evidence a document that is not referred to in the pleadings or the list of documents of the party who seeks to introduce the document.[61] Absent some agreement between the parties, subsection 89(1) of the *Rules* should not readily be

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[59] The List of Documents forms the table of contents for 137ON's book of documents; therefore, the inadvertent overlooking of the 2014 Invoices presumably occurred when the List of Documents was prepared, as well as when the book of documents was compiled.

[60] In *Scavuzzo v The Queen*, 2004 TCC 806, ¶5, Chief Justice Bowman noted that to confront a party with numerous documents that were not disclosed in the other party's list of documents could take the first party by surprise and put him at a significant and possibly unfair disadvantage.

[61] *Walsh v The Queen*, 2009 TCC 557, ¶25. See also *Canadian Economic Consultants Ltd. v The Queen*, [2001] 1 CTC 123 (FCA); and *568864 B.C. Ltd. v The Queen*, 2014 TCC 373, ¶107.

ignored.[62] A departure from the general rule requires some justification[63] or some reason.[64]

[65] The opening words of subsection 89(1) of the *Rules* provide the Court with a discretion to allow a document into evidence even if the requirements of subsection 89(1) have not been met.[65] As a foundation for the exercise of this discretion, there should be some reason provided to the Court in support of the proposition that a previously undisclosed document should be allowed into evidence.[66] The Court must exercise its discretion judicially, according to the rules of reason and justice, and not arbitrarily.[67] In determining whether to admit a previously undisclosed document, there must be a balancing of the competing interests of both parties, so as to avoid a miscarriage of justice.[68] The Court must also be mindful of the interests of justice and the overriding importance of having all of the relevant information before the Court to enable it to arrive at a proper and just disposition of the particular appeal.[69] Finally, the Court should not lose sight of subsection 4(1) of the *Rules*, which provides that the *Rules* are to "be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."[70]

[66] I am of the view that counsel's inadvertent oversight and compilation error are sufficient justification to support a departure from the general rule (which typically would exclude a document not referred to in the pleadings or the list of documents of the party who seeks to introduce the document).[71] In reaching this decision, I have endeavoured to balance the interests of both Parties and I have been mindful of the overriding importance of having all of the relevant information before me to enable me to arrive at a proper and just disposition of these Appeals.

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62 *Savoy v The Queen*, 2011 TCC 35, ¶23 and footnote 6 therein.

63 *Walsh*, *supra* note 61, ¶25.

64 *Myrdan Investments Inc. v The Queen*, 2013 TCC 35, ¶26.

65 *Ibid.*, ¶27. See also *Sydney Mines Firemen's Club v The Queen*, 2011 TCC 403, ¶17.

66 *Myrdan Investments*, *supra* note 64, ¶26.

67 *Sydney Mines*, *supra* note 65, ¶18. See also *Doiron v Haché*, 2005 NBCA 75, ¶57; and *New Brunswick v Stephen Moffett Ltd.*, 2008 NBCA 9, ¶10.

68 *Sydney Mines*, *supra* note 65, ¶17.

69 *Ibid.*, ¶21.

70 *Myrdan Investments*, *supra* note 64, ¶27; and *Sydney Mines*, *supra* note 65, ¶22.

71 This determination is not to be taken as a suggestion that, in other cases, counsel should not take reasonable care when drafting a list of documents or compiling a book of documents. Rather, it is simply an acknowledgment that occasionally innocent mistakes occur and that, where relief can be provided on a basis that is fair and just to the other party, such relief may, depending on all the circumstances, be granted.

By providing counsel for the Crown with an opportunity (which was declined) to cross-examine Mr. Foley in respect of the 2014 Invoices, I have striven to avoid unfairness or a miscarriage of justice insofar as the Crown is concerned.

D. Analysis of Invoices

[67] I will now turn to an analysis of the ten Invoices that have been put into evidence in respect of these Appeals, in order to determine whether the information prescribed by the *ITCI Regulations* is set out in those Invoices. The results of that analysis are set out in Appendix A, which tabulates the various subparagraphs of the *ITCI Regulations* that are listed in paragraph 52 above, and then indicates whether the particular requirement was satisfied or not. For many of the provisions, such as paragraph 3(*a*)(i) of the *ITCI Regulations*, there is little, if any, dispute as to whether the particular requirement was satisfied. In the discussion that follows, I will focus only on those requirements where there is an element of controversy.[72]

[68] The 2014 and 2015 Invoices of Mark Foley and Deborah Foley and the 2015 Invoice of Lanmark set out all of the information prescribed by the *ITCI Regulations*. Therefore, there is no issue concerning those Invoices insofar as the documentation requirement is concerned.

[69] Beginning with subparagraph 3(*a*)(ii) of the *ITCI* Regulations, the 2013 Invoice of Cole Foley does not contain a date. This is a significant deficiency.

[70] Moving to subparagraph 3(*b*)(i) of the *ITCI Regulations*, all four of the 2013 Invoices and the 2014 Invoice of Lanmark are missing the GST registration number of the particular supplier. However, as explained above, the information required by subsection 169(4) of the *ETA* may be contained in more than one document.[73] As the 2014 Invoices of Mark and Deborah and the 2015 Invoices of

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[72] In a well-organized, detailed and thoroughly drafted table included in the Crown's Written Representations, counsel for the Crown has summarized a similar analysis. The Crown seems to be of the view that both subparagraphs 3(*b*)(iii) and (iv) of the *ITCI Regulations* must be satisfied. I do not read those two provisions in that manner. It is my understanding that, if the price paid for a supply is GST/HST-excluded, subparagraph 3(*b*)(iii) requires that the amount of GST/HST is to be stated, but if the price is GST/HST-included, subparagraph 3(*b*)(iv) requires that there be a statement to that effect, together with the applicable rate of GST/HST. In these Appeals, the fees set out in the Invoices were HST-excluded, not HST-included.

[73] *Westborough Place, supra* note 49, ¶32. See also paragraph 53 above.

Mark, Deborah and Lanmark contain the respective GST registration numbers of the indicated suppliers, I am of the view that this is sufficient to satisfy the requirement to provide the GST registration numbers of those three suppliers in respect of the 2013 Invoices.[74] However, there is no document that was put into evidence that contains the GST registration number of Cole Foley. This is a deficiency in respect of his 2013 Invoice.

[71] Subparagraph 3(*c*)(iii) of the *ITCI Regulations* states that the terms of payment are prescribed information. Cole Foley's 2013 Invoice contains the phrase "NOW DUE". Apart from Cole's 2013 Invoice, none of the Invoices expressly sets out information that is referred to as "terms of payment" (other than stipulating the amount of the fee that is the subject of the particular Invoice). It is my understanding that, if a contractual document (which presumably includes an invoice) does not state express terms of payment, the fee or price that is the subject of the invoice is payable in cash currently or perhaps within a reasonable time.[75] If a supplier were to permit payment to be made in instalments or at a date some distance in the future, with or without interest (as the case may be) and with or without security, it would be incumbent to specify expressly such terms of payment. However, it is my understanding that the fees that were the subject of the Invoices were to be paid within a reasonable time, if not immediately. Accordingly, it is my view that each of the Invoices, by specifying the amount of the fee to be paid, with the implied requirement that the fee be paid in cash within a reasonable time, has satisfied the requirement in subparagraph 3(*c*)(iii) to set out the terms of payment.

[72] Subparagraph 3(*c*)(iv) of the *ITCI Regulations* indicates that a description of the particular supply is prescribed information. The 2014 Invoice of Lanmark does not contain such a description.

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[74] While it is not determinative, another point to note is that, given the relationship among 137ON on the one hand and Mark Foley, Deborah Foley and Lanmark on the other hand, it is likely that the GST registration numbers of Mark, Deborah and Lanmark were available to 137ON, and were in the possession of a director or officer of 137ON, at all material times.

[75] G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006), p. 533 & 541. See also G.H.L. Fridman, *Sale of Goods in Canada*, 5th ed. (Toronto: Thomson Carswell, 2004), p. 238- 239; although this text relates to the sale of goods, it is my view that the statements therein concerning time and methods of payment are statements of general principle that also apply to a contract for the supply of services.

[73] It might be arguable that, even though 137ON has not fully complied with subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*, it has substantially complied, such that it should not fail in its claim for ITCs in respect of the 2013 Invoice of Cole Foley and the 2014 Invoice of Lanmark merely because it may not have possessed, at the time when it claimed the ITCs, supporting documentation setting out all of the prescribed information. However, the Courts have consistently taken the position that section 3 of the *ITCI Regulations* is to be strictly applied. In *Systematix Technology*, the Federal Court of Appeal stated:

> [4] We are of the view that the legislation [i.e., subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*] is mandatory in that it requires persons who have paid GST to suppliers to have valid GST registration numbers from those suppliers when claiming input tax credits.
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> [5] We agree with the comments of Bowie J. in the case of *Key Property Management Corp. v. R.* [2004] G.S.T.C. 32 (T.C.C.) where he stated:
>
> > "The whole purpose of paragraph 169(4)(a) and the *Regulations* is to protect the consolidated revenue fund against both fraudulent and innocent incursions. They cannot succeed in that purpose unless they are considered to be mandatory requirements and strictly enforced. The result of viewing them as merely directory would not simply be inconvenient, it would be a serious breach of the integrity of the statutory scheme [*emphasis added by the FCA*].
>
> [6] We also agree with the comments of Campbell J. in *Davis v. R.* [2004] G.S.T.C. 134 (TCC):
>
> > "Because of the very specific way in which these provisions are worded, I do not believe they can be sidestepped. They are clearly mandatory and the Appellant has simply not met the technical requirements which the *Act* and the *Regulations* place upon him as a member of a self-assessing system [*emphasis added by the FCA*].[76]

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

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

> I think it is fair to say that none of these types of documents [i.e., the types of documents listed in the definition of "supporting documentation" in section 2 of the *ITCI Regulations*] has been produced, either to the Canada Revenue Agency or to the Court. The requirement for documentation is not unreasonable nor indeed is it particularly onerous. It is, in any event, a requirement under the *ETA*.[77]

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

> The main reasons [*sic*] for the disallowance was that the suppliers' GST numbers were not shown on the invoices. This is a requirement under section 3 of the *Input Tax Credit Information Regulations*. While there may be some justification in certain cases for treating technical or mechanical requirements as directory rather than mandatory … that is not so in the case of the GST provisions of the *Excise Tax Act*.[78]

[75] Accordingly, as 137ON has not fully complied with subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*, it is not entitled to ITCs in respect of the 2013 Invoice of Cole Foley and the 2014 Invoice of Lanmark.

[76] Apart from the 2013 Invoice of Cole Foley and the 2014 Invoice of Lanmark, the other eight Invoices pertained, in part, to services acquired by 137ON for consumption or use in the course of its commercial activities. The fees that are the subject of those eight Invoices must be allocated between 137ON's commercial activities and its residential rental activities. The amounts of the ITCs that are supportable by those Invoices are tabulated as follows:

Table 7

Supplier	Invoice Date	Fee	Total HST	Commercial Portion	ITC
Mark	31 Dec '13	$42,000	$5,460	75%	$4,095.00

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

78 *Helsi Construction Management*, *supra* note 51, ¶11. See also *Oak Ridges Lumber*, *ibid.*, ¶11.

Deborah	31 Dec ’13	24,000	3,120	25%	780.00
Lanmark	31 Dec ’13	53,000	6,890	75%	5,167.50
		57,000	7,410	100%	7,410.00
Mark	6 May ’14	50,000	6,500	75%	4,875.00
Deborah	6 May ’14	24,000	3,120	25%	780.00
Mark	31 Mar ’15	50,000	6,500	75%	4,875.00
Deborah	31 Mar ’15	24,000	3,120	25%	780.00
Lanmark	31 Mar ’15	53,000	6,890	75%	5,167.50
		30,000	3,900	100%	3,900.00
Total					$37,830.00

[77] Accordingly, 137ON is entitled, during the reporting periods in question, to ITCs in the aggregate amount of $37,830. The allocation of the aggregate ITCs to the specific reporting periods is set out in Table 8 below.

V. CONCLUSION

[78] The Appeals in respect of the quarterly reporting periods ending on December 31, 2013, June 30, 2014 and March 31, 2015 are allowed, and the Reassessments in respect of those reporting periods are referred back to the Minister for reconsideration and reassessment on the basis that 137ON is entitled to ITCs for those reporting periods as set out below:

Table 8

Period Ended	ITCs	Period Totals
December 31, 2013	$4,095.00	
	780.00	
	5,167.50	
	7,410.00	
Total for period	$17,452.50	$17,452.50
June 30, 2014	$4,875.00	
	780.00	
Total for period	$5,655.00	5,655.00
March 31, 2015	$4,875.00	
	780.00	
	5,167.50	
	3,900.00	
Total for period	$14,722.50	$14,722.50
Total for all periods		$37,830.00

[79] The Appeals in respect of the quarterly periods ending on September 30, 2014 and December 31, 2014 are dismissed.[79]

[80] As success has been divided, my inclination is not to make an award of costs. However, if the Parties take a different view, they shall have 30 days from

[79] It is my understanding that the Minister did not disallow any ITCs for the quarterly period ending on March 31, 2014, and that 137ON is not seeking any relief in respect of that period.

the date of the Judgment in respect of these Appeals to reach an agreement on costs and to so advise the Court, failing which 137ON shall have a further 30 days to file written submissions on costs, and the Crown shall have yet a further 30 days to file a written response. Any such submissions shall be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement on costs and no submissions are received from the Parties, no costs shall be awarded.

Signed at Ottawa, Canada, this 16th day of July 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

APPENDIX A

Information Prescribed by Section 3 of the *ITCI Regulations*

	3(*a*)(i)	3(*a*)(ii)	3(*a*)(iv)	3(*b*)(i)	3(*b*)(iii)	3(*c*)(ii)	3(*c*)(iii)	3(*c*)(iv)	
Invoice	Name of Supplier	Invoice Date	Amount Payable	Supplier's GST Number	Amount of HST	Name of Recipient	Terms of Payment	Description of Services	s.169(4) Compliant
Mark 2013	Yes	Yes	Yes	No*	Yes	Yes	Yes	Yes	Yes
Deborah 2013	Yes	Yes	Yes	No*	Yes	Yes	Yes	Yes	Yes
Cole 2013	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No
Lanmark 2013	Yes	Yes	Yes	No*	Yes	Yes	Yes	Yes	Yes
Mark 2014	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Deborah 2014	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Lanmark 2014	Yes	Yes	Yes	No*	Yes	Yes	Yes	No	No

	3(*a*)(i)	3(*a*)(ii)	3(*a*)(iv)	3(*b*)(i)	3(*b*)(iii)	3(*c*)(ii)	3(*c*)(iii)	3(*c*)(iv)	
Invoice	Name of Supplier	Invoice Date	Amount Payable	Supplier's GST Number	Amount of HST	Name of Recipient	Terms of Payment	Description of Services	s.169(4) Compliant
Mark 2015	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Deborah 2015	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Lanmark 2015	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
* The respective GST registration numbers are shown on other Invoices.									

CITATION:	2019TCC149
COURT FILE NO.:	2016-3232(GST)G
STYLE OF CAUSE:	1378055 ONTARIO LIMITED AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 1, 2018
APPELLANT'S SUBMISSIONS:	July 12, 2018
RESPONDENT'S SUBMISSIONS:	July 13, 2018
CASE MANAGEMENT CONFERENCE:	June 17, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF JUDGMENT:	July 16, 2019

APPEARANCES:

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Counsel for the Respondent:	Devon E. Peavoy

COUNSEL OF RECORD:

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