Docket: 2015-2586(GST)G

BETWEEN:

VOCAN HEALTH ASSESSORS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 10, 11, 12, 13, 2020 and continued on September 2, 2020, at Toronto, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the appellant:	Naresh Misir Ken Singh Devendranauth Misir
Counsel for the respondent:	Christopher Bartlett

JUDGMENT

The appeal from the assessment under Part IX of the *Excise Tax Act* for the reporting periods from March 1, 2009 to February 29, 2010, March 1, 2010 to February 28, 2011, and March 1, 2011 to February 29, 2012 is dismissed.

Costs are awarded to the respondent. The respondent shall provide written submissions on costs within 30 days from the date of this Judgment. Vocan shall provide written submissions on costs within 30 days from the filing date of the respondent's submissions. The respondent shall provide their reply within 15 days

of the filing date of Vocan's submissions. All submissions and reply shall be restricted to no more than 15 pages in length.

Signed at Nanaimo, British Columbia, this 6th day of August 2021.

"K. Lyons"

Lyons J.

Citation: 2021 TCC 49
Date: 20210806
Docket: 2015-2586(GST)G

BETWEEN:

VOCAN HEALTH ASSESSORS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

I. INTRODUCTION

[1] Vocan Health Assessors Inc., the appellant, ("Vocan"), provided two services: treatment and supplied assessment reports to insurance companies or legal representatives ("referring source") in respect of individuals injured in motor vehicle accidents ("individuals"). Vocan contracted with various types of assessors to prepare the assessment reports in respect of the individuals. Assessors billed Vocan and were compensated by Vocan for services rendered. Vocan billed the referring source for the assessment reports, for a marked-up fee, and was compensated by the referring sources. Assessment reports assist insurers in the determination of injured individuals' entitlement to insurance benefits.

[2] Vocan appeals the assessment by the Minister of National Revenue under the *Excise Tax Act* ("ETA").[1] The assessment for the reporting periods ending between March 1, 2009 to February 28, 2011 (collectively "both Periods") is in respect of Goods and Services Tax ("HST") collectible but not charged pertaining to the supply of assessment reports Vocan made to referring sources, and gross negligence penalties levied for HST not charged for the supply of the assessment reports. The

[1] Notice of Assessment dated December 27, 2013, Exhibit A2, Tab 1, and confirmed by notice dated March 27, 2015.

assessment for the reporting period from March 1, 2011 to February 29, 2012 ("2012 Period") is in respect of the input tax credit ("ITC") amount disallowed.

[3] Vocan asserts the service (the supply of assessment reports) it provided during both Periods is an exempt supply pursuant to section 2 of Part II of Schedule V of the ETA, thus penalties were incorrectly levied, and the ITC it claimed for the 2012 Period should not be reduced.

II. ISSUES

[4] This appeal raises the following issues:

a) Whether the supply of assessment reports to referring sources during both Periods is taxable or exempt under Part IX of the ETA?

b) If it is found the supply is taxable, whether the Minister properly imposed penalties for both Periods pursuant to section 285 of the ETA*?*

c) What, if any, additional amount of ITC is Vocan entitled to?

[5] At the hearing, Vocan abandoned its alternative argument that the supply of assessment reports was zero-rated.

III. SUMMARY OF FACTS

[6] Vocan called eight witnesses to testify on its behalf.

Vocan

[7] Kashmira Handy, Vocan's owner, operator and sole director, testified it is in the health care business, conducts assessments and treats mostly individuals that sustained injuries in motor vehicle accidents. It was created because she perceived a cultural insensitivity to individuals' needs.

[8] Vincent Rabbaya, Vocan's Manager of Operations responsible for its day-to-day operations, has a BSc in physiotherapy from the Philippines but is not a regulated health professional in Canada nor an assessor. He testified Vocan had four employees in 2012 and provided services that consisted of assessments and physiotherapy to injured individuals suffering physically or psychologically.

[9] Siva Vimalachandran, Vocan's bookkeeper and a part-time employee from 2009 to 2012 (the "bookkeeper"), had previous training and experience in general accounting but did not have an accounting designation.

[10] The following assessors provided some background as to their credentials and testified that during 2009 to 2012 they prepared assessment reports arising from their assessments of injured individuals.

Practitioners

[11] Knolly Hill, a psychologist licensed in Ontario since 1987, confirmed during cross-examination he has a PhD in psychology.

[12] David Kunashko, a chiropractor licensed in Ontario since 1992, conducted assessments for Vocan since 2007 and up to 2012 and is governed by the *Chiropractic Act, 1991*, of Ontario, which sets out the scope of the work. When he entered practice, there was funding from Ontario Health Insurance Plan ("OHIP") for chiropractors but not in 2009 nor 2012.

[13] Saeid Gholeizadeh, a physiotherapist licensed in Ontario since 2002 under the *Ontario Health Act and Physiotherapy Act*, is a member of the College of Physiotherapists of Ontario, is not restricted to physiotherapy and has certain specialties like acupuncture. He agreed that licensed physiotherapists can only bill OHIP if registered.

[14] These Practitioners agreed they are not medical doctors (Medical Practitioners) nor a member of the Ontario College of Physicians and Surgeons. Ms. Handy agreed and accepted that the remaining Practitioners, the Nurse and Other Assessors are not medical doctors.

Medical Practitioners

[15] Dr. Alex Pister, a dental surgeon licensed to practise in Ontario since 1983 and a member of the Royal College of Dental Surgeons of Ontario, did temporal mandibular joint ("TMJ") assessments.

[16] Dr. M. K. Joseph Kwok, an orthopaedic surgeon licensed to practise in Ontario since 1976, became a specialist to do surgery in 1980 and did orthopaedic assessments.

Credibility findings and observations

[17] Ms. Handy's evidence was self-serving, there were inconsistencies in her testimony compared with others and she obfuscated in parts. Parts of her evidence were not credible and other parts were not reliable. Mr. Rabbaya's evidence was generally clear and credible. Aspects of Mr. Vimalachandran's evidence tended to be confusing and therefore unreliable, and other aspects were internally inconsistent thus not credible. Overall, the assessors' evidence was credible and presented in a forthright manner.

[18] Terms used by Vocan in its pleading and some used at trial were confusing at times. For instance, some Practitioners were referred to as "doctor" even though they are not Medical Practitioners as defined in section 1 of Part II of Schedule V of the ETA. Its pleading uses terms "providers", "health care providers", "health care practitioners" and "health care professionals" interchangeably and to encompass all assessors that prepared assessment reports even though some assessors are not health professionals in the health professions specified on Schedule 1 of the *Regulated Health Professions Act, 1991* ("*RHPA*" and "Schedule 1").[2]

[19] Four types of assessors are defined below in paragraph 10 of the partial Statement of Agreed Facts ("agreed facts"). Twenty sample assessment reports, arising from the assessments, were tendered at the hearing.[3] It would be useful to mention that when testifying witnesses described an assessment in various ways. Namely, independent medical examination (used by some Medical Practitioners), evaluation, functional capacity evaluation, follow-up in-home assessment, ergonomic intervention, work-site survey, document review rebuttal and other descriptors.[4]

Agreed Facts

[20] The agreed facts indicate:

---

[2] *Regulated Health Professions Act*, S.O. 1991, c. 18.

[3] Personal information was redacted.

[4] Part 8 of Form 22 differentiates between examination versus assessment. Vocan asserts CRA Policy P-248 "The application of GST/HST to the supply of an independent medical examination ("IME") and to other independent assessments" does not correctly state the law and is too narrow. The policy refers to independent medical examinations (by Medical Practitioners) and independent assessments (by others).

1. Vocan Health Assessors Inc. (the "Appellant") was incorporated in 2005.

2. The Appellant's sole shareholder was Kashmira Handy.

3. The Appellant is a GST registrant.

4. The Appellant filed its return on an annual basis.

5. This appeal relates to the annual reporting periods from:

(a) March 1, 2009 to February 28, 2010 (the "2010 period");

(b) March 1, 2010 to February 28, 2011 (the "2011 period"); and

(c) March 1, 2011 to the end of February 2012 (the "2012 period").

6. On or around August 25, 2010, the Appellant filed a GST/HST return for the 2010 Period reporting nil GST/HST and total input tax credits ("ITCs") of $6,260.17. On or around September 13, 2010, the Appellant filed an Amended GST/HST return for the 2010 Period reporting nil GST/HST and nil ITCs.

7. The following table sets out the amounts that the Appellant reported in its Amended GST/HST return for the 2010 Period, its GST/HST return for the 2011 Period and its GST/HST return for the 2012 Period, as well as the amounts that were assessed in the assessments under appeal:

Period	**2010**		**2011**		**2012**	
	Reported	Assessed	Reported	Assessed	Reported	Assessed
GST/HST Sales	NIL	$1,244,727	NIL	$1,261,821	$431,703	$431,703
GST/HST Collectible	NIL	$62,236	NIL	$127,224	$66,279	$66,279
ITCs	NIL	NIL	NIL	NIL	$58,544.33	$24,648
Net Tax	NIL	$62,236	NIL	$127,224	$13,181	$41,631

A copy of the Goods and Services Tax/Harmonized Sales Tax (Re)Assessment dated December 27, 2013 in respect of the 2010, 2011 and 2012 Periods is located at tab 1 of the Joint Book of Documents.

8. At all relevant times, the Appellant provided two types of services:

(a) it supplied assessment reports ("Assessment Reports"); and

(b) it provided treatment to individuals.

9. The Assessment Reports were in respect of individuals who had been injured in motor vehicle accidents for the purpose of determining whether the individuals were entitled to benefits pursuant to the *Statutory Accident Benefits Schedule,* O. Reg. 34/10, and the *Insurance Act*, R.S.O. 1990, c. 1.8.

10. The Appellant contracted with assessors, each of whom were either:

(a) a dentist, an orthopedic specialist, a physiatrist, or a psychiatrist (collectively, the "Medical Practitioners");

(b) a nurse (the "Nurse");

(c) a chiropractor, an occupational therapist, a physiotherapist, or a psychologist (collectively, the "Practitioners"); or

(d) a social worker or a vocational rehabilitation counselor (collectively, the "Other Assessors")

11. The Medical Practitioners were members of the Ontario College of Surgeons and Physicians or the Royal College of Dental Surgeons of Ontario.

12. The Nurse was registered with the College of Nurses of Ontario.

13. The Practitioners were registered with the College of Chiropractors of Ontario, the College of Physiotherapists of Ontario, or the College of Psychologists of Ontario.

14. The Other Assessors were not entitled under the laws of any province to practise the profession of medicine or dentistry, and did not practise the profession of optometry, chiropractic, physiotherapy, chiropody, podiatry, osteopathy, audiology, speech-language pathology, occupational therapy, psychology, midwifery, dietetics, acupuncture or naturopathy as a naturopathic doctor.

15. When an individual was referred to the Appellant for an Assessment Report, a form OCF-22 (Application for Approval of an Assessment or Examination) was completed and submitted to the applicable insurance company to request prior approval for payment of an assessment or examination fee. A copy of a blank OCF-22 is located at tab 2 of the Joint Book of Documents.

16. If approved, an Assessment Report and, if applicable, a form OCF-18 (Treatment and Assessment Plan) were prepared. A copy of a blank OCF-18 is located at tab 3 of the Joint Book of Documents.

17. Each OCF-22, OCF-18 and Assessment Report was completed by an Assessor.

18. The Assessors billed the Appellant for the services rendered and were compensated by the Appellant.

19. The Appellant supplied the Assessment Reports to the individuals' insurers or legal representatives for a marked-up fee.

20. By type of Assessor, the Appellant's sales in respect of Assessment Reports in the 2010 and 2011 Periods were as follows:

Type of Assessor	**2010 Period**	**2011 Period**
Medical Practitioners	$134,239	$161,140
Nurse	NIL	$82,838
Practitioners	$1,030,934	$936,254
Other Assessors	$22,564	$60,544
Total	**$1,187,737**	**$1,240,776**

21. The Appellant's sales in respect of Assessment Reports prepared by the Medical Practitioners included the following services, all of which were provided in the Medical Practitioner's offices and not in a facility operated by the Appellant:

Type of Service	**2010 Period**	**2011 Period**
Completion of OCF22	$1,912	$2,750
Completion of OCF18	$127	$740
Orthopaedic Assessment Report	$40,000	$4,600
Orthopaedic Re-Assessment Report	$2,300	NIL
Psychiatric Assessment Report	$31,500	$48,500

Physiatry Assessment Report	$16,600	$70,100
TMJ Assessment	NIL	$14,000
TMJ + OCF22 Preparation	$41,800	$20,000
Transportation	NIL	$450
Total	**$134,239**	**$161,140**

22. Redacted copies of the following invoices by the Appellant and the corresponding reports are located in the Joint Book of Documents:

(a) invoice no. 4000 in respect of, among other things, an Orthopaedic Assessment Report and the corresponding report dated November 13, 2009 by Joseph Kwok are located at tabs 4 and 5 of the Joint Book of Documents;

(b) invoice no. 3672 in respect of, among other things, a Psychiatric Assessment and the corresponding report dated September 8, 2009 by Jerry Cooper are located at tabs 6 and 7 of the Joint Book of Documents;

(c) invoice no. 41807 in respect of, among other things, a Physiatry Assessment and the corresponding report dated August 11, 2010 by Joseph Wong are located at tabs 8 and 9 of the Joint Book of Documents; and

(d) invoice no. 42250 in respect of, among other things, a T.M.J. Assessment and the corresponding report dated December 10, 2010 by Alex Pister are located at tabs 10 and 11 of the Joint Book of Documents.

23. The Appellant's sales in respect of Assessment Reports prepared by the Nurse included the following services that were provided in a facility operated by the Appellant:

Type of Service	**2011 Period**
Completion of OCF22	$70
Completion of OCF18	$70
Attendant Care Needs (form 1)	$3,824
Attendant Care Needs Assessment	$45,780

Attendant Care Needs Re-Assessment	$11,360
Second Re-Attendant Care Needs Assessment	$860
Re-assessment of Attendant Care Needs III	$1,000
Total	**$62,964**

24. The Appellant's sales in respect of Assessment Reports prepared by the Nurse included the following services that were not provided in a facility operated by the Appellant:

Type of Service	**2011 Period**
Ergonomic Intervention	$1,000
Home Site Assessment Report	$13,200
Follow-Up Home Site Assessment Report	$1,000
Third Follow Up Home Site Assessment Report	$1,000
Work Site Survey	$1,000
Attendant Care Needs (Form 1)	$127
Attendant Care Needs Assessment	$2,000
Mileage	$152
Travel Time	$395
Total	**$19,874**

25. The Appellant's sales in respect of Assessment Reports prepared by the Practitioners included the following services that [*sic*] provided in a facility operated by the Appellant:

Type of Service	**2010 Period**	**2011 Period**
Completion of OCF22	$33,198	$25,978

Completion of OCF18	$4,269	$44,629
Combined Functional Capacity Assessment	$190,550	$149,350
Combined Functional Capacity Re-Assessment	NIL	$3,675
Attendant Care Needs (form 1)	$5,990	$7,519
Attendant Care Needs Assessment	$61,400	$67,300
Attendant Care Needs Re-Assessment	$760	$20,620
Activity and Physical Mobility (A.P.M.)	$20,000	$12,200
Testing/Scoring/Interpretation	$70,511	$46,226
Consultation w/ Client	$70,930	$47,309
Treatment Planning	$105,555	$66,152
Report Preparation	$116,332	$80,679
Disability Certificate Assessment	$180	NIL
Disability Certificate (OCF3)	$64	NIL
Treatment Plan (OCF18)	$191	$757
Psychological Assessment Report	$8,750	$2,188
Transportation	$600	$780

T.M.J. Assessment + OCF22 Preparation	$2,000	$2,000
Vocational Assessment	NIL	$3,900
Rebuttal in paper	$23,400	$25,200
Total	**$714,680**	**$606,462**

26. Redacted copies of the following invoices by the Appellant and the corresponding reports are located in the Joint Book of Documents:

(a) invoice no. 42196 in respect of, among other things, a Combined Functional Capacity Assessment and the corresponding report dated August 23, 2010 by David Kunashko are located at tabs 12 and 13 of the Joint Book of Documents;

(b) invoice no. 41550 in respect of, among other things, "Testing/Scoring/Interpretation", "Consultation w/ Client", and "Treatment Planning", and the corresponding report dated June 7, 2010 by Rakesh Ratti are located at tabs 14 and 15 of the Joint Book of Documents;

(c) invoice no. 3631 in respect of, among other things, "Psychological Assessment", and the corresponding report dated September 14, 2009 by Knolly Hill are located at tabs 16 and 17 of the Joint Book of Documents; and

(d) invoice no. 3146 in respect of a Rebuttal in paper and the corresponding report dated May 4, 2009 by David Kunashko are located at tabs 18 and 19 of the Joint Book of Documents.

27. The Appellant's sales in respect of Assessment Reports prepared by Practitioners included the following services that were not provided in a facility operated by the Appellant:

Type of Service	**2010 Period**	**2011 Period**
Home Site Assessment Report	$126,963	$88,147
Follow-up home site assessment	$68,509	$88,529

Second Follow-Up Home Site Assessment	$6,449	$26,000
Third Follow Up Home Site Assessment	NIL	$4,000
Exercise Regimen	NIL	$3,268
In-Home Exercise Regimen	NIL	$5,188
Second In-Home Exercise Regimen	NIL	$2,700
Work Site Assessment	$15,500	$16,870
Graduated Return to Work Programme	NIL	$2,486
Ergonomic Assessment	$1,278	$10,000
Attendant Care Needs (Form 1)	$6,629	$1,848
Attendant Care Needs Assessment	$7,640	NIL
Mileage	$1,399	$1,140
Travel Time	$3,739	$3,630
Rebuttal in person	$58,125	$24,025
Educational Session	$20,025	$43,761
Second Educational Session	NIL	$4,950
Total Body Assessment	NIL	$612
Provide Pt w/ Recommendations	NIL	$1,319
File and Medical Doc. Review	NIL	$1,319

Total	**$316,256**	**$329,792**

[Number 28 is missing in the partial Agreed Statement of Facts.]

29. Redacted copies of the following invoices by the Appellant and the corresponding reports are located in the Joint Book of Documents:

(a) invoice no. 41791 in respect of, among other things, "Home Site Assessment", and the corresponding report dated August 17, 2010 by Sandy Pister are located at tabs 20 and 21 of the Joint Book of Documents;

(b) invoice no. 3105 in respect of, among other things, "Follow-Up Home Site Assessment Report", "Attendant Care Needs (Form 1)", "Attendant Care Needs Assessment", "Travel Time" and "Mileage", and the corresponding report dated April 8, 2009 by Saeid Gholeizadeh are located at tabs 22 and 23 of the Joint Book of Documents;

(c) invoice no. 3733 in respect of, among other things, "Follow-Up Home Site Assessment Report", and the corresponding report dated August 22, 2009 are located at tabs 24 and 25 of the Joint Book of Documents;

(d) invoice no. 41908 in respect of, among other things, "Work Site Survey Report", and the corresponding report dated August 30, 2010 by Sandy Pister are located at tabs 26 and 27 of the Joint Book of Documents;

(e) invoice no. 4327 in respect of, among other things, "Ergonomic Assessment", and the corresponding report dated February 24, 2010 by Sandy Pister are located at tabs 28 and 29 of the Joint Book of Documents;

(f) invoice no. 41686 in respect of, among other things, "Ergonomic Assessment", and the corresponding report dated July 15, 2010 by Sandy Pister are located at tabs 30 and 31 of the Joint Book of Documents;

(g) invoice no. 42425 in respect of, among other things, "In-Home Exercise Regimen" and the corresponding report rated January 9, 2011 by Sandy Pister are located at tabs 32 and 33 of the Joint Book of Documents;

(h) invoice no. 42354 in respect of, among other things, "Report Preparation", "In-Home Exercise Regimen", "File and Medical Doc. Review", "Provide Pt w/ Recommendation", and "Total Body Assessment" and the corresponding report dated December 2, 2010 by Saeid Gholeizadeh are located at tabs 34 and 35 of the Joint Book of Documents;

(i) invoice no. 41760 in respect of "In Person Rebuttal" and the corresponding report dated July 29, 2010 by Sandy Pister are located at tabs 36 and 37 of the Joint Book of Documents; and

(j) invoice no. 3649 in respect of, among other things, "Educational Session" and the corresponding report dated November 23, 2009 by Sandy Pister are located at tabs 38 and 39 of the Joint Book of Documents.

30. The Appellant's sales in respect of Assessment Reports prepared by the Other Assessors included the following services that were provided in a facility operated by the Appellant:

Type of Service	**2010 Period**	**2011 Period**
Completion of OCF22	$64	$1,044
Vocational Assessment	$22,500	$22,500
Total	**$22,564**	**$23,544**

31. Redacted copies of invoice no. 41605 in respect of, among other things, "Vocational Assessment", and the corresponding report dated December 3, 2009 by Gurleen Minhas are located at tabs 40 and 41 of the Joint Book of Documents.

32. The Appellant's sales in respect of Assessment Reports prepared by the Other Assessors included the following services that were not provided in a facility operated by the Appellant:

Type of Service	**2010 Period**	**2011 Period**
Driver Re-Integration Evaluation	NIL	$37,000
Total	**NIL**	**$37,000**

33. Redacted copies of invoice no. 42229 in respect of, among other things, "Driver Re-Integration Evaluation", and the corresponding report dated November 24, 2010 by A. Davis are located at tabs 42 and 43 of the Joint Book of Documents.

34. The Appellant's sales included the following amounts invoiced by the Appellant to Physiotherapy Wellness Institute Inc. in respect of psychological, chiropractic and physiotherapy treatments:

(a) $169,837 in the 2010 Period;

(b) $142,473 in the 2011 Period; and

(c) $295,615 in the 2012 Period.

35. Before 2010, the Appellant charged GST/HST on the supply of Assessment Reports.

36. The Appellant charged and collected HST in respect of Assessment Reports:

(a) in the amount of $348.28 in the 2011 Period; and

(b) in the amount of $66,279 in the 2012 Period.

[21] In these reasons, forms OCF-22 and OCF-18 will also be referred to as Form 22 and Form 18, respectively, and Assessment Reports will also be referred to as Report(s).

Vocan's facility

[22] Vocan's facility is located at Jane Street, Toronto. It consists of 1,200 square feet, with a front desk and three care rooms each containing a computer, a bed, a blood pressure instrument, reflex hammer, stethoscope, and a functional capacity room with the Arcon machine, treadmill and bicycle. Ms. Handy's description of the facility was confirmed by Mr. Rabbaya. In cross-examination she acknowledged it had another location on Yonge Street, Toronto, and adjacent to each Vocan location was the Physiotherapy Wellness Institute ("PWI"), owned by her. Under an agreement, Vocan shared and subleased premises from PWI. Paragraph 34 of the agreed facts indicates that Vocan invoiced PWI in respect of psychological, chiropractic and physiotherapy treatments.

[23] Mr. Rabbaya grouped assessments into those conducted by specialists outside Vocan's facility and those conducted by the rest of the assessors that he characterized as functional capacity evaluations, which included visits off-site, follow-up visits or vocational assessments. Testing conducted in a care room consists of range of motion, sitting, standing and squatting. The functional room contains objective diagnostic equipment, the Arcon, which accurately measures the individual's physical tasks such as pushing, pulling and bending, thereby testing limitations. Most of the time, the case study room and designated offices are used to do the medical briefs, which sometimes are "paper briefs."[5] He claimed that he observed

[5] An example of that is Exhibit A2, Tab 19, Document Review Rebuttal Report. Mr. Kunashko did not meet the individual. Instead, he reviewed others' reports.

daily the intake process and meetings with individuals and assessors in the care or examination rooms. However, during cross-examination he acknowledged that tests are done by assessors in closed examination rooms, he is not present and privacy is required in accordance with Vocan's procedures.

[24] Combined, Mr. Gholeizadeh, Mr. Kunashko and Mr. Hill described the facility as having a large room with computers, assistants, case offices and functional and examination rooms equipped with equipment, as identified by Mr. Rabbaya. Mr. Gholeizadeh initially claimed that one of the "professional rooms" was dedicated to him, but during cross-examination he recanted that.

[25] Mr. Hill conducted psychological assessments at Vocan, including administering Beck testing and scoring same to ascertain the individual's problems to make recommendations to assist the individual to return to normal functioning and rehabilitation, and discussed his Report and recommendations with the individual at Vocan. Unless it is an emergency situation, he typically recommends 12 therapy sessions.[6] In cross-examination, he agreed that between 2009 to February 2012, he also had a private practice at his own office.

[26] When Sukhvinder Gill, CRA auditor, attended Vocan's facility for a meeting she briefly observed the care rooms containing equipment that included beds.[7]

Screening Process

[27] Upon receipt of a request from a referring source, Vocan makes the appointment with the individual and the assessor at Vocan's facility for an activity and physical mobility screening ("screening") unless it is done at the specialist's facility. Ms. Handy continued that the purpose of screening or a "short assessment" is to ascertain the individual's ability to do certain things to facilitate a "full-fledged" assessment; Mr. Rabbaya agreed with that and added it provides a clinical impression with treatment goals set out in Form 22, which is sent to the referring source for approval of an assessment. Next, she said Vocan waits for approval for an assessment from the referring source and Form 22 is then completed. She agreed in cross-examination it was necessary to first complete and send Form 22 to the

[6] Exhibit A2, Tab 17. Subheadings in his Reports, and contents, were reviewed in detail at trial. Subheadings comprise: Clinical Presentation; Medication; Details of the accident and accident related information and active drivers licence; Clinical history - individual's background, family, school, work; and Conclusion - recommendations, diagnostic criteria and treatment plan.
[7] Transcript, Examination for Discovery page 50, questions 187 to 189, lines 5 to 15.

insurer to seek approval. If approval is obtained, the insurer signs Form 22. Binderized medical information is obtained from doctors and lawyers, which Vocan had given to assessors at the outset.

[28] Mr. Rabbaya's description of the process was clearer. Upon receipt of referrals from referring sources, Vocan's intake coordinator arranged the appointments for both baseline screening and assessments (if approved) with the individual and the assessor or with the assessor's office. Whether screening is at or outside Vocan's facility, the individual's history is obtained from the referring source, including insurance and medical information, and provided to the assessor with the area of expertise. Subjective functional testing, such as standing, sitting, and bending, is where the details of accident and injuries are collected. Objective functional testing can be included for more serious injuries by engaging the Arcon apparatus. He commented that Vocan's job is to arrange for and seek funding from the referring source for approval for an assessment.

[29] During screening, Mr. Gholeizadeh obtained a list of injuries and ascertained limitations from a physiotherapy perspective, which he used to complete Form 22. Similarly, Mr. Kunashko ascertained if there is pain while performing activities of daily living ("ADL"), if there are problems at work, if devices are needed, and if further intervention is required; he viewed it as the "initial step" to seek approval for a functional abilities evaluation (assessment). Mr. Hill viewed screening as an "initial assessment"; he referred to information provided by Vocan (medical history, results of x-rays and family documentation), which assisted him with what he might propose in Form 22 and then signed and sent same to the referring source to seek approval for an assessment.

Application for Approval of an Assessment or Examination – Form 22

[30] Ms. Handy briefly touched on Parts 1 and 2 of Form 22. Part 4, the nature of assessment, and Part 5 being completed by an assessor. When asked in cross-examination about Part 5(a)(ii), she said she was unsure if this meant an individual had already been treated and was inclined to say the individual "could have". If declined, even partially, by the insurer, she said the assessment might still proceed after discussions with the lawyer. Vocan would bill to the individual's name and send it to the lawyer. She then stated that Mr. Rabbaya, responsible for billings, knows better than her. Mr. Rabbaya said Vocan goes back to individuals. Typically, the individual proceeds with the assessment as there is likely an ongoing legal dispute and the insurance company might later revisit the situation and pay.

[31] Contrary to Ms. Handy's initial claim that Vocan had reviewed, completed and signed the Form 22s at its facility, Mr. Rabbaya presented a more accurate account. He said Vocan merely completed basic contact information (about the individual and insurer) in Parts 1 and 2. It also had the individual complete the Authorization for Release of Information form ("Authorization Form").[8] Assessors were required by insurers to complete Parts 4 up to Part 8, consistent with their evidence and as reflected in paragraph 17 of the agreed facts.

[32] Each assessor gave an overview, albeit in some detail, about the general process to obtain approval for an assessment; in large part, this corroborated Mr. Rabbaya's evidence on this aspect. Summarized, each assessor stated Vocan's intake coordinator arranges or coordinates appointments with individuals and assessors or the assessor's office for screening (and assessment). Parts 4 to 7 were completed by them during screening with information from individuals, who also signed Form 22 and any documents sent by Vocan which facilitated assessors' recommendations for the proposed goods and services. Assessors said Vocan received the fee for completing Form 22, not them, and they submitted the Forms to insurance companies, on behalf of individuals, who may approve, wholly or partially, or decline the recommendations. The Assessors' evidence conflicts with Ms. Handy's evidence in that she had suggested in re-examination that Part 7 of Form 22 was completed on Vocan's behalf, but as she acknowledged in cross-examination, Form 22 pertains to the individual.

[33] I observe that completion of the more substantive Parts, 3 to 7, pertain to assessor functions who are required to complete and sign same. Part 5 requires Provisional Clinical Information, a description of the complaint, if treatment had previously been provided, details of the proposed assessment, a rationale and whether the assessor is aware of a prior assessment of the type being proposed in Form 22. Mr. Gholeizadeh said insurers required him to go through every Part, which he explained and discussed with the individual plus the benefits before he faxed the Form to the insurance company for approval. Also, Part 8 requires the insurer to sign, whether approval is granted or not for the assessment. If approved, the insurer is required to notify the assessor and the individual. If declined, it is to advise the individual that it is not agreeing to pay for same thus an examination is required.

Invoices

[8] Exhibit A3.

[34] Once signed by an assessor, the report is sent to Vocan. The assessor billed for the assessment report. Vocan then bills and supplies the report to the referring source setting out charges for services, completion of Form 22 and the assessor's report. In re-examination, Ms. Handy said Vocan had referred individuals to Dr. Kwok and pointed to an invoice that Vocan sent to the referring source reflecting charges for both services and confirmed that he had received a flat fee separately for the Report from Vocan for a lesser amount. Mr. Rabbaya agreed and said usually Vocan's invoices itemize two services on two dates showing charges for both services paid to or receivable by Vocan from the referring source. He added that the assessor is not paid the $63.72 for completion of Form 22. Mr. Hill corroborated that and confirmed that Vocan paid him a fixed fee for a lesser amount for his Reports.

[35] When Ms. Handy was asked if screening would be charged and would be on the invoice, it was suggested it was part of the standard part of the intake process. She believed screening was done for everyone but does not know if Vocan charged for screening. Mr. Rabbaya indicated it is "not all the time" that screening is billed for any type of assessment. Although screening is administered to every individual at Vocan, it is not always billed. For example, after the first assessment, if Vocan needs to do another baseline screening it would not bill for it. Both of them agreed that these cannot be charged to OHIP given the purpose was for insurance benefits.

[36] Mr. Rabbaya discussed four other Vocan invoices subject to the same billing process, each of which itemizes charges for both services. He highlighted all the details from the invoices which I have summarized as follows:[9]

Completion of Forms	**$**	**Reports**	**$**
September 1, 2009	63.72	September 8, 2009	3,500
May 10, 2010	70	August 11, 2010	2,300
November 3, 2010	200	December 10, 2010	2,000
May 20, 2010	70	August 23, 2010	1,225

[9] The first two are for completion of Form 22, the last two pertain to Form 18. Exhibit A2, Tabs 6 and 7, 8 and 9, 10 and 11 and 12 and 13. The assessors, Dr. Jerry Cooper (psychiatrist), Dr. Wong (physiatrist), Dr. Alex Pister (dentist), and Mr. Kunashko (chiropractor) and Sandy Pister (physiotherapist) combined, respectively.

Treatment and Assessment Plan – Form 18

[37] Unlike Form 22, Form 18 was not completed for every individual. If an assessor wanted to see the individual again for another type of treatment or an assisted device was needed, Vocan would follow up and seek approval for other services or goods recommended and completed Form 18, which Mr. Rabbaya said resulted in additional revenue for Vocan.[10] Part 4 refers to the assessor's "clinical impression" through examination and medical documentation and is signed by the health practitioner. Part 5 lists regulated health care professionals for which he reviews credentials when hiring assessors; he thinks all professionals listed are regulated but is unsure about social workers. Part 6 includes the assessor's diagnosis of the injury with findings of physical and psychological symptoms. Part 7 requires information about the individual's prior and concurrent conditions. Part 8 requires the assessor to describe the individual's impairment and how these affect their employment. Part 9 is rehabilitative and establishes goals for pain reduction and increase in strength and range of motion.

[38] The respondent conceded the fees Vocan billed to and received from referring sources for completion of Forms 18 and 22 belong to Vocan and the amounts Vocan had paid to the assessors for the Reports were less than the amounts Vocan billed to referring sources.

IV. PARTIES' POSITIONS

[39] As pled, Vocan's position is it is a health care facility within the meaning of section 1 of Part II of Schedule V of the ETA, and all assessors render medical care and supplies to its patients. Hence, "the words medical care should not be limited only to physicians but to include other health care professionals/practitioners such as nurses, chiropractors, occupational therapists, physiotherapists and psychologists etc. who are all capable to render what is required to diagnose, treat and/or prevent disease, injuries or other illnesses as permitted in the *Ontario Regulated Health Professionals Act*."[11] The "health care professionals who render the services to the patients of VOCAN at its facility are governed by their respective statutes in the *Regulated Health Professional's Act*, to provide medical care."[12]

---

[10] Exhibit A2, Tab 3 Treatment and Assessment Plan (OCF-18), was completed by assessors after September 2010 and sent to insurance companies.
[11] Notice of Appeal, paragraph 27.
[12] Notice of Appeal, paragraph 21.

[40] Under section 1, Part II, Schedule V, "practitioners" are defined and are not required to charge GST/HST in respect to supplies of health care services listed in sections 7 and 7.1 of Part II of Schedule V.[13] Services rendered by assessors are exempt from HST under those sections and sections 2, 5, 6, 9, 10.[14] Accordingly, "…medical services can be provided by other health care providers and not only medical doctors".[15]

[41] At the hearing, Vocan's position is that the supply of Reports, during both Periods, is an exempt supply under section 2 of Part II of Schedule V. It is a health care facility that provides medical care rendered by assessors who fall within the health professions specified in Schedule 1 of the *RHPA* to individuals as patients of its facility; individuals seek benefits and treatment to deal with chronic pain. Other Assessors, not governed by the *RHPA*, are equally qualified professionals and provide medical care. Therefore, its supply of Reports to referring sources constitutes medical care. As such, no HST was charged on the value of consideration and penalties were improperly levied.

[42] The respondent's position is that every supply of Reports by Vocan—regardless of the type of assessor—fails one or more of the section 2 tests of Part II of Schedule V. It did not provide an "institutional health care service", it did not operate a "health care facility", as defined in Section 1 of Part II of Schedule V, and individuals were not patients of its facility. Therefore, such supply is taxable and Vocan is liable for unreported HST collectible for both Periods and associated penalties, as assessed. Contrary to Vocan's submissions, the respondent argues there is no evidence that assessors were agents of Vocan, nor is it entitled to additional ITC's.

[43] Unless otherwise specified, all references to provisions that follow are to the ETA.

V. LAW

[44] Goods and Services Tax is imposed on every recipient of a taxable supply made in Canada, in respect of the supply, calculated at the applicable rate on the

---

[13] Notice of Appeal, paragraph 22.
[14] Notice of Appeal, paragraphs 16, 18, 19, 20 and 23.
[15] Notice of Appeal, paragraph 19.

value of the consideration for the supply.[16] Ontario harmonized its sales tax with the Goods and Services Tax (collectively "HST").

[45] By virtue of subsection 123(1), a "taxable supply" means a supply made in the course of a commercial activity. A "supply" is broadly defined to mean the provision of "property" or "services" in any manner. Therefore anything provided in the course of a commercial activity will conceivably be subject to HST.

[46] The term "exempt supply" means a supply included in Schedule V.

[47] Before turning to the first issue as to whether the supply of Reports is taxable or exempt, I will address Vocan's submission that assessors are its agents.

Agency

[48] When asked in cross-examination about his testimony describing Dr. Cooper as Vocan's agent, Mr. Rabbaya responded he lacks legal training, it is not a legal conclusion and he was unaware of any agency agreement.[17] Ms. Handy commented in re-examination that all assessors were Vocan's agents because assessors billed Vocan, and Vocan then billed the insurance company. No written agency agreement was produced at the hearing.

[49] It is only where there is no written agreement that the conduct of the parties must be examined for the purpose of determining whether there was an implied agency.[18]

[50] Some general principles governing key features of an agency relationship would be useful at this point. In *Kinguk Trawl Inc. v The Queen* ("*Kinguk*")[19], the Federal Court of Appeal adopted the definition of the term "agency" as "…a fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."[20]

---

[16] Subsection 165(1) of the ETA.
[17] Exhibit A2, Tab 7.
[18] *Avotus Corp. v The Queen*, 2006 TCC 505, 2007 D.T.C. 215 (Eng.).
[19] *Kinguk Trawl Inc. v The Queen*, 2003 FCA 85, 2003 D.T.C. 5168.
[20] *Ibid*, at paragraph 35. The Court referenced the definition created by the authors of Bowstead & Reynolds on Agency (17th edition, Sweet & Maxwell, 2001).

[51] The Court also adopted the "essential ingredients" of an agency relationship consisting of:

a) consent of principal and agent;

b) authority of the agent (given by principal) to affect the principal's legal position; and

c) the principal's control of the agent's actions.

[52] The Court noted that in reality, authority and control often overlap "…as the principal's control over the actions of his agent is manifested in the authority given to the agent."[21]

[53] In *Merchant Law Group v The Queen* ("*Merchant*"),[22] the Federal Court of Appeal identified authority of the agent as one of three "essential qualities" and highlighted that, "It is settled at common law that for an agency relationship to exist the agent must be able to affect the principal's legal position with third parties by entering into contracts on the principal's behalf or by disposing of the principal's property."[23]

[54] In *Fourney v The Queen*, Justice Hogan held where there is no written agreement, the test for finding an agency relationship is restrictive necessitating evidence of the necessary conduct.[24] In his analysis he identified a number of principles. The following are relevant to the present case:[25]

a) Absent a written agency agreement, the court must closely examine the conduct of the parties to determine whether there was an implied intention to create an agency relationship.

---

[21] *Kinguk*, paragraph 36. The Court referred to and relied on *Royal Securities Corp. Ltd. v Montreal Trust Co. et. al*, 59 D.L.R. (2d) 666, Gale C.J.H.C.

[22] *Merchant Law Group v The Queen*, 2010 FCA 206, [2010] G.S.T.C. 116.

[23] *Ibid*, paragraph 17. At paragraphs 16 and 18, the Court referred to and relied on CRA's Policy Statement P-182R that lists three essential qualities, this one included, and noted that although the Court previously found the Policy is not binding, it is useful.

[24] *Fourney v The Queen*, 2011 TCC 520, [2011] G.S.T.C. 147. at para. 29.

[25] In *GEM Health Care Group Ltd. v The Queen*, 2017 TCC 13, [2017] G.S.T.C. 3. Justice Sommerfeldt, in his discussion regarding implied agency, referred to the decision in *Fourney* and indicated that these principles are paraphrased.

b) In reviewing the conduct of alleged principal and agent, it is key to determine the level of control which the former exerted over the latter.

c) The alleged principal's control over the actions of the alleged agent may be manifested in the authority given by the former to the latter. Thus, the concepts of authority and control sometimes overlap.

[55] Vocan argues it exerted a level of control over the assessors when it referred individuals to the assessors, dictated the scope and purpose of what assessors did, scheduled appointments for assessors and individuals, organized and collated medical information for assessors, who thus acted "on behalf of" Vocan (per the Reports) and reported to it. Assessors themselves agreed they were consultants, assessed individuals, prepared Reports, which were sent back to it for fact-checking, and some assessors had both their own and Vocan's letterhead.

[56] For the reasons that follow, I find that the conduct of Vocan and the assessors leads me to conclude that there was no implied agreement to create an agency relationship between them.

[57] Vocan failed to establish the essential quality for an agency relationship that assessors were able to affect Vocan's legal position with third parties by entering into contracts on Vocan's behalf or disposing of Vocan's property. There was no evidence that assessors had any such authority.

[58] Scheduling appointments and the provision of such information, if available, to assessors merely assists assessors in facilitating meetings with individuals. In my view, these factors do not show a level of control in an implied agency context. Setting scope and purpose for assessors could equally apply to entering into a basic contractual arrangement.

[59] Dr. Pister explained that Vocan contacted his office manager for scheduling. Individuals attended at his dental office for TMJ assessments. Before he met them, documentation was prepared and placed by his office manager on his desk; he speculated it must have been sent by Vocan. His approach was to not review same before seeing individuals. Instead, he had developed a skeleton and did his own intake assessment based on it. Vocan could not tell Dr. Pister, nor any of the assessors, how to conduct the tests nor change the substance of their Reports as corroborated by Ms. Handy.

[60] The Authorization Form signed by the individual authorizes Vocan to allow its "clinician, physician, chiropractor, psychologist or any other specialist/consultant

to release all information, opinions and reports regarding my physical and/or psychological condition(s) to the agents, requesting this independent functional/medical evaluation". Yet, Dr. Kwok, Dr. Pister and Mr. Hill prepared notes and retained those in their own files, not Vocan's. Even forwarding the Reports to Vocan was conditional on securing authorization from individuals. The fact of such authorization and retention of notes is not indicative of assessors acting as Vocan's agents and being under its control nor reporting to it.

[61] I am not persuaded by Vocan's submission that individuals might have formed the impression there was an agency arrangement merely because the Authorization Form referred to the assessment being conducted "under" Vocan by the consultant. Although Ms. Handy suggested in re-examination that Part 7 of Form 22 was completed on behalf of Vocan, she had acknowledged in cross-examination that Form 22 pertains to the individual. Practitioners testified they submitted Form 22 on behalf of individuals and were obliged to complete Parts 3 to 7. Mr. Gholeizadeh confirmed insurers required him to go through every Part; he discussed Form 22 plus benefits with the individuals before faxing the Form to the insurance company for approval. If approval was declined, he would ask the individual if he or she wanted to self-fund, discussed risks and provided advice. According to Part 8, if approved, the insurer is required to notify only the individual and the assessor, not Vocan. If declined, only the individual is notified.

[62] I find little, if any, control was exerted by Vocan over the assessors.

[63] While some assessors used "Vocan Health Assessors" on the cover page of their Reports, this was not a uniform practice and others used their own letterhead. This could support an argument in either direction.[26]

[64] Mr. Rabbaya initially claimed that Vocan was required to abide by the colleges' rules and regulations through the assessors. In cross-examination, he agreed that Vocan is not a member of any of the colleges, and assessors are required to abide by the rules and regulations.

[65] The evidence does not establish that Vocan contracted with assessors to prepare the Reports as Vocan's agents; it contracted assessors to prepare the Reports. Assessors assessing individuals and preparing Reports for Vocan and forwarding same to Vocan were merely fulfilling their contractual obligation to prepare and provide a Report to Vocan in exchange for a fee. As acknowledged by Mr. Rabbaya, there was an agreement of how assessors were paid for the Reports but he was

[26] Dr. Kwok, Dr. Cooper, Dr. Wong and Mr. Hill used their own letterhead.

unaware of any agency agreement. Rather, Vocan referred individuals to assessors for the purpose of preparing the Reports; assessors provided those to Vocan for a flat fee and it then supplied the Reports to the referring sources for an increased fee paid or payable to Vocan. I find that there is no implied agency.

VI. ISSUE I: Is the supply of Reports taxable or exempt?

[66] Vocan asserted it is a health care facility that provides medical care, through all assessors, to its patients (individuals) and therefore the supply of Reports is exempt. However, the question is whether Vocan's supply of Reports satisfies section 2 of Part II of Schedule V to constitute an exempt supply of an "institutional health care service" made by the operator of a health care facility rendered to a patient or resident of the facility.

Nature of Supply

[67] First, the nature of the supply must be determined.[27] Vocan submits it made a single compound supply of Reports. The underlying rationale for the entire transaction was medical care. Everything inputted was necessary; the entire process (scheduling, collection and review of information, intake, and the assessment including testing) is integral to the overall supply of the Report which culminates in the diagnosis, the end result. The Report is the manifestation of all of that. The purpose is the assessment of the level of disability which started with Vocan providing medical care in its facility. The purpose of the Report was to determine the individual's level of disability to engage in the question of eligibility for benefits, all of which goes to rehabilitative care. The small fraction of time spent on the Reports versus the true purpose of being assessed and associated steps are necessary, which is what they were commissioned to do. Regardless of whether approval is given, consumers still have the option to go ahead.

[68] In support of its submission that the predominant element is to be found objectively from the individual's (consumer's) perspective looking at the supply received, it relied on the decision of *Applewood Holdings Inc. v The Queen*

[27] *In Calgary (City) v The Queen*, 2012 SCC 20, [2012] 1 S.C.R. 698, the Court developed the test set out in *O.A. Brown Ltd. v Canada*, [1995] G.S.T.C. 40 to determine if there was a single compound supply or multiple (separate) supplies. The Court considered what was integral to the overall supply of livestock and concluded it was the buying service, thus only a single supply was provided as such service was indivisible from other services offered.

("*Applewood*")[28] It argues looking at the totality of its role as a whole (its process during intake and explanation to individuals), Vocan's activities, similar to *Applewood*, were not administrative in nature but amounted to medical care in its true essence. It referenced the principle from the decision in *Canadian Imperial Bank of Commerce v The Queen* ("*CIBC*").[29] Namely, "Often times, a supply is nothing if not a culmination of its various inputs, where from the perspective of the purchaser, it is the culmination or end result, and not the constituent elements which make up the end result, that is the true value added service which is being transacted for."[30] Vocan asserts that the predominant element is to diagnose injured individuals (to ascertain the level of disability and treat them is essential).

[69] The respondent agrees it is a single supply, submits it is a taxable supply and asserts the predominant element is the assessment.

[70] I agree there is a single supply. I disagree with Vocan's approach, and that the underlying rationale is medical care for the reasons explained below.

[71] In determining whether a supply satisfies the statutory definition in issue to render a supply to be exempt, the approach endorsed by the Federal Court of Appeal in *Great-West Life Assurance Co. v The Queen* ("*Great-West*") requires two questions to be answered.[31] First, identify all services provided for the consideration received, not just the predominant element(s). Second, determine whether the supply

---

[28] In *Applewood Holdings Inc. v. The Queen*, 2018 TCC 231, [2018] G.S.T.C. 93 at para 21. The consumer purchases the vehicle and the sales manager then has the business manager attempt to sell insurance products, warranties and other items to the consumer and obtains information from the consumer. There was an examination of the process and explanation of insurance policies and constituent elements to assist the consumer in the selection of an appropriate insurance product. The Court looked at the ultimate consumer and totality of the role in arranging for the provision of group insurance and concluded these cannot be reduced to promotional or administrative activities. The Court referred to *Great-West*, which had clarified the two-step test set out in *Global Cash Access (Canada) Inc. v The Queen*, 2013 FCA 269, [2013] G.S.T.C. 141.

[29] *Canadian Imperial Bank of Commerce v The Queen*, 2018 TCC 109, [2018] G.S.T.C. 57.

[30] *CIBC*, at para 67.This Court found that the supply CIBC received from Visa was not an exempt supply of a financial service, and the Visa services provided to CIBC met paragraphs (a)(i) and (l) of the definition. However, the Court concluded that the exclusionary paragraph (t) of the definition applied, thus CIBC received an administrative service and Visa was not a person at risk. The Federal Court of Appeal allowed CIBC's appeal because of a factual error, and found that the service Visa provided to CIBC was not an "administrative service."

[31] In *Great-West Life Assurance Co. v The Queen*, 2016 FCA 316, [2013] G.S.T.C. 141, the statutory definition in issue was "financial service" (in applying the inclusions and exclusions).

is included in such definition, and in doing so, only the predominant element(s) of the supply, if it is a single compound supply, is to be taken into account.

[72] In determining whether the supply of Reports satisfies the definition of "institutional health care service", I find that the answer to the first question is that Vocan provided the supply of Reports (arising from the assessments carried out by assessors) for the consideration it received. The answer to the second question is that the predominant element is the assessments prepared by the assessors.

[73] In the agreed facts, it is acknowledged that Vocan has two distinct services: treatment and supply of assessment reports. The dispute in these appeals centres on Vocan's sales in respect of the supply of Reports totalling $1,187,739 and $1,240,776 for both Periods, respectively.[32] Reports can be grouped in respect of assessments conducted by assessors off-site, and those conducted on-site in Vocan's facility as follows:

Assessments

	Off-site 2010|2011 Periods		Vocan's Facility 2010|2011 Periods	
Practitioners	316,256	329,792	714,680	606,462
Other Assessors		37,000	22,564	23,544
Nurse		19,874		62,964
Medical Practitioners	134,239	161,140		

[74] Reports were requested by insurance companies to determine individuals' eligibility for insurance benefits stemming from the insurance regime and statutory accident benefits schedule. Mr. Rabbaya explained there is a pre-approved minor injury guideline for goods and services and assessments up to a maximum of $3,500. Ms. Handy, and others, confirmed that the assessment enables insurance companies

[32] It appears there is a minor ($2) calculation error for the 2010 Period in the agreed facts for the total amount.

to determine if accident benefits, housekeeping or income replacement, would be available.

[75] Regarding assessments conducted by Practitioners, Other Assessors and the Nurse outside Vocan's facility (at an individual's home, work-site, car) ("off-site"), these are elements conducted off-site. Assessors that conducted off-site assessments include Mr. Gholeizadeh, Sandy Pister, Mr. Kunashko, other Practitioners, A. Davis (the social worker), and the Nurse.[33]

[76] But for an off-site assessment, there would be no corresponding off-site assessment report including a driver re-integration evaluation report. Mr. Gholeizadeh (in-home assessments being the bulk of his work) and Mr. Rabbaya agreed there could be no in-home assessment report (or follow-up, or work-site assessment report or follow-up) where the assessor does not attend the home (or work-site) of the individual. Mr. Kunashko said that the only time he would meet the individual as part of an in-home assessment is at the person's home.

[77] In his Report, Mr. Gholeizadeh states he "spent 12 hours to complete this assessment including the completion of his written report; of which approximately 1.5 hours was spent at the patient's home." He elaborated that the 1.5 hours inclusion was "for the assessment", and was included to ensure the insurance adjuster understood he was at the individual's home. However, the adjuster "wouldn't care" where the rest of the time was spent in respect of the Report, and "you can't really say" where it was spent; there was no account of it in his Report.[34] He confirmed time was spent on document review, report preparation and writing, editing, proofreading, invoicing, travel time and mileage to complete his exercise regiment overview. In cross-examination, it was put to him that as part of an in-home assessment he met the individual and since 1.5 hours is shown, he met her at her home only. He could not agree because he did not know nor could he recall but knows he met her at home.[35] The format and the wording regarding the 1.5-hour time allocation were common features in Reports for off-site assessments.

---

[33] Exhibit A2, Tab 13. Ms. Pister's Reports: Attendant Care Needs, Home Site Assessment, Education Session, Follow Up Home Site Assessment, Re-Assessment of Attendant Care Needs and a 2nd Follow Home Site Assessment. Her Activities of Daily Living (ADL) In-Home Functional Assessment "involved a detailed interview covering such topics as accident details, post accident injury diagnosis, current medical conditions, rehabilitation efforts, functional capacity of the client's daily living and any relevant social history": Exhibit A2, Tab 21

[34] Exhibit A2, Tab 23 - Follow-Up in Home Assessment.

[35] Exhibit A2, Tab 33. Follow-Up In-Home Report.

[78] Assessors typed their own Reports which could be completed anywhere, even Starbucks, according to Ms. Handy. Mr. Gholeizadeh prepared his at Vocan because it afforded him privacy as he worked at other companies. Mr. Kunashko prepared his at home.

[79] An in-home assessment necessarily entails an assessment of the home environment and its features to determine if it meets the individuals' needs for ADL and could include housekeeping, home maintenance, personal care and caretaking tasks, et cetera. The significance to the insurer of the time spent at the individual's home, the indifference to and lack of accounting where the rest of the time was spent, and the nature of the Report illustrates that the off-site assessment (whether in-home, work-site, car or elsewhere) is the predominant element. I find all other elements are inputs that go into creating the Report.

Law

[80] Part II of Schedule V deems certain supplies in various sections under "Health Care Services" to be exempt where such supplies are made or rendered by health professionals or an entity. Some sections have general application; others pertain to supplies made by specific health care professionals. In some instances, a health professional may be exempted under more than one section.[36] Section 2 of Part II of Schedule V exempts a supply of an "institutional health care service" made by the operator of a health care facility if the service is rendered to a patient or resident of the facility.

[81] Section 2 was amended in the midst of both Periods that are in issue.[37] Both iterations are reproduced below:

Before March 4, 2010 it read:

> 2 A supply of an institutional health care service made by the operator of a health care facility if the institutional health care service is rendered to a patient or resident of the facility, but not including a supply of a service related to the provision of a

[36] *Jema*, paragraph 44.

[37] Amendment is non-contentious. A surgical or dental service performed for cosmetic purposes was previously excluded. In 2010, it was amended because of the addition of section 1.1 of Part II, which excludes a cosmetic service supply that is not made for medical or reconstructive purposes from being an exempt health care service.

> surgical or dental service that is performed for cosmetic purposes and not for medical or reconstructive purposes.

On or after March 4, 2010 and currently reads:

> [A] supply of an institutional health care service made by the operator of a health care facility if the institutional health care service is rendered to a patient or resident of the facility."

[82] Both iterations of section 2 engage the following tests:

a) whether the supply is a supply of an "institutional health care service";

b) whether the supply was made by the operator of a "health care facility"; and

c) whether the supply was made to a patient of the facility.

[83] Section 1 of Part II of Schedule V defines the terms "institutional health care service", "health care facility", "medical practitioner" and "practitioner". Definitions for the last two terms are in Appendix A to these reasons.

[84] An "institutional health care service", and the parallel definition "services de santé établissement" of the French version, is defined as follows:

[…] *institutional health care service* means any of the following when provided in a health care facility:	Les services et produits suivants offerts dans un établissement de santé:
(a) laboratory, radiological or other diagnostic services,	a) les services de laboratoire, de radiologie et autres services de diagnostic;
(b) drugs, biologicals or related preparations when administered, or a medical or surgical prosthesis when installed, in the facility in conjunction with the supply of a service included in any of paragraphs (a) and (c) to (g),	b) lorsqu'elles sont accompagnées de la fourniture d'un service ou d'un bien figurant à l'un des alinéas a) et c) à g), les drogues, substances biologiques ou préparations connexes administrées dans l'établissement et les prothèses

(c) the use of operating rooms, case rooms or anaesthetic facilities, including necessary equipment or supplies,

(d) medical or surgical equipment or supplies

(i) used by the operator of the facility in providing a service included in any of paragraphs (a) to (c) and (e) to (g), or

(ii) supplied to a patient or resident of the facility otherwise than by way of sale,

(e) the use of radiotherapy, physiotherapy or occupational therapy facilities,

(f) accommodation,

(g) meals (other than meals served in a restaurant, cafeteria or similar eating establishment), and

(h) services rendered by persons who receive remuneration therefor from the operator of the facility;

[…]

médicales ou chirurgicales installées dans l'établissement;

c) l'usage des salles d'opération, des salles d'accouchement et des installations d'anesthésie, ainsi que l'équipement et le matériel nécessaires;

d) l'équipement et le matériel médicaux et chirurgicaux :

(i) utilisés par l'administrateur de l'établissement en vue d'offrir un service figurant aux alinéas a) à c) et e) à g),

(ii) fournis à un patient ou à un résident de l'établissement autrement que par vente;

e) l'usage des installations de radiothérapie, de physiothérapie ou d'ergothérapie;

f) l'hébergement;

g) les repas (sauf ceux servis dans un restaurant, une cafétéria ou un autre établissement semblable où l'on sert des repas);

h) les services rendus par des personnes rémunérées à cette fin par l'administrateur de l'établissement.

[…]

Analysis

(a) whether the supply is a supply of an "institutional health care service"?

[85] It is Vocan's position that the components in paragraphs 1(a), (c), (d)(i) and (e) of the definition of institutional health care service were satisfied. Specifically, it provided diagnostic services under paragraph 1(a), and Practitioners utilized rooms (case and functional) with equipment under paragraphs 1(c), (d)(i) and (e) for testing and examining individuals that led them to the process by which Form 22 was completed, and assisted them in their determinations such as the functional ability of individuals and the diagnosis. Assessors were remunerated by Vocan pursuant to paragraph 1(h).

[86] The respondent disagrees it met the first section 2 test.

Off-site assessments – Practitioners, Other Assessor and Nurse

[87] Vocan has demonstrated, at paragraphs 22 to 26 of these reasons, it has case rooms and a functional room with equipment. Ms. Handy said that assessors carry out functional ability testing on individual's at Vocan's facility, then they go to the individual's home or work-site for no more than one hour. Others' testimony and Reports indicate that of the total time spent (ranging from 7 to 12 hours), approximately 1.5 hours was spent off-site, at a person's home or work-site. Mr. Gholeizadeh stated he would spend a maximum of two hours at the individual's home to perform an in-home assessment. For the driver re-integration evaluation, comprised of "an in-depth clinical interview and an in-vivo assessment", she claims equal time was spent at Vocan's facility and the individual's home. Yet, that evaluation Report reflects he "spent approximately 12 hours to complete this assessment including the completion of this written report; of which approximately 1.5 hours was spent with the patient driving on the road in the car and in the patient's home" but no mention is made of any time spent at Vocan's facility.[38]

[88] Vocan submits that Mr. Rabbaya and Mr. Gholeizadeh indicated that some physiotherapists that conducted off-site assessments already have testing completed (using the Arcon to test the individual's functional abilities and limitations with respect to ADL) before going off-site to conduct the in-home assessment. The difficulty with that is even if assessors spent time in Vocan's facility on preparatory activities in connection with preparing Reports, it is only the predominant part of the

[38] Exhibit A2 Tab 43, Driver-Reintegration Evaluation.

service - the assessment conducted off-site - that is to be considered in making the determination as to whether the supply constituted an institutional health service. Testing, therefore, would be in an input.

[89] Vocan argues that regardless of whether the Nurse (and Medical Practitioners) operate outside Vocan's facility they meet the definition of providing medical care, based on *Jema International Travel Clinic Inc. v The Queen* ("*Jema*"), because it is inherent in the nature of Vocan's supply that it all started at Vocan. "Started at" does not satisfy the legislative requirement "when provided in" a health care facility. There was recognition in *Jema* of the fact that a physician on staff supervised nurses and was available for consultation.[39] There is no evidence of either in Vocan's situation, and the Nurse contracted by Vocan was working off-site.

[90] Vocan relies on the decision of this Court in *Riverfront Medical Evaluations Ltd. v The Queen* ("*Riverfront*"),[40] affirmed by the Federal Court of Appeal, as being comparable to its position. The only difference, it says, is that *Riverfront* contracted only physicians, but in all other respects, Vocan's business, facilities, intake, process and daily activities pertaining to rehabilitative and chronic care are very similar.

[91] *Riverfront* provided independent medical examinations ("IMEs") of patients, conducted by "speciality" "contract physicians" it retained, to insurance companies in the form of reports. Because of the physician-patient relationship, it mattered not that the physician was paid by the insurance company.[41] The Court found the diagnostic component (diagnostic procedures in examining the patient), and use of case rooms, including necessary equipment or supplies, that were "provided in" *Riverfront's* facility pursuant to paragraphs 1(a) and 1(c) of Part II of Schedule V, respectively, was clearly satisfied in addition to the requirement in paragraph 1(h). All of which led the Court to conclude it was a health care facility such that the supply of reports to insurance companies constitutes an institutional health care service thus amounted to medical care. Hence, such supply falls within the exemption in section 2 of Part II of Schedule V.

---

[39] *Jema International Travel Clinic Inc. v The Queen*, 2011 TCC 462, [2011] G.S.T.C. 135.
[40] *Riverfront Medical Evaluations Ltd. v The Queen*, [2001] G.S.T.C. 80, [2001] T.C.J. No. 381. Affirmed, 2002 FCA 341.
[41] *Ibid*, para 27.

[92] I agree there were some similarities between Vocan and *Riverfront* (parts of its process, steps and rooms with equipment).[42] However, retaining only physicians that not only conducted IMEs of patients in *Riverfront's* premises, but took all other steps in its premises, was significant to the Court in its findings. Conversely, Medical Practitioners were neither present nor practising in Vocan's facility. Even the Nurse (and Practitioners) services were provided off-site. *Riverfront* is not comparable to nor assists Vocan. The off-site assessments conducted by Practitioners, Other Assessors and the Nurse in the individual's home, work-site, car or elsewhere, were not provided in any facility, let alone a "health care facility" operated by Vocan.

(b) whether the supply was made by the operator of a "health care facility"?

[93] Assessments conducted on-site, in Vocan's facility, in respect of the supply of Reports during both Periods are captured in the amounts identified in paragraph 73 of these reasons. The question is whether the supply of these on-site Reports constitute a supply made by Vocan as the operator of a "health care facility."

[94] Vocan's primary position is that in view of what "medical" means, all healthcare professionals who are members of the health professions specified in Schedule 1 of the *RHPA* are qualified professionals who have medical qualifications. Effectively, it suggests it met the test in section 2 of Part II of Schedule V because the Practitioners and the Nurse are on an equal footing with Medical Practitioners and provide medical care based on the *RHPA* regime and what each of them do. In Ontario, health care practitioners (that is, Medical Practitioners, Practitioners, and the Nurse) are regulated by the *RHPA*. Section 1 provides that a "'health profession' means a health profession set out in Schedule 1."[43] This includes medicine, dentistry, nursing, chiropractic, physiotherapy and psychology. Further, since the last three professions listed in paragraphs 7(b), (c) and (j) of Part II of Schedule V of the ETA provide that "if the service is rendered to an individual by a practitioner of the service" it is a supply, therefore, the term "services" could include the supply of independent medical assessment reports which Vocan provided.

[95] Vocan submits it was operating for the purpose of providing medical care to injured patients, including acute, rehabilitative and chronic care, per the Reports. Therefore, it supplies medical care including medical assessments. The purpose of the Reports, it says, shows the assessments require an understanding of individuals'

---

[42] Steps: reviewed records, laboratory data and x-rays, obtained detailed history from patient, physical examination, rendered a diagnosis and prognosis, assessed the degree of impairment and prepared report.

[43] Schedule 1, Appendix B to these reasons.

disabilities who are seeking benefits and rehabilitative treatment with some suffering from chronic pain.[44] All assessors testified about their purpose: obtaining medical history and reviewing records, diagnosing and assessing the nature of patients' injuries and problems, providing a prognosis and appropriate treatment to return to ADL or to cope with chronic pain or psychological injury, and completing the Reports.

[96] The respondent's position is that the services rendered on-site by Vocan through Practitioners, Other Assessors and the Nurse to individuals were not provided in a health care facility as Vocan's facility did not qualify because it was not operated for the purpose of providing medical care (or hospital care).

[97] The question of whether Vocan is a health care facility involves a determination of the meaning of "medical care" as found in paragraph 1(a) of Part II of Schedule V of the definition of health care facility.

[98] The term "medical care" is not defined in the ETA.

[99] Health care facility is defined in section 1 of Part II of Schedule V. It and the parallel definition of "établissement de santé" of the French-version read as follows:

health care facility means	établissement de santé
(a) a facility, or a part thereof, operated for the purpose of providing medical or hospital care, including acute, rehabilitative or chronic care,	a) Tout ou partie d'un établissement où sont donnés des soins hospitaliers, notamment aux personnes souffrant de maladie aiguë ou chronique, ainsi qu'en matière de réadaptation;
(b) a hospital or institution primarily for individuals with a mental health disability, or	b) hôpital ou établissement pour personnes ayant des problèmes de santé mentale;
(c) a facility, or a part thereof, operated for the purpose of providing residents of the facility who have limited physical or mental capacity for	c) tout ou partie d'un établissement où sont offerts aux résidents dont l'aptitude physique ou mentale sur le

[44] Since the 2013 amendment regarding the addition of "qualifying health care supply" in sections 1 and 1.2 of Part II of Schedule V, the supply of a medical assessment report could only be an exempt supply under specific circumstances.

self-supervision and self-care with	plan de l'autonomie ou de l'autocontrôle est limitée :
(i) nursing and personal care under the direction or supervision of qualified medical and nursing care staff or other personal and supervisory care (other than domestic services of an ordinary household nature) according to the individual requirements of the residents,	(i) des soins infirmiers et personnels sous la direction ou la surveillance d'un personnel de soins infirmiers et médicaux compétent ou d'autres soins personnels et de surveillance (sauf les services ménagers propres à la tenue de l'intérieur domestique) selon les besoins des résidents,
(ii) assistance with the activities of daily living and social, recreational and other related services to meet the psycho-social needs of the residents, and	(ii) de l'aide pour permettre aux résidents d'accomplir des activités courantes et des activités récréatives et sociales, et d'autres services connexes pour satisfaire à leurs besoins psycho-sociaux,
(iii) meals and accommodation;	(iii) les repas et le logement.

[Emphasis added]

[100] The relevant provision, paragraph 1(a), requires a "health care facility" operate for the purpose of providing "medical or hospital care".

[101] The term "medical or hospital care" translates into French as "soins médicaux ou hospitaliers". The French term "soins hospitaliers" translates into English as "hospital care", revealing a discrepancy.

[102] In view of that, when interpreting bilingual statutes and there is a discrepancy in the English and French texts of the same legislation, the approach endorsed by the Supreme Court of Canada involves two steps. First, determine if there is a common meaning. If so, determine if that meaning is consistent with Parliament's intent. If there is no common meaning, alternatively, a search for the more restrictive of the two meanings is to be undertaken.

[103] The words "medical" and "hospital" are defined in the *Canadian Oxford Dictionary* as follows:

> **Medical** *adjective* **1** of or relating to the science or practice of medicine in general. **2** of or relating to conditions requiring medical and not surgical treatment (*medical ward*). **3** of or relating to the condition of one's health (*medical leave*).
>
> **Hospital** *noun* **1** an institution providing medical and surgical treatment and nursing care for sick or injured people….

[104] *Collins English Dictionary* defines "medical" as follows:

> **Medical** *adjective* 1 of or relating to the science of medicine or to the treatment of patients by drugs, etc., as opposed to surgery.

[105] *Le Petit Robert* provides the following for "hospitalier":

> **Hospitalier.** Médecins, chirurgien des hôpitaux. Dr X, ancien interne des hôpitaux de Paris. Les salles, les chambres d'un hôpital. Lit hôpital. Envoyer, admettre un malade dans un hôpital, à hôpital.

[106] The term "Médecins, chirurgien des hôpitaux," translates into English as "doctors and surgeons from hospital".

[107] Looking at the definitions of "medical", "hospital" and "hospitalier" in the preceding paragraphs, the common meaning gleaned from the English and French versions is care provided in a hospital that provides medical treatment by a doctor, if necessary with medication, and surgical treatment by a surgeon to sick or injured people. In other words, medical and surgical treatment in a hospital setting is key as used in the definition of "health care facility" in section 1 of Part II of Schedule V of the ETA.

[108] Turning to the second step as to whether the common meaning is congruent with Parliament's intent. The English version could have said the legislative intent was to only "operate for the purpose of hospital care." It did not. Parliament's intention was to look at both medical and hospital care.

[109] The May 1990 Department of Finance Technical Notes provide a window into the term "institutional health care service." The Notes reference ancillary services when provided to patients in a hospital or residents in a facility. Examples comprise "provision of accommodation" (in a standard, semi-private or private ward), "meals

provided with accommodation", and "rentals of medical equipment, such as a dialysis machine, to patients or residents of the facility". The Notes state:

> This term is relevant to section 2 below. It defines the range of health care services that are exempt when provided in a health care facility. The definition includes basic health care services provided by health care facilities to their patients or residents. Of particular note, it includes the provision of accommodation (including standard ward, semi-private or private), as well as meals provided with accommodation, and rentals of medical equipment, such as a dialysis machine, to patients or residents of the facility. Other services provided by these institutions, such as parking and meals served in a cafeteria to visitors, or haircuts for which a separate fee is charged, do not fall under the definition of institutional health care services.

[110] I agree with the respondent's submissions that this emphasizes that the key aspect in an "institutional health care service" is the institutional focus. For example, when someone is admitted to hospital, they will receive meals as they are in a hospital bed, and medical equipment will be rented to them to use during their stay in the hospital or facility. These examples accord with an "institutional health care service", therefore, Parliament's intent is consistent with the common meaning of the French and English versions that care is provided in a hospital setting.

[111] Even if that was not the common meaning, the more restrictive version in this instance would be the French text given the absence of the word "médicaux" (medical).

[112] Vocan is not a hospital that provides medical and surgical treatment. It was not an approved public hospital under the *Public Hospital Act,* nor is it licensed as a private hospital under the *Private Hospitals Act* in Ontario. It did not have births in any of its rooms. Medical doctors did not provide treatment at its facility. Individuals who were treated or examined did not stay overnight at its facility. Ms. Handy agreed Vocan did not provide hospital care.

[113] Effectively, Vocan suggests "medical" is synonymous with health care thereby expanding the definition of "medical care" to mean "health care". Respectfully, Vocan's proposed interpretation is inconsistent with the text, context and purpose of the provision. I disagree that "medical care", within the confines of section 1 of Part II, is as expansive as Vocan suggests. Its proposed interpretation would mean that Practitioners and the Nurse provide medical care simply because they are all are health professionals under Schedule 1 of the *RHPA.* If Vocan's interpretation is correct, why would each health profession need to have specific

legislation, scope of practice and regulatory colleges. The scope of practice for a Medical Practitioner is broader than a Practitioner.

[114] In Ontario, the *RHPA* and the Code in Schedule 2, as modified by each health Act specific to a health profession ("legislation"), sets out, in part, the governing framework for the self-governing health professions specified in Schedule 1. The *RHPA* operates in conjunction with the specific legislation. The specific legislation defines the scope of practice and controlled acts that health professionals are authorized to perform in their practice area. Each health profession is a separate group (including nurses, chiropractors, physiotherapists, psychologists and dentists) with its own regulatory colleges that regulate the practise of their health profession and its membership. The Medical Practitioners, Practitioners and the Nurse are members of, and subject to, the rules and regulations in their respective colleges, as set out in paragraphs 11, 12 and 13 of the agreed facts.

[115] Physicians and surgeons, engaged in the practise of medicine, have their own separate group. They are subject to the *Medicine Act, 1991*, of Ontario. The scope of practice for them states:

> The practice of medicine is the assessment of the physical or mental condition of an individual and the diagnosis, treatment and prevention of any disease, disorder or dysfunction.

[116] Returning to the definition "medical", as relating to the science and practice of medicine, a textual interpretation supports the interpretation "medical care" comprise services provided by physicians and surgeons practising medicine and providing treatment in hospital.

[117] A contextual analysis supports that "medical care" is to be interpreted as being connected to the practice of medicine. Part II of Schedule V draws distinctions between "medical practitioner as those restricted to practise the profession of medicine or dentistry, and "practitioner" as others practising in one of the 12 other health care related professions, including chiropractic, physiotherapy, and psychology. However, "nurse" is not included in either definition.

[118] The use of the term "medical care", versus "health care", in the definition of "health care facility" itself supports that "medical care" does not mean "health care".

[119] No treatment was performed by a Medical Practitioner (physician, medical doctor or surgeon or dentist) at Vocan's facility. No evidence was presented that

medication was prescribed at Vocan's facility. Vocan did not operate for the purpose of providing medical care.

[120] I agree that the respondent's interpretation is consistent with the text and provides a result that achieves the statutory objectives and gives effect to the statutory scheme.

[121] Relying on the definition of medical care in *Riverfront* and *Jema* and comparing itself to those cases, Vocan further argues its daily activities, pertaining to rehabilitative and chronic care, are similar since its assessors diagnose, evaluate and treat individuals (being the purpose of the supply).[45] For example, Mr. Kunashko and Mr. Gholeizadeh gave evidence they diagnose and provide recommendations for treatment. It was within Mr. Kunashko's scope of practice as a chiropractor to test for pain, identify irritation, read x-rays and do neurological testing. Vocan also referred to the wording in the exemption for Medical Practitioners under section 5 of Part II of Schedule V involving a supply of consultative diagnostic treatment to an individual. It suggests its assessors have provided all services described in that exemption. Consequently, it says Vocan operated for the purpose of medical care and provided same at its facility.

[122] Vocan referred to Justice D'Arcy's statements that:

> In my view, the word "medical care" as used in the definition of "Health Care Facility" in section 1.2 of Schedule V of the HST legislation means that a person provided with what is required … to diagnose, treat and/or prevent disease injury or other illness. This would include services relating to treatment of an existing medical condition and services relating to maintain the person's current health....such as annual physical health."

[123] Justice D'Arcy found since the activities of *Jema's* clinic was preventive medicine, diagnosis of potential illnesses, determining current health of the client and the provision of drugs constitutes medical care provided by a trained medical professional, and concluded it was a "health care facility." One witness was described as "one of the responsible physicians for *Jema*." Physicians were involved in *Jema's* clinic, and it was found that "a number of physicians provide consulting services to *Jema*." An authorization letter from the Association of Registered Nurses of Newfoundland noted the owner and nurse operator of the clinic "will be working in consultation with a physician".

---

[45] *Jema*, para's 50 to 55.

[124] *Jema* does not assist Vocan. In Vocan, no preventative medicine nor provision of drugs could be provided by Practitioners. Medical Practitioners prescribe medication in providing medical care, not Practitioners. Mr. Gholeizadeh agreed in cross-examination that physicians can provide care that physiotherapists cannot. In his view, the main limitation being that medications cannot be recommended by physiotherapists. Dr. Pister administered medication and gas at his dental office. No evidence was adduced that Medical Practitioners (physicians) worked with, consulted with, or were responsible for any services provided by the Practitioners, Nurse or Other Assessors contracted by Vocan. The presence of physicians at the facilities in both *Jema* and *Riverside* was key.

[125] *Jema's* clinic is in Newfoundland. Justice D'Arcy noted that the Newfoundland *Registered Nurses Act* does not contain a definition of "nursing practice". He relied, in part, on the definition of practice of nursing from the Quebec *Nurses Act* in carrying out his analysis and ultimately determined nurses in Newfoundland provided medical care. The Quebec *Nurses Act* states:

> The practice of nursing consists in assessing a person's state of health, determining and carrying out of the nursing care and treatment plan, providing nursing and medical care and treatment in order to maintain or restore health and prevent illness, and providing palliative care.

[126] The *Nursing Act* of Ontario sets out the scope of practice of nursing. It states:

> The practice of nursing is the promotion of health and the assessment of, the provision of care for and the treatment of health conditions by supportive, preventive, therapeutic, palliative and rehabilitative means in order to attain or maintain optimal function.

[127] Absent from that scope of practice is the term "medical care." Since the Nurse in Vocan is governed by Ontario legislation, *Jema* does not assist Vocan.

[128] Despite Ms. Handy had agreed that one assessor, a vocational rehabilitation counsellor, is not a health care professional under *RPHA*, Vocan nonetheless submitted that that assessor and the social worker are effectively qualified health professionals who engaged in activities akin to those in both cases. Therefore, they too provided medical care.[46] Vocan asserted that looking practically at the description at what social workers do, as set out in the exemption in section 7.2 of

[46] Exhibit A2, Tab 41. Vocational Assessment, Transferrable Skills and Labour Market Analysis prepared by Gurleen Minhas, who is also a Certified Human Resources Professional.

Part II of Schedule V, the social worker should qualify because of the professional-client relationship.[47] I disagree with Vocan's submissions as the Other Assessors are even further removed than the Practitioners and the Nurse.

[129] I conclude that since Vocan is not a "health care facility" (as it is not operated for the purpose of providing hospital or medical care), the supply of Reports in respect of the services provided in Vocan's facility is not an "institutional health care service", and fails to satisfy section 2 of Part II of Schedule V of the ETA. With respect to the Practitioners, the Nurse and Other Assessors, Vocan also fails to satisfy the test because the supply was not made by the operator of a health care facility as Vocan does not operate a health care facility.

[130] All Medical Practitioners, including Dr. Kwok and Dr. Pister, conducted examinations and carried out all other steps outside Vocan's facility, as confirmed by Mr. Rabbaya. Dr. Kwok's orthopaedic Report was prepared at his office the same day as he did the examination.[48] Dr. Pister interviewed and examined individuals at his premises.[49] Since the issue is whether Vocan itself was the operator of a health care facility, which I have found it is not, its supply of the Reports to referring sources prepared by all Medical Practitioners were not supplies made by the operator of a health care facility.

(c) whether the supply was made to a patient of the facility?

[131] As to whether individuals assessed by assessors were patients of Vocan's facility, Vocan's position is the individuals were patients of both Vocan and of the assessors and were described as such by them. It is comparable to *Riverfront* because the Court found that patients of the physician were also patients of *Riverfront*. In *Riverfront*, the Court found that "a patient of a physician practising in the clinic is regarded as a patient of that clinic."[50] Again, Medical Practitioners were neither present or practising in Vocan's facility.

[132] Further, a clinic-patient relationship existed because each individual was seeking benefits and treatments from Vocan to deal with their chronic pain. The

---

[47] Respondent's Book of Authority, page 1094, section 7.2.
[48] He reviewed documents sent by Vocan, interviewed the individual during intake and examined the individual, after which he opined there was a reduction in range of motion and degree of loss.
[49] Exhibit A2, Tab 11 – Dental and TMJ Assessment Report, pages 56 to 60. He evaluated the individual to see if there was a disc displacement enabling him to make a diagnosis and a treatment plan.
[50] Paragraph 27 of *Riverfront*.

supply of Reports is rendered to individuals as patients. This was demonstrated by the process described, when the Authorization Form is signed by an individual during the intake process that is the "essence of the clinic-patient relationship".

[133] Vocan had some form of relationship with each individual, noted on the Authorization Form as "Client", but I am not persuaded it was in the nature of a clinic-patient relationship.

[134] Vocan only receives the assessment report if the individual signs the Authorization Form. Dr. Kwok only provided his Reports to Vocan if individuals gave permission. Similarly, Dr. Pister's Report indicates that the individual signed the consent for examination and gathering of information as it pertains to the diagnosis and consented to him sharing information with others as he sees necessary. Ms. Pister obtained such consent. Such examples are not conducive to the Authorization Form having created a clinic-patient relationship between Vocan and the individual.

[135] Ms. Handy said once the assessor completes an assessment report, it is sent to Vocan for review for errors, omissions and to add the individuals contact information. However, neither the assessor's opinion or substance of the reports can be changed. Mr. Rabbaya's responsibility was to review assessors' reports, check facts, typographical errors, accuracy and completeness, as confirmed by Dr. Kwok. Once signed by assessors, the Reports are sent to Vocan and it bills referring sources.

[136] Ms. Handy remarked if assessors' notes involve the individual's physical or psychological situation, Vocan does not have these in its file nor access to them because it is "privileged information". She acknowledged psychiatrists' and psychologists' notes are not in Vocan's file because "it's their relationship" and they are not allowed to give their personal notes to anyone.

[137] During cross-examination of all witnesses, only Mr. Gholeizadeh said everything goes into Vocan's file. Other assessors testified that any notes, records or working papers about the individual that the assessor may prepare before finalizing the Report are retained by the assessor as part of the assessor's own file and are not shared with or sent to Vocan. Dr. Pister gave his intake notes to his office manager for typing, placed intake information in storage, and only sent his Reports to Vocan. Dr. Kwok said if he typed notes, absent consent from the individual, he did not provide these to Vocan. Mr. Hill transcribed his handwritten notes onto a cassette recording device, gave the recording to his assistant to type in a report format and once typed, he would review and give it to Vocan. For his clinical work, he has a file at his office for each individual, which is under his control and "nobody

sees" same unless authorization is obtained from the individual. He does not leave records at Vocan and stated it has its own separate files for the financial aspects.

[138] Witnesses suggested a clinic-patient relationship existed between Vocan and the individual, and the assessor and the individual. Mr. Rabbaya suggested that though the process, Vocan gained the individual's trust, and this suffices for its clinic-patient relationship. In cross-examination, he admitted that Dr. Pister had an obligation to provide a mouth guard. In re-examination, he said Vocan's corresponding obligation was to try to communicate with the individual, ensuring follow up and because accident benefits require Form 22. Both Mr. Gholeizadeh and Mr. Hill remarked that moving the individual along in an orderly and efficient manner was suffice for Vocan's clinic-patient relationship, whereas Mr. Kunashko indicated that being a consultant paid by Vocan was adequate. Dr. Pister's view was that individuals were Vocan's patients because it had initially determined a TMJ was necessary. None of the foregoing assist Vocan, in my view.

[139] The following factors, in my opinion, are not indicative of a clinic-patient relationship as between Vocan and the individual. Assessors discussed the content of the Reports with individuals. Consent or an Authorization Form was needed before assessors could forward Reports, or parts of its contents, to Vocan. Of significance, the retention of notes or working papers that assessors may have prepared before finalizing the Reports were maintained in the assessor's personal file and they were not permitted to give those to anyone. I find that individuals were not patients of Vocan's facility such that the supply of the Reports were not made to a patient of Vocan's facility, and Vocan did not satisfy the last test in section 2 of Part II of Schedule V.

[140] Consequently, the supply of all Reports, whether off-site or in Vocan's facility, do not qualify as an exempt "institutional health care service" pursuant to section 2 of Part II of Schedule V of the ETA.[51]

VII. ISSUE 2: Whether the Minister properly imposed gross negligence penalties for both Periods?

[141] Given my finding that the supply of Reports is a taxable supply, the second issue is whether penalties levied pursuant to section 285 of the *Excise Tax Act* for both Periods are warranted.

[51] Amounts are set out in paragraph 73 of these reasons.

[142] At the conclusion of Ms. Gill's audit in 2013, adjustments were made by her to HST sales and HST collectible and its net tax liability for both Periods; adjustments were because of Vocan's failure to charge HST in the amounts of $62,236.33 and $127,223.99 in the 2010 Period and the 2011 Period, respectively ("HST Amounts"). Penalties were levied because of the misstatements in its GST returns for both Periods.[52]

2010 return and amended 2010 return

[143] The bookkeeper, Siva Vimalachandran, and Ms. Handy identified the GST returns for the 2010 Period and the 2011 Period ("2010 return" and "2011 return"), prepared by him and reviewed and signed by her, and excerpts from income tax returns that he prepared and she reviewed for the same time frame.[53] The 2010 return was signed on August 23, 2010 and received by CRA on August 25, 2010.[54] In it, Vocan claimed an ITC in the amount of $6,260.17 ("2010 ITC claim").

[144] The bookkeeper testified that in 2010 Mr. Chan and Ms. Liu, CRA prepayment auditors ("CRA auditors"), advised him that since the assessment reports are exempt supplies, Vocan cannot claim an ITC. He relayed that advice to Ms. Handy. Because of that advice, he then prepared and sent an amended 2010 return to CRA, signed by her on September 13, 2010 ("amended 2010 return"). In it, the 2010 ITC claim was reduced to nil and he reported nil HST.[55] All of which Ms. Handy confirmed in her testimony.

[145] In cross-examination of the bookkeeper, it was established that it was after the 2010 return was filed that Mr. Chan contacted the bookkeeper to inquire why Vocan reported nil HST yet made the 2010 ITC claim. The bookkeeper said at the hearing he had responded to Mr. Chan that it was because the supplies are exempt supplies, to which he said Mr. Chan would have responded that if it is an exempt supply, Vocan cannot claim an ITC. Notwithstanding the bookkeeper's claim that he received CRA auditors' advice before filing the amended 2010 return in September 2010, it was established that it was after that that Ms. Liu had first contacted him in October 2010.

---

[52] Excerpts from Ms. Gill's examination for discovery, pages 358 and 359, questions 1402 to 1405, lines 18 to 25 and 1 to 6.
[53] Exhibit A5 and A6.
[54] Exhibit R3. The respondent produced the complete 2010 return, whereas Vocan produced only Part 1 of the 2010 return without the date it was signed.
[55] Exhibits A7, Exhibit A8, Amended 2010 return.

Law

[146] Section 285 states that "every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in making of a false statement or omission in a return … made in respect of a reporting period or transaction is liable to a penalty ... if the false statement or omission is relevant to the determination of net tax of the person for a reporting period."

[147] The burden of proof is on the respondent to justify the assessment of penalties.

[148] The classic definition of what constitutes gross negligence was articulated by Justice Strayer in *Venne v The Queen* ("*Venne*"),[56] when he stated:[57] ***

> ..."Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not....

[149] In *DeCosta v The Queen*,[58] Chief Justice Bowman articulated various principles and stated that consistent with the principle in *Venne*: [59]

> (9) ….The question in every case is, leaving aside the question of wilfulness, which is not suggested here,"
>
> (a) "was the taxpayer negligent in making a misstatement or omission in the return?" and
>
> (b) "was the negligence so great as to justify the use of the somewhat pejorative epithet 'gross' ?"
>
> [11] In drawing the line between "ordinary" negligence or neglect and "gross" negligence a number of factors have to be considered. One of course is the magnitude of the omission in relation to the income declared. Another is the opportunity the taxpayer had to detect the error. Another is the taxpayer's education

---

[56] *Venne v The Queen*, [1984] F.C.J. No. 314 (Fed. T.D.)
[57] See also *LaPlante v The Queen*, 2008 TCC 335, 2008 D.T.C. 4822.
[58] *DeCosta v The Queen*, [2005] T.C.J. No. 396 (T.C.C. [Informal Procedure])
[59] Chief Justice Bowman remarked he had no difficulty reconciling the decision in *Udell v Minister of National Revenue* (1969), [1969] C.T.C. 704, 70 D.T.C. 6019 (Can. Ex. Ct.) with two decisions by Rip J. (as he then was) as each depend on a finding of fact by the Court with respect to the degree of involvement of the taxpayers.

> and apparent intelligence. No single factor predominates. Each must be assigned its proper weight in the context of the overall picture that emerges from the evidence.
>
> …
>
> [13] Further, in *Villeneuve* c. *R.*, 2004 D.T.C. 6077 (F.C.A.), the Federal Court of Appeal made it clear that "gross negligence" could include wilful blindness in addition to an intentional act and wrongful intent.

Analysis

[150] Vocan's position is it was not grossly negligent because it relied on the bookkeeper whom relied on CRA auditors' advice that the supply was exempt therefore Vocan cannot claim ITCs. It declared the full amounts of sales in its income tax returns allocable to both Periods and a lesser amount in its GST returns for both Periods because part of the sales, the supply of the Reports, were not taxable. Penalties levied against it because nil HST collectible was reported in its GST returns regarding such supply is wrongful given the advice originated from CRA. Consequently, this cannot be viewed as indifference culminating in gross negligence.

[151] Vocan provided the following excerpts of read-ins from examination for discovery of Ms. Gill purportedly in support of its position:

> Q. The record is what I'm talking about. The record today show there were two people, Chan and Liu?
>
> A. Okay.
>
> Q. They both dealt with the taxpayer, told the taxpayer, yeah, I agree with you that it's exempt, and therefore you should claim ITCs, and the taxpayer said, Okay, I'm filing an amended return?
>
> A. I do not know if they agreed with the taxpayer. She just advised to me since it's exempt supplies, no ITCs were allowed. The *Excise Tax Act* tells you that if there are exempt supplies, no ITCs are allowed.[60]

[152] The respondent provided the following excerpts to qualify read-ins pertaining to Ms. Gill:

> Q. That's correct.

[60] Pages 347 and 348, questions 1362 to 1363, lines 21 to 25 and 1 to 8.

> A. But that does not mean anybody verified whether they were exempt or not.[61]

[153] From this exchange, it seems to me that CRA auditors were merely stating that if supplies are exempt, no ITCs could be claimed under the ETA. They were not agreeing, characterizing or advising as to the nature of supply being exempt as the bookkeeper and Vocan appear to suggest.

[154] Vocan misconstrues the content of the Memo for File prepared by Ms. Liu ("Memo") in asserting that the chronology in the Memo shows that one auditor had a conversation with another auditor and then an amended 2010 return was filed. I could glean no such conversation from that Memo. It indicates the filing of the amended 2010 return prompted her to contact the bookkeeper by phone to clarify why the adjustment regarding the 2010 ITC claim was made. Her entry dated October 25, 2010 refers to the bookkeeper's conversation with Mr. Chan, as relayed to her by the bookkeeper, and that she had received the file assigned to her by Mr. Chan. After she reviewed the history of GST filing, she contacted the bookkeeper and during their conversation he said that after he had spoken with Mr. Chan, the bookkeeper came to the realization Vocan should not claim the ITC. Her entry states:

> I called Siva and told him that I received the amended return from him. John (ph) Chan has assigned the file to me. I asked him the reason for the adjustment. He said after spoken to John Chan, he realized that the company should not claim ITC. [Emphasis added]

[155] When the Memo was initially shown to the bookkeeper at trial, he claimed CRA auditors provided advice to him before he filed the amended 2010 return (on September 13, 2010). When it was brought to his attention during cross-examination that the return was filed after he spoke with Mr. Chan but before the bookkeeper first spoke with her on October 25, 2010, several weeks after filing the amended 2010 return, he then said he no longer remembered whether he spoke with her. The bookkeeper lacks credibility.

---

[61] Page 348, lines 9 to 11.

[156] When asked whether Vocan had reported the amounts for the 2010, 2011 and 2012 Periods as set out in an affidavit tendered by the respondent, which I accept, Ms. Handy said she did not know:[62]

Reporting Period	Sales & Other Revenue	GST/HST & Adj	ITC & Adj	Net Tax
2009 Period	NIL	NIL	$3,260.86	($3,260.17)
2010 Period	NIL	NIL	$6,260.17	($6,260.17)
2011 Period	NIL	NIL	NIL	NIL
2012 Period	$509,839.00	$66,279.07	$58,544.33	$7,734.74
2013 Period	$431,702.54	$56,121.33	$53,098.32	$3,023.01

[157] For the reasons that follow, I find that penalties were warranted pursuant to section 285 of the ETA.

[158] The evidence demonstrates that Vocan's decision to stop charging HST for both Periods was because of the insurance companies' refusal to pay HST thus Vocan reported nil HST collected or collectible in respect of the supply of the Reports, at the same time it made the 2010 ITC claim in the 2010 return. This caused CRA auditors to query Vocan's basis for the apparent inconsistency in its filing position. The bookkeeper, having realized that Vocan should not charge HST and in consultation with Ms. Handy, filed the amended 2010 return to reduce the 2010 ITC claim to nil.

[159] When asked in cross-examination for his understanding as to why Vocan did not charge HST, the bookkeeper said it was because insurance companies refused to pay it and would not charge it, and Vocan only resumed charging insurance companies HST for the 2012 Period because Ms. Handy decided that and told him that was needed. Her evidence aligned with the bookkeeper's, and she admitted it was her decision to stop sending out Vocan's invoices charging HST for the 2009 Period but she was "not sure" when that decision was made. I infer it stopped

[62] Affidavit of Simon McLeod, CRA litigation, paragraph 14, Exhibits D, E and F, regarding the filings of Vocan's GST returns.

charging HST as early as March 1, 2008 when the 2009 Period commenced, consistent with its GST filings.

[160] Another explanation from Ms. Handy as to why Vocan stopped charging HST in both Periods was because previously Vocan only had a kinesiologist, thus the types of assessors and its services were different. That conflicts with evidence from Practitioners. Mr. Gholeizadeh worked as a physiotherapist with Vocan since June 2006, started slowly as he worked at other clinics, progressively did more assessments, and by 2007 worked with Vocan most of the time. Mr. Kunashko conducted assessments (functional, work site ergonomic and in-home ADL) for Vocan since 2007. On November 1st, 2013, the bookkeeper confirmed with Ms. Gill that services in both Periods were of the same nature as in the 2012 Period. Clearly, the nature of the services and types of assessors were the same before, during and after both Periods. I reject Ms. Handy's evidence as not credible.

[161] Vocan argues the decision in *Rexe v The Queen* is distinguishable because millions of dollars were in issue and he was a sophisticated individual with financial knowledge.[63] Ms. Handy, on the other hand, has no training in accounting and relied on the bookkeeper as a qualified professional with training in general accounting and tax (albeit he was not an accountant). Her lack of training in accounting and Vocan's reliance on the bookkeeper, in my view, does not relieve Vocan of its HST obligations. Ms. Handy is an intelligent person and operates at least two businesses in several locations. Having charged Goods and Services Tax for assessment reports for previous reporting periods before 2009, Vocan was fully aware of such obligations.[64] If there was any doubt whether the supply of Reports was exempt, Vocan could have sought professional advice. It chose not to do so other than Ms. Handy asking a "lawyer friend" (which was not relied on) and calling CRA; no records were produced to support either scenario.

[162] The overall picture that emerges from the evidence is that by its conduct, Vocan exhibited a cavalier attitude and was recklessly indifferent with respect to its HST obligations (charge HST on the supply of Reports in both Periods and then collect, report and remit same.) Although the magnitude of the HST Amounts that should have been charged and collected in both Periods are significant, no real effort

---

[63] *Rexe v The Queen,* 2008 TCC 360, [2008] G.S.T.C. 129.

[64] Penalties were applied where there was indifference to its obligation to pay HST in *Construction Biagio Maiorino Inc. v The Queen*, 2012 TCC 416, [2012] G.S.T.C. 128 at paragraph 53 and in *Rexe v The Queen,* 2008 TCC 360, [2008] G.S.T.C. 129, paragraphs 44, 47 and 48; the latter also involved recklessness indifference.

was made by Vocan to determine if the supply of Reports was exempt nor did it look at the ETA. Of its own volition, Vocan decided to stop charging HST on the supply of Reports simply because insurance companies complained about HST. It was only in 2012 when Vocan started to supply assessment reports to Misir & Company, a personal injury law firm that informed Vocan that HST should be charged and collected on their reports, that Vocan then resumed charging insurance companies HST for assessment reports in the 2012 Period.[65]

[163] Consequently, I conclude that Vocan made false statements in its GST returns for the 2010 Period and the 2011 Period in circumstances amounting to gross negligence when it chose not to charge HST and reported nil HST collectible and nil HST sales in respect of the Reports. Therefore, the penalties levied pursuant to section 285 of the ETA are warranted in the circumstances, thus the respondent discharged her onus.

VIII. ISSUE 3: What, if any, additional ITC is Vocan entitled to?

[164] Now turning to the final issue, what, if any, additional ITC's is Vocan entitled to.

[165] There was considerable confusion as to what Vocan was claiming as ITCs and the pertinent reporting period(s). Without identifying a reporting period, its Notice of Appeal indicates that the Minister improperly denied it ITCs claimed and ignored the invoices provided. At examination for discovery of Ms. Handy, the respondent sought to clarify same via the following undertaking accompanied by her answers:

No.	Question	Answer	Follow-up Question	Answer to the Follow-up Question
660	To advise if the [A]ppellant is seeking any amount, in this proceeding, in respect of ITCs for the 2010 or 2012 period.	The Appellant is seeking amounts as claimed.	For each of 2010 and 2011 periods, a) How were the amounts "claimed", and b) What amount did the	The amounts claimed are including in the GST/HST returns filed by the Appellant.

[65] The 2012 Period commenced on March 1, 2011

Appellant claim?	Please see the GST/HST returns in possession of CRA.

[166] These answers did not enlighten the situation for both Periods. Also, for the 2010 Period, the answer appears to be incorrect since the amended 2010 return was filed to reduce the ITC to nil.[66] For the 2011 Period, it appears an ITC was claimed in the amount of $348.28 but it is unclear what that is in respect of.

[167] At the hearing, Vocan's sole submission regarding ITCs was framed as an "alternative" argument in the event the Court found that the Reports are taxable in both Periods; the amounts set out at paragraph 192 of these reasons are the ITCs they would seek to claim based on the bookkeeper's explanation during the hearing. Of course, that explanation does not accord with the amounts in the initial 2010 return or the 2011 return. In Reply argument, however, it then said it was clarifying that the ITC sought is for the 2012 Period.

[168] I will nonetheless address ITCs for the 2012 Period and both Periods.

Background facts

(1) 2012 Period

[169] The bookkeeper had inputted accounting information into Vocan's computer and prepared a document titled "Vocan Health Assessors Expenses for the period: March - Feb 2012", which represents the ITC summary for only the 2012 Period ("ITC summary").[67] Vocan claimed an ITC totalling $58,544.34, as noted on its ITC summary. It lists the type of expense or name of the entity that supplied the item or service and the expense amount. The adjacent column, "HST (13%)", shows the HST amount as calculated by the bookkeeper based on the expense amount for each expense listed.

[170] Ms. Gill met twice with the bookkeeper in November 2013. At the conclusion of her audit she sent a letter to Vocan dated December 24, 2013 ("2013 letter") with two attachments involving two separate issues. The attachment, pertaining to ITCs for the 2012 Period, states:[68]

---

[66] Exhibit A8.
[67] Exhibit R4.WPs FT#600 and FT#650.
[68] Exhibit A4.

> "During our meeting on November 1, 2013, it was determined that the registrant had both exempt and taxable supplies for the fiscal year ending 2012-02-29. The bookkeeper, Shiva, stated he has claimed 100% of HST paid for expenses in 2012. We explained to bookkeeper that the input tax credits (ITCs) must be pro-rated since the registrant had both exempt and taxable supplies. We further explained that ITCs for taxable supplies should be determined based on a reasonable allocation method such as input."

[171] It also states during the field audit on November 29, 2013 the bookkeeper told her that Ms. Handy feels she is entitled to claim 100% of ITC. Given he had also told Ms. Gill that he does not have any reasonable allocation method, Ms. Gill apportioned Vocan's total revenue for the 2012 Period into 63% of taxable sales for assessments reports, 37% of exempt sales, and concomitantly pro-rated the ITC such that 63% of the substantiated ITC was to be allowed (since no other information was available); this resulted in ITCs of $28,449.77. However, due to a computational error, an ITC of $33,896.10 was actually allowed on assessment.[69] The ITC of $28,449.77 that CRA intended to allow for the 2012 Period was determined as follows:

ITC summary	58,544.34
ITCs unsubstantiated	-13,385.98
Revised ITCs	45,158.36
Taxable supplies	.63%
ITCs	28,449.77

[172] Ms. Gill had conducted a sampling of items for which ITCs were claimed totalling $13,385.98 but were unsubstantiated.[70]

(2) Both Periods

[69] The Minister cannot challenge her own assessment that would result in an increase of an appellant's liability for tax.

[70] Exhibit A4, page 1 of 1 ITC, note 3. Items disallowed comprise Auto Lease, CIBC and Rent paid to LPF Realty Office Inc were unsubstantiated because Vocan did not obtain documents containing prescribed information. Also, ABS Copy Fax was disallowed because it was assumed it was not a GST registrant at the date of transactions with Vocan.

[173] Ms. Gill concluded that Vocan was obliged to pay HST on the Reports for both Periods. Although he initially said he had provided ITC summaries for both Periods to her, in cross-examination the bookkeeper said he could not remember if he had but speculated he must have. I reject his evidence. There is no mention of any other ITC summaries for both Periods in the attachment (itself strictly focussed on ITCs and the ITC summary for the 2012 Period) nor the 2013 letter. Also, the "Receipt for borrowed books and records" ("Receipt") pertains only to documents regarding the 2012 Period.

Law

[174] Generally, subsection 169(1) of the ETA permits a registrant to claim an ITC on a taxable supply and zero-rated supply on the amount of the property or services acquired for consumption, use, or supply in the course of commercial activities of the person and set outs three conditions. If an exempt supply is made, no ITC can be claimed because an exempt supply does not fall within the definition of the term "commercial activity" in subsection 123(1).

[175] To claim an ITC for a reporting period, a GST registrant must satisfy the mandatory documentary requirements in subsection 169(4). Specifically, an ITC may not be claimed unless before filing the return in which an ITC is claimed for a reporting period, a registrant has obtained sufficient information in such form containing such information as may be prescribed enabling the amount of the ITC to be determined.

[176] In *1378055 Ontario Limited v The Queen*,[71] Justice Sommerfeldt summarized and analyzed sections 2 and 3 of the *Input Tax Credit Information (GST/HST) Regulations* ("*Regulations*"), in the context of subsection 169 (4) of the ETA.[72] It was noted that for the purpose of paragraph 169(4)(a), prescribed information is set out in section 3 of *Regulations*; examples listed in the decision include the name of the supplier, the total amount paid or payable for the supply, the name of the supplier and the GST registration number of the supplier, the terms of payment and a description of the supply.[73]

---

[71] *1378055 Ontario Ltd. v The Queen*, 2019 TCC 149, para 52; *Systematix Technology Consultants Inc. v The Queen*, 2007 FCA 226, paras 4 to 6.
[72] *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45.
[73] *Regulations*, subparagraphs 3(a)(i), 3(a)(iv), 3(b)(i), 3(c)(iii), and 3(c)(iv), respectively.

[177] It was also noted section 2 of the *Regulations* defines the term "supporting documentation" as meaning "the form in which information prescribed by section 3 is contained…" Information required by subsection 169 (4) need not be contained in a single document; rather, it may be contained collectively in multiple documents.[74] However, to constitute supporting documentation, a particular document must be issued or signed by the supplier.[75]

Analysis

[178] Vocan submits it provided sufficient information in supporting documentation which contains prescribed information obtained by it before filing the GST returns for which ITCs are claimed, pursuant to subsection 169(4) of the *ETA* and section 3 of the *Regulations*. It says in addition to credit card statements and bank statements (the "statements"), two binders of invoices and other ITC-related documentation were provided to Ms. Gill to substantiate the ITCs claimed but were never returned. Vocan produced the following read-ins from her examination for discovery:

> Q. -- and invoices because he gave you a number of binders, right, a whole pile of binders? You didn't go through those binders, did you?
>
> A. There were no invoices there.
>
> Q. No invoices?
>
> A. No.
>
> Q. I see a sample you have here in Tab 9 and 10. Where did you get these from?
>
> A. So ---
>
> Q. Tab 9, 10, 11.
>
> A. So we requested them again on November 6th, 2013 in my audit query. I wouldn't request this unless I was missing this.
>
> Q. Okay. So you requested and got them?
>
> A. November 6th when I requested, November 29th is when I was provided with them.

---

[74] *Westborough Place Inc. v The Queen*, 2007 TCC 155, [2007] G.S.T.C. 35.
[75] Paragraph 2(h) of *Regulations.*

> Q. Okay, so my question did you ever get them? So we ----
>
> A. I did.[76]

[179] The respondent countered with qualifying and contextual read-ins of the examination for discovery of Ms. Gill. These indicate:

> Q. How do I know those are what under exhibits are what were provided to you?
>
> A. If you look under 18 in my memo, I didn't specifically write how many he provided. So, if you look at page 4, Tab 18, November 29, 2013, he provided me with sales summaries for the physical years ending February 20th, 2010 and February 20, 2011. He provided some sales invoices. As per Shiva, it is very time consuming to print each and every invoice for these periods.
>
> Q. But I think we canvassed this at the last time that the binders were provided to you?
>
> A. Binders were provided on November 1st, and they were copies of cancelled cheques. They were for the periods where I did not make an adjustment to the GST/HST collectible. They were for only 2012 period. I would also like to correct. Mr. Misir, last time you said I was repetitive in my query, but if you look at my query, he only provided me information for one taxation year on November 1st, 2013. I was not repetitive in my query, because he did not provide me information for the two fiscal period that were listed. So, you could look over here on my entry November 1st, 2013, and you can compare to my query.[77]

[180] Consistent with that, in cross-examination and re-examination the bookkeeper confirmed two binders with business bank statements and an ITC summary of the ITC claimed for the 2012 Period with copies of cancelled cheques were provided to Ms. Gill on November 1, 2013. Initially, he said the expense invoices used to calculate the ITCs claimed were given to Ms. Gill but resiled from that and said he did not have, and could not provide to CRA, expense invoices or receipts, or copies, for expenses on the statements. He was taken to another attachment to the 2013 letter concerning GST/HST collectible for both Periods. It indicates:

> "During our meeting on November 29, 2013, we were provided with partial sales invoices issued in 2010 and 2011." [Emphasis added]

---

[76] At page 67, questions 265 to 270, lines 3 to 25.
[77] Page 288, lines 9 to 25, and page 289, lines 1 to 7.

[181] To recap, Ms. Gill received binders on November 1, 2013 with information for the 2012 Period which included copies of cancelled cheques for periods for which she did not make an adjustment to GST/HST collectible. She emphatically denied, according to the read-ins, that the binders included invoices for expenses ("expense invoices").[78] Given the paucity of supporting documentation, on November 6, 2013, as part of her audit query, she gave the bookkeeper a sample list. On November 29, 2013, he provided her with sales summaries and some partial sales invoices for both Periods and said it was very time consuming for him to print each invoice for both Periods.[79]

[182] Partial *sales* invoices pertaining to revenue generating assessment reports for both Periods were provided to Ms. Gill. These are not the same as *expense* invoices pertaining to the ITC claimed for the 2012 Period.

Receipt

[183] The bookkeeper's testimony that Ms. Gill never provided a receipt to him for books and records given to her was challenged in cross-examination. He was shown the Receipt signed by Ms. Gill and also signed by a person representing Vocan which appear to have the initials SV.[80] Although there is no signature in the box "Return of the above books, records and documents is hereby acknowledged", it does indicate that "Returns via registered mail, December 23, 2013." Further, Ms. Handy agreed there is nothing in Vocan's correspondence to CRA that indicates binders or documents are missing.

[184] Vocan pointed out that the Receipt mentions some but not all documents provided to Ms. Gill, which is apparent from the 2013 letter. It is equally true, however, that the 2013 letter does not mention expense invoices. Had such invoices been provided to her, it is likely these would have at least been mentioned by her in her detailed analysis. It is more plausible, and I find, that no *expense* invoices pertaining to ITCs for the 2012 Period were provided to Ms. Gill contrary to Vocan's submission. Given that, I need not address his allegation she did not receive these documents back to him.

---

[78] Transcript, Page 57, questions 225 and 226, lines 5 to 15.
[79] Page 309, lines 1 to 23.
[80] Exhibit R5.

[185] For the reasons that follow, Vocan did not discharge its onus in demonstrating its entitlement to additional ITCs, either for the 2012 Period or both Periods.

[186] Vocan has not produced any receipts or expense invoices showing HST was even paid to support any of the ITC claims thus Vocan failed to comply with subparagraph 3(a)(iv) of the *Regulations* (i.e., the total amount paid or payable for the supply). As such, no supporting documentation containing prescribed information was provided to substantiate the ITC claims.

[187] The ITCs quantified on the ITC summary were based on the statements. For example, using the $17,739.02 expense listed on CIBC's card statement, the bookkeeper calculated and claimed an ITC of $813.94 even though the statement did not show how much HST was charged. The bookeeper could not recall if he had cross-referenced the statements with the invoices but confirmed he could not provide invoices for expenses on the card statements.

[188] The bookkeeper also agreed he did not provide receipts to Ms. Gill for HST paid on the Auto Lease as it was "impossible". Nor could he provide gas receipts as these do not accompany the statements. It appears he prepared the ITC summary even without looking at prescribed information.

[189] For the 2012 Period, initially the bookkeeper said he had provided the invoices used to calculate the ITC to Ms. Gill, but subsequently he indicated he did not have the expense invoices, therefore, he could not provide those to CRA. Further, the ITC claimed was calculated based on the statements even though these do not show the amounts of HST, and seemingly without him having reviewed receipts or expense invoices to determine what HST would have been paid.

[190] I find the statements and the ITC summary inadequate and insufficient as supporting documentation, and Vocan did not provide prescribed information.

[191] For both Periods, the bookkeeper said Vocan paid HST on operating expenses and he calculated ITCs as a percentage (the applicable rate) of such expenses (after deductions) for both Periods. When he had prepared the 2010 return in which he made the ITC claim of $6,260.17, it was based certain on operating expenses.[81]

[81] These comprise advertising, marketing, office supplies and rent expenses. Total expenses are $1.269 million and $1,354,748 for the 2010 Period and 2011 Period, respectively. Vocan also referred to HST having been paid by it on occupancy costs, repairs and maintenance, telephone and telecommunications, delivery and freight and a motor vehicle.

Similarly, when the 2011 return was prepared, expenses totalling $135,660, taken from the T2 general income tax return filed by it for the tax year ended February 28, 2011, were multiplied by 13%.

[192] According to his calculations, he estimates ITCs that Vocan would have claimed, had he not been ill-advised by CRA auditors, are noted below. This was so even though Vocan had chosen to file GST returns for both Periods on the basis the supply of Reports were exempt supplies. He arrived at the amounts of ITCs for both Periods after applying the 63% ratio (used for the 2012 Period) as follows:

Operating Expenses				ITCs Estimated @ 63%
2010	$173,924	GST @ 5%	=$8,696.20	=$5,478.61
2011	$135,660	HST @ 13%	=$17,635.80	=$11,110.55

[193] The bookkeeper seems to have been confused because during cross-examination he admitted that he does not know if a business only has exempt supplies whether he could claim an ITC.

[194] The Minister assumed the BMW automobile for which Vocan claimed ITCs in the 2012 Period was not used exclusively for business purposes. Ms. Handy said there were no records nor log to support the business use of the BMW; she commuted 14 kilometres daily from home.

Objection

[195] During the hearing, Vocan objected to the relevance of a question put to Ms. Handy by the respondent regarding PWI. I reserved on the ruling. The Minister assumed that rent paid to LPF Realty Office Inc. for 1835 Yonge Street in the 2012 Period was incurred by PWI and not by Vocan. Given that the occupancy cost in respect of the lease formed part of the operating expenses on which Vocan based its ITC claim, I find it is relevant. Ms. Handy testified that Vocan did not have a lease signed with the landlord for the premises but PWI had signed the lease and Vocan subleased it from PWI. She was unaware of any invoice from PWI to Vocan.

[196] Apart from that, Vocan’s approach of taking the total of operating expenses and multiplying the GST/HST rate applicable at the time is of no consequence

without producing supporting documentation with sufficient information including prescribed information for both Periods.[82]

[197] Based on the foregoing, I conclude that the documentation requirements of subsection 169(4) of the ETA and sections 2 and 3 of the *Regulations* were not satisfied. The statements and the ITC summary pertaining to the 2012 Period are in suffice such that Vocan is not entitled to ITCs greater than the assessed amount in the 2012 Period nor is it entitled to any ITC's in both Periods as it failed to provide supporting documentation with the prescribed information, therefore, it did not meet the mandatory requirements.

[198] The appeals for the 2010 Period, 2011 Period and 2012 Period are dismissed.

IX. COSTS

[199] Costs are awarded to the respondent. The respondent shall provide written submissions on costs within 30 days from the date of this Judgment. Vocan shall provide written submissions on costs within 30 days from the filing date of the respondent's submissions. The respondent shall provide their reply within 15 days of the filing date of Vocan's submissions. All submissions and reply shall be restricted to no more than 15 pages in length.

Signed at Nanaimo, British Columbia, this 6th day of August 2021.

"K. Lyons"

Lyons J.

[82] Apportionment is appropriate for the 2012 Period where HST is quantified and there is a pool of ITCs that have been proven by supporting documentation. Apportionment is not appropriate for both Periods without such information.

X. Appendix A

Definitions: Section 1of Part II of Schedule V of the ETA

medical practitioner means a person who is entitled under the laws of a province to practise the profession of medicine or dentistry;

practitioner, in respect of a supply of optometric, chiropractic, physiotherapy, chiropodic, podiatric, osteopathic, audiological, speech-language pathology, occupational therapy, psychological, midwifery or dietetic services, means a person who

(a) practises the profession of optometry, chiropractic, physiotherapy, chiropody, podiatry, osteopathy, audiology, speech-language pathology, occupational therapy, psychology, midwifery or dietetics, as the case may be,

(b) where the person is required to be licensed or otherwise certified to practise the profession in the province in which the service is supplied, is so licensed or certified, and

(c) where the person is not required to be licensed or otherwise certified to practise the profession in that province, has the qualifications equivalent to those necessary to be so licensed or otherwise certified in another province.

médecin Personne autorisée par la législation provinciale à exercer la profession de médecin ou de dentiste.

praticien Quant à la fourniture de services d'optométrie, de chiropraxie, de physiothérapie, de chiropodie, de podiatrie, d'ostéopathie, d'audiologie, d'orthophonie, d'ergothérapie, de psychologie, de sage-femme, de diététique, d'acupuncture ou de naturopathie, personne qui répond aux conditions suivantes :

a) elle exerce l'optométrie, la chiropraxie, la physiothérapie, la chiropodie, la podiatrie, l'ostéopathie, l'audiologie, l'orthophonie, l'ergothérapie, la psychologie, la profession de sage-femme, la diététique, l'acupuncture ou la naturopathie à titre de docteur en naturopathie, selon le cas;

b) si elle est tenue d'être titulaire d'un permis ou d'être autrement autorisée à exercer sa profession dans la province où elle fournit ses services, elle est ainsi titulaire ou autorisée;

c) sinon, elle a les qualités équivalentes à celles requises pour obtenir un permis ou être autrement autorisée à exercer sa profession dans une autre province.

XI. Appendix B

Regulated Health Professions Act, S.O. 1991, c. 18.

Interpretation

1 (1) In this Act,

"**health profession**" means a health profession set out in Schedule 1; ("profession de la santé")

"**health profession Act**" means an Act named in Schedule 1; ("loi sur une profession de la santé")

…

Schedule 1
SELF GOVERNING HEALTH PROFESSIONS

Health Profession Acts	*Health Profession*
Audiology and Speech-Language Pathology Act, 1991	Audiology and Speech-Language Pathology
Chiropody Act, 1991	Chiropody
Chiropractic Act, 1991	Chiropractic
Dental Hygiene Act, 1991	Dental Hygiene
Dental Technology Act, 1991	Dental Technology
Dentistry Act, 1991	Dentistry
Denturism Act, 1991	Denturism
Dietetics Act, 1991	Dietetics
Homeopathy Act, 2007	Homeopathy
Kinesiology Act, 2007	Kinesiology

Massage Therapy Act, 1991	Massage Therapy
Medical Laboratory Technology Act, 1991	Medical Laboratory Technology
Medical Radiation and Imaging Technology Act, 2017	Medical Radiation and Imaging Technology
Medicine Act, 1991	Medicine
Midwifery Act, 1991	Midwifery
Naturopathy Act, 2007	Naturopathy
Nursing Act, 1991	Nursing
Occupational Therapy Act, 1991	Occupational Therapy
Opticianry Act, 1991	Opticianry
Optometry Act, 1991	Optometry
Pharmacy Act, 1991	Pharmacy
Physiotherapy Act, 1991	Physiotherapy
Psychology Act, 1991	Psychology
Psychotherapy Act, 2007	Psychotherapy
Respiratory Therapy Act, 1991	Respiratory Therapy
Traditional Chinese Medicine Act, 2006	Traditional Chinese Medicine

CITATION:	2021 TCC 49
COURT FILE NO.:	2015-2586(GST)G
STYLE OF CAUSE:	VOCAN HEALTH ASSESSORS INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 10, 11, 12, 13, 2020 and September 2, 2020
REASONS FOR JUDGMENT BY:	The Honourable Justice K. Lyons
DATE OF JUDGMENT:	August 6, 2021

APPEARANCES:

Counsel for the Appellant:	Naresh Misir Ken Singh Devendranauth Misir
Counsel for the Respondent:	Christopher Bartlett

COUNSEL OF RECORD:

For the Appellant:

Name:	Naresh Misir
Firm:	Misir & Company

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada