Docket: 2018-1078(GST)G

BETWEEN:

FIERA FOODS COMPANY,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on October 31, 2022, November 1 to 3, 2022, November 7 to 10, 2022, November 14 to 16, 2022 and January 20, 2023, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Al Meghji, Alexander Cobb Mark Sheeley and Alexandra McLennan Brown
Counsel for the Respondent:	Jack Warren, Dan Daniels and Albert Brunelle

---

JUDGMENT

UPON hearing the evidence and submissions of counsel for the Appellant and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Judgment (the "Reasons"), the appeal from the reassessments under Part IX of the *Excise Tax Act* that denied the deduction of input tax credits claimed by the Appellant in computing net tax for each of the 37 monthly reporting periods ending in the period from January 1, 2011 to and including January 31, 2014 is allowed with costs to the Appellant and the reassessments are referred back to the Minister of National Revenue for

reconsideration and reassessment on the basis that the Appellant is entitled to the ITCs as defined in paragraph 4 of the Reasons.

The parties shall have 60 days from the date of this judgment to agree on costs. If no agreement is reached the Appellant shall have a further 30 days to submit written submissions on costs. The Respondent shall have a further 30 days to provide written submissions in response to the Appellant's submissions. The written submissions of each party are not to exceed ten pages.

Signed at Ottawa, Canada, this 20th day of September 2023.

"J.R. Owen"

Owen J.

Citation: 2023 TCC 140
Date: 20230920
Docket: 2018-1078(GST)G

BETWEEN:

FIERA FOODS COMPANY,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] Fiera Foods Company (the "Appellant") appeals reassessments (the "Reassessments") by the Minister of National Revenue (the "Minister") under Part IX of the *Excise Tax Act*, RSC 1985, c E-15 (the "ETA")[1] of the 37 monthly reporting periods (collectively, the "Reporting Periods") ending in the period from January 1, 2011 to and including January 31, 2014 (the "Relevant Period"). The Reassessments denied the deduction of a total of $5,758,469.46 of input tax credits claimed by the Appellant in computing net tax for the Reporting Periods and assessed penalties under section 285.

[2] The Appellant claimed the input tax credits in respect of harmonized sales tax ("HST") paid by the Appellant to 13 payees that the Appellant says provided taxable supplies to the Appellant during the Relevant Period. The names of the 13 payees (individually, an "Agency" and collectively, the "Agencies") and the details regarding the disallowed input tax credits are set out in the following chart, which is appended as Schedule "A" to the Reply:

[1] Unless otherwise noted, all statutory references are to the ETA.

	2011	2012	2013	2014	TOTAL
	Jan-Dec	Jan-Dec	Jan-Dec	Jan	
	$	$	$	$	$
2305070 Ontario Inc. (o/a Edaca)		164,655.15	348,250.20		512,905.35
Alpha Logistics Services Inc.		26,707.45	392,612.05	36,081.88	455,401.38
1870769 Ontario Inc. (o/a Apac Group)		130,287.70	28,795.99		159,083.69
1886758 Ont Inc. (o/a Proxor Group)			188,917.71		188,917.71
Savex Consulting Inc.	288,522.90	762,612.03			1,051,134.93
SN Rush Services Inc	324,320.02	266,655.65			590,975.67
2343528 Ontario Inc. (o/a Unicorn Management)		219,187.57	821,691.29		1,040,878.86
1903090 Ontario Inc. (o/a Vista Group)			17,760.49	17,653.02	35,413.51
2291828 Ontario Inc. (o/a VM Balance)	116,522.90	228,528.52			345,051.42
2365067 Ontario Inc. (o/a V-Star Consulting)			106,460.32	38,929.06	145,389.38
2354124 Ontario Inc. (o/a Westlake Consulting)			377,699.24	101,537.55	479,236.79
Teamco Staffing Inc.	450,755.00				450,755.00
2266272 Ontario Inc. (o/a Rightway Optimum)	303,325.77				303,325.77
TOTAL	**1,483,446.59**	**1,798,634.07**	**2,282,187.29**	**194,201.51**	**5,758,469.46**

[3] In its written argument, the Appellant concedes that it is not entitled to input tax credits in respect of amounts paid to Alpha Logistics Services Inc ("Alpha") for the weeks ending December 8, 2012 to August 10, 2013 because it did not have an HST registration number for that Agency at the time it filed the corresponding HST returns.

[4] The Appellant's concession reduces the input tax credits claimed by the Appellant in respect of Alpha from $455,401.38 to $180,595.42 and reduces the total input tax credits claimed by the Appellant from $5,758,469.46 to $5,483,663.50. I will refer to the total amount of input tax credits remaining in dispute as the "ITCs".

[5] The Respondent admits that the Appellant paid the amounts in respect of which it calculated the ITCs but denies that the payments by the Appellant were for taxable supplies. The Respondent contends that the Agencies were not capable of providing the services paid for by the Appellant. In the alternative, the Respondent submits that the Appellant has not satisfied the documentary requirements in subsection 169(4) and in the *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45 (the "Information Regulations").

[6] Consequently, the issues raised by the Appellant's appeal of the Reassessments are as follows:

1. Is the Appellant entitled to the ITCs under subsection 169(1)?

2. If the answer to the first question is yes, is the Appellant precluded from claiming the ITCs because of paragraph 169(4)(a) and the Information Regulations?

3. If the answer to the first question is no, is the Appellant entitled to a rebate for tax paid in error under section 261 and subsection 296(2.1)?

4. Is the Appellant liable for the penalties assessed by the Minister under section 285?

II. The Evidence

A. The Witnesses

[7] The Appellant called 11 witnesses, all of whom were employees of the Appellant or of a corporation related to the Appellant. Some of these employees had started as non-employee workers and subsequently became full-time employees of the Appellant. I will refer to an individual who worked for the Appellant but who was not an employee of the Appellant at the relevant time as a "temporary worker" or a "TW". I note that the legal character of the relationship between the Appellant and the TWs is not in issue.

[8] The Appellant's witnesses were as follows:

1. Mr. Mahendra Bungaroo, the chief financial officer and chief administrative officer of the Appellant and the chief financial officer of several other corporations related to the Appellant.

2. Mr. Zorik Ochakovsky, the director of manufacturing of the Appellant.

3. Ms. Nataliya Seleznova, formerly a temporary worker (circa 2000–2001) and currently the payroll manager of the Appellant. Ms. Seleznova was a payroll supervisor of the Appellant from 2011 to 2018.

4. Ms. Zinaida Kissin, a time and attendance clerk of the Appellant.

5. Mr. Kennet Ojo, formerly a temporary worker and currently a production supervisor of the Appellant.

6. Ms. Lanie Manabat, formerly a temporary worker and currently an employee who works in the packaging department of the Appellant.

7. Mr. Admoon Aadam, formerly a temporary worker and currently an employee who works in the packaging department of the Appellant.

8. Ms. Tetyana Taranenko, formerly a temporary worker and currently an employee who works in the packaging department of the Appellant.

9. Mr. David Mandel, formerly a temporary worker and currently an employee who works in the packaging department of the Appellant.

10. Mr. Abhishek Khosla, an information technology ("IT") manager of Ryan Consulting Corporation ("RCC"), a corporation related to the Appellant. RCC provides IT services to the Appellant and corporations related to the Appellant.

11. Ms. Malgorzata Magda Gawedzka, a production manager at the Appellant who was a production supervisor at the Appellant during the Relevant Period.

[9] The Respondent called 17 witnesses, three of whom were Canada Revenue Agency ("CRA") auditors at the time of the audit of the Relevant Period and 14 of whom were former temporary workers who testified under subpoena.[2] Two of the former temporary workers are current employees of the Appellant[3] and two were employees of the Appellant for a period of time.[4]

[10] The three CRA auditors are as follows:

1. Mr. Chris Li, an auditor with the CRA who does GST/HST audits.

2. Mr. Raminder Kooner, an auditor with the CRA who does GST/HST audits.

3. Ms. Kathleen Servilla, an auditor with the CRA who does GST/HST audits.

B. The Credibility and Reliability of the Witnesses

[11] The credibility of a witness refers to the honesty of the witness or the readiness of the witness to tell the truth. A finding that a witness is not credible is a finding that the evidence of the witness cannot be trusted because the witness is deliberately not telling the truth.

[12] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence.

[13] Reliability may be affected by any number of factors, including the passage of time. In *R v Norman*, [1993] OJ No 2802 (QL), 68 OAC 22, the Ontario Court of Appeal explained the importance of reliability at paragraph 47:

> . . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

---

[2] I will not recite the names of the 14 subpoenaed witnesses but will refer to individual names as the need arises.

[3] Ms. Cadet and Ms. Sharify.

[4] Ms. Haroon and Mr. Abdulkhalik.

[14] In this case, reliability is a particular concern because at the time of the hearing, the Relevant Period had commenced nearly 12 years prior and many of the subpoenaed witnesses worked at the Appellant's premises for only a short period of time.

[15] With respect to each fact witness, I have considered all relevant factors[5] and I have concluded that each fact witness is credible.[6] I will address issues of reliability in the context of the evidence.

C. Summary of the Evidence

(1) Introduction

[16] The resolution of the issues raised in this appeal will turn in large part on my findings of fact. As there is no agreement between the parties as to the facts, I am required to parse the evidence in considerable detail to ensure that, to the best of my ability, my findings of fact are correct. As a result, these reasons will be longer than might be the case where the facts are either straightforward or substantially agreed.

(2) The Business of the Appellant

[17] The Appellant is in the business of producing frozen bakery products for retailers such as supermarkets and fast-food chains located in Canada and in the United States. The frozen products are in the form of either raw dough or pre-baked items depending on the needs of the retailer. The Appellant has carried on its bakery business since 1987.

[18] The Appellant operates from two plants in the Toronto area: one located at 50 Marmora Street ("Marmora"), comprising approximately 250,000 to 300,000 square feet on four floors, and one located at 220 Norelco Drive ("Norelco"), comprising approximately 55,000 square feet. The Marmora and Norelco plants operate five to six days per week depending on demand, with two 12-hour or three 8-hour shifts per day.

---

[5] See *Nichols v The Queen*, 2009 TCC 334 at paragraphs 23 and 24.

[6] In argument, counsel for the Respondent declined to assert that the Appellant's witnesses were not credible: Transcript of Hearing on January 20, 2023, line 28 of page 68, page 69 and lines 1 to 7 of page 70.

[19] At Marmora, the Appellant produces several products in different areas of the plant, including bagels, bread, croissants, pastries and sometimes cookies and muffins. At Norelco, the Appellant produces croissants and some pastry products.

[20] During the Relevant Period, the Appellant had annual revenues of between $195 million and $300 million from the sale of between 8 million and 10 million cases of products. A small portion of these products were produced at the facility of a corporation related to the Appellant called Upper Crust.[7]

[21] Only a small percentage of the Appellant's sales are made under long-term contracts. Most sales are from *ad hoc* orders received from customers, and those types of orders typically have a turnaround of less than ten days. On occasion, the turnaround may be as short as one day.[8]

[22] The prices for the Appellant's products are negotiated with customers.[9] The Appellant is a relatively small player in the frozen baked goods market, so it has little leverage when it comes to passing on cost increases to customers. If a customer will not accept a price increase, the Appellant has to decide whether to stop doing business with the customer.[10]

[23] The profit margins for the Appellant's business are low and the Appellant relies on high sales volumes to earn a profit. Consequently, the profitability of the Appellant is sensitive to the cost of inputs such as raw materials and labour.[11] The direct labour costs of the Appellant for 2011, 2012 and 2013 were stated in the financial statements of the Appellant to be $32,634,072, $35,409,549 and $41,071,078, respectively.[12] Mr. Bungaroo testified that the direct labour figure represented the labour cost for full-time employees of the Appellant and TWs.[13]

(3) <u>The Use of TWs by the Appellant</u>

---

[7] The background information in paragraphs 17 to 20 is stated in the testimony of Mr. Bungaroo ("Bungaroo"): Transcript of Hearing on October 31, 2022, line 1 of page 29 to line 2 of page 35.

[8] Ibid., lines 14 to 26 of page 38.

[9] Ibid., lines 27 to 28 of page 38 and lines 1 to 2 of page 39.

[10] Ibid., lines 5 to 28 of page 41 and lines 1 to 15 of page 42.

[11] Ibid., lines 3 to 28 of page 39, page 40 and lines 1 to 4 of page 41.

[12] Exhibits A-1, A-3 and A-5.

[13] Bungaroo: Transcript of Hearing on October 31, 2022, line 28 of page 40 and lines 1 to 4 of page 41.

[24] During the Relevant Period, the workforce of the Appellant comprised between 1,100 and 1,200 individuals. Approximately 35 to 40 percent of the workers were employees of the Appellant and the remainder were provided to the Appellant by agencies. Approximately 200–250 individuals worked at the Appellant's plants "per shift" (see line 19 of page 35 of the October 31, 2022 transcript.)[14]

[25] Mr. Bungaroo testified that the Appellant used agencies to obtain TWs because it did not have the internal resources to source TWs.[15] The Appellant used the Agencies because they were consistently able to provide TWs on very short notice while other agencies were not.[16] Although the TWs provided by the Agencies sometimes gave rise to personnel issues, the Appellant continued to work with the Agencies because they were always able to provide TWs on very short notice.[17]

[26] The turnover of TWs was high and therefore the Appellant had to source TWs daily.[18] The availability of TWs sometimes on very short notice was critical to the Appellant's business.[19]

[27] Ms. Kissin testified that during the Relevant Period, she contacted the Agencies for TWs except in urgent situations, where a production supervisor of the Appellant could contact the Agencies directly for TWs to avoid his or her production line shutting down.[20]

[28] The testimony of the TWs (I will refer to the TWs who testified as the "witness TWs") indicates that they were attracted by advertising or, in a few cases, by word of mouth (i.e., a friend or relative). In cross-examination, Mr. Bungaroo testified that the Appellant advertised in community publications to attract employees but not to attract TWs. However, these advertisements would generate calls from agencies and resulted in a lot of agencies knowing that the Appellant used TWs.[21]

---

[14] Ibid., lines 3 to 19 of page 35.

[15] Ibid., lines 9 to 12 of page 53, lines 26 to 28 of page 55 and lines 1 to 6 of page 56.

[16] Ibid., lines 14 to 18 and 28 of page 58 and lines 1 to 9 of page 59.

[17] Ibid., line 5 of page 62 to line 25 of page 63 and Exhibit A-10.

[18] Ibid., lines 1 to 25 of page 55 and lines 10 to 18 of page 59, Testimony of Mr. Ochakovsky ("Ochakovsky"): Transcript of Hearing on November 2, 2022, lines 27 and 28 of page 23 and lines 1 to 17 of page 24 and Testimony of Ms. Kissin ("Kissin"): Transcript of Hearing on November 3, 2022, lines 1 to 9 of page 68.

[19] Ochakovsky: Transcript of Hearing on November 2, 2022, lines 17 to 28 of page 26, page 27 and lines 1 to 7 of page 28 and Exhibits A-25 and A-26.

[20] Kissin: Transcript of Hearing on November 3, 2022, lines 10 to 23 of page 68 and Exhibits A-53 and A-75.

[21] Bungaroo: Transcript of Hearing on November 1, 2022, line 28 of page 74, page 75 and lines 1 to 10 of page 76.

[29] On the basis of the testimony of the witness TWs, the advertising appears to have been targeted at specific communities through local publications such as community-oriented newspapers, and the TWs who responded to the advertising were often recent immigrants to Canada.

[30] The Appellant did not treat the TWs as employees and paid amounts to the agencies for the TWs. All but one of the witness TWs[22] stated that they were paid weekly in cash.[23] Two witness TWs testified that they were initially paid in cash but subsequently obtained a debit card that was provided by a person other than the Appellant.[24] One of these two witness TWs testified that they were required to give a $20 deposit to obtain the debit card.[25]

[31] On the basis of the testimony of the witness TWs, TWs could obtain their pay for the week on either Friday or Saturday of that week. The payments in cash were made in one of three ways: (1) pick up cash at a specific location, which was a Money Mart or a location adjoining a Western Union; (2) receive, on the Appellant's premises, an envelope of cash from an Agency representative; or, (3) receive, on the Appellant's premises, an envelope of cash from a production supervisor of the Appellant. The procedure for obtaining payment varied but typically a TW had to sign something to obtain payment of his or her weekly wages.

[32] Ms. Gawedzka testified that for a period of time, the Appellant allowed representatives of the Agencies to distribute envelopes in a parking lot of the Appellant. Following a robbery, the Appellant allowed its production supervisors, who at the time included Ms. Gawedzka, to distribute envelopes of cash to TWs on the Appellant's premises.

[33] Ms. Gawedzka testified that the envelopes of cash distributed to TWs by production supervisors were delivered to the Appellant's premises by individuals who were representatives of the Agencies. Ms. Gawedzka stated that the names of two of the individuals who delivered envelopes were Souren and Rosemary.[26]

---

[22] Ms. Suladze thought that she was paid bi-weekly in cash on Thursdays: Transcript of Hearing on November 15, 2022, line 28 of page 10 and lines 1 to 2 of page 11.

[23] Employees of the Appellant were paid bi-weekly by direct deposit.

[24] Mr. Aadam and Ms. Taranenko.

[25] Ms. Taranenko.

[26] Testimony of by Ms. Gawedzka ("Gawedzka"): Transcript of Hearing on November 16, 2022, at pages 57 to 62.

[34] The Agencies changed during the Relevant Period. The way in which each change was accomplished is described under a heading that appears later on in these reasons and that reads as follows: "(7) The Replacement of an Agency with a New Agency".

[35] Exhibit A-9 consists of 12 letter agreements, which show the following execution dates:

Name of Agency	**Date of Agreement**
SN Rush Services Ltd ("SN Rush")	December 20, 2009
Teamco Staffing Inc ("Teamco")	November 11, 2010
Savex Consulting Inc ("Savex")	August 18, 2011
VM Balance ("VM Balance")	September 16, 2011
APAC Group ("APAC")	March 29, 2012
EDACA	September 5, 2012
Unicorn Management ("Unicorn")	October 15, 2012
Alpha	December 6, 2012
1886758 Ontario Inc./Proxor Group ("Proxor")	January 5, 2013
Westlake Consulting ("Westlake")	September 2, 2013
Vista Group ("Vista")	November 26, 2013
V-Star Consulting ("V-Star")	No Date

[36] The Appellant could not locate a letter agreement for Right Way Optimum ("Right Way").[27]

[37] Mr. Bungaroo testified that the Appellant did not strictly enforce the letter agreements because the agreements were written for the benefit of the Appellant to protect the Appellant.[28] The Appellant did not inspect the business premises of the Agencies because the Appellant knew whether the TWs provided by the Agencies were showing up for work.[29]

---

[27] Bungaroo: Transcript of Hearing on October 31, 2022, lines 1 to 12 of page 57. The chart from the Reply reproduced in paragraph 2 above refers to "Rightway" but the invoices in Exhibit A-11 use the name "Right Way".

[28] Ibid., lines 21 to 28 of page 69. See, also, lines 18 to 28 of page 66, pages 67 and 68 and lines 1 to 20 of page 69 regarding specific clauses.

[29] Ibid., lines 21 to 26 of page 60.

[38] Mr. Bungaroo testified that the Appellant checked to ensure that each Agency had a Workplace Safety and Insurance Board ("WSIB") certificate but did not make inquiries regarding the shareholders and directors of the Agencies.[30]

(4) <u>The Representatives of the Agencies</u>

[39] Mr. Bungaroo testified that three individuals were collectively the points of contact for all the Agencies: Mr. Souren Sarkissov, Mr. Igor Morozov and Mr. Alex Zeinalov (individually, a "Representative" and, collectively, the "Representatives").[31] The Appellant stopped working with Souren Sarkissov in 2014, Igor Morozov in 2016 or 2017 and Alex Zeinalov in 2018.[32]

[40] Mr. Bungaroo testified that he communicated with Souren Sarkissov by e-mail and telephone[33] and infrequently met with Mr. Sarkissov in his office.[34] Mr. Bungaroo also stated that he met and communicated with Igor Morozov and Alex Zeinalov.[35]

[41] Exhibit A-10 is an e-mail chain in which Mr. Bungaroo and Mr. Ochakovsky each sent e-mails to "teamcostaffing@gmail.com", which start "Suren" and "Dear Suren and Naum", respectively. The record indicates that the correct spelling of Mr. Sarkissov's first name is "Souren".

[42] Counsel for the Respondent pointed out in his cross-examination of Ms. Seleznova that Exhibit A-37, which is an e-mail from her to several of the Agencies, did not identify specific individuals, only the names of the Agencies.[36]

[43] After counsel for the Respondent provided Ms. Seleznova with the document to refresh her memory, Ms. Seleznova identified her contacts at the Agencies as follows:

---

[30] Ibid., lines 3 to 20 of page 60.

[31] Ibid., lines 13 to 28 of page 57, line 1 of page 58, lines 19 to 28 of page 59, and lines 1 to 2 of page 60.

[32] Ibid., lines 7 to 13 of page 65, lines 4 to 12 of page 66, lines 23 to 28 of page 65 and lines 1 to 3 of page 66.

[33] Ibid., lines 27 to 28 of page 60, pages 61 and 62 and lines 1 to 25 of page 63 and Exhibit A-10.

[34] Ibid., lines 27 to 28 of page 60 and lines 1 to 9 of page 61.

[35] Ibid., lines 26 to 28 of page 63 and lines 1 to 12 and lines 25 to 28 of page 64 and lines 1 to 3 of page 65.

[36] Seleznova: Transcript of Hearing on November 2, 2022, lines 20 to 28 of page 111, pages 112 and 113, lines 1 to 12 of page 114 and lines 6 to 13 of page 115.

1. Alpha: Igor
2. SN Rush: Igor
3. APAC: Alex
4. Proxor: Alex
5. Vista: Alex
6. VM Balance: Souren
7. EDACA: Souren
8. Right Way: Souren
9. Savex: Souren
10. Teamco: Souren
11. Unicorn: Souren
12. V-Star: Souren
13. Westlake: Souren[37]

(5) <u>The Appellant's Time and Attendance System (TraceTime)</u>

[44] The Appellant issued each employee of the Appellant and each TW a swipe card–also frequently referred to by the witnesses as a punch card–that identified the individual by a bar code.

[45] The Appellant had punch clocks that were supplied and maintained by a third party located throughout its plants. A TW would swipe the card and the clock would recognize the bar code and log the time. The punch clocks had a button so a TW could choose whether the in and out time was for the shift or for a break (e.g., lunch) during the shift. The punch clocks were programmed with a list of valid bar codes.

---

[37] Ibid., lines 26 to 28 of page 117 and lines 1 to 23 of page 118.

If a bar code was not used for six months, it was deactivated, but it was possible to have it reactivated.[38]

[46] All employees and TWs had to use the punch clocks. However, because it would take a few days to issue a swipe card to a new TW, the hours of a new TW would be recorded by the TW's production supervisor until a swipe card was issued to the TW.[39]

[47] In cross-examination, Mr. Bungaroo testified that during the Relevant Period, the Appellant had a requirement that the identification of new TWs be checked the first time a TW entered a plant. Once a TW started working at a plant, the TW's production supervisor would be able to identify the TW.[40] In 2014, a photograph of the card holder was added to the swipe cards.[41]

[48] Most of the witness TWs testified that they reported to security when they arrived at the Appellant's premises for the first time. With one exception,[42] the witness TWs either did not mention being asked for identification ("ID") when they arrived at the Appellant's premises for the first time, or, if asked by counsel, stated that they did not recall being asked for ID, that they believed or thought that they were not asked for ID, or, in a couple of instances, that they were not asked for ID.

[49] The Appellant used a time and attendance system called TraceTime to keep track of the hours worked by all employees and TWs and to assign schedules to employees and TWs. TraceTime aggregated all punch-in and punch-out information from the punch clocks in the Appellant's plants, and all time entered manually into TraceTime. The information available to a person using TraceTime would depend on the role of the person.[43]

---

[38] Testimony of Mr. Khosla ("Khosla"): Transcript of Hearing on November 7, 2022, lines 11 to 28 of page 123, pages 124 to 125, lines 1 to 23 of page 126 and lines 14 to 19 of page 127, and Ochakovsky: Transcript of Hearing on November 1, 2022, lines 24 to 28 of page 114 and lines 1 to 8 of page 115.

[39] Bungaroo: Transcript of Hearing on October 31, 2022, lines 20 to 28 of page 73 and lines 1 to 12 of page 74, Ochakovsky: Transcript of Hearing on November 1, 2022, lines 9 to 16 of page 115, and testimony of Ms. Seleznova ("Seleznova"): Transcript of Hearing on November 2, 2022, lines 10 to 28 of page 72 and lines 1 to 5 of page 73.

[40] Bungaroo: Transcript of Hearing on October 31, 2022, lines 4 to 28 of page 115 and lines 1 to 2 of page 116.

[41] Bungaroo: Transcript of Hearing on November 1, 2022, lines 12 to 19 of page 51.

[42] Mr. Abdulkhalik testified that he was asked for ID: Transcript of Hearing on November 16, 2022, lines 23 to 26 of page 46.

[43] Bungaroo: Transcript of Hearing on October 31, 2022, lines 20 to 28 of page 73, lines 1 to 12 of page 74 and lines 26 to 28 of page 97 and lines 1 to 3 of page 98, Ochakovsky: Transcript of Hearing on November 1, 2022, lines 17 to

[50] Programs called "policies" were applied to the raw information to adjust times for various reasons such as to remove 30 minutes to account for a lunch break and to limit total time to the length of the shift.[44] In cross-examination, Mr. Khosla testified that a unique policy that sets various attributes was also associated with each Agency's ID number, which in turn was associated with an Agency name.[45] However, an Agency did not have attributes, only the policy.[46]

[51] In cross-examination, Mr. Khosla testified that the only way to determine whether time was from a punch clock or from a manual entry was to compare the raw data from the clocks (the clock table) with the work time database, which included all clock times and manually entered times. Mr. Khosla agreed that the raw clock table and the raw work time database had not been entered into evidence but stated that the information in evidence did come from the work time database.[47]

[52] During the Relevant Period, Ms. Seleznova and Ms. Kissin were responsible for entering TWs into TraceTime and obtaining swipe cards for TWs.[48] To do this, they needed the TW's name, the name of the agency with which the TW was associated, the department in which the TW would work and the rate to be paid to the agency.[49] Ms. Kissin testified that she did not rely on the agencies for information about TWs. Instead, she relied on the Appellant's production supervisors for such information.[50]

[53] Most of the time, new TWs were assigned one of two pay rates. The rate was determined by the physical difficulty of the work to be performed by the TW. Occasionally, a special rate would be approved by management.[51]

---

20 of page 115, and Khosla: Transcript of Hearing on November 7, 2022, lines 10 to 28 of page 131, pages 132 to 135 and lines 1 to 6 of page 136.

[44] Khosla: Transcript of Hearing on November 7, 2022, lines 19 to 28 of page 145, pages 146 to 148 and lines 1 to 22 of page 149.

[45] Khosla: Transcript of Hearing on November 8, 2022, lines 7 to 28 of page 88, lines 1 to 17 of page 89 and lines 22 to 24 of page 99.

[46] Ibid., lines 4 to 10 of page 104.

[47] Ibid., lines 10 to 28 of page 74, lines 1 to 10 of page 75, lines 23 to 28 of page 83, lines 1 to 14 of page 84, lines 19 to 28 of page 86 and lines 1 to 11 of page 87.

[48] Seleznova: Transcript of Hearing on November 2, 2022, lines 6 to 15 of page 73 and lines 22 to 28 of page 73.

[49] Ibid., lines 13 to 16 and 26 to 28 of page 74 and lines 1 to 2 of page 75.

[50] Kissin: Transcript of Hearing on November 3, 2022, lines 14 to 17 of page 90.

[51] Seleznova: Transcript of Hearing on November 2, 2022, lines 24 to 28 of page 75 and lines 1 to 21 of page 76.

(6) The Payments by the Appellant to the Agencies

[54] Mr. Bungaroo identified Exhibits A-11, A-12, A-13 and A-14 as the invoices in the names of the Agencies received by the Appellant. Exhibits A-11, A-12, A-13 and A-14 contain copies of all invoices showing the name of an Agency that were received by the Appellant for 2011, 2012, 2013 and January 2014, respectively. Each invoice is accompanied by a form of agency payments report ("APR") printed by the Appellant from TraceTime and a payment slip showing information regarding the cheque or cheques issued by the Appellant to pay the invoice.[52] The payment slips indicate that all payments by the Appellant were to the Agency named in the accompanying invoice.

[55] Exhibits A-11 to A-14 contain invoices for the following periods:

Name of Agency	**Period**
Teamco	January 2, 2011 to August 13, 2011
SN Rush	January 2, 2011 to December 1, 2012
Right Way	February 6, 2011 to September 10, 2011
Savex	September 11, 2011 to October 13, 2012
VM Balance	September 11, 2011 to September 1, 2012
APAC	March 25, 2012 to February 16, 2013
EDACA	September 2, 2012 to October 5, 2013
Unicorn	October 14, 2012 to August 31, 2013
Alpha	December 2, 2012 to February 1, 2014
Proxor	February 17, 2013 to November 23, 2013
Westlake	September 1, 2013 to February 1, 2014
V-Star	October 6, 2013 to February 1, 2014
Vista	November 24, 2013 to February 1, 2014

[56] Mr. Bungaroo testified that the APRs in Exhibits A-11 to A-14 were prepared by the Appellant weekly for each Agency using the information in TraceTime. TraceTime had the name of the Agency associated with each TW, the TW's

[52] Bungaroo: Transcript of Hearing on October 31, 2022, lines 21 to 28 of page 71, pages 72 and 73, and lines 1 to 24 of page 74.

"employee" number, the rate payable to the Agency for that TW and the hours worked by the TW.[53]

[57] Ms. Seleznova testified that every Tuesday she printed two types of APRs from TraceTime for every Agency that had provided TWs to the Appellant during the previous week. Ms. Seleznova identified the documents in Exhibit A-32 as representative of the APRs she printed weekly.[54] I will refer to the two types of APRs printed by Ms. Seleznova as "purchase-summary-APRs" and "hours-APRs".

[58] The purchase-summary-APRs state the name of the Appellant's plant (e.g., Marmora or Norelco), the name of the Agency, the week to which the report applies, and the total dollar amount payable to the Agency broken down by department (e.g., packaging department, bagel department).

[59] The hours-APRs state the name of the Appellant's plant, the name of the Agency, the week to which the report applies, the name of the TWs associated with the Agency who had worked for the Appellant during the week, and the total hours worked for the Appellant by each such TW during the week. As with the purchase-summary-APR, the hours-APR is organized by department.

[60] Collectively, the purchase-summary-APR and the hours-APR for a particular week allow for the determination of the average hourly rate paid by the Appellant for TWs working in a particular department of the Appellant during that week.

[61] Ms. Seleznova testified that on Tuesdays she sent a purchase-summary-APR and an hours-APR to each Agency that provided TWs for the week covered by the APR and would expect to receive an invoice from the Agencies by noon on Wednesdays.[55]

[62] Ms. Seleznova would check each invoice received from an Agency against her purchase-summary-APR and, if the invoice was correct, she would enter the invoice into ACCPAC—the Appellant's accounting system—for payment.

---

[53] Ibid., lines 16 to 28 of page 72, and lines 1 to 3 and lines 20 to 25 of page 73.

[54] Seleznova: Transcript of Hearing on November 2, 2022, lines 1 to 24 of page 80, lines 17 to 28 of page 81, lines 1 to 12 of page 82.

[55] Ibid., lines 14 to 28 of page 85 and lines 1 to 5 of page 86. See, also, the testimony of Mr. Bungaroo in cross-examination: Transcript of Hearing on October 31, 2022, lines 23 to 28 of page 130 and lines 1 to 9 of page 131.

Ms. Seleznova would then print a cheque and would give it to her manager for approval.[56]

[63] Ms. Seleznova testified that there were very rarely errors in invoices, and she could not recall any one in particular.[57]

[64] Occasionally an Agency would dispute the hours worked by a TW. If hours were disputed, Ms. Seleznova would ask the relevant production supervisor to check and confirm the hours. If this was not done quickly enough to include any additional amount owed in the payment to the Agency for the week, then the amount would be added to the following week's payment.[58]

[65] Ms. Seleznova testified that cheques issued to the Agencies were either mailed to the Agency or picked up by a representative of the Agency. Ms. Seleznova identified the representatives of the Agencies as Alex, Souren, and Igor. Ms. Seleznova did not recall any other representative picking up cheques.[59]

[66] In his cross-examination of Mr. Bungaroo, counsel for the Respondent pointed out several relatively small discrepancies (when comparing the totals) between the amounts stated in an hours-APR printed in 2019 for a particular Agency and week and the invoice for the same Agency and week. Mr. Bungaroo explained that the correct numbers were found in the contemporaneous APRs and that APRs printed later contained discrepancies because of changes in the status of TWs, such as becoming inactive or changing Agencies.[60]

[67] Mr. Khosla testified that the Appellant has three databases, which he identified as the bill of materials database, the time and attendance database (i.e., TraceTime) and the accounting software database.

[68] The Appellant backs up all three databases on tape drives.[61] The time and attendance and the accounting databases are backed up daily and the bill of materials

---

[56] Ibid., lines 6 to 16 of page 86 and line 28 of page 88 and page 89.

[57] Ibid., lines 17 to 27 of page 87.

[58] Ibid., line 28 of page 87 and lines 1 to 24 of page 88.

[59] Ibid., lines 1 to 16 of page 90.

[60] Bungaroo: Transcript of Hearing on October 31, 2022, lines 19 to 28 of page 140, pages 141 to 151, and lines 1 to 13 of page 152.

[61] Testimony of Mr. Khosla ("Khosla"): Transcript of Hearing on November 7, 2022, lines 5 to 20 of page 115, line 28 of page 119, and lines 1 to 3 and 20 to 23 of page 120.

database is backed up every two hours.[62] The backups were stored off-site so that they would be available if there was a disaster at Marmora. Only the IT group had access to the backups.[63]

[69] In cross-examination, Mr. Khosla testified that the tape drives were kept for eight to ten years and were not overwritten.[64] In re-examination, Mr. Khosla clarified that the Appellant still had the backups for the Relevant Period.[65]

[70] Mr. Khosla testified that in 2015, the Appellant discovered issues with APRs printed from the then current TraceTime database. Specifically, the numbers in an APR printed from the current database did not match the numbers on historical documents, such as purchase-summary-APRs printed by Ms. Seleznova.[66] This resulted in relatively minor discrepancies.[67]

[71] Once discovered, the issues[68] were fixed going forward but to obtain accurate information for APRs for a period prior to the fix, the APR had to be printed from the backup of the database that was as close as possible to the date on which the original APR would have been printed,[69] which was typically the Tuesday after the week that the APR addressed. In cross-examination, Mr. Khosla agreed with counsel for the Respondent that it was not possible to tell from a document whether it was printed from a backup.[70]

[72] Ms. Kissin testified that during the Relevant Period, she was employed as a time and attendance clerk with the Appellant. Ms. Kissin summarized her duties during the Relevant Period as follows:

> I received a request or orders from supervisors. I called agencies and made arrangements so they will send us people and when those workers showed up, I set

---

62 Ibid., lines 4 to 10 of page 120.

63 Ibid., lines 10 to 27 of page 121.

64 Khosla: Transcript of Hearing on November 8, 2022, lines 12 to 28 of page 87 and lines 1 to 3 of page 88.

65 Ibid., lines 11 to 20 of page 105.

66 Ibid., lines 16 to 28 of page 8 and lines 1 to 8 of page 9.

67 Two examples presented to Mr. Bungaroo in cross-examination showed discrepancies of 1.85% and 2.44%.

68 Mr. Khosla describes the issues at ibid., lines 9 to 28 of page 10 and lines 1 to 8 of page 11.

69 Ibid., lines 15 to 27 of page 11.

70 Ibid., line 28 of page 82 and lines 1 to 3 of page 83.

> up files for each worker based on the order I was provided by supervisors. And then just recorded working hours which I received from supervisors.[71]

[73] Ms. Kissin testified that a record of a new TW's time would be kept by the TW's production supervisor until a swipe card was issued to the new TW, which would take about one week. Ms. Kissin would manually enter the time recorded by the production supervisor into TraceTime.[72]

[74] Ms. Kissin would enter the following information in TraceTime: the first and last name of the TW, the hours worked, the department of the Appellant in which the TW worked, the referring agency and the rate. The rate was provided to Ms. Kissin by her supervisor.[73]

[75] Ms. Kissin would enter a TW into TraceTime only after the TW's production supervisor had provided her with the hours worked by the TW on his or her first day.[74] Ms. Kissin recalled that heavy lifting positions had a higher rate of pay.[75]

[76] Ms. Kissin testified that production supervisors would advise her of their personnel needs mainly by telephone but sometimes by e-mail. Ms. Kissin would then call Agencies to see if they had TWs available. If an Agency had TWs available, she would e-mail to confirm the request for TWs. Ms. Kissin stated that she sent an e-mail because there had been instances when an Agency had sent more TWs or fewer TWs than requested.[76]

[77] Ms. Kissin identified 31 e-mails, or e-mail chains, to or from Agencies and/or about TWs.[77] Most of the e-mails were to Ms. Kissin from Unicorn, Savex, Vista, EDACA, Westlake, Proxor or Teamco. In a few instances, Ms. Kissin had forwarded an e-mail to someone else who worked at the Appellant or had responded to an e-mail from an Agency.

---

[71] Kissin: Transcript of Hearing on November 3, 2022, lines 8 to 13 of page 63.

[72] Ibid., lines 19 and 28 of page 64 and lines 1 to 18 of page 65.

[73] Ibid., line 28 of page 65 and lines 1 to 6 of page 66.

[74] Ibid., lines 8 to 17 of page 69.

[75] Ibid., lines 10 to 20 of page 66.

[76] Ibid., lines 21 to 28 of page 66 and lines 1 to 15 of page 67.

[77] Ibid., lines 18 to 28 of page 69, pages 70 to 106 and lines 1 to 19 of page 107, and Exhibits A-46 through A-77.

[78] The topics of the 31 e-mails are as follows: an Agency providing Ms. Kissin with the name(s) of TW(s) from the Agency,[78] an Agency providing Ms. Kissin with the name(s) of TW(s) from the Agency who are replacing other TW(s) from the Agency,[79] a request by an Agency to check for missing hours or to increase the rate for a TW provided by that Agency,[80] Ms. Kissin forwarding to an Agency an internal e-mail identifying issues with TWs from an Agency,[81] and an e-mail from Savex to Ms. Kissin attaching a "name list of our employees for Nov 11 2011"[82].

[79] In response to a question from counsel for the Appellant as to why an Agency would send an e-mail regarding replacement TWs, Ms. Kissin explained:

> A. Well, when temporary employees got sick or unable to show up at work they were supposed to report it to their agency and then the agency ask us whether we needed the replacement.
>
> Q. Why were they supposed to report it to the agency?
>
> A. Because they are employees of the agency.[83]

[80] Ms. Kissin testified that over time she learned which agencies she could rely on to provide TWs and which agencies she could not rely on. Ms. Kissin stated that she had a whole list of agencies with names of individuals to contact. When asked for the names of people she called she said that she remembered some information, but she was "not quite sure in which year are all these agencies on the list".[84]

[81] In cross-examination, Ms. Kissin agreed with counsel for the Respondent that the only documents she received from Agencies were the e-mails, that she received the hours from the production supervisors but there were no documents in evidence to that effect, that she did not meet with or collect documents from new TWs, and that she did not review the IDs of new TWs.[85]

---

[78] Exhibits A-46 to A-49, A-50, and A-53 to A-64.

[79] Exhibits A-51, A-52, A-66 to A-71, and A-75.

[80] Exhibits A-74, A-76 and A-77.

[81] Exhibits A-72 and A-73.

[82] Exhibit A-65.

[83] Kissin: Transcript of Hearing on November 3, 2022, lines 18 to 24 of page 75.

[84] Ibid., lines 16 to 28 of page 67.

[85] Ibid., lines 27 to 28 of page 108, page 109.

(7) The Replacement of an Agency with a New Agency

[82] The dates that invoices in a particular Agency name ceased and commenced, combined with the dates of the letters of understanding, indicate that during the Relevant Period Teamco and Right Way were replaced by Savex and VM Balance, respectively, SN Rush was replaced by Alpha, Savex was replaced by Unicorn, VM Balance was replaced by EDACA, APAC was replaced by Proxor, EDACA was replaced by V-Star and Proxor was replaced by Vista.

[83] The invoices issued for the last week of January 2014 are in the names of Vista, V-Star, Westlake and Alpha, indicating that these Agencies were the only ones dealing with the Appellant at the end of the Relevant Period.

[84] The Appellant's counsel asked Mr. Bungaroo why three individuals represented 13 Agencies. Mr. Bungaroo stated:

> A. Some agencies will stop working and those contact[s] will come to us and say we have stopped with those agencies and they're working with different agencies now. And they're representing a different agency.[86]

[85] Mr. Bungaroo testified that when a Representative advised the Appellant that he was working with a new Agency, the TWs associated with the prior Agency would be given the opportunity to move to the new Agency.[87] The Appellant facilitated the transfer by providing to the new Agency an office in the basement of the plant.[88] Ms. Seleznova did not recall any TW complaining about changing Agencies.[89]

[86] For the Appellant, the change in Agencies was accomplished by adding the new Agency to TraceTime and moving the TWs associated with the prior Agency to the new Agency.[90] The new Agency was also set up in ACCPAC.[91]

[87] In cross-examination, Mr. Khosla testified that it was possible to accomplish a change in Agency by changing the name of the Agency in TraceTime only if the

---

[86] Bungaroo: Transcript of Hearing on October 31, 2022, lines 25 to 28 of page 59 and lines 1 to 2 of page 60.

[87] Ibid., lines 14 to 18 of page 65.

[88] Ibid., lines 19 to 22 of page 65.

[89] Seleznova: Transcript of Hearing on November 2, 2022, lines 9 to 12 of page 98.

[90] Ibid., lines 13 to 16 of page 98.

[91] Ibid., lines 17 to 19 of Page 98.

Appellant knew at the time of the change that all the TWs associated with the former Agency were moving over to the replacement Agency and that except for the name change everything was staying the same.[92]

[88] Ms. Seleznova testified that prior to adding the new Agency in TraceTime and ACCPAC, she would require the owner or director of the new Agency to sign a letter of understanding. Ms. Seleznova would also obtain a WSIB certificate for the new Agency.[93] Ms. Seleznova had online tools available to ensure that a new Agency had a WSIB certificate.[94]

[89] In re-examination, Ms. Seleznova testified that when a Representative changed Agencies, she would simply change the name of the Agency in TraceTime so that all the TWs associated with the old Agency in TraceTime would become associated with the new Agency in TraceTime. She would also set up the new Agency in ACCPAC.[95]

[90] In cross-examination, Ms. Seleznova testified that she did not confirm with the new Agency that the TWs of the former Agency were employed by the new Agency because the same Representative was representing the new Agency.[96] Ms. Seleznova and counsel for the Respondent had the following exchange:

> Q. By representing Alpha did you take this to mean that the workers provided by Alpha were Igor's workers?
>
> A. Igor was representing Alpha, yes.
>
> Q. Did you take that to mean the workers that Igor supplied that went to Alpha when it came to SN Rush was the workers that Igor was providing you?
>
> A. Yes, as a representative, yes.
>
> Q. And the same thing would apply when Souren or Alex changed agencies?
>
> A. Correct.[97]

---

[92] Khosla: Transcript of Hearing on November 8, 2022, lines 11 to 21 of page 104.

[93] Seleznova: Transcript of Hearing on November 2, 2022, lines 6 to 17 of page 97.

[94] Ibid., lines 20 to 28 of page 98 and lines 1 to 2 of page 99.

[95] Seleznova: Transcript of Hearing on November 3, 2022, line 28 of page 45 and lines 1 to 19 of page 46.

[96] Seleznova: Transcript of Hearing on November 2, 2022, lines 15 to 28 of page 119.

[97] Ibid., lines 18 to 28 of page 119.

[91] In cross-examination, counsel for the Respondent asked Ms. Seleznova if there was any documentation relating to a change in Agency and she stated that there was only a verbal agreement and that nothing was done by the Appellant to verify the transfer of the TWs to the new Agency.[98]

[92] In cross-examination, Ms. Seleznova testified that Agency invoices were sent to the Appellant by fax or e-mail. Ms. Seleznova agreed with counsel for the Respondent that the sample in tab 2A of Exhibit A-11 did not have a fax cover sheet or an e-mail showing that the invoice was an attachment.

[93] Counsel for the Respondent asked Ms. Seleznova about a correction to the invoice at tab 2A of Exhibit A-11 that added $960 for a TW. Ms. Seleznova stated that she did not recall the timing but acknowledged that the invoice from the Agency showed the corrected amount and had the same January 18, 2011 date as the APR.[99]

[94] Counsel for the Respondent took Ms. Seleznova to tabs 48B and 49D of Exhibit A-12, which include invoices from SN Rush and Alpha Logistics, respectively. Ms. Seleznova agreed with counsel that the layout of the two invoices is similar, that the invoices show the same telephone and fax numbers in the address line and that they both say "Established since 1998". Ms. Seleznova confirmed that Igor represented both Agencies. The dates of the two invoices indicate that SN Rush was replaced by Alpha after the week ending December 1, 2012.[100]

[95] Counsel for the Respondent took Ms. Seleznova through the same exercise with the invoices at tabs 35A, 37B, 32C and 37C of Exhibit A-11 and at tabs 7A, 8A, 47A and 48A of Exhibit A-13 to much the same effect.[101]

[96] Counsel for the Respondent took Ms. Seleznova to Exhibit A-32 and asked if many of the TWs shown in the detailed APRs for SN Rush at page 4 of tab 32 and page 10 of tab 33, respectively, were the same. Ms. Seleznova agreed that they were and that someone would have changed the duplicate TWs from SN Rush to Alpha in the Appellant's system.[102]

---

[98] Ibid., lines 1 to 13 of page 120.

[99] Ibid., lines 23 to 28 of page 121 and pages 122 and 123.

[100] Ibid., lines 8 to 28 of page 125, page 126 and lines 1 to 21 of page 127.

[101] Ibid., lines 10 to 28 of page 129, pages 130 to 133 and lines 1 to 10 of page 134.

[102] Ibid., lines 2 to 28 of page 128 and lines 1 to 9 of page 129.

[97] Counsel for the Respondent took Ms. Seleznova to an employee information audit report (an "EIA report") for a TW (Exhibit R-33) and compared that report to APRs for Savex, EDACA and V-Star (Exhibits R-34, R-35 and R-36). Ms. Seleznova agreed with counsel that Exhibit R-33 did not reflect the last change in Agency to V-Star, which was reflected in Exhibit R-36.[103] Counsel undertook a similar exercise with 15 other TWs to the same effect.[104] Ms. Seleznova stated repeatedly that she used EIA reports for a limited purpose and that she knew that they existed but was not "really" familiar with that type of report.[105]

[98] In examination in chief and in cross-examination, Mr. Khosla provided a detailed explanation of the contents of an EIA report.[106]

[99] Mr. Khosla identified Exhibits A-90 and A-91 as examples of two reports printed from the same backup. The crux of Mr. Khosla's testimony is that one cannot simply look at an EIA report and conclude that information such as a change in Agency is missing because the backup used determines the information on the EIA report.[107]

[100] In cross-examination, Mr. Khosla confirmed that it was not possible to tell from the face of an EIA report when an Agency had changed or from which backup the EIA report had been printed. The information on the EIA report reflected only what was in the system at the time of the backup from which the EIA report had been printed. To determine which backup was used, the EIA report had to be cross-referenced with other reports. The "printed" date revealed only the date on which the report was printed, not the backup from which the report was printed.[108]

[101] In cross-examination, Mr. Khosla testified that if an Agency name is changed in TraceTime, the change will not appear on an EIA report or any other document. However, if a new agency is added to TraceTime (i.e., an additional agency as

---

[103] Seleznova: Transcript of Hearing on November 3, 2022, lines 4 to 28 of page 7, pages 8 to 12 and lines 1 to 6 of page 13.

[104] Ibid., lines 16 to 28 of page 13, pages 14 to 43 and lines 1 to 6 of page 44 and Exhibits R-37 to R-56.

[105] Ibid., lines 2 to 12, lines 17 to 21 and lines 24 to 26 of page 8 and lines 20 to 22 of page 28.

[106] Khosla: Transcript of Hearing on November 7, 2022, lines 7 to 28 of page 156, pages 157 to 169, and lines 1 to 3 of page 170 and Transcript of Hearing on November 8, 2022, lines 19 to 28 of page 76 and pages 77 to 79.

[107] Khosla: Transcript of Hearing on November 8, 2022, lines 16 to 28 of page 28, lines 1 to 14 of page 29, lines 11 to 28 of page 30, page 31 and lines 1 to 5 of page 32.

[108] Ibid., lines 13 to 28 of page 80, page 81 and lines 1 to 3 of page 82.

opposed to a replacement agency), then the change will be captured on an EIA report of any TW associated with that new agency.[109]

[102] In re-examination, counsel for the Appellant asked Ms. Seleznova to compare Exhibits R-39, R-44, R-47 and R-56, being EIA reports for four different TWs, to Exhibits A-41 to A-45, being EIA reports for the same four TWs.[110] All the EIA reports show a "printed" date of February or March of 2019. The comparison revealed that the information in the EIA reports differed depending on the name of the Agency stated on the top right of the EIA report, which in turn suggests that the EIA reports were printed from different backups.

(8) The CRA Audit of the Appellant and of the Agencies

[103] Mr. Li testified that Mr. Au, a CRA auditor, initially audited the Appellant for the period from December 2010 until the end of November 2012.[111]

[104] Mr. Li testified that Mr. Au's audit addressed the Appellant's claim of input tax credits, but that Mr. Au made no adjustments.[112] Mr. Au did, however, raise issues regarding 12 agencies paid by the Appellant—seven of which were Agencies—because the HST remitted by the agencies was significantly less than the input tax credits claimed by the Appellant.[113]

[105] Mr. Li testified that the team auditing the Relevant Period requested records but that the CRA received a "very limited amount of information".[114] In cross-examination, Mr. Li conceded that Mr. Au did not have any concern regarding the

---

[109] Ibid., lines 18 to 28 of page 89 and lines 1 to 17 of page 90.

[110] Seleznova: Transcript of Hearing on November 3, 2022, lines 23 to 28 of page 46, pages 47 to 58, and lines 1 to 12 of page 59.

[111] Testimony of Mr. Li ("Li"): Transcript of Hearing on November 8, 2022, lines 10 to 21 of page 123 and Transcript of Hearing on November 9, 2022, line 28 of page 132 and lines 1 to 5 of page 133.

[112] Li: Transcript of Hearing on November 9, 2022, lines 21 to 25 of page 98.

[113] Li: Transcript of Hearing on November 9, 2022, lines 27 to 28 of page 89, page 90, lines 1 and 2 of page 91, lines 21 to 28 of page 98 and lines 1 to 14 of page 99.

[114] Li: Transcript of Hearing on November 8, 2022, lines 6 to 28 of page 125, lines 1 to 6 of page 126.

Appellant's books and records[115] and that all records requested by the CRA were in fact provided by the Appellant.[116]

[106] In re-examination of Mr. Li, counsel for the Respondent suggested, in reference to Exhibit A-114, that information requested by Mr. Kooner had not been provided, and Mr. Li agreed. Mr. Kooner also testified that the information was not provided.[117] However, in cross-examination, Mr. Kooner stated that Exhibit R-90, which is an excerpt from a CRA audit report for VM Balance, was correct when it stated the following in an entry dated February 4, 2014:

> Response received from Fiera Food Company, the following documents provided – GL listing, sample invoices (5), contract and sample of cancelled cheques (5). Services provided – Temporary General Production Labour, last day of Interactions September 7, 2012. Contact information Natalia (416) 827-8530[118]

[107] In cross-examination, Mr. Kooner conceded that Exhibit R-81, which is an excerpt from Mr. Kooner's audit report for EDACA, stated the following in an entry for December 31, 2013:

> Response received from Fiera Foods Company, the following documents provided – GL listing, sample invoices (5), contract and sample of cancelled cheques (5).[119]

[108] In Mr. Kooner's "Memo for File" regarding EDACA, which is included in Exhibit A-114, Mr. Kooner writes in an entry dated December 31, 2013 that he received a package from the Appellant by mail and states the following: "I will review the information and complete a WP analysis of the sales and GST/HST collected". In the next entry, dated January 7, 2014, Mr. Kooner writes "I discussed the file with my TL and we discussed that the next step I would take is a bank requirement".[120] There is no suggestion in the "Memo for File" regarding EDACA that the Appellant was not co-operating or that information was being withheld by

---

[115] Li: Transcript of Hearing on November 9, 2022, lines 5 to 17 of page 86, and lines 9 to 17 of page 87.

[116] Ibid., lines 25 to 28 of page 88, page 89, lines 1 to 24 of page 90, lines 24 to 28 of page 91, lines 1 to 10 and 26 to 28 of page 92, lines 1 to 10 and 27 to 28 of page 93, lines 1 to 5 and 14 to 19 of page 94, lines 4 to 24 of page 95, lines 5 to 28 of page 96, page 97, lines 1 to 20 of page 98, lines 3 to 28 of page 103 and lines 1 to 24 of page 104.

[117] Testimony of Mr. Kooner ("Kooner"): Transcript of Hearing on November 10, 2022, line 28 of page 16 and lines 1 to 2 of page 17.

[118] Ibid., lines 23 to 28 of page 39 and lines 1 to 8 of page 40.

[119] Ibid., lines 22 to 28 of page 46 and lines 1 to 11 of page 47.

[120] Exhibit A-122 is copy of a requirement to provide information dated January 17, 2014 issued to Buduchnist Credit Union Ltd.

the Appellant. However, there are several entries in the memo that indicate that there had been difficulty obtaining third-party information from others.

[109] Mr. Li testified that during the audit of the Relevant Period, the Appellant's file was referred to the Criminal Investigations Division of the CRA.[121] In cross-examination, Mr. Kooner testified that the decision to make the referral was made on October 31, 2014.[122]

[110] The decision of the Criminal Investigations Division of the CRA found no evidence of wrongdoing by the Appellant. Mr. Bungaroo identified a letter from the Criminal Investigations Division of the CRA dated February 7, 2020, which stated the following:

> The Criminal Investigations Division of the Canada Revenue Agency (CRA) confirms that Fiera Foods Company, its officers, directors, or agents are no longer targets or potential parties of the criminal investigation pertaining to the supply of temporary labour services to Fiera Foods Company from 2011-2014 and the suppliers' alleged failure of remitting certain required Goods and Services Tax/Harmonized Sales Tax payments to the CRA.[123]

[111] Mr. Bungaroo confirmed that no further action was taken against the Appellant by the Criminal Investigations Division of the CRA.[124]

[112] In cross-examination, Mr. Li acknowledged that Mr. Au had raised the need for further investigation to determine whether the Appellant had colluded with the agencies even though he had "no solid evidence" of collusion.[125] Mr. Li testified that he found no evidence that any of the money paid by the Appellant to the Agencies had made its way back to the Appellant.[126]

[113] In cross-examination, Mr. Li agreed that with respect to the provision of TWs, the CRA did not ask the Appellant for contact details for TWs and did not ask for

---

[121] Li: Transcript of Hearing on November 8, 2022, lines 11 to 20 of page 126.

[122] Kooner: Transcript of Hearing on November 10, 2022, lines 1 to 3 of page 50.

[123] Bungaroo: Transcript of Hearing on October 31, 2022, lines 22 to 28 of page 100 and lines 1 to 13 of page 101, and Exhibit A-22.

[124] Ibid., lines 14 to 16 of page 101.

[125] Exhibit A-117.

[126] Li: Transcript of Hearing on November 9, 2022, lines 23 to 28 of page 101, page 102 and lines 1 and 2 of page 103.

access to TraceTime. Instead, the CRA relied on the names listed in the hourly APRs provided by the Appellant.[127]

[114] In cross-examination, Mr. Li testified that the CRA used name searches in the CRA database to try and identify and track down TWs. Mr. Li conceded that the Appellant would not have social insurance numbers for the TWs because the TWs were not employees of the Appellant.[128] Mr. Li also conceded that the CRA had no way of knowing whether the people who the CRA was contacting were the same people as those listed on the APRs provided by the Appellant.[129]

[115] In cross-examination, Mr. Li was asked a series of questions regarding the information that had to be provided to obtain a registration number under the ETA. Mr. Li identified the information that, to his knowledge, had to be provided as the following:

1. the name, social insurance number and postal code of the owner of the business;

2. the business name, business number and type of business; and

3. the physical address of the business and, if different, the mailing address of the business.

[116] In cross-examination, Mr. Li confirmed that a post office box could be given as the address of the business, that there was no requirement for the owner of the business to warrant that the business be carried out from the address provided, that no one other than the owner had to be identified and that the applicant did not have to disclose other registration numbers.[130] Mr. Li testified that the searches of the Agencies conducted by the CRA were based on the information provided by the Agencies to obtain a registration number.[131]

---

[127] Ibid., lines 22 to 28 of page 105, page 106 and lines 1 to 10 of page 107.

[128] Ibid., lines 11 to 28 of page 107 and lines 1 to 6 of page 108.

[129] Ibid., lines 7 to 12 of page 108 and lines 8 to 14 of page 111.

[130] Ibid., lines 7 to 28 of page 119, lines 1 to 17 of page 120 and lines 2 to 10 of page 122.

[131] Ibid., lines 25 to 28 of page 120 and lines 1 to 15 of page 121.

[117] In cross-examination, Mr. Li testified that it "appears that they [the Agencies] did not report taxable sales they had made from [the Appellant]".[132]

[118] In cross-examination, Mr. Li testified that the Minister's position was not that the Appellant had made everything up or that the TWs had not worked for the Appellant, but rather that the Agencies had not provided labour services to the Appellant.[133]

[119] In re-examination, Mr. Li testified that the CRA had attempted to contact the owners of the Agencies, but without success.[134]

[120] Mr. Kooner testified that he audited EDACA and Teamco on his own and that he took over the audits of SN Rush, Unicorn and VM Balance after Mr. Singh, the previous CRA auditor, went on leave in October 2014.[135]

[121] Mr. Kooner testified as to his audit findings at some length using his audit summaries and audit reports to refresh his memory.[136] Mr. Kooner's evidence may be summarized as follows:

1. On the basis of the T4s issued, the five Agencies had few employees and minimal payrolls, particularly in relation to the amounts on the invoices provided to the CRA by the Appellant.

2. The cheques received by EDACA from the Appellant were cashed at a cash house. I note that Mr. Li testified that most of the Agencies' cheques from the Appellant were cashed at the same cash house.[137]

3. Mr. Kooner identified a different owner for each of the five Agencies but was not able to reach anyone from four of the five Agencies. Mr. Kooner had gotten sidetracked after a question on whether he

---

[132] Ibid., lines 18 to 22 of page 118.

[133] Ibid., lines 22 to 28 of page 131 and lines 1 to 3 of page 132.

[134] Ibid., lines 5 to 13 of page 135.

[135] Kooner: Transcript of Hearing on November 10, 2022, lines 3 to 28 of page 9, lines 1 to 24 of page 10 and lines 7 to 11 of page 36.

[136] Ibid., lines 3 to 28 of page 11, pages 12 to 34 and line 1 of page 35.

[137] Li: Transcript of Hearing on November 8, 2022, lines 6 to 23 of page 157.

was able to reach the owner of Unicorn, and counsel did not return to the question.

4. Mr. Kooner found no reference to Souren Sarkissov in his audits of EDACA, SN Rush or Teamco. Counsel did not ask about Unicorn or VM Balance. I note that Ms. Seleznova identified Igor Morozov as her contact at SN Rush.

[122] In cross-examination, Mr. Kooner had the following exchange with counsel for the Appellant regarding an entry in Exhibit R-81 dated June 3, 2014 that recorded a conversation with Larissa Ischenko from GTA Financial Investment Corporation:

> Q. The last bullet says she says she remembered that the client is an employment agency and that they need cash to pay for the employees that work for them.
>
> A. Correct.
>
> Q. One of the few contacts you made with a third party other than Fiera also told you that Edaca was an employment agency?
>
> A. Correct.[138]

[123] Ms. Servilla audited Savex for the period January 1, 2011 to August 31, 2013. Ms. Servilla testified that Mr. Au had requested information from Mr. Sergio Portnoy, the accountant for Savex, who provided copies of 60 invoices, 59 of which were issued to the Appellant. Ms. Servilla had interviewed Mr. Portnoy and Mr. Portnoy had provided Ms. Servilla with information regarding the activities of Savex, including an additional 100 invoices issued to persons other than the Appellant. The invoices to third persons were in the general ledger of Savex, but the invoices to the Appellant were not.[139]

[124] Ms. Servilla was taken by counsel for the Respondent to three pairs of invoices issued by Savex. One invoice of each pair was issued to a third party, and

---

[138] Kooner: Transcript of Hearing on November 10, 2022, lines 13 to 20 of page 48.

[139] Testimony of Ms. Servilla ("Servilla"): Transcript of Hearing on November 10, 2022, lines 16 to 27 of page 82, line 28 of page 84, page 85, lines 1 to 18 of page 86, lines 10 to 28 of pages 89 and 90 and lines 1 to 13 of page 91.

one was issued to the Appellant. Each pair of invoices had the same number but the invoice to the Appellant was followed by the letter "A".[140]

[125] Ms. Servilla identified Mr. Stanislav Yasenik as the owner and director of Savex but did not come across the name Souren Sarkissov in her audit as being a director, officer or employee.[141]

[126] Ms. Servilla performed a bank account reconciliation for the bank statements of Mr. Yasenik and determined that with minor variations, the invoices to persons other than the Appellant were reflected in the bank account but the invoices to the Appellant were not.[142]

[127] Ms. Servilla determined that Savex had issued six T4s for 2011 totalling $13,681 and nine T4s for 2012 totalling $20,847.[143]

[128] Ms. Servilla testified that the business address of Savex was a residential apartment building.[144] In cross-examination, Ms. Servilla agreed that this information was not recorded in her audit report.[145]

[129] In cross-examination, Ms. Servilla agreed with counsel for the Appellant that Savex would work with other agencies when the demand for TWs exceeded its available workers and that one such agency was VM Balance. Ms. Servilla also agreed with counsel that she had requested and received from VM Balance its invoices for these services.[146]

[130] In cross-examination, Ms. Servilla agreed with counsel for the Appellant that no one from the team that was auditing the Appellant had contacted her in December 2014 or March 2015 to provide her with additional information that was received from the Appellant and to ask her to follow up on that information.[147]

---

[140] Ibid., lines 22 to 28 of page 94, page 95, and lines 1 to 12 of page 96.

[141] Ibid., lines 9 to 14 of page 88 and lines 16 to 20 of page 98.

[142] Ibid., lines 12 to 28 of page 93 and lines 1 to 7 of page 94.

[143] Ibid., lines 19 to 24 of page 88.

[144] Ibid., lines 16 to 23 of page 97.

[145] Ibid., lines 10 to 28 of page 103 and lines 1 to 5 of page 104.

[146] Ibid., lines 19 to 28 of page 105 and lines 1 to 3 of page 106.

[147] Ibid., lines 11 to 28 of page 106 and lines 1 and 2 of page 107.

III. The Submissions of the Parties

A. The Appellant's Submissions

[131] The Appellant submits that there is overwhelming evidence of the Appellant's need for TWs on a regular and continuous basis and that that need was fulfilled by the Agencies. TWs made up the majority of the Appellant's production workforce and payments to Agencies for TWs constituted the majority of the Appellant's production labour expense.

[132] The Appellant used TWs provided by the Agencies because it was far more cost effective and efficient and because the Agencies were able to provide TWs to meet the Appellant's specific production needs, which varied from time to time. The Appellant could not fulfill its constant requirement for workers itself and therefore needed the Agencies to fulfill that role.

[133] The Appellant entered into letters of understanding with the Agencies for the provision of TWs and the Agencies provided TWs to the Appellant. The Agencies invoiced the Appellant for the TWs provided and the Appellant paid the Agencies the full amounts of the invoices, which included HST.

[134] Mr. Bungaroo, Mr. Ochakovsky, Ms. Seleznova, Ms. Kissin and Ms. Gawedzka all testified about their interactions with the individuals who represented the Agencies and about how the Appellant sourced temporary labour through the Agencies. There are hundreds of contemporaneous records substantiating that the Appellant placed orders for TWs with the Agencies, that those orders were filled by the Agencies and that the Agencies and the Appellant were in regular communication about issues surrounding TWs.

[135] The Appellant submits that the Respondent has no theory as to how the TWs were supplied, or by whom, if they were not supplied by the Agencies. Nor does the Respondent have an explanation as to why the Appellant would pay the Agencies millions of dollars if the Agencies were not providing TWs to the Appellant. The Respondent has not alleged that the Appellant recovered any of the monies paid to the Agencies for TWs and there is no evidence to support such a conclusion.

[136] The Appellant submits that the facts and circumstances in this appeal are substantially the same as those addressed in *Salaison Lévesque Inc v The Queen*, 2014 TCC 36 ("*Salaison Lévesque*"), where the Tax Court judge allowed the taxpayer's claim for input tax credits.

[137] The Appellant submits that it has met the documentary requirements imposed by subsection 169(4) and the Information Regulations.

[138] The Appellant submits that except for the requirement that the HST number of the supplier appear in the documentation, which has been strictly enforced, the courts have been flexible with the document requirements in the Information Regulations: *Lohas Farm Inc v The Queen*, 2019 TCC 197 at paragraph 146, and *Bijouterie Almar Inc v The Queen*, 2010 TCC 618 at paragraphs 71 and 77.

[139] The Appellant cites *Forestech Industries Ltd v The Queen*, 2009 TCC 591 at paragraph 30 for the proposition that it is only necessary that the Appellant possessed the documentation with the prescribed information at the time the relevant return was filed, and *CFI Funding Trust v The Queen*, 2022 TCC 60 ("*CFI*") at paragraph 48 for the proposition that the documentation need not be signed by the supplier provided that the claimant can otherwise substantiate that the amounts claimed are correct.

[140] In the event the Court concludes that services were not provided by the Agencies, the Appellant submits that it is entitled to a rebate under subsection 296(2.1) because (i) the Appellant did not apply for any rebate in respect of the tax that it paid to the Agencies and (ii) the Appellant would have been entitled to a rebate under subsection 261(1) had it applied for such a rebate within the applicable limitation period in subsection 261(3).

[141] The Appellant submits that subsection 296(2.1) requires the Minister to apply an unclaimed rebate against the net tax of a person even where no application for a rebate was made within the applicable limitation period: *United Parcel Service Canada Ltd v Canada*, 2009 SCC 20, [2009] 1 SCR 657 at paragraphs 29–32. The Appellant submits that if no taxable supply was made to the Appellant, then the HST paid by the Appellant must have been paid in error: *Welch v The Queen,* 2010 TCC 449 at paragraph 12.

[142] The Appellant submits that it paid amounts on account of HST to the Agencies and that if the Agencies did not provide taxable supplies to the Appellant, those amounts were paid in error. The reason for the error is not a consideration: *Mediclean Incorporated v The Queen*, 2022 TCC 37 at paragraphs 126–128.

[143] The Appellant submits that the Respondent cannot discharge the burden of establishing that the Appellant deliberately disregarded the law or demonstrated such an indifference to appropriate and reasonable diligence in a self-assessing system as

belies or offends common sense: *Guindon v Canada*, 2015 SCC 41, [2015] 3 SCR 3 ("*Guindon*") at paragraphs 60–61.

[144] The Appellant filed its HST returns for the Relevant Period on the good faith belief that, having received supplies of TWs from, and paying HST to, the Agencies, it was entitled to the ITCs. The Minister had accepted these claims for prior periods.

[145] The audit of the Appellant's returns for the period from December 2010 to November 2012 has no bearing on the application of the penalties in issue and it is paradoxical to suggest otherwise given that the CRA auditor for that period allowed the ITCs claimed by the Appellant on the basis that the Appellant met the documentary requirements. Further, the audit did not end until 2013, so any guidance given was after the returns for the Relevant Period were filed and the only potentially relevant guidance related to vendors having valid HST registrations, which the Appellant heeded.

B. The Respondent's Submissions

[146] The Respondent submits that the evidence of the witnesses who were TWs of the Appellant during the Relevant Period (the "TW Witnesses") contradicts the information from TraceTime and the associated records (the "Records").

[147] The Respondent submits that the TW Witnesses testified to the following:

1. He/she had no knowledge of the agency or agencies with which he/she is associated in the Records (ten TW Witnesses);

2. He/she did not remember the name of the agency (two TW Witnesses);

3. He did not provide the name of an agency (one TW Witness);

4. He remembered the name of the agency, but it was not an Agency (one TW Witness);

5. He could not confirm that he worked for an agency (one TW Witness);

6. He never spoke to anyone at an agency and never visited an agency (one TW Witness);

7. She remembered only one of the two or three Agencies with which she is associated in the Records (two TW Witnesses); and

8. She did not work at the Appellant's premises during the Relevant Period (one TW Witness).

[148] The Respondent submits that there is no third-party evidence to corroborate the Records because the Appellant failed to call any of the Representatives as a witness. The Respondent asks the Court to draw an adverse inference from the absence of such evidence.

[149] The Respondent submits that the Appellant has the burden to prove on a balance of probabilities any facts alleged in the Notice of Appeal that are denied by the Respondent, and to demolish the Minister's assumptions of fact: *Eisbrenner v Canada*, 2020 FCA 93 at paragraph 24.

[150] The Respondent submits that the Appellant has failed to meet this burden because the Appellant has not established that the Agencies supplied TWs to the Appellant and has not established that the Appellant collected the information required by subsection 169(4) and the Information Regulations.

[151] The Respondent submits that the requirements under subsection 169(4) and the Information Regulations are strictly enforced mandatory requirements: *Systematix Technology Consultants Inc v Canada*, 2007 FCA 226 ("Systematix") at paragraphs 4–6.

[152] Where the supplier listed on an invoice is not the actual supplier, the requirements of the Information Regulations have not been met and the ITCs may not be claimed: *Modes Crystal Inc v The Queen*, 2013 TCC 33 at paragraph 25; *Constructions Marabella Inc v The Queen*, 2012 TCC 397 at paragraph 27; *Kosma-Kare Canada Inc v Canada*, 2014 FCA 225 at paragraphs 6–7; *Salaison Lévesque* at paragraph 91.

[153] Where documentation is not in a form enumerated in the Information Regulations, the documentation must be authored by or signed by the supplier: *Vocan Health Assessors Inc v The Queen*, 2021 TCC 49 ("*Vocan*") at para 177; *International Hi-Tech Industries Inc v The Queen*, 2018 TCC 240 (*"International Hi-Tech"*) at para 68 [sic 66].

[154] The Respondent submits that the interpretation proposed in *CFI* at paragraph 48 runs contrary to the text and purpose of the Information Regulations and could lead to absurd results, such as denying paper records but allowing electronic records with the same information.

[155] The Respondent submits that the Appellant's case requires the Court to accept that the Agencies were *bona fide* employment agencies distinct from one another, but the evidence does not support that conclusion:

1. There is no evidence tying the Representatives to the Agencies.

2. The Appellant understood that the Representatives provided the TWs to the Appellant and the Appellant never met with anyone else associated with an Agency.

3. The only business dealings that the Appellant had with the Agencies was through the Representatives, but there is no documentary evidence linking the Representatives to the Agencies or showing that a Representative changed Agencies.

4. When an Agency changed names, nothing changed in the terms under which TWs were provided to the Appellant and therefore the Appellant must have known that the name change was superficial.

5. The testimony of the TW Witnesses indicates that there was no paperwork associated with a change in Agency and that most of the TW Witnesses were either unaware of a change in Agency or were aware only because the Appellant told them of the change.

6. The EIA reports of the Appellant do not reflect or properly reflect the changes in Agency and at times contradict the data in TraceTime.

[156] The Respondent submits that the Records are not reliable, are inconsistent, are contradicted by the testimony of the TW Witnesses and cannot be accepted for the truth of their contents.

[157] The Respondent submits that the penalties assessed under section 285 are justified because the Appellant made a false statement in the returns that claimed the ITCs and either knew that the Agencies did not make the supplies or should have inquired about the relationship between the Agencies and the Representatives. Given

the circumstances, that is, the failure to make inquiries regarding the supply of the TWs, the Appellant was either wilfully blind or was grossly negligent.

[158] The Respondent submits that the Appellant did not pay HST in error. The Appellant has failed to establish that the HST that it paid was not payable by the Appellant. The supply of TWs is a taxable supply and the Appellant paid HST in respect of that supply pursuant to subsection 165(1).

IV. The Relevant Provisions of the ETA and the Information Regulations

[159] The provisions of the ETA and of the Information Regulations relevant to the issues raised by the parties are reproduced in Appendix A of these reasons.

V. Analysis

A. Review of the Evidence and Findings of Fact

[160] The Respondent's position is in substance that the Agencies could not have provided TWs to the Appellant because the Agencies did not have the employees or resources to perform that function.

[161] Mr. Kooner testified that the CRA audit of EDACA, SN Rush, Unicorn, Teamco and VM Balance revealed minimal employees in comparison to the TWs listed in the records of the Appellant as having been provided by those Agencies. Ms. Servilla testified to much the same effect about Savex. I will refer to the six audited Agencies as the "Audited Agencies". Because there is no evidence to suggest otherwise, I infer that the findings of the CRA with respect to the Audited Agencies apply to all the Agencies.

[162] The witness TWs all testified that they were paid in cash (directly or through a debit card) and the TWs who were called by the Appellant testified that they were not issued a T4 for their work at the Appellant or, in one case, that he did not recall receiving a T4.

[163] Consequently, the evidence of the Respondent's witnesses and of the TWs called by the Appellant establishes that the Agencies did not treat the TWs as employees and did not comply with any of the requirements imposed by law on an employer, including the reporting, withholding and remitting requirements imposed under the *Income Tax Act*, RSC 1985, c1 (5th Supp)("ITA"), the *Employment*

Insurance Act, SC 1996, c23 ("EI Act") and the *Canada Pension Plan*, RSC 1985, c C-8 ("CPP").

[164] The CRA audits of the Audited Agencies also revealed that the Agencies did not record in their books and records any activities with the Appellant and that they did not disclose to or remit to the CRA any HST received from the Appellant.

[165] While the Respondent's evidence and the TWs' evidence support the conclusion that the Agencies deliberately concealed any activities that they may have had with the Appellant—a point made most clearly by Ms. Servilla in her testimony regarding the information provided by Mr. Portnoy, the reconciliation Ms. Servilla performed of Savex's bank account, and the "duplicate" invoices Ms. Servilla uncovered in the records of Savex—this evidence does not lead to the conclusion that the Agencies provided no services to the Appellant.

[166] The testimony of Mr. Bungaroo, Mr. Ochakovsky, Ms. Seleznova, Ms. Kissin and Ms. Gawedzka and the exhibits that accompany that testimony indicate quite clearly that the Appellant entered into arrangements with the Agencies and that pursuant to those arrangements the Agencies sourced and directed TWs to the Appellant, billed the Appellant for those TWs and paid those TWs in cash. In a few cases, the Appellant directed TWs sourced elsewhere to the Agencies, which then billed the Appellant for the TWs and paid the TWs in cash.

[167] I infer from the evidence that the principal objective of the Appellant was to secure TWs to work in its plants at the lowest possible cost. If the Appellant failed to acquire the needed TWs for a particular production line, the production line was at risk of shutting down with the attendant consequences to the Appellant's bottom line.

[168] The Appellant relied on the Agencies to meet its principal objective because the Agencies proved capable of directing sufficient TWs to the Appellant to meet its need for workers, which often arose on very short notice. While the services provided by the Agencies were far from perfect, the Agencies proved to be the best available option for the Appellant to meet its principal objective.

[169] The Appellant did not rely on the Agencies for any function other than soliciting and directing TWs to the Appellant, obtaining a WSIB certificate (which was checked by Ms. Seleznova), billing the Appellant for the work that was performed by the TWs for the Appellant, and paying the TWs for that work (collectively, the "Agency Activities").

[170] The Respondent did not argue that the Agencies, in performing the Agency Activities, were acting in the capacity of an agent for the Appellant and there is no evidence to support such a conclusion. The Agencies performed the Agency Activities as principal. This is consistent with the CRA's own findings that there was no evidence of collusion between the Appellant and the Agencies.

[171] The Agencies were represented by three individuals. The evidence of Mr. Bungaroo and Ms. Seleznova indicates that these three individuals were the contact points between the Appellant and the Agencies. The evidence of Mr. Bungaroo, Ms. Seleznova and Ms. Kissin, as well as other evidence of the Appellant, supports the conclusion that the Appellant regularly and consistently dealt with these three individuals as representatives of the Agencies.

[172] Ms. Servilla testified that Mr. Au requested information from Mr. Sergio Portnoy, the accountant for Savex, who provided copies of 60 invoices, 59 of which were issued to the Appellant. Ms. Servilla also testified that she interviewed Mr. Portnoy and that Mr. Portnoy provided her with information regarding the activities of Savex, including an additional 100 invoices issued to persons other than the Appellant.

[173] The invoices issued by Savex to third persons were in the general ledger of Savex but the invoices to the Appellant were not. Souren Sarkissov, the Representative of Savex, represented 8 of the 13 Agencies. Ms. Servilla's evidence regarding Savex is consistent with the Agencies issuing invoices to the Appellant but excluding from their records not only the invoices issued to the Appellant but all dealings with the Appellant. Ms. Servilla's evidence is inconsistent with a person other than the Agencies issuing the invoices in the name of the Agencies to the Appellant.

[174] In a few instances, an Agency did not direct a TW to the Appellant, but the Appellant treated the TW as if he or she had been provided by an Agency, and the Agency complied with this arrangement. I have no doubt that the Appellant chose this course to avoid the legal obligations and the cost of employing the TW. Whatever the reason, the Agency billed the Appellant for the work that was performed by the TW for the Appellant and paid the TW in cash for that work.

[175] All arrangements such as training TWs and establishing the amount paid for TWs, and all record keeping associated with the Appellant's use of TWs, was under the control of the Appellant. The Appellant provided the information that it compiled regarding the hours and cost of TWs to the Agencies in the form of the hours-APRs

and the purchase-summary-APRs so that the Agencies could bill the Appellant for the TWs. While there was an occasional correction of the information in the APRs for missing time, any correction would be based on information confirmed by the Appellant's production supervisors.

[176] Ms. Kissin testified that she did not rely on the Agencies for information about TWs. Instead, she relied on the Appellant's production supervisors for such information.

[177] The evidence of Mr. Bungaroo, Ms. Seleznova, Ms. Kissin and Mr. Khosla and the exhibits entered through those witnesses indicate that, in its records, the Appellant associated TWs who were directed to the Appellant by an Agency with the Agency. If an Agency was replaced by a new Agency, the TWs were then associated with the new Agency by changing the name of the Agency in TraceTime.

[178] The Appellant made no other change and did not confirm the transfer of TWs from the old Agency to the new Agency. The whole process was invisible to the TWs, who continued to receive envelopes of cash or credits to a debit card for hours worked at the Appellant's plants. In cases where the TWs were paid on the Appellant's premises, the cash was provided by the Representatives of the Agencies, which is consistent with Mr. Li's and Mr. Kooner's evidence that the Agencies cashed the cheques issued by the Appellant at cash houses.

[179] Every Tuesday, the payroll department of the Appellant would print from TraceTime an hours-APR and a purchase-summary-APR for each Agency associated with the TWs who had worked for the Appellant during the previous week. Ms. Seleznova sent the APRs for a particular Agency to that Agency with the expectation that the Agency would bill the Appellant by noon the following day. The bill issued by each Agency is evidenced by an invoice in the name of the Agency issued to the Appellant and the Appellant's payment to the Agency is evidenced by a payment stub showing payment to the Agency. Copies of the purchase-summary-APRs, invoices and payment stubs for the Relevant Period are contained in Exhibits A-11, A-12, A-13 and A-14 (the "Billing and Payment Exhibits").

[180] The purchase-summary-APR for an Agency for a week summarizes the dollar value of the work performed during the week by TWs associated with the Agency in the Appellant's records. The amounts are broken down by department within the Appellant and not by TW.

[181] The hours-APR for an Agency for a week provides a report of the hours worked for the Appellant during that week by each TW associated with the Agency in the Appellant's records, again broken down by department. The Billing and Payment Exhibits do not include the hours-APRs, but examples of those printouts for TWs who worked at Norelco are found in Exhibit A-32. I have no reason to doubt Ms. Seleznova's testimony that she provided both forms of APRs to the Agency named in the APR. In any event, the hours-APRs are clearly part of the Appellant's contemporaneous records.

[182] The invoice of each Agency for a week is in the amount stipulated in the associated purchase-summary-APR, plus HST at the rate of 13%. Ms. Seleznova testified that she checked the invoices against the Appellant's records, and if correct, entered the amount into ACCPAC for payment. She would then print a cheque, which she gave to her manager for approval. The payment stubs in the Billing and Payment Exhibits indicate that the Appellant paid the Agency named in the associated invoice the full amount stipulated in that invoice.

[183] The Respondent raises concerns regarding the authenticity and trustworthiness of the Appellant's records, including the invoices, purchase-summary-APRs and payment stubs included in the Billing and Payment Exhibits.

[184] The records contained in the Billing and Payment Exhibits are undoubtedly contemporaneous business records of the Appellant under the common law established by the Supreme Court of Canada in *Ares v Venner*, [1970] SCR 608. I heard ample evidence from Mr. Bungaroo, Ms. Seleznova, Ms. Kissin and Mr. Khosla to support the authenticity of these records and I heard no convincing evidence that challenged the authenticity of these records.[148]

[185] The existence of a few trivial discrepancies in subsequently printed records is not evidence that the Billing and Payment Exhibits either lack authenticity or are untrustworthy. The content of the records is entirely consistent with the Appellant's entire course of conduct. The Appellant was meticulous in ensuring that it paid only for TWs that the Appellant could verify had worked in its plants and only for the time that the Appellant could verify was worked by the TWs.

[148] The Respondent did not raise sections 31.1 and 31.2 of the *Canada Evidence Act*. In my view, the requirements in these sections are clearly satisfied by the testimony of Mr. Khosla, Mr. Bungaroo, Ms. Seleznova and Ms. Kissin.

[186] I have heard no evidence that supports the position that the Appellant was keeping false records. Quite the contrary, Mr. Bungaroo, Ms. Seleznova, Ms. Kissin and Mr. Khosla each provided detailed evidence regarding the creation, use and maintenance of the business records entered into evidence by the Appellant. The notion that a failure on the part of the Appellant to enter the raw data behind these records somehow impeaches the records is not tenable. Mr. Khosla confirmed that the records in evidence were taken from the databases of raw information maintained by the Appellant and that the Appellant retained all its daily backups from the Relevant Period.

[187] The CRA conducted a civil audit and a criminal investigation into the arrangements between the Appellant and the Agencies and found no evidence of collusion and no evidence that supports the Respondent's contention that the Appellant's records do not reflect what in fact transpired.

[188] The Respondent suggests that I should draw an adverse inference because the Appellant did not subpoena witnesses who could testify from the perspective of the Agencies. I decline to do so for two reasons.

[189] First, it is clear from the evidence of the Respondent's witnesses that the Agencies were perpetrating a fraud against the Crown in collecting HST but not remitting that HST. This raises a serious question about the credibility of any such evidence. I certainly have no reason to believe that an individual representing the Agencies would have credible and reliable evidence that impeaches the contemporaneous business records maintained by the Appellant.

[190] Second, the CRA audited six of the Agencies in 2014 and the only person found who had knowledge of an Agency's activity was Mr. Portnoy. I fail to see how the Appellant can be expected to track down individuals with first-hand knowledge of the activities of the Agencies for a trial almost ten years after the end of the Relevant Period.

[191] The Respondent does not contest that the Appellant paid the amounts indicated in the Billing and Payment Exhibits and in fact asserts that the Appellant was required to pay the HST on the amounts identified in the purchase-summary-APRs and associated invoices (i.e., the Respondent asserts that no amount was paid in error). However, the Respondent has not explained to the Court why the Appellant would be keeping the detailed records evidenced by the Billing and Payment Exhibits but for the purposes explained by the witnesses for the Appellant.

[192] The Respondent's own evidence is that the Agencies received the cheques issued by the Appellant in payment of the invoices in the Billing and Payment Exhibits and that the Agencies converted the cheques received into cash. This is entirely consistent with the testimony of most of the witness TWs regarding how they were paid each week for their work at the Appellant.

[193] Mr. Li testified in chief that most of the cheques to the Agencies were cashed at the same cash house rather than deposited into a bank account. This evidence is irreconcilable with the position that the records supporting these very payments are not authentic and are not trustworthy.

[194] The Respondent rests its position on the actions of the Agencies in omitting from their own records any evidence of a business relationship with the Appellant and in failing to acknowledge in any way an employer-employee relationship with the TWs directed to the Appellant.

[195] The Respondent points to things such as the similarity of the invoices issued by successive Agencies, a few relatively minor discrepancies between the numbers in the Billing and Payment Exhibits and the numbers in subsequently printed reports, and purported issues with EIA reports to cast doubt on the Appellant's position that TWs were provided to the Appellant by the Agencies.

[196] The similarity of the invoices issued by successive Agencies is consistent with the fact that the Representatives of the successive Agencies did not change. The Appellant told the Agencies what to bill and the Agencies billed the amount provided by the Appellant, plus HST. Ms. Seleznova testified that there were very rarely errors in invoices, and she could not recall any one in particular.

[197] The Agencies had to issue invoices to the Appellant in order to be paid by the Appellant. On the basis of the course of conduct of the Agencies vis-à-vis the TWs, the Agencies no doubt took the most expedient approach to the preparation of the invoices, which resulted in near identical invoices for successive Agencies. As already stated, Ms. Servilla's testimony regarding Savex indicates that Savex did issue invoices to the Appellant but did not reflect those invoices in its records.

[198] The Respondent pointed to minor differences between the numbers in the Billing and Payment Exhibits and the numbers in subsequently printed APRs. These differences do not impeach the accuracy of the Billing and Payment Exhibits. As fully explained by Mr. Khosla, the errors are in the subsequently printed materials,

not in the Billing and Payment Exhibits. The errors are also very small in relation to the amounts in issue.

[199] The Respondent also pointed to certain EIA reports to support the position that the Appellant's records did not accurately reflect the association of TWs and Agencies. Mr. Khosla explained in detail the source and content of the EIA reports. Mr. Khosla's testimony explains why it is not possible to draw conclusions from the apparent inconsistencies in the relationship between an Agency and a TW because the content of a report is dependent on the backup from which the report is printed, which is not identified in the report.

[200] In my view, the uncontradicted evidence of the Appellant's witnesses is that the Appellant kept detailed records for every TW who worked for the Appellant and used these records to determine how much to pay an Agency for TWs associated with that Agency. One cannot expect witnesses to attend court some ten years after the events in issue with a detailed recollection of those events. Business records provide an accurate account of the detailed sorts of information that humans cannot be expected to retain for extended periods of time and the materials in the Billing and Payment Exhibits are such business records.

[201] In summary, the evidence establishes that the Appellant needed TWs to run its business, looked to the Agencies to solicit and direct TWs to the Appellant, kept detailed records with respect to the hours worked by these TWs, which it provided to the Agencies for billing purposes, received invoices from the Agencies for the amounts identified in these materials, and paid the Agencies the amounts in the invoices once confirmed to be in agreement with the Appellant's detailed records. The evidence also establishes that the Agencies cashed the cheques issued to them by the Appellant in payment of the invoices mostly at one cash house and paid most of the TWs in cash and the rest by credit to a debit card.

[202] If a TW was referred to the Appellant by someone other than an Agency (e.g., a friend or relative), the Appellant directed the individual to an Agency and the arrangements with respect to that TW were as if the Agency had directed the TW to the Appellant. The Agency billed the Appellant for the work performed for the Appellant by the TW and paid the TW for that work in cash.

[203] I am not ignoring the testimony of the witness TWs, which evidences a general lack of knowledge or awareness of the arrangements between the Appellant and the Agencies. However, given that the witness TWs identified themselves as recent immigrants to Canada looking for work, it seems unlikely that the nature of the

relationship between them and the Agencies or between the Appellant and the Agencies was of any consequence to them even at the time the relevant events occurred.

[204] The clear focus of the witness TWs was finding work and being paid for that work, both of which did occur. The testimony of the witness TWs as a whole is entirely consistent with the general nature of the arrangements between the Appellant and the Agencies described by the contemporaneous documentation and the other witnesses for the Appellant. It is also consistent with the Respondent's evidence that the Agencies failed to treat the TWs as employees.

[205] In particular, the testimony of the witness TWs is generally consistent with (a) TWs being solicited by a third party to work for the Appellant, (b) TWs working as temporary workers at one of the Appellant's plants, and (c) TWs being paid in cash or near cash for the work with payment taking place at the Appellant's premises or elsewhere.

[206] The lack of recollection or knowledge of further details after approximately ten years is hardly sufficient to overturn the copious testimonial and contemporaneous documentary evidence of the Appellant addressing the details of its arrangements with the Agencies and the work performed by TWs provided by the Agencies in its plants.

[207] I therefore conclude that the testimony of the witness TWs does not contradict or impeach the contemporaneous business records of the Appellant and the testimony of Mr. Bungaroo, Mr. Ochakovsky, Ms. Seleznova, Ms. Kissin and Ms. Gawedzka even though some of their testimony also suffered from a lack of memory about details that is inevitably brought about by the passage of a significant period of time.

[208] The Respondent points to other issues such as the fact that e-mails were addressed to the Agencies rather than to specific individuals. I do not see how this supports the position that the Agencies did not provide the TWs identified in these e-mails to the Appellant. The e-mails sent by the Appellant are addressed to the entities that the Appellant says were providing TWs to the Appellant. The e-mails to the Appellant were from those same Agencies.

[209] Several of the Appellant's witnesses identified the Representatives as the individuals who represented the Agencies. The fact that their names did not appear in most of the e-mails does not alter the fact that the uncontradicted evidence of

Ms. Kissin is that the e-mails, which addressed issues relating to TWs, were between the Appellant and the Agencies named in the e-mails, not between the Appellant and a third party.

[210] I am not suggesting that the arrangements between the Appellant and the Agencies were typical. I infer from the evidence that the Appellant was driven by its objective of securing TWs to work in its plants at the lowest possible cost and that to achieve this objective the Appellant turned a blind eye to the many anomalous aspects of its relationship with the Agencies.

[211] The focus of the Appellant on this objective is well illustrated by the Appellant's admission that some of the rates charged for TWs were below the minimum wage at the time. No doubt such behaviour places the Appellant in a most unfavorable light.

[212] The most glaring of these anomalies was the seemingly magical ability of an Agency to switch its entire workforce to a new Agency virtually overnight. This ability is explained by the fact that the TWs sourced by the Agencies were not treated by the Agencies as employees of the Agencies. Rather, the Agencies sourced TWs for the Appellant through various means and paid those TWs in cash. This required the Agencies to do no more than place advertisements, direct individuals who responded to the advertisements to the Appellant, bill the Appellant for the amounts stipulated by the Appellant, receive cash from the Appellant and distribute the cash to TWs. The evidence as a whole amply supports the conclusion that the Agencies performed these services on their own account.

[213] A second anomaly is that when TWs were not sourced by an Agency but were referred to the Appellant by a friend or relative, the Appellant treated such TWs as having been sourced by an Agency and that Agency would pay the TW. An agency that was actually employing a TW would no doubt want some say in whether to hire the TW and would need to obtain the information required by an employer to satisfy its obligations as an employer, including its obligations with respect to withholdings and remittances under the ITA, the EI Act and the CPP.

[214] A third anomaly is that the Appellant did not enforce many of the terms in the letters of understanding. Mr. Bungaroo testified that the conditions were for the benefit of the Appellant. To this I would add that the Appellant did not need to enforce the terms of the letter agreements because it controlled all the material aspects of its use of TWs other than finding and directing TWs to the Appellant, billing for the TWs directed to the Appellant (or for which the Agency assumed

responsibility) and paying the TWs in cash. In short, the Appellant did not rely on the Agencies for anything other than these functions.

[215] I infer from the evidence taken as a whole that the Appellant chose to ignore the obvious signs that the Agencies were not treating the TWs as employees and/or were not meeting the obligations of an employer because the Appellant's principal objective was to secure the TWs needed to run its plants at the lowest possible cost. The Appellant controlled all aspects of the arrangements with the Agencies that related to the work performed by the TWs and the cost of the TWs, thereby meeting this objective.

[216] The evidence nevertheless overwhelmingly supports four critical findings. First, the Agencies solicited and directed TWs to the Appellant. Second, the Agencies billed the Appellant for the work performed for the Appellant by the TWs. Third, the Appellant paid amounts to the Agencies, together with HST, for its use of the TWs directed to the Appellant by the Agencies. Fourth, the Agencies paid the TWs directed to the Appellant for the work that they performed for the Appellant.

[217] I therefore reject the position of the Respondent that the Agencies did not provide services to the Appellant. Clearly, the Agencies provided services to the Appellant and the Appellant paid the Agencies for those services, plus HST at 13%.

[218] The failure of the Agencies to treat the TWs as employees and the failure of the Agencies to comply with the requirements of applicable legislation (including, but not limited to, the ETA, the ITA, the EI Act and the CPP) do not alter the facts that a service was provided by the Agencies to the Appellant and that the Appellant paid the Agencies for that service, plus HST. In the absence of fraud, collusion or a sham, none of which has been alleged by the Respondent and none of which is revealed by the evidence, these facts determine whether the Appellant is entitled to the ITCs.

[219] The evidence also establishes that the information obtained by the Appellant in respect of the payments it made to the Agencies included the information stated on the hours-APRs, the purchase-summary-APRs, the invoices received from the Agencies, the payment stubs and the letters of understanding. This information was available to the Appellant at least from the point in time that the Appellant printed the APRs sent to the Agencies. Mr. Khosla testified that this information was retained by the Appellant in the form of the daily backups made during the Relevant Period.

[220] The information stated in these materials includes, for each week in the Relevant Period, the name of the Agencies to which the Appellant paid amounts in respect of the week, the registration numbers of the Agencies to which the Appellant paid amounts in respect of the week,[149] the date of each invoice issued by an Agency to the Appellant in respect of the week, the total amount payable by the Appellant to an Agency that issued an invoice to the Appellant in respect of the week, the HST paid by the Appellant to an Agency that issued an invoice to the Appellant in respect of the week, the Appellant's name, the names of the TWs who performed work for the Appellant during the week, the hours worked by the TWs who worked for the Appellant during the week, the department of the Appellant in which the TWs worked during the week, the statement that each timely issued invoice would be paid by the Friday of the week in which the invoice was issued, and proof of payment by the Appellant to the Agency of the full amount stated in an invoice issued to the Appellant by the Agency for the week, including the date of the payment.

B. Is the Appellant Entitled to the ITCs?

(1) Introduction

[221] On the basis of my findings of fact, the questions that I must now address are whether the Appellant is entitled to input tax credits for HST paid to the Agencies in respect of the services provided by the Agencies to the Appellant and, if so, whether the Appellant may claim the input tax credits to which it is entitled.

[222] The answer to the first question turns on the application of subsection 169(1) to the facts and the answer to the second question turns on the application of paragraph 169(4)(a) and the Information Regulations to the facts.[150] These provisions must be interpreted in accordance with accepted rules of statutory interpretation, which I will review below.

[223] To answer these questions requires consideration of the scheme of the ETA regarding the imposition and collection of the HST in issue in this appeal.[151] However, before commencing that analysis, I note that the behaviour of the Appellant in ignoring the anomalous aspects of the arrangements with the Agencies, while certainly troubling, is not relevant to the two questions that determine whether

---

[149] Excluding the invoices from Alpha which the Appellant concedes did not contain a registration number.

[150] If I find that the Appellant is not entitled to or is not able to claim the ITCs, I must then consider whether under the applicable provisions of the ETA the Appellant is entitled to a rebate for HST paid in error.

[151] R v Dr. Kevin L. Davis Dentistry Professional Corporation, 2023 FCA 76.

the Reassessments are correct. As stated by the Federal Court of Appeal in the context of the ITA:

> In quantifying a taxpayer's tax liability under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), is it ever necessary to evaluate the morality of the taxpayer's conduct? As a matter of general principle, the answer should be no. The *Income Tax Act* is intended to raise revenue for the use of the federal government. It also contains provisions intended to facilitate the distribution of social benefits according to standards established by Parliament, or to encourage or discourage certain industries or commercial practices in the public interest as perceived by Parliament from time to time. But nothing in the *Income Tax Act* expressly permits or requires the Minister of National Revenue, or the Courts, to apply the *Income Tax Act* differently depending upon the morality of the taxpayer's conduct.[152]

[224] Similarly, nothing in the ETA expressly permits or requires the Minister, or the Courts, to apply the ETA differently depending upon the morality of the taxpayer's conduct. The issue is simply whether the Appellant has met the requirements in the ETA to be entitled to and to claim input tax credits in respect of amounts paid by the Appellant to the Agencies for the services provided by the Agencies.

[225] This general principle applies equally to the conduct of the persons that administer the various taxing statutes under this Court's jurisdiction:

> This Court's jurisdiction in an appeal of an income tax assessment is restricted to determining the validity and correctness of the assessment based on the applicable provisions of the *ITA* applied to relevant facts to ascertain whether the Minister correctly assessed taxes owed by a taxpayer. However, it does not have jurisdiction to vacate an assessment predicated on tax officials' conduct, including reprehensible conduct, their motivations, abuse of power, abuse of process, including the possible underlying process or process by which the assessment was established, nor unfairness. All of which have no bearing on whether the Minister validly or correctly assessed a taxpayer.[153]

[Footnotes omitted.]

(2) <u>The Application of the ETA to the Appellant</u>

---

[152] Canadian Imperial Bank of Commerce v Canada, 2013 FCA 122 at para 1.

[153] *Propak Systems Ltd v The Queen*, 2022 TCC 153 at para 57. The Tax Court judge cites several decisions of the Federal Court of Appeal in support of these statements.

[226] The ETA imposes tax under four Divisions: Division II, Division III, Division IV and Division IV.1. Division II, which comprises sections 165 through 211.25, levies tax on taxable supplies that are made in Canada. The provisions relevant to this appeal are in Division II and in the later Divisions of the ETA that address the administration and enforcement of the ETA.

[227] Under Division II, every "recipient" of a "taxable supply" made in Canada is required to pay to His Majesty in right of Canada (the "Crown") tax in respect of the supply calculated on the value of the consideration for the supply. If the taxable supply is made in a participating province, then an additional amount of tax is payable to the Crown, again calculated on the value of the consideration for the supply.[154] The total amount of such tax is commonly referred to as HST.

[228] The rate of tax for a taxable supply included in Schedule VI (a "zero-rated supply"[155]) is zero.[156]

[229] If consideration for a supply is payable under an agreement for the supply, the "recipient" of the supply is the person who is liable under the agreement to pay that consideration.[157] The tax is payable by the recipient on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due.[158]

[230] A "supply" is "the provision of "property" or a "service" in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition".[159] A "taxable supply" is a "supply" made in the course of a "commercial activity". A "supplier" in respect of a supply is the person making the supply.[160]

---

[154] Subsections 165(1) and (2). The rate of tax under subsection 165(1) is 5% and the rate of tax under subsection 165(2) is a prescribed provincial percentage. For taxable supplies made in Ontario after June 30, 2010, the aggregate rate of tax is 13%. See, also, the definitions of "participating province" and "tax rate" in subsection 123(1).

[155] Subsection 123(1).

[156] Subsection 165(3).

[157] Paragraph (a) of the definition of "recipient" in subsection 123(1).

[158] Subsection 168(1). Rules in subsections 168(2) through (9) address special circumstances such as consideration that is paid or becomes due on more than one day. Subsection 152(1) deems when consideration for a taxable supply becomes due.

[159] Subsection 123(1). This meaning is subject to the rules in sections 133 and 134.

[160] Subsection 123(1).

[231] "Property" means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money.[161]

[232] "Service" means anything other than property, money and anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person.[162] As a result of the last exception, an employer is not required to pay tax on consideration paid to an individual for services as an employee.

[233] A "commercial activity" of a person is (a) a "business" carried on by the person, except to the extent to which the business involves the making of exempt supplies[163] by the person, (b) an adventure or concern of the person in the nature of trade (an "ANT"), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply.[164]

[234] If the business is carried on by, or the ANT is engaged in by, an individual, a personal trust or a partnership of individuals, then the business must be carried on and the ANT must be engaged in with a reasonable expectation of profit.[165]

[235] A "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment.[166]

[236] The Agencies provided a supply to the Appellant that comprised soliciting and directing TWs to the Appellant and paying the TWs for the services provided by those TWs to the Appellant. The supply by each Agency was made under an agreement (i.e., a letter of understanding) between the Appellant and the Agency.

---

[161] Ibid.

[162] Ibid.

[163] An "exempt supply" is any supply included in Schedule V.

[164] Subsection 123(1).

[165] These requirements are stated as parenthetical exceptions in the definition of "commercial activity".

[166] Subsection 123(1).

Therefore, with respect to the supply provided by each Agency to the Appellant, the Agency was a "supplier", and the Appellant was a "recipient".

[237] The supply of services made by each Agency to the Appellant is not described in Schedule V of the ETA and therefore is not an exempt supply. The supply was provided by each Agency in the course of an "undertaking of any kind whatever" and, therefore, is a taxable supply. The taxable supply was made in Ontario such that the consideration for the supply is subject to tax under subsections 165(1) and (2). The taxable supply is not described in Schedule VI of the ETA and therefore is not a zero-rated supply.[167]

[238] Consequently, the Appellant was required to pay to the Crown tax at the rate of 13% of the consideration for the taxable supply made by each Agency to the Appellant on the earlier of the day the consideration for the supply was paid and the day the consideration for the supply became due. The Appellant paid the tax to the Agencies on the day it paid the invoices by issuing cheques to the Agencies for the full amount of each invoice. Each such cheque was issued on the Friday following the date of the invoice as provided for in the letters of understanding.[168]

[239] The Respondent accepts that the Appellant paid the HST imposed by subsections 165(1) and (2) in respect of the amounts paid by the Appellant to the Agencies and asserts that the Appellant was required to pay that tax.

[240] The Minister may assess a person for any tax that the person is required to pay to the Crown under subsections 165(1) and (2).[169] A recipient that pays the tax to the supplier of the taxable supply that gives rise to the tax discharges its liability to pay the tax to the Crown because the supplier collects the tax as agent for the Crown.[170]

[241] The question of whether the tax imposed by subsections 165(1) and (2) has been paid by the recipient to the supplier is a question of fact to be determined on a case-by-case basis. This factual determination brings into play questions such as whether the payment of the tax is a sham, fraud or other subterfuge designed to give

---

[167] See the definition of "zero-rated supply" in subsection 123(1) and subsection 165(3).

[168] I base this statement on a sample of the invoices and payment stubs, so it is possible that there are exceptions. However, the Respondent does not dispute that the amounts indicated in the invoices were paid by the Appellant.

[169] Paragraph 296(1)(b). Under this paragraph, the Minister may assess tax payable by a person under Division II, IV or IV.1.

[170] Subsection 221(1) and *Airport Auto Limited v The Queen*, 2003 TCC 683 ("*Airport Auto*") at paragraph 19.

the impression of a payment of tax. Such factual exclusions were recognized by the Tax Court judge in *Airport Auto*.

[242] I have found as a fact that the Appellant was the recipient of taxable supplies made by the Agencies to the Appellant. In respect of each invoice included in Exhibits A-11, A-12, A-13 and A-14, the Appellant paid to the Agency the tax levied by subsections 165(1) and (2) on the taxable supply made to the Appellant by that Agency during the week covered by the invoice.

[243] By virtue of subsection 221(1), the payment by the Appellant to the Agency of the tax imposed by subsections 165(1) and (2) discharged the Appellant's obligation to pay that tax to the Crown because the Agency collected that tax as agent for the Crown.

[244] There are two mechanisms in the ETA that allow the Minister to obtain the tax collected by the Agencies. The first is through the assessment of the net tax of the Agencies under subsection 225(1) and paragraph 296(1)(a). The second is through the deemed trust provisions in subsections 222(1) and (3).

[245] With respect to the first mechanism, under subsection 238(1), every "registrant"[171] must file a return for each reporting period of the registrant. Under subsection 238(2), every person who is not a registrant must file a return for a reporting period for which net tax is remittable by the person.[172] Consequently, anyone who is a registrant or who is not a registrant but owes net tax for a reporting period is required to file a return.

[246] Under subsection 228(1), every person who is required to file a return under Division II must calculate in the return the person's net tax for the reporting period for which the return is filed.

[247] Under paragraph 228(2)(b), a person is required to remit to the Minister that person's net tax for a reporting period on or before the day the return for the reporting period is due.

[248] Subject to the rules in Subdivision B, a person's net tax is the sum of all amounts collectible or collected in the reporting period as or on account of tax under

---

[171] A "registrant" is a person who is registered or who is required to be registered under Subdivision D of Division V: subsection 123(1).

[172] The reporting period for a person who is not a registrant is a calendar month: subsection 245(1).

Division II plus all other amounts required by the ETA to be added to net tax for the reporting period **less** the sum of input tax credits for the reporting period or a prior reporting period claimed by the person in a return under Division II filed for the reporting period and all amounts that may be deducted from net tax under the ETA for the reporting period.[173]

[249] The net tax of a person includes under A of the formula all amounts collectible or collected by the person in the reporting period as or on account of tax under Division II. The use of the phrase "as or on account of" means that the net tax of a person includes all tax imposed under subsections 165(1) and (2) that is collected or collectible by the person and all amounts on account of such tax that is collected or collectible by the person.

[250] With respect to the second mechanism, the deemed trust provisions in subsections 222(1) and (3) allow the Minister to pursue a person that has collected an amount as or on account of tax without the need for an assessment of that amount. The Minister may also issue garnishment orders to third parties under section 317.

[251] In this case, rather than relying on the mechanisms in the ETA for obtaining from the Agencies the HST collected by the Agencies from the Appellant, the Minister has chosen to impose on the Appellant the burden of the Agencies failing to remit the HST duly paid by the Appellant by denying the Appellant's claim for the ITCs.

[252] Subsection 169(1) determines a person's entitlement to an input tax credit. Distilled down to the words relevant to this appeal, subsection 169(1) states:

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

[173] Subsection 225(1).

> A is the tax in respect of the supply . . . that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and
>
> B [is a proration rule that is not applicable]

[253] Reading these words in their entire context and in their grammatical and ordinary sense, a person is entitled to an input tax credit calculated by a formula if the person acquires a service during a reporting period of the person during which the person is a registrant and tax in respect of the supply becomes payable by the person or is paid by the person without having become payable. The addition to an input tax credit of amounts that are paid without having become payable captures situations in which a person has paid the tax prior to the time the rules in the ETA cause the amount to become payable (e.g., a prepayment of tax). The Appellant did not prepay tax to the Agencies, so I will limit my analysis to the "payable" wording of subsection 169(1).

[254] Assuming that the proration rules in B of the formula do not apply, which is the case here, the input tax credit is equal to the amount of tax in respect of the supply that becomes payable by the person.

[255] There are four notable aspects to subsection 169(1) that are relevant to the analysis.

[256] First, subsection 169(1) requires that tax in respect of a supply be "payable" by the person that acquired the supply. The tax in respect of each taxable supply in issue became payable by the Appellant on the earlier of the day that the invoice for the supply was issued to the Appellant and the date of that invoice.[174]

[257] Second, subsection 169(1) refers to tax, which is defined in subsection 123(1) to mean tax payable under the ETA. Consequently, tax for the purposes of subsection 169(1) includes tax payable by the Appellant under any of Division II, Division III, Division IV and Division IV.1 of the ETA. In this case, the tax in respect of the supplies made by the Agencies to the Appellant was payable by the Appellant under subsections 165(1) and (2), which are in Division II.

[258] Third, to be eligible for an input tax credit, a person must be a registrant. The Appellant was a registrant throughout the Relevant Period.

---

[174] Subsection 168(1) and paragraph 152(1)(a).

[259] Finally, subsection 169(1) does not require that the tax payable by the person that acquires the supply be payable to a particular person. Subsection 169(1) simply requires that the tax in respect of a supply be payable by the person.

[260] However, because subsection 221(1) does not apply if the recipient pays the tax to a person other than the supplier, thereby leaving the recipient open to assessment under paragraph 296(1)(b), and because paragraph 169(4)(a) and the Information Regulations require a person claiming an input tax credit to secure a minimum amount of information regarding the supplier, in practice, the recipient will pay the tax levied under subsections 165(1) and (2) either to the supplier or directly to the Crown. In this case, the Appellant paid the tax to the supplier.

[261] Considering the requirements of subsection 169(1) and my findings of fact, the Appellant is entitled to input tax credits for all the HST paid by the Appellant to the Agencies in respect of supplies made by the Agencies to the Appellant during the Relevant Period.

[262] Under paragraph 296(1)(a), the Minister was entitled to assess the Agencies for all HST that the Agencies were required by subsection 221(1) to collect from the Appellant because this amount was included in the net tax of the Agencies by paragraph 225(1)A(a).

[263] Under subsection 222(1), all amounts collected by an Agency as or on account of tax were deemed, for all purposes and despite any security interest in the amounts, to be held in trust for the Crown by the Agency, separate and apart from the property of the Agency. As well, when an Agency failed to remit the tax collected from the Appellant, subsection 222(3) deemed property of the Agency equal in value to the amount that should have been remitted to be held in trust for the Crown separate and apart from the property of the Agency.

[264] In summary, under subsection 169(1), the Appellant is entitled to input tax credits for all the HST payable by the Appellant in respect of the taxable supplies made by the Agencies to the Appellant during the Relevant Period. However, to claim the input tax credits, the Appellant must satisfy the information requirements in paragraph 169(4)(a) and the Information Regulations, which are addressed next.

(3) <u>The Requirement to Obtain Information</u>

[265] The Respondent submits that even if the Appellant is entitled to the ITCs, the Appellant may not claim the ITCs because it has failed to obtain the information required by paragraph 169(4)(a) and the Information Regulations.

[266] The Respondent does not dispute that the Appellant has records of the transactions with the Agencies, and I have already addressed the authenticity and trustworthiness of those records.

[267] The Respondent relies on *Vocan* (a general procedure case) at paragraph 177 and *International Hi-Tech* (a general procedure case) at paragraph 68 [sic 66] for the proposition that documentation not in a form enumerated in the Information Regulations must be authored by or signed by the supplier.

[268] In *Vocan*, the Tax Court judge cites the decision in *1378055 Ontario Ltd v The Queen*, 2019 TCC 149 in which the Tax Court judge reviews paragraph 169(4)(a) and the Information Regulations and states:

> [52] To claim an ITC, a GST registrant must satisfy certain documentation requirements, as set out in subsection 169(4) of the *ETA* and section 3 of the *ITCI Regulations*. In particular, paragraph 169(4)(*a*) of the *ETA* requires a registrant, before filing a return in which an ITC is claimed for a reporting period, to obtain "sufficient information in such form containing such information as will enable the amount of the [ITC] to be determined, including any such information as may be prescribed." In turn, section 3 of the *ITCI Regulations* states that, for the purposes of paragraph 169(4)(*a*) of the *ETA*, various items of information are prescribed, as set out in three provisions (i.e., paragraphs (*a*), (*b*) and (*c*), depending on the amount paid or payable in respect of the particular supply). . . .
>
> [53] Section 2 of the *ITCI Regulations* defines the term "supporting documentation" as meaning "the form in which information prescribed by section 3 is contained...." The information required by subsection 169(4) of the *ETA* need not be contained in a single document; rather, it may be contained collectively in multiple documents. **However, to constitute supporting documentation, a particular document must be issued or signed by the supplier.**
>
> [Emphasis added.]

[269] The Tax Court judge cites paragraph (h) of the definition of "supporting documentation" in section 2 of the Information Regulations and paragraph 34 of *Westborough Place Inc v The Queen*, 2007 TCC 155 (IP) ("*Westborough*") in

support of the last comment. *Westborough* is a decision under the informal procedure and therefore has no precedential value.[175]

[270] Paragraph 34 of *Westborough* states:

> The definition of a "supporting documentation" is not exhaustive, as is seen by the use of the word "includes" before the listing of the various types of documents in paragraphs (*a*) to (*h*). However, the reference in paragraph (*h*) to "any other document validly issued or signed by the registrant [...]" demonstrates that in order to qualify as supporting document, it must originate from or be signed by the registrant.

[271] With respect, the observation of the Tax Court judge that the definition is not exhaustive is not correct. The definition of "supporting documentation" is introduced with the word "means" and is therefore clearly exhaustive even if the list of items in paragraphs (a) through (h) (the "List") is not. I will return to this point below.

[272] In *CFI* (a general procedure case), the Tax Court judge reviews subsection 169(4) and the definition of "supporting documentation" and reaches a different conclusion:

> Considering all of the above, I conclude that the Regulations do not set out a general requirement for the supporting documentation to be issued or signed by the supplier. The definition of "supporting documentation" only requires the document to be issued or signed by the supplier where the documentation does not fit within one of the document types outlined in paragraphs (a) to (g) or fall within the meaning of "form" as set out in the preamble to the definition. To place this requirement on all supporting documentation would read words into the Regulations where the words of the definition are otherwise precise and unequivocal.[176]

[273] The Respondent submits that the conclusion in *CFI* runs contrary to the text and purpose of the Information Regulations and could lead to absurd results such as denying paper records but allowing electronic records with the same information.

[274] Rather than picking one of the approaches to the definition of "supporting documentation" taken in these three decisions, I believe that the requirement in

---

[175] Section 18.28 of the *Tax Court of Canada Act*, RSC 1985, c T-2.

[176] Paragraph 48. The Tax Court judge in *Axamit Versa Inc v The King*, 2022 TCC 163 cites *CFI*.

paragraph 169(4)(a) is of sufficient importance to warrant my own analysis of that provision and the Information Regulations.

[275] I will start by reproducing the basic approach to statutory interpretation in tax cases, as recently stated by the Supreme Court of Canada in *Canada v Loblaw Financial Holdings Inc*, 2021 SCC 51:

> This narrow question of statutory interpretation requires us to draw upon the well-established framework that "statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects" (*Michel v. Graydon*, 2020 SCC 24, at para. 21). Where the rubber hits the road is in determining the relative weight to be afforded to the text, context and purpose. Where the words of a statute are "precise and unequivocal", their ordinary meaning will play a dominant role (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In the taxation context, a "unified textual, contextual and purposive" approach continues to apply (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 22, quoting *Canada Trustco*, at para. 47). In applying this unified approach, however, the particularity and detail of many tax provisions along with the *Duke of Westminster* principle (that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable) lead us to focus carefully on the text and context in assessing the broader purpose of the scheme (*Placer Dome*, at para. 21; *Canada Trustco*, at para. 11). . . .
>
> . . .
>
> I again reiterate that if taxpayers are to act with any degree of certainty, then full effect should be given to Parliament's precise and unequivocal words.[177]

[276] Subsection 169(4) states:

> (4) A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,
>
> (a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and
>
> (b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax payable in

[177] Paragraphs 41 and 61.

> respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

[277] The requirement in paragraph 169(4)(b) is not in issue in this appeal.

[278] Reading the words of paragraph 169(4)(a) in their entire context and in their grammatical and ordinary sense, the paragraph prohibits a person from claiming an input tax credit unless the person has, prior to claiming the input tax credit in a return, obtained sufficient evidence in such form containing such information (including any prescribed information) as enables the amount of the input tax credit to be determined.

[279] The clear focus of the paragraph is not the form of the evidence as such, which is unspecified, but the requirement that the evidence include the information necessary to determine the amount of the input tax credit. This information includes any information prescribed by the Information Regulations.

[280] The French version of paragraph 169(4)(a) makes this point more succinctly when it states:

> (4) L'inscrit peut demander un crédit de taxe sur les intrants pour une période de déclaration si, avant de produire la déclaration à cette fin:
>
> a) il obtient les renseignements suffisants pour établir le montant du crédit, y compris les renseignements visés par règlement;

[281] The French text simply requires that the person claiming the input tax credit obtain information (including prescribed information) sufficient to establish the amount of the input tax credit.

[282] Although phrased differently, in both the English and French texts the requirement is in substance to obtain sufficient evidence to establish the amount of the input tax credit, which in turn requires sufficient evidence of certain prescribed information. The objective that the evidence allow for the determination of the amount of the input tax credit necessarily implies that the evidence must be in a form that allows a reliable determination of the amount and of the prescribed information.[178] However, the reliability of the information (prescribed or otherwise)

---

[178] *Key Property Management Corp v The Queen*, 2004 TCC 210 (GP) at paragraph 14, cited with approval in *Systematix*.

goes only to whether the "sufficient evidence" requirement is satisfied and is not a requirement that the information be contained in a particular form.

[283] The text of paragraph 169(4)(a) refers to the Information Regulations in a neutral fashion. In particular, the text of paragraph 169(4)(a) does not state or even imply that the evidence must take a form specified in the Information Regulations.

[284] If Parliament had intended such a meaning, it would have been simple enough to say "including such supporting documentation as is prescribed". Reading into paragraph 169(4)(a) a requirement regarding the form in which the information (including prescribed information) must be contained runs contrary to the precise and unequivocal words that Parliament has used in both the English and French versions of the text.

[285] The technical notes accompanying the introduction of paragraph 169(4)(a) do not suggest that the paragraph has a broader unstated purpose:

> This subsection provides that a registrant is not permitted to claim an input tax credit unless, prior to claiming the credit, **the registrant has sufficient evidence to support the claim**. Sufficient evidence for this purpose would include an invoice issued by a supplier to a registrant containing sufficient information to determine the amount of the credit.
>
> [Emphasis added.]

[286] The technical notes confirm that the focus of the paragraph is the adequacy of the evidence and not the form of the evidence. The technical notes provide as an example an invoice issued by a supplier to a registrant "containing sufficient information to determine the amount of the credit". The focus of the example is not that the evidence is in the form of an invoice, nor that the invoice is issued by the supplier, which is to be expected, but that the invoice contains "sufficient information to determine the amount of the credit".

[287] The same focus is found in subsection 169(5), which allows the Minister to waive the requirements of subsection 169(4) if the Minister is satisfied that there are sufficient records available to establish the particulars of any supply. The technical notes accompanying the introduction of subsection 169(5) state:

> This subsection provides authority for the Minister of National Revenue to exempt a registrant or class of registrants **from the information requirements under**

> **subsection (4)** where the Minister is satisfied that sufficient records otherwise exist to support any claim for an input tax credit.
>
> [Emphasis added.]

[288] In *Systematix*, the Federal Court of Appeal was asked to consider whether paragraph 169(4)(a) was mandatory or directory. The Court reproduced the paragraph and paragraphs 3(b) and (c) of the Information Regulations (but not the definition of "supporting documentation") and then stated:

> [4] We are of the view that the legislation is mandatory in that it requires persons who have paid GST to suppliers to have valid GST registration numbers from those suppliers when claiming input tax credits.
>
> [5] We agree with the comments of Bowie J. in the case of *Key Property Management Corp. v. R.* [2004] G.S.T.C. 32 (T.C.C.) where he stated:
>
> > "The whole purpose of paragraph 169(4)(a) and the *Regulations* is to protect the consolidated revenue fund against both fraudulent and innocent incursions. They cannot succeed in that purpose unless they are considered to be mandatory requirements and strictly enforced. The result of viewing them as merely directory would not simply be inconvenient, it would be a serious breach of the integrity of the statutory scheme [emphasis added].

[289] It is clear, therefore, that where specific information is prescribed by the Information Regulations, the person claiming an input tax credit must obtain sufficient evidence of that information. However, *Systematix* says nothing about the form of that evidence. The flexibility built into the wording of paragraph 169(4)(a) recognizes that the forms of information addressing transactions covered by the ETA vary greatly and may change and evolve over time.

[290] If the Minister and the person claiming an input tax credit disagree regarding the sufficiency of the evidence obtained by that person, the issue is a question of fact that can be resolved by the courts.

[291] The decisions that take a narrow view of the acceptable form of information rely on paragraph (h) of the definition of "supporting documentation" in section 2 of the Information Regulations to restrict the acceptable form of documents. With respect, these decisions place far too much emphasis on the definition, which plays a very limited role in the Information Regulations.

[292] For ease of reference, the relevant provisions of the Information Regulations state:

> 2. In these Regulations,
>
> "Act" means the *Excise Tax Act*;
>
> "intermediary" of a person, means, in respect of a supply, a registrant who, acting as agent of the person or under an agreement with the person, causes or facilitates the making of the supply by the person;
>
> . . .
>
> "supporting documentation" means the form in which information prescribed by section 3 is contained, and includes
>
> (a) an invoice,
>
> (b) a receipt,
>
> (c) a credit-card receipt,
>
> (d) a debit note,
>
> (e) a book or ledger of account,
>
> (f) a written contract or agreement,
>
> (g) any record contained in a computerized or electronic retrieval or data storage system, and
>
> (h) any other document validly issued or signed by a registrant in respect of a supply made by the registrant in respect of which there is tax paid or payable;
>
> "tax paid or payable" means tax that became payable or, if it had not become payable, was paid.
>
> 3. For the purposes of paragraph 169(4)(a) of the Act, the following information is prescribed information:
>
> (a) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is less than $30,
>
> (i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business,

(ii) where an invoice is issued in respect of the supply or the supplies, the date of the invoice,

(iii) where an invoice is not issued in respect of the supply or the supplies, the date on which there is tax paid or payable in respect thereof, and

(iv) the total amount paid or payable for all of the supplies;

(b) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $30 or more and less than $150,

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

(ii) the information set out in subparagraphs (a)(ii) to (iv),

(iii) where the amount paid or payable for the supply or the supplies does not include the amount of tax paid or payable in respect thereof,

(A) the amount of tax paid or payable in respect of each supply or in respect of all of the supplies, or

(B) where provincial sales tax is payable in respect of each taxable supply that is not a zero-rated supply and is not payable in respect of any exempt supply or zero-rated supply,

(I) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of each taxable supply, and a statement to the effect that the total in respect of each taxable supply includes the tax paid or payable under that Division, or

(II) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of all taxable supplies, and a statement to the effect that the total includes the tax paid or payable under that Division,

(iv) where the amount paid or payable for the supply or the supplies includes the amount of tax paid or payable in respect thereof and one or more supplies are taxable supplies that are not zero-rated supplies,

(A) a statement to the effect that tax is included in the amount paid or payable for each taxable supply,

> (B) the total (referred to in this paragraph as the "total tax rate") of the rates at which tax was paid or payable in respect of each of the taxable supplies that is not a zero-rated supply, and
>
> (C) the amount paid or payable for each such supply or the total amount paid or payable for all such supplies to which the same total tax rate applies, and
>
> (v) where the status of two or more supplies is different, an indication of the status of each taxable supply that is not a zero-rated supply; and
>
> (c) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $150 or more,
>
> (i) the information set out in paragraphs (a) and (b),
>
> (ii) the recipient's name, the name under which the recipient does business or the name of the recipient's duly authorized agent or representative,
>
> (iii) the terms of payment, and
>
> (iv) a description of each supply sufficient to identify it.

[293] The definitions in section 2 of the Information Regulations are introduced with the words "In these Regulations". Therefore, the definitions in section 2 apply only for the purposes of the Information Regulations.

[294] Notably, the term "supporting documentation" is not used anywhere in the ETA and the only other place that the term appears is in the *Accounting for Imported Goods and Payment of Duties Regulations* (SOR/86-1062), Schedule 2, items 33 and 35, which explicitly require supporting documentation. Those Regulations include several definitions but do not define the term "supporting documentation".

[295] The definition of the term "supporting documentation" in the Information Regulations is introduced with the word "means". In *The King v McColman*, 2023 SCC 8, the Supreme Court of Canada stated:

> First, not all statutory definitions are exhaustive: R. Sullivan, *The Construction of Statutes* (7th ed. 2022). Exhaustive definitions "declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage", whereas non-exhaustive definitions "do not purport to displace the meaning that the defined term would have in ordinary usage; they simply add to, subtract from or exemplify that meaning": pp. 69-70. **Exhaustive definitions are generally introduced using the verb "means", while non-exhaustive definitions are introduced with the verb "includes":** pp. 69-70.[179]
>
> [Emphasis added.]

[296] Accordingly, whatever interpretation may be given to the definition of the term "supporting definition", that interpretation is exhaustive of all meanings of the term wherever it is used in the Information Regulations.

[297] With respect to use, the text of section 3 read in its entire context and in its grammatical and ordinary sense uses the term "supporting documentation" solely to determine whether paragraph 3(a), 3(b) or 3(c) applies to prescribed information for the purposes of paragraph 169(4)(a). For example, paragraph 3(a) of the Information Regulations states:

> For the purposes of paragraph 169(4)(a) of the Act, **the following information is prescribed information**:
>
> (a) **where** the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is less than $30, . . .
>
> [the prescribed information is then identified in subparagraphs (i) to (iv)]
>
> [Emphasis added.]

[298] If the total amount paid or payable shown on the supporting documentation in respect of the supply or multiple supplies is less than $30, then paragraph 3(a) determines the information that is prescribed for the purposes of paragraph 169(4)(a). The term is used for the same limited purpose in paragraphs 3(b) and 3(c) of the Information Regulations.

---

[179] Paragraph 38.

[299] The term "supporting documentation" has no stated role in determining the form that the information prescribed by paragraph 3(a), (b) or (c) must take. This is consistent with both the English and French versions of the text of paragraph 169(4)(a), which refer only to "any such information as may be prescribed" and to "y compris les renseignements visés par règlement", respectively. Neither version specifies the form that such information must take, and neither version requires that the information (including prescribed information) be contained in "supporting documentation".

[300] Consequently, I conclude that the question that I must answer is whether, prior to filing the returns in which the ITCs are claimed, the Appellant obtained sufficient evidence in such form containing such information as to enable the amount of the ITCs to be determined, including sufficient evidence of the information prescribed by the Information Regulations.

[301] If, however, the definition of "supporting documentation" plays a greater role than I have found, I also find that the definition of "supporting documentation" does not require that information prescribed by section 3 be in a particular form. Rather, the opening words of the definition unambiguously state that supporting documentation means "the form in which information prescribed by section 3 is contained". Consequently, if information prescribed by section 3 is contained in a particular form, that form is supporting documentation.

[302] The word "form" has many senses. However, in this context, the only reasonable sense is "the particular mode in which a thing exists or manifests itself"[180] or "one of the different modes of existence, action, or manifestation of a particular thing or substance".[181]

[303] The List identifies several possible forms in which the information prescribed by section 3 may be contained, including "any record contained in a computerized or electronic retrieval or data storage system". The word "includes" indicates that the List is intended to exemplify the types of forms that may exist but is not exhaustive of those forms.

---

[180] Oxford English Dictionary (2nd ed).

[181] Webster's Third New International Dictionary (Unabridged).

[304] In *Caisse populaire Desjardins de l'Est de Drummond v Canada*, 2009 SCC 29 ("*Caisse populaire*"), the Court considered the meaning of "security interest" in subsection 224(1.3) of the ITA. Justice Rothstein, writing for the majority, stated:

> In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. **While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property"**: see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 68, and R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 61-68.
>
> . . .
>
> . . . The fact that the terms "contractual compensation" or "contractual set-off" do not specifically appear as examples of the defined term "security interest" in s. 224(1.3) *ITA* does not mean that an agreement which provides for compensation, but which also conforms to the statutory definition of a "security interest" in s. 224(1.3) *ITA* is to be exempted from the purview of this definition. The list is non-exhaustive. . . . [182]
>
> [Emphasis added.]

[305] In *Canada v Canada North Group Inc*, 2021 SCC 30, Côté J, writing for three of the five judges in the majority, states that broad words followed by an inclusive list may nevertheless limit the broad words to items in the nature of the list:

> [62] This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the CCAA cannot fall within its meaning. . . .
>
> . . .
>
> [63] My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court's decision in *Caisse populaire Desjardins de l'Est de Drummond*, where Rothstein J. wrote that the provided examples "do not diminish the broad scope of the words 'any interest in property' (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para.

[182] Paragraphs 15 and 40.

> 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound "means . . . and includes" structure to establish its definition: "*security interest* means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes . . . ". In my view, this structure evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments **that are similar in nature** fall within the definition.
>
> [Boldface emphasis added.]

[306] Two other justices in the majority addressed the issue before the Court on a different basis and the four justices in dissent disagreed with Côté J's approach to the interpretation of subsection 224(1.3) of the ITA. It is therefore unclear what weight Côté J's approach to the interpretation of provisions that use "means . . . and includes" will carry in future statutory interpretation cases. However, given that the case cited by Rothstein J in *Caisse populaire* (i.e., *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403, at para 68) was addressing a provision that used the words "including, without restricting the generality of the foregoing" and not simply the word "includes", Côté J's approach must be taken into consideration.

[307] The List includes a broad range of forms that are in the general nature of records used or maintained in respect of transactions in goods and services and therefore to the extent the List limits the scope of the broad words that precede it, this effect is itself quite limited.

[308] As well, the List does not expressly exclude any forms in which prescribed information may be contained. If Parliament intends to exclude items from a definition, it uses the words "but does not include". This is well illustrated by the definitions of "business" and "property" in subsection 123(1).[183]

[309] Finally, for at least three reasons, paragraph (h) of the definition of "supporting documentation" in section 2 of the Information Regulations does not impose a requirement that all forms in which information prescribed by section 3 is

---

[183] There are numerous other definitions in subsection 123(1) of the ETA that expressly exclude items using these words. For example, the definitions of "builder", "charity", "consumer", "convention", "debt security", "financial service", "money" and "office".

contained be validly issued or signed by a registrant in respect of a supply made by the registrant.

[310] First, the first three words of paragraph (h) of the definition of "supporting documentation" in section 2 of the Information Regulations identify "any other document", clearly and unambiguously indicating an intention to expand the forms identified by the List, not limit the scope of the List or the scope of the broad introductory words of the definition.

[311] Second, there is no punctuation in paragraph (h) of the definition of "supporting documentation" in section 2 of the Information Regulations to suggest that the words following "any other document" are intended to stand alone as a qualification of the remainder of the List or of the entire definition. If the words that follow the phrase were intended to have that effect, they would not have been included in paragraph (h), but rather would have been placed after paragraph (h), either at the same level as paragraph (h), or at the same level as the beginning of the definition.[184]

[312] Third, the rule of interpretation known by the Latin phrase *ejusdem generis* holds that where a list of items is followed by a general provision, the scope of the general provision may be limited to any class to which the specific items belong.[185]

[313] However, there is no rule of statutory interpretation that holds that a general rule at the end of a list of more specific items imparts a restriction on the previous items in the list. The obvious reason for this is that such a rule would defeat the purpose of having a general item at the end of a list of more specific items.

[314] I therefore reject the Respondent's position that the interpretation adopted in *CFI* runs contrary to the text and purpose of the Information Regulations. Even if the definition of "supporting documentation" has a broader role in the Information Regulations than is evident from the clear and unambiguous text of the Information Regulations read in its entire context and in its grammatical and ordinary sense, it does not require that the preceding items in the List be validly issued or signed by a registrant in respect of a supply made by the registrant, and does not materially limit the scope of the broad introductory words of the definition.

---

[184] See, generally, the presumptions regarding legislative drafting described in Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016), at page 129, particularly the third presumption.

[185] See, for example, *Walker v Ritchie*, 2006 SCC 45 at paras 24 to 28.

[315] The supporting documentation of the Appellant includes, among other things, the purchase-summary-APRs, the hours-APRs, the invoices received by the Appellant from the Agencies, the payment stubs and the letters of understanding. The amount payable by the Appellant as stated in each purchase-summary-APR and the corresponding invoice is greater than $150.

[316] Under section 3 of the Information Regulations, where the total amount paid or payable shown on the supporting documentation in respect of a supply or in respect of multiple supplies is greater than $150, the supply or supplies are taxable supplies only, an invoice is issued in respect of the supply or supplies, the tax is not included in the amount paid or payable for the supply or supplies (i.e., the tax is stated separately), there is no provincial sales tax payable in respect of the supply or supplies and the supply or supplies are not made by an intermediary, the following information is prescribed information:

1. The name of the supplier or the name under which the supplier does business.

2. The registration number assigned under section 241 to the supplier.

3. The date of the invoice.

4. The total amount paid or payable for all the supplies.

5. The amount of tax paid or payable in respect of each supply or in respect of all the supplies.

6. The recipient’s name, the name under which the recipient does business or the name of the recipient’s duly authorized agent or representative.

7. The terms of payment.

8. A description of each supply sufficient to identify it.

[317] In my view, the information contained in the documents comprising Exhibits A-9, A-11, A-12, A-13, A-14 and A-32 (the “Documents”) amply satisfy the requirement for information imposed by paragraph 169(4)(a).

[318] The circumstances in which the Documents came into existence and the purpose of the Documents were described in detail by Mr. Bungaroo, Ms. Seleznova and Ms. Kissin. The information in the Documents was obtained by the Appellant long before the filing of the returns under the ETA claiming input tax credits in respect of the amounts shown in the Documents. The Documents comprehensively address the information prescribed by the Information Regulations.

[319] The Respondent submits that the Document's are inaccurate and are not to be trusted while at the same time accepting that the Appellant paid the amounts indicated in the Documents to the Agencies and asserting that the tax stated in the Documents was payable by the Appellant. The Respondent's own evidence supports that the amounts identified in the Documents were paid by the Appellant to the Agencies and that the Agencies cashed the cheques issued by the Appellant at one or more cash houses. The Respondent has provided no evidence to explain why the Appellant would be paying large amounts of money to the Agencies if it were not for the fact that the Agencies were providing to the Appellant the services described by the witnesses for the Appellant.

[320] The Respondent also submits that the content of the invoices included in the Documents is hearsay. I note that an invoice issued by a third party to a person claiming an input tax credit will always be hearsay if entered for truth of the facts stated on the face of the invoice. Nevertheless, the explanatory notes accompanying the introduction of paragraph 169(4)(a) explicitly identify an invoice as sufficient evidence provided the invoice contains sufficient information to determine the amount of the input tax credit being claimed.

[321] I accept that some of the information on the face of the invoices has not been confirmed, such as the address of the Agency stated on the invoice. However, the information that is required by the Information Regulations, including the names of the Agencies, the dates of the invoices, the amounts paid for the supplies provided by the Agencies to the Appellant, the amount of tax paid by the Appellant to the Agencies and the registration numbers of the Agencies, is confirmed by the non-hearsay evidence of Mr. Bungaroo, Ms. Seleznova, Ms. Kissin and Mr. Khosla, by the Appellant's contemporaneous business records (including the Documents) and by the Respondent's evidence regarding the CRA's audit of the Appellant and the Agencies.

[322] With respect to the last point, Mr. Au's conclusions following his audit of the Appellant indicate that Mr. Au believed that he had sufficient evidence to enable him to determine the amount of the input tax credits claimed by the Appellant and

he made that determination. Mr. Au had no difficulty identifying the agencies in existence during the period of his audit and the HST paid by the Appellant to those agencies. Mr. Au's conclusions imply a finding that the supplies received by the Appellant were taxable supplies and that the Appellant was required to pay tax under subsections 165(1) and (2) in respect of those supplies. I have heard no evidence to suggest that something changed between the time of Mr. Au's audit and the subsequent audit by Mr. Li.

[323] Mr. Au raised issues regarding the failure of the agencies to remit the tax collected by those agencies from the Appellant, and Mr. Kooner and Ms. Servilla conducted audits of the Agencies based on that information. None of this is consistent with a lack of sufficient evidence in the records of the Appellant to enable the Minister to determine the input tax credits of the Appellant.

[324] For the foregoing reasons, I find that with respect to its claim for the ITCs, the Appellant satisfied the requirements of paragraph 169(4)(a) and the Information Regulations and therefore could claim the ITCs.

(4) Rebate for Tax Paid in Error and Penalties

[325] Given my conclusions, I need not address the argument that the Appellant is entitled to a rebate for tax paid in error. However, I will make a few brief comments regarding the assessment of penalties by the Minister.

[326] The opening words of section 285 state:

> Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which is in this section referred to as a "return") made in respect of a reporting period or transaction is liable to a penalty . . .

[327] The introductory words identify two conditions that must be satisfied if the assessment by the Minister of a penalty under section 285 is to be maintained.

[328] First, the Appellant must have made, participated in, assented to or acquiesced in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer, referred to collectively as a "return". A "false statement" is a statement in a return that is untrue and an "omission" is something that is left out of a return.

[329] Second, the false statement or omission must have been made by the Appellant knowingly or under circumstances amounting to gross negligence, or the Appellant must have participated in, assented to or acquiesced in the making of the false statement or omission knowingly or under circumstances amounting to gross negligence.

[330] The Minister does not dispute that the Appellant paid the tax that it was required to pay under subsections 165(1) and (2), nor does the Minister dispute the quantum of the amounts paid by the Appellant as shown in the Appellant's detailed business records.

[331] Mr. Li testified that the CRA audit revealed that the Agencies cashed the cheques given to the Agencies by the Appellant in payment of the amounts invoiced by the Agencies. These amounts included the HST charged on those invoices.

[332] The CRA undertook both a civil audit and criminal investigation of the Appellant and found no evidence of collusion between the Appellant and the Agencies. Mr. Li testified that he found no evidence that any amount paid by the Appellant to the Agencies was returned to the Appellant.

[333] The sole identifiable basis for imposing penalties is the Minister's theory that the Agencies were not capable of making the taxable supplies to the Appellant in respect of which the Appellant paid tax to the Agencies and therefore the Appellant is not entitled to the ITCs. The Minister's theory of the case is based on information regarding the Agencies that the Minister uncovered using its extensive audit powers. The Agencies were registrants under the ETA and only the Minister had the powers necessary to "audit" the Agencies.

[334] As found by the Supreme Court in *Guindon*, in the context of near identical language in the ITA, section 285 is intended to address situations in which a person deliberately disregards the obligations imposed on that person by the ETA or demonstrates such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense.[186]

[335] The Appellant had detailed contemporaneous business records that supported the Appellant's evidence of what transpired between the Appellant and the Agencies. Because the Respondent was calling these records into question, in argument, I specifically asked counsel for the Respondent if he was asking me to find that the

[186] *Guindon* at para 60.

witnesses for the Appellant were not credible and he responded that the Respondent was asking me to draw a negative inference because of the lack of evidence from the Agencies supporting the testimony of the Appellant's witnesses. This reveals a simple dispute over the interpretation of evidence and a questionable reliance by the Respondent on the absence of evidence from a source that is unlikely to prove credible or reliable.

[336] In *Salaison Lévesque*, the Tax Court judge was faced with circumstances that were somewhat similar to those in this case. The judge made the following observations regarding the suppliers in that case:

> [32] In the light of these multiple findings, it appears reasonable to me to conclude that it was obvious that the [supplier] businesses were unreliable and dishonest, genuine fraudsters whose sole objective was to enrich themselves to the detriment of society and undoubtedly exploiting vulnerable, defenseless persons.
>
> [33] In such a context, any information coming from these businesses was neither reliable nor credible; indeed, the *modus operandi* required the absence of data, information and documents. These businesses, by virtue of their approach, had a vested interest in not having records, documents or other material that could incriminate them.

[337] The actions of the Agencies are not the actions of the Appellant and nothing in the scheme of the ETA leads to a contrary conclusion. Each had its obligations under the ETA and only the Agencies failed to meet those obligations, albeit in an egregious fashion. In short, there is simply no reasonable basis for the Minister to conclude that the Appellant demonstrated "such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense".[187] The Appellant simply claimed input tax credits that any reasonable person in the circumstances of the Appellant would believe were available under the ETA.

VI. Conclusion

[338] For the foregoing reasons, the appeal of the Appellant is allowed with costs to the Appellant and the Reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is entitled to the ITCs.

---

[187] *Guindon* at paragraph 60.

[339] The parties shall have 60 days from the date of this judgment to agree on costs. If no agreement is reached the Appellant shall have a further 30 days to submit written submissions on costs. The Respondent shall have a further 30 days to provide written submissions in response to the Appellant's submissions. The written submissions of each party are not to exceed ten pages.

Signed at Ottawa, Canada, this 20th day of September 2023.

"J.R. Owen"

Owen J.

APPENDIX A

The Relevant Provisions of the ETA

123(1) In section 121, this Part and Schedules V to X,

. . .

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

. . .

"commercial activity" of a person means

> (a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
>
> (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
>
> (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

. . .

"property" means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money;

. . .

"service" means anything other than

(a) property,

(b) money, and

(c) anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person;

. . .

"supplier", in respect of a supply, means the person making the supply;

"supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

. . .

"taxable supply" means a supply that is made in the course of a commercial activity;

. . .

165(1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

(2) Subject to this Part, every recipient of a taxable supply made in a participating province shall pay to Her Majesty in right of Canada, in addition to the tax imposed by subsection (1), tax in respect of the supply calculated at the tax rate for that province on the value of the consideration for the supply.

. . .

168(1) Tax under this Division in respect of a taxable supply is payable by the recipient on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due.

. . .

169(1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having

become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

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

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

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

. . .

(4) A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,

(a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and

(b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax

payable in respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

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

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

(b) specify terms and conditions of the exemption.

. . .

221(1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

. . .

222(1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

. . .

223(1) If a registrant makes a taxable supply, other than a zero-rated supply, the registrant shall indicate to the recipient, either in prescribed manner or in the invoice or receipt issued to, or in an agreement in writing entered into with, the recipient in respect of the supply,

> (a) the consideration paid or payable by the recipient for the supply and the tax payable in respect of the supply in a manner that clearly indicates the amount of the tax; or
>
> (b) that the amount paid or payable by the recipient for the supply includes the tax payable in respect of the supply.

(1.1) If a registrant makes a taxable supply, other than a zero-rated supply, and, in an invoice or a receipt in respect of the supply issued to the recipient or in an agreement in writing in respect of the supply, the registrant indicates the tax payable

or the rate or rates at which tax is payable in respect of the supply, the registrant shall indicate in that invoice, receipt or agreement

(a) the total tax payable in respect of the supply in a manner that clearly indicates the amount of that total; or

(b) the total of the rates at which tax is payable in respect of the supply.

. . .

224 Where a supplier has made a taxable supply to a recipient, is required under this Part to collect tax from the recipient in respect of the supply, has complied with subsection 223(1) in respect of the supply and has accounted for or remitted the tax payable by the recipient in respect of the supply to the Receiver General but has not collected the tax from the recipient, the supplier may bring an action in a court of competent jurisdiction to recover the tax from the recipient as though it were a debt due by the recipient to the supplier.

224.1 No person, other than Her Majesty in right of Canada, may bring an action or proceeding against any person for acting in compliance or intended compliance with this Part by collecting an amount as or on account of tax.

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

A – B

where

A is the total of

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

(b) all amounts that are required under this Part to be added in determining the net tax of the person for the particular reporting period; and

B is the total of

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

(b) all amounts each of which is an amount that may be deducted by the person under this Part in determining the net tax of the person for the particular reporting period and that is claimed by the person in the return under this Division filed by the person for the particular reporting period.

. . .

(4) An input tax credit of a person for a particular reporting period of the person shall not be claimed by the person unless it is claimed in a return under this Division filed by the person on or before the day that is

. . .

(b) where the person is not a specified person during the particular reporting period, the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within four years after the end of the particular reporting period; or

. . .

228(1) Every person who is required to file a return under this Division shall, in the return, calculate the net tax of the person for the reporting period for which the return is required to be filed, except where subsection (2.1) or (2.3) applies in respect of the reporting period.

(2) Where the net tax for a reporting period of a person is a positive amount, the person shall, except where subsection (2.1) or (2.3) applies in respect of the reporting period, remit that amount to the Receiver General,

(a) where the person is an individual to whom subparagraph 238(1)(a)(ii) applies in respect of the reporting period, on or before April 30 of the year following the end of the reporting period; and

(b) in any other case, on or before the day on or before which the return for that period is required to be filed.

. . .

232(1) Where a particular person has charged to, or collected from, another person an amount as or on account of tax under Division II in excess of the tax under that Division that was collectible by the particular person from the other person, the particular person may, within two years after the day the amount was so charged or collected,

(a) where the excess amount was charged but not collected, adjust the amount of tax charged; and

(b) where the excess amount was collected, refund or credit the excess amount to that other person.

. . .

238(1) Every registrant shall file a return with the Minister for each reporting period of the registrant

(a) where the registrant's reporting period is or would, in the absence of subsection 251(1), be the fiscal year,

(i) if the registrant is a listed financial institution described in any of subparagraphs 149(1)(a)(i) to (x), within six months after the end of the year,

(ii) if subparagraph (i) does not apply, the registrant is an individual, the fiscal year is a calendar year and, for the purposes of the *Income Tax Act*, the individual carried on a business in the year and the filing-due date of the individual for the year is June 15 of the following year, on or before that day, and

(iii) in any other case, within three months after the end of the year; and

(b) in every other case, within one month after the end of the reporting period of the registrant.

. . .

240(1) Every person who makes a taxable supply in Canada in the course of a commercial activity engaged in by the person in Canada is required to be registered for the purposes of this Part, except where

(a) the person is a small supplier;

(b) the only commercial activity of the person is the making of supplies of real property by way of sale otherwise than in the course of a business; or

(c) the person is a non-resident person who does not carry on any business in Canada.

. . .

241(1) The Minister may register any person that applies for registration and, upon doing so, must assign a registration number to the person and notify the person in writing of the registration number and the effective date of the registration.

. . .

242(1) The Minister may, after giving a person who is registered under this Subdivision reasonable written notice, cancel the registration of the person if the Minister is satisfied that the registration is not required for the purposes of this Part.

. . .

261(1) Where a person has paid an amount

(a) as or on account of, or

(b) that was taken into account as,

tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) to (3), pay a rebate of that amount to the person.

(2) Restriction — A rebate in respect of an amount shall not be paid under subsection (1) to a person to the extent that

(a) the amount was taken into account as tax or net tax for a reporting period of the person and the Minister has assessed the person for the period under section 296;

(b) the amount paid was tax, net tax, penalty, interest or any other amount assessed under section 296; or

(c) a rebate of the amount is payable under subsection 215.1(1) or (2) or 216(6) or a refund of the amount is payable under section 69, 73, 74 or 76 of the *Customs Act* because of subsection 215.1(3) or 216(7).

. . .

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

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

$$A - B$$

where

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

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

(b) if the false statement or omission is relevant to the determination of an amount of tax payable by the person, the amount, if any, by which

(i) that tax payable

exceeds

(ii) the amount that would be the tax payable by the person if the tax were determined on the basis of the information provided in the return, and

(c) if the false statement or omission is relevant to the determination of a rebate under this Part, the amount, if any, by which

(i) the amount that would be the rebate payable to the person if the rebate were determined on the basis of the information provided in the return

exceeds

(ii) the amount of the rebate payable to the person.

. . .

296(2.1) Where, in assessing the net tax of a person for a reporting period of the person or an amount (in this subsection referred to as the "overdue amount") that became payable by a person under this Part, the Minister determines that

(a) an amount (in this subsection referred to as the "allowable rebate") would have been payable to the person as a rebate if it had been claimed in an application under this Part filed on the particular day that is

(i) if the assessment is in respect of net tax for the reporting period, the day on or before which the return under Division V for the period was required to be filed, or

(ii) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,

and, where the rebate is in respect of an amount that is being assessed, if the person had paid or remitted that amount,

(b) the allowable rebate was not claimed by the person in an application filed before the day notice of the assessment is sent to the person, and

(c) the allowable rebate would be payable to the person if it were claimed in an application under this Part filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that application only because the period for claiming the allowable rebate expired before that day,

the Minister shall apply all or part of the allowable rebate against that net tax or overdue amount as if the person had, on the particular day, paid or remitted the amount so applied on account of that net tax or overdue amount.

The Relevant Provisions of the Information Regulations

2. In these Regulations,

"Act" means the *Excise Tax Act*;

“intermediary” of a person, means, in respect of a supply, a registrant who, acting as agent of the person or under an agreement with the person, causes or facilitates the making of the supply by the person;

. . .

“status” means, in respect of a supply,

(a) exempt,

(b) taxable and zero-rated, or

(c) taxable and not zero-rated;

“supporting documentation” means the form in which information prescribed by section 3 is contained, and includes

(a) an invoice,

(b) a receipt,

(c) a credit-card receipt,

(d) a debit note,

(e) a book or ledger of account,

(f) a written contract or agreement,

(g) any record contained in a computerized or electronic retrieval or data storage system, and

(h) any other document validly issued or signed by a registrant in respect of a supply made by the registrant in respect of which there is tax paid or payable;

“tax paid or payable” means tax that became payable or, if it had not become payable, was paid.

3. For the purposes of paragraph 169(4)(a) of the Act, the following information is prescribed information:

(a) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is less than $30,

(i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business,

(ii) where an invoice is issued in respect of the supply or the supplies, the date of the invoice,

(iii) where an invoice is not issued in respect of the supply or the supplies, the date on which there is tax paid or payable in respect thereof, and

(iv) the total amount paid or payable for all of the supplies;

(b) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $30 or more and less than $150,

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

(ii) the information set out in subparagraphs (a)(ii) to (iv),

(iii) where the amount paid or payable for the supply or the supplies does not include the amount of tax paid or payable in respect thereof,

(A) the amount of tax paid or payable in respect of each supply or in respect of all of the supplies, or

(B) where provincial sales tax is payable in respect of each taxable supply that is not a zero-rated supply and is not payable in respect of any exempt supply or zero-rated supply,

(I) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of each taxable supply, and a statement to the effect that the total in respect of each taxable supply includes the tax paid or payable under that Division, or

(II) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of all taxable supplies, and a statement

to the effect that the total includes the tax paid or payable under that Division,

(iv) where the amount paid or payable for the supply or the supplies includes the amount of tax paid or payable in respect thereof and one or more supplies are taxable supplies that are not zero-rated supplies,

(A) a statement to the effect that tax is included in the amount paid or payable for each taxable supply,

(B) the total (referred to in this paragraph as the "total tax rate") of the rates at which tax was paid or payable in respect of each of the taxable supplies that is not a zero-rated supply, and

(C) the amount paid or payable for each such supply or the total amount paid or payable for all such supplies to which the same total tax rate applies, and

(v) where the status of two or more supplies is different, an indication of the status of each taxable supply that is not a zero-rated supply; and

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

(i) the information set out in paragraphs (a) and (b),

(ii) the recipient's name, the name under which the recipient does business or the name of the recipient's duly authorized agent or representative,

(iii) the terms of payment, and

(iv) a description of each supply sufficient to identify it.

CITATION:	2023 TCC 140
COURT FILE NO.:	2018-1078(GST)G
STYLE OF CAUSE:	FIERA FOODS COMPANY v HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	October 31, 2022, November 1 to 3, 2022, November 7 to 10, 2022, November 14 to 16, 2022 and January 20, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENT:	September 20, 2023

APPEARANCES:

Counsel for the Appellant:	Al Meghji, Alexander Cobb Mark Sheeley and Alexandra McLennan Brown
Counsel for the Respondent:	Jack Warren, Dan Daniels and Albert Brunelle

COUNSEL OF RECORD:

For the Appellant:

Name:	Al Meghji, Alexander Cobb and Mark Sheeley
Firm:	Osler, Hoskin & Harcourt LLP Toronto, Ontario

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada