Docket: 2012-2292(GST)I

BETWEEN:

SHAMSUDDIN SYED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Abida Begum Syed, *(2012-4656(GST)I)*,
on March 5 and 6, 2014, at Montréal, Quebec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the appellant:	François Asselin
Counsel for the respondent:	Michel Rossignol

JUDGMENT

The appeal of the assessment under Part IX of the *Excise Tax Act* is allowed in part in accordance with the attached Reasons for Judgment. The matter is referred back to the Minister of National Revenue for reconsideration and reassessment so as to reflect the attached consent judgment, made by Justice Jorré of this Court in the case of *Buffet Samrat Inc.*, *(2011-1092(GST)G)*.

Signed at Kingston, Ontario, this 22nd day of October 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 31st day of March 2015
Catherine Jones, Translator

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Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the appellant:	François Asselin
Counsel for the respondent:	Michel Rossignol

JUDGMENT

The appeal of the assessment under Part IX of the *Excise Tax Act* is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 22nd day of October 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 31st day of March 2015
Catherine Jones, Translator

Citation: 2014 TCC 307
Date: 20141022
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Docket: 2012-4656(GST)I

BETWEEN:

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Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Masse D.J.

[1] In docket 2012-4656(GST)I, Shamsuddin Syed (Shamsuddin) was assessed by notice of assessment dated July 11, 2011, and bearing the number F-032866, under subsection 323(1) of the *Excise Tax Act*, R.S.C. (1985), c. E-15 (the ETA) in his capacity as director of a company, Buffet Samrat Inc. (Samrat). The assessment in the amount of $86,640.07 included the goods and services tax (the GST) and related interest and penalties, which Samrat is required to pay to the Minister of National Revenue (the Minister) under subsection 228(2) of the ETA for the period from January 1, 2003, to December 31, 2006. As explained below, the amount of this assessment is reduced to $66,666.39.

[2] In docket 2012-4656(GST)I, Abida Begum Syed (Abida) was assessed by notice of assessment dated February 27, 2012 and bearing the number F-036082 under subsection 325(2) of the ETA, with respect to the amount of $110,000, which was transferred by Samrat at the end of December 2008 and at the beginning of January 2009. The amount of the assessment is $57,357.83. The Minister submits that Abida was not dealing with Samrat at arm's length and that she received this money without consideration. Therefore, according to the respondent, Abida and Samrat are jointly and severally liable to pay the assessment.

[3] Shamsuddin and Abida appeal their assessments. Both appeals were heard on common evidence.

Factual background

[4] Moinuddin Syed (Moinuddin) was born in Bangladesh in 1967. He is Shamsuddin's brother. He immigrated to Canada in 1988 where he worked in the restaurant business. In 1995, he sponsored his father, mother, four brothers and one of his sisters to immigrate from Bangladesh to Canada. The family lived together in his apartment. In 1996, he married Abida. The financial situation was very difficult for Moinuddin, because the family depended on him. In 2003, an acquaintance of Moinuddin proposed that he go into business and operate a restaurant. Moinuddin could not invest money or become a shareholder, because he had no savings, but his brother Shamsuddin had some. Therefore, a corporation, Buffet Samrat Inc., was incorporated and Shamsuddin became a shareholder with two other investors. Shamsuddin had also become a director of the corporation without knowing what he was getting involved in. Samrat was a buffet-style Indian restaurant located on Ste-Catherine Street in Montréal. It was not disputed that Samrat is a legal person duly incorporated and registered for the purposes of Part IX of the ETA.

[5] The restaurant was never successful and always operated at a deficit. The other investors became discouraged and they were not willing to continue in the business. Therefore, they sold their shares to Shamsuddin. Shamsuddin became the sole shareholder and director of Samrat in 2004.

[6] The two brothers, Shamsuddin and Moinuddin, took care of the management of the restaurant. Moinuddin had more experience than Shamsuddin in the restaurant business and Shamsuddin hired Moinuddin to fulfill, on his behalf, several director functions. While Shamsuddin was Samrat's sole shareholder and director, it was really a family business managed by Moinuddin and Shamsuddin.

Shamsuddin admitted that he had no experience in accounting. Therefore, bookkeeping, pay, financial statements, income tax returns and tax declarations (GST and the Quebec sales tax (QST)) were prepared by Samrat's accountant, Hadi Aliahmad (Hadi). Hadi himself compiled Samrat's expenses. However, it is curious to note that Samrat's sales were compiled by Shamsuddin or Moinuddin and not by Hadi. Every three months, Shamsuddin or Moinuddin handed in the total sales and all the other expense invoices to Hadi so that he could prepare the GST/QST declarations, financial statements and income tax returns. Hadi prepared these declarations and the cheques to pay the taxes owing, for signature by Moinuddin or Shamsuddin. Shamsuddin or Moinuddin reviewed the declarations, signed and sent the cheques and declarations to Revenu Québec.

[7] The restaurant had financial problems. It always operated at a deficit. Samrat had to advertise and make promotions to attract clients. Various promotions were advertised: (a) 2 for 1 buffet, (b) one free drink on presenting a hotel room key, and (c) a second free alcoholic drink when you purchase a first drink. Unfortunately, these promotions did not generate profits. Despite this, Samrat did not stop the promotions. Moinuddin estimated that approximately 30% of the alcohol purchased was given to clients for free. The rest of the alcohol was sold at the normal price. Shamsuddin estimated that 30 to 35% of the alcohol purchased was simply given in promotion to clients. Unfortunately, these estimates are not supported by any supporting evidence. The quantity of alcohol that was lost through broken bottles, or alcohol used in the kitchen or stolen by employees or given in promotion was never recorded. Samrat did not keep a record of the alcohol lost or given in promotion. The estimates of 30 to 35% are exactly that: estimates, and very imprecise ones.

[8] In 2007, the city of Montréal purchased the building where Samrat was located. The city intended to demolish this building and so the city invoked a clause of the lease with Samrat that allowed the termination of the lease. Following negotiations held between the city of Montréal and Samrat, it was agreed that the city would terminate Samrat's lease and that Samrat would have to leave the premises in December 2008. The city of Montréal paid Samrat $138,794 (which represents $150,000 less the late rent that Samrat owed to the city) to terminate the lease. Samrat left the premises and terminated its operations. Samrat also obtained $20,000 by liquidating its equipment, which was sold at auction. After December 2008, Samrat no longer operated a business, no longer had employees and had stopped liquidating its assets.

[9] What should be done with the amount of money that Samrat received from the city of Montréal? Hadi was of the opinion that this money could be withdrawn by Shamsuddin as "Capital Stock" without tax impact on Samrat's balance sheet, because Shamsuddin was the sole shareholder and this amount represented the capital invested in the company by Shamsuddin. Hadi accounted for the $150,000 received for termination of the lease in the section "Revenue and cancellation of lease" in Samrat's 2008 financial statement. Shamsuddin was paid $10,000 for living expenses and $23,000 to pay a credit card debt. On December 23, 2008, Samrat wrote a cheque payable to Abida in the amount of $60,000. This cheque was signed by Shamsuddin. The amount of $50,000 was transferred from Samrat's bank account directly to Abida's bank account on January 3, 2009 (see Exhibit I-1, Tabs 3 and 4). These transactions were accounted for by lowering Samrat's "Capital Stock" account. Abida testified that these sums were given to her as gifts so that she and Moinuddin could purchase a family home. She received the money instead of Moinuddin, because he owed money to the Minister of Employment and Social Security, as he had sponsored his family to immigrate to Canada and he wanted to avoid paying this debt.

[10] Shamsuddin claims that he ceased to be a director of Samrat on November 15, 2008. There is no doubt that Samrat ceased these commercial activities in December 2008. Its GST and QST accounts have been inactive since January 1, 2009. However, as I will explain below, Shamsuddin continued to act as director after Samrat's operations had ended.

[11] In 2007, Arnold Richard, an auditor working for Revenu Québec, decided to analyze some of Samrat's financial indices. First, he examined the amount of taxes paid on supplies purchased by Samrat compared to the taxes collected on sales. In the restaurant business, it is rare that taxes paid exceed 30% of taxes collected. He noted that the taxes paid compared to taxes collected were very high—in this case, the percentage was 87% in 2003, 66% in 2004, 71% in 2005 and 69% in 2006. Second, the business was always at a deficit and, according to him, would never realize a profit. Third, the payroll was low considering the number of employees; lower than industry standards. Fourth, the cost of energy exceeded industry standards. All of this indicated that there were financial irregularities.

[12] Mr. Richard visited the restaurant in October 2007 and he requested all the accounting records regarding the restaurant's sales and purchases for 2003, 2004, 2005 and 2006. He conducted an analysis of these records by using an alternative method to reconstruct the restaurant's income. Mr. Richard fully explained this method, which is a statistical method developed by Revenu Québec and the

Université de Montréal. The method establishes a ratio of sales to the litres of alcohol sold using software. Alcohol is often used as a starting point in this method, because it is easy to check with the SAQ or with breweries the volume of alcohol purchased by a restaurateur. Usually, restaurateurs keep records of alcohol sales because alcohol sales generate large profits. There is usually better internal controls in restaurants with respect to alcohol purchased and sold, compared to the other products sold. Unfortunately, Samrat did not have good internal controls of alcohol sales or "losses and promotion" (meaning the loss of alcohol caused by broken bottles, alcohol stolen or drunk by employees, alcohol used in the kitchen and the amount of alcohol given in promotion).

[13] The total number of litres of alcohol purchased by Samrat is determined. This allows the software to extrapolate the total number of litres of alcohol sold based on the number of litres purchased for the year. Then, the number of litres of alcohol purchased by the company is reduced by 5% as losses. According to Mr. Richard, those losses refer to alcohol that is not found on clients' bills. This number is necessarily arbitrary because Samrat did not keep records of losses and promotions that would help establish a more precise percentage. The 5% rate is generally the percentage of losses that may be found in the industry. It is presumed that all litres of alcohol purchased less the losses and promotions are sold, given that there was very little change in inventory of alcohol from one year to the next. Afterward, the bills for sales were reviewed. To estimate the actual sales and compare them to the declared sales, Mr. Richard carried out a sampling. The software randomly selects dates and periods of time to review. Indeed, a sampling of the food bills was taken and all the sales for this period are recorded and computerized. The litres of alcohol sold are determined and then, a ratio of the sales is established for the sampling periods, by dividing the total sales by the total number of litres of alcohol sold. If we multiply the number of litres of alcohol purchased by the ratios of each year, we obtain an estimate of taxable supplies during the year. Given the relationship between sales figures, represented by the total sales, and the volume of alcohol sold, a certain amount of alcohol sales must be expected. However, the restaurant had declared only amounts lower than the expected sales figures. In this case, the difference between the sales reported by Samrat and the reconstructed sales was $186,299 for 2003 (a difference of 97.35% compared with reported sales), a difference of $257,479 for 2004 (a difference of 104.50%), a difference of $134,056 (a difference of 61.29%) for 2005, and a difference of $135,280 (a difference of 63.09%) for 2006. The total difference between the reconstructed income and the income reported by Samrat for the taxation period totals $713,114.

[14] The GST assessment of the company is based on the unreported taxable income calculated by this alternative method. The estimated taxable supplies less the taxable supplies reported by the company gives us the amount of unreported taxable supplies. The following table gives the results of the audit by assuming a percentage of losses and promotions of 5% (see Exhibit I-5, Tab 15, page 1):

Assuming a rate of 5% for losses and promotions

GST	Unreported Income	Taxes on Unreported Income
2003	$186,299	$13,040.93
2004	$257,479	$18,023.53
2005	$134,056	$9,383.92
2006	$135,280	$8,793.20

[15] In this case, the percentage of losses and promotions was increased to 10% following submissions made by the appellants relative to the Samrat file. If we assume a percentage of losses and promotions of 10%, the results are indicated in the following table (see Exhibit I-5, Tab 21):

Assuming a rate of 10% for losses and promotions

GST	Unreported Income	Taxes on Unreported Income
2003	$166,422	$11,649.59
2004	$230,960	$16,167.21
2005	$115,488	$8,084.17
2006	$116,875	$7,596.88

[16] Of course, the results are estimates of unreported income, because this is an alternative indirect method. Mr. Richard admitted that he never asked questions of Shamsuddin and Moinuddin as part of the audit about the promotions, absence of profits, high rate of taxable expenditures on total income, payroll or energy costs. Therefore, he did not factor in the losses and promotions of 30% to 35% estimated by Moinuddin and Shamsuddin because he was never made aware of these estimated percentages. Mr. Richard stated that the clients' bills that he reviewed were written by hand, were not numbered and they did not indicate whether alcohol was given to clients in promotion. If alcohol was given in promotion, one would expect to see "Promo, 1 beer $00" or something similar on clients' bills.

[17] On January 6, 2010, the Minister assessed Samrat for GST (see Exhibit A-15). On November 29, 2010, the respondent obtained a Federal Court judgment against Samrat pursuant to section 316 of the ETA with respect to amounts it owed of $84,068.11 including penalties and interest. On March 2, 2011, the Federal Court issued a writ of seizure and sale against Samrat. On March 22, 2011, the writ of seizure and sale for that amount had been returned unsatisfied in whole. On July 11, 2011, notice of assessment number F-032866 was issued for Shamsuddin, in his capacity as director of Samrat under paragraph 323(1) of the ETA for a total of $86,640.07.

[18] Eventually, Samrat and the Minister entered into a settlement and Justice Jorré of the Tax Court of Canada issued a consent judgment dated April 26, 2013 (see Exhibit I-7). By this consent, the assessment was reduced to a total of $43,497.78. The Minister made some concessions; a percentage of 10% instead of 5% for losses and promotions and the penalty was cut to 50%. A new notice of assessment was issued for Samrat dated May 30, 2013 (see Exhibit I-5, Tab 5).

Appellants' position

[19] Shamsuddin challenges his assessment by relying on three grounds:

(a) Samrat had no GST debt. The company did not fail to withhold, report or remit the net tax. Samrat's assessment is based entirely on theories rather on its records, which were complete and accurate;

(b) More than two years elapsed since he ceased directing the company, which ceased its operations in 2008, and thus the assessment was statute barred. He raises as a defence the provisions of subsection 323(5) of the ETA;

(c) The appellant was diligent in his management of the company. All the records and returns were completed by an accountant and the company paid the taxes thus calculated and owed and no income was hidden, nor was any expenditure inflated.

[20] Abida challenged her assessment by relying on the following grounds:

(a) Samrat had no GST debt on the dates of the payments that she received;

(b) She also challenged the validity of Samrat's underlying assessments;

(c) No transfer took place within the meaning of subsection 325(2) of the ETA.

[21] The appellants request that the assessments be vacated. Otherwise, the appellants request that the matter be referred back to the Minister for redetermination and reassessment on the basis of a percentage of 30% as losses and promotions.

Respondent's position

[22] The respondent argues that Samrat's underlying assessment is valid and that the appellants have not demonstrated that this assessment is without basis in law or in fact.

[23] The respondent claims that the appellant Shamsuddin always acted as director of Samrat during the periods when it was required to pay the net tax to the respondent. At all relevant times, Shamsuddin never resigned, nor was replaced or removed as director of Samrat. Shamsuddin was Samrat's sole director for the period from 2003 up to the beginning of 2012. Shamsuddin knew, or should have known that Samrat failed to remit the positive amount of its net tax as required by the ETA. Shamsuddin did not act with the care, diligence and skill required, nor did he take all steps to prevent Samrat's failure to meet its obligations with respect to the ETA. Therefore, Shamsuddin is jointly and severally liable with Samrat to pay the assessment amount and the related interest and penalties under subsection 323(1) of the ETA.

[24] The respondent claims that the appellant Abida received from Samrat a transfer of property without consideration and, thus, she is jointly and severally liable with Samrat to pay Samrat's tax debts up to the amount assessed under subsection 325(1) of the ETA.

Statutory provisions

[25] Subsection 286(1) of the ETA sets out an agent's obligation to keep books and records:

> 286. (1) Every person who carries on a business or is engaged in a commercial activity in Canada, every person who is required under this Part to file a return and every person who makes an application for a rebate or refund shall keep records in English or in French in Canada, or at such other place and on such terms and conditions as the Minister may specify in writing, in such form and containing such information as will enable the determination of the person's liabilities and obligations under this Part or the amount of any rebate or refund to which the person is entitled.

[26] Subsection 288(1) of the ETA confers on duly authorized persons, the power to audit an agent's books and records to establish his or her tax liability:

> 288. (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Part, inspect, audit or examine the documents, property or processes of a person that may be relevant in determining the obligations of that or any other person under this Part or the amount of any rebate or refund to which that or any other person is entitled …

[27] Under subsection 296(1) of the ETA, the Minister may make an assessment to determine an agent's net tax for a reporting period and the penalties and interest payable by the agent. Under subsection 299(3) of the ETA, an assessment is deemed to be valid and binding.

[28] Subsection 323(1) of the ETA defines and delimits the liability of a director of a company:

> 323. (1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.
>
> (2) A director of a corporation is not liable under subsection (1) unless
>
> *(a)* a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
>
> *(b)* the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

> *(c)* the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.
>
> (3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.
>
> (4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.
>
> (5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

[29] A person with a non-arm's length relationship with an agent who is registered under Part IX of the ETA can be found liable for the agent's GST debt if the agent transfers property to him or her without consideration. Section 325 of the ETA provides as follows:

> 325. (1) Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to;
>
> *(a)* the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,
>
> *(b)* an individual who was under eighteen years of age, or
>
> *(c)* another person with whom the transferor was not dealing at arm's length,
>
> the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of
>
> *(d)* the amount determined by the formula
>
> A – B
>
> where
>
> A
>
> is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and,
>
> B

> is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the Income Tax Act in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and
>
> *(e)* the total of all amounts each of which is
>
> (i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or,
>
> (ii) interest or penalty for which the transferor is liable as of that time,
>
> but nothing in this subsection limits the liability of the transferor under any provision of this Part.
>
> …
>
> (2) The Minister may at any time assess a transferee in respect of any amount payable by reason of this section, and the provisions of sections 296 to 311 apply, with such modifications as the circumstances require.

Analysis

Burden of proof

[30] In *Amiante Spec Inc v. Canada*, [2009] F.C.J. No. 603 (QL), 2009 FCA 139, [2009] G.S.T.C. 71, the Federal Court of Appeal described the burden of proof applicable when a taxpayer wishes to challenge the validity of an assessment:

> [15] *Hickman* reminded us that the Minister proceeds on assumptions in order to make assessments and that the taxpayer has the initial burden of demolishing the exact assumptions stated by the Minister. This initial onus is met where the taxpayer makes out at least a *prima facie* case that demolishes the accuracy of the assumptions made in the assessment. Lastly, when the taxpayer has met his or her onus, the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and prove the assumptions (*Hickman*, *supra*, at paragraphs 92, 93 and 94)
>
> …
>
> [23] A *prima facie* case is one "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by that evidence" (*Stewart v. Canada*, [2000] T.C.J. No. 53, paragraph 23).
>
> [24] Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that

> "[i]t is the taxpayer's business" (*Orly Automobiles Inc v. Canada*, 2005 FCA 425, paragraph 20). This Court stated that the taxpayer "knows how and why it is run in a particular fashion rather than in some other ways. He [or she] knows and possesses information that the Minister does not. He [or she] has information within his [or her] reach and under his [or her] control".

[31] Thus, it is up to the appellants to establish on a balance of probabilities that the assessments are unfounded.

The file of Buffet Samrat Inc. restaurant

[32] The appellants argue that Samrat had no GST debt and Samrat did not fail to withhold, report or remit the GST that it owed during the period at issue. The appellants claim that Samrat's assessment is based entirely on theories rather than on its records, which were complete and accurate. In other words, according to the appellants, the alternative method described by Mr. Richard could not be used in this case because Samrat had adequate accounting records. Mr. Richard should have relied only on Samrat's records in conducting his audit and not on an alternative method. The two appellants owe nothing to the Minister, since Samrat owed nothing to the Minister.

[33] My colleague Justice Favreau, in his decision *9100-8649 Québec Inc v. Canada*, [2013] T.C.J. No. 124 (QL), 2013 TCC 160, [2013] ACWS (3d) 274, (affirmed by the Federal Court of Appeal, [2014] F.C.J. No. 131 (QL), 2014 FCA 20, [2014] GSTC 20), stressed the need to use alternative methods in cases where the taxpayer does not have reliable records:

> [39] Courts allow tax authorities to use alternative audit methods not only in cases where the taxpayer does not have adequate accounting records, but also when the books, registers and financial statements are not reliable.
>
> [40] In this case, the appellant had no documents in support of the inventory counts. In the circumstances, it is not open to the appellant to argue that its books, registers and financial statements are complete, adequate and reliable.

[34] To the same effect, my colleague Justice Bédard noted in *Restaurant Place Romaine Inc v. Canada*, [2010] T.C.J. No. 262 (QL), 2010 TCC 347, [2010] GTC 74:

> [16] In regard to the appellant's claim that it was unwarranted for the Minister to use an indirect audit method since the books and records were adequate and well kept, my comments will be brief. The appellant must understand that the Minister may be justified in using an indirect audit method for a taxpayer's affairs

> even if the books and records appear to be adequate and well kept on the surface. In fact, these books, records and financial statements must be reliable. … How can the appellant claim that its books, records and financial statements are reliable when it has no documentation in support of its inventory taking? … How can the appellant claim that these books, records and financial statements are reliable when, for each of the periods in relevant period, there is a significant gap between the purchases and the sales of beer and wine considering how little variation there was in its inventory from one year end to another?...

[35] All circumstances must be considered in determining whether the Minister was justified in using an alternative audit method. In this case, Samrat did not produce any document in support of inventory taking. The auditor, Mr. Richard, noted that the ratio of input tax credits claimed to the GST collected by Samrat is very high, between two to three times higher than normal in the industry. From the beginning, Samrat had financial difficulties and was always operating at a deficit. Each year, the payroll reported by the company was very low for the eight to ten employees that the company employed. The cost of power was very high compared to the industry standard. Although Hadi did the company's accounting himself, he relied only on the sheets prepared by Shamsuddin and Moinuddin, which indicated the amount of income without considering any of the supporting documents. Hadi never reviewed the sales invoices during the preparation of the financial statements. In the circumstances, even if the books, records and financial statements are adequate and well kept, these books, records and financial statements must also be reliable and reflect the financial reality of the business. The appellants cannot claim that the books, records and financial statements of Samrat were complete, adequate and reliable when Samrat kept no records of the loss of alcohol or the quantity of alcohol given in promotion, with a very high value of supposedly 30% to 35% of the value of alcohol purchased. The sale of alcohol can generate great profits. The insufficiency of internal control of alcohol in this case calls into question the reliability of Samrat's books and records. In my view, given all the circumstances, the Minister was justified in using an indirect auditing method with respect to Samrat.

[36] The appellants challenge the reliability of this alternative method. They suggest that the Minister should have called an expert witness at the hearing so as to show that the premises on which the audit method is based are reliable. As Mr. Rossignol indicated, the alternative audit method used by the Minister in this case has been recognized by the courts for some years, without expert testimony. Mr. Rossignol referred in Court to several decisions where the indirect audit method used in this case was confirmed by the Tax Court of Canada: see *9100-8649 Québec inc.*, *supra*, (confirmed by the Federal Court of Appeal, [2014]

F.C.J. No. 131 (QL), 2014 FCA 20), *Restaurant Place Romaine inc.*, *supra*, and *9110-1568 Québec Inc v. Canada*, [2014] T.C.J. No. 436 (QL), 2009 TCC 554 (CanLII).

[37] In this case, I must point out that the appellants themselves did not call witnesses to refute Mr. Richard's testimony or the methodology that he used. The appellants did not propose another more reliable method and did not provide more clearly accurate data than the results produced by the alternative method.

[38] In *Ruest v. Canada*, [1998] T.C.J. No. 798 (QL), [1998] GSTC 112, 1998 CanLII 649, Judge Tardif found that the taxpayer did not discharge her burden of showing that the assessment was ill-founded as instead of bringing forward arguments to support her position, she chose to focus on discrediting the respondent's work . It is up to the appellants to prove that the method used was not valid. Judge Tardif established the following:

> [25] In such matters, the burden of proof is on the person challenging the validity of the assessment, which generally results from an audit followed by discussions and negotiations.
>
> [26] In other words, if the appellant does not prove that the assessment, which is presumed valid, is incorrect, the Court must simply confirm it. The appellant must prove this on a balance of evidence; thus, proof beyond a reasonable doubt is not necessary. However, it is essential that the balance of probabilities support the arguments underlying the appeal.
>
> [27] Such proof generally requires the involvement of witnesses whose testimony is supplemented and confirmed by adequate documentary evidence. It may sometimes be helpful to call one or more experts. The evidence must be coherent, clear and above all credible and plausible.
>
> [28] In the instant case, the appellant's evidence was totally deficient and without foundation; she chose to focus her energies on discrediting the respondent's work. She forgot that she was legally obliged to have, at all times, records supplemented by the appropriate documentation allowing the quality of her administration as a fiduciary of the government to be established and defined.
>
> …
>
> [30] It may seem excessive for such a burden to be imposed on some taxpayers, but it can be explained and justified by the fact that our society puts its trust in its citizens, who must self-assess. Persons with such a responsibility have to understand that they are important players who are directly involved in good government management. In this regard, they are obliged to have, at all times,

> accounting that is clear, precise, detailed and complete so as to make it possible to verify whether their obligations have been properly fulfilled.
>
> [31] Here, the appellant completely failed to fulfil her obligations and must therefore take the consequences of her gross negligence.

[39] I arrive at the same conclusion as Judge Tardif. In this case, the appellants simply disqualified Mr. Richard's work without proving that the alternative method used by him was not valid.

[40] The appellants dispute the percentage awarded by the Minister as losses and promotions. It must be pointed out that it is up to the appellants to submit persuasive evidence in support of their claim that the percentage awarded by the Minister is erroneous. The only contrary evidence provided by the appellants with respect to the percentage of losses of alcohol is an approximation by Moinuddin and Shamsuddin that 30 to 35% of alcohol purchased was lost by theft, waste, drunk by employees, broken bottles, used in the kitchen or in promotions. As I already stated, the appellants provided no adequate documentary evidence in support of this approximation. Samrat had the obligation at all times to have clear, precise, detailed and complete accounting, allowing to check whether its obligations were assumed correctly. It is inconceivable that a restaurant would not keep adequate records to help determine the cost of losses and promotions—a very large expense in this case. The approximation of 30 to 35% is very imprecise and unreliable. The evidence submitted by the appellants in this case does not create the degree of probability required to constitute *prima facie* evidence. I am of the view that the allocation of 10% for losses and promotions allowed by the Minister is very reasonable in the circumstances.

[41] In considering all of the evidence, I find that the Minister was justified in using an indirect method to reconstruct Samrat's income. This method is valid and has been accepted by several of my colleagues. I am also of the view that the appellants have not discharged their burden of proof to establish that Samrat's assessment is not valid. According to subsection 286(1) of the ETA, Samrat had the obligation of having, at all times, records completed by adequate documentation establishing its obligations and responsibilities under the ETA. In the absence of evidence from the appellants that Samrat's assessment, which was presumed to be well-founded, is unfounded, the court must simply confirm the said assessment. The appellants produced no documentary evidence. The appellants' evidence in this respect is deficient and unfounded.

[42] I am of the view that the assessment established regarding Samrat is valid and I confirm the said assessment.

Abida Begum Syed's file

No transfer within the meaning of subsection 325(1) ETA

[43] Abida argued that subsection 325(1) of the ETA does not apply to the circumstances in which she obtained the money. She claims that it was Shamsuddin who gave the money to Abida, not Samrat. The money belonged to Shamsuddin, not Samrat. The section "Capital Stock" on the company's balance sheet is part of the "Shareholders' equity" section. Abida claimed that the shareholders' equity belonged to the shareholders and not to the company. In this case, it concerns redemptions of preferred shares by Samrat. Abida stated that the company reimbursed the funds invested initially by Shamsuddin, without gain or added value. Shamsuddin was a creditor of these amounts retrieved from Samrat. It was open to him to assign them to Abida. She argued that the fact that Shamsuddin had authorized Samrat's direct payment to her changes nothing in this legal reality. Abida relied on article 1557 of the *Civil Code of Quebec*, CQLR c. C-1991 (the CCQ), which provides the possibility of designating a third party to receive the payment due to him as creditor. This article provides:

> [1557] Payment shall be made to the creditor or to a person authorized to receive it for him.
>
> Payment made to a third person is valid if the creditor ratifies it; if it is not ratified, the payment is valid only to the extent of the benefit that the creditor derives from it.

[44] In support of this argument, Abida refers to the decision of my colleague, Justice O'Connor, in *Finch v. Canada*, [2003] T.C.J. No. 389 (QL), 2003 TCC 472.

[45] With respect, I must reject this argument.

[46] The purpose and spirit of section 325 of the ETA are to prevent a taxpayer from transferring property to a person with whom he or she has a non-arm's length relationship in order to thwart Minister's efforts to collect the money which is owed to him; see *Canada v. Livingston*, [2008] F.C.J. No. 360 (QL), 2008 FCA 89, paragraph 18, with respect to section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1

(5th suppl.) (the ITA). Section 160 of the ITA is the equivalent of section 325 of the ETA.

[47] It cannot be disputed that there is a non-arm's length relationship between Abida and Samrat given the non-arm's length relationship between Abida and Shamsuddin—the sole shareholder and director of Samrat. Section 160 of the ITA (and therefore section 325 of the ETA, whose wording is very similar) applies so long as there is a transfer of property by a company controlled by a person with whom the taxpayer has a non-arm's length relationship: see *Christensen v. Canada*, [1998] T.C.J. No. 361 (QL), 98 DTC 1893.

[48] Subsection 325(1) of the ETA applies to a person who transfers property, either directly or indirectly, to a person with whom he or she has a non-arm's length relationship. The evidence shows that Samrat transferred the amounts of money in question directly to Abida through a cheque dated December 23, 2008, in the amount of $60,000 drawn from Samrat's bank account and, through a direct transfer from Samrat's bank account to Abida's bank account in the amount of $50,000 on January 3, 2009. These two transactions constitute direct transfers from Samrat to Abida. These two amounts of money come from the city of Montréal, which paid the amount of $150,000 to Samrat at the termination of the lease that Samrat had with Montréal. A lease is an asset. The lease in question was certainly an asset belonging to Samrat and not to Shamsuddin. Therefore, the amount that Samrat received for the termination of the lease is also Samrat's asset and not Shamsuddin's.

[49] I accept the respondent's argument that as a shareholder of Samrat, Shamsuddin contributed to Samrat by combining contributions. These contributions constitute Samrat's patrimony. The patrimony of the company is separate from that of the appellant Shamsuddin. The sums included in the item "Capital Stock", as well as the retained earnings of the company belong to the company and not to Shamsuddin. Shamsuddin was a shareholder of the company and not a creditor. Therefore, article 1557 of the CCQ does not apply in this case.

[50] I am of the view that the transfers totalling $110,000 that were made by Samrat directly to Abida were made without consideration. I am also of the view that at the time when the transfers were made, Samrat owed the minister a GST debt. Under section 325 of the ETA, the appellant is jointly and severally liable for the payment of the amounts that Samrat is liable for under the ETA up to $53,956.53.

Shamsuddin Syed's file

The assessment is statute barred

[51] The issue of the date on which a person ceases to be a director is often raised in the context of subsection 323(5) of the ETA. This provision provides that the an assessment for an amount payable by a person who is a director shall not be made more than two years after the person last ceased to be a director. Therefore, the date on which a person last ceased to be a director of a company is very important and is sometimes difficult to determine. Everything depends on the facts in the case.

[52] In this case, Shamsuddin was assessed on July 11, 2011, by notice F-032866 under subsection 323(1) of the ETA. Therefore, the issue to determine is whether Shamsuddin last ceased to be the director of the company before July 11, 2009, two years before. If so, the assessment is statute barred by the application of subsection 323(5) of the ETA and Shamsuddin is in no way obliged to pay the respondent the amount of the assessment. If not, he is jointly and severally liable with Samrat to pay the amount and the related interest and penalties.

[53] The Shamsuddin argued that his term as director was terminated at the end of 2008, as he stated in the questionnaire at tab 11 of Exhibit I-3. Samrat was no longer a registrant to collect GST in June 2009, more than two years before the assessment under appeal was issued (see Exhibit A-18). Shamsuddin stated that Samrat was no longer operating after 2008 and only Moinuddin acted for the company for the sole purpose of challenging tax assessments. However, the respondent argued that Shamsuddin never ceased to be the director; he was the director at all times, in law and/or in fact.

Director in law

[54] According to the *Companies Act*, Part IA, CQLR, c. C-38 (the CA), section 123.76, "Notwithstanding the expiry of his term, a director remains in office until he is re-elected, replaced, or removed". In this case, it is admitted by the appellant that no notification of resignation as director was given by him, whether verbally or in writing. According to Shamsuddin, the fact that Samrat ceased its operations ended his term as director and he has done nothing as director since the restaurant ceased commercial activities.

[55] According to the respondent, the mere fact of the expropriation of the premises rented by the company and the company's cessation of operations does not automatically imply that the company ceases to exist and that its director is no longer in his position. As my colleague Justice Bédard observed in *Dufour v. Canada*, [2005] T.C.J. No. 15 (QL), 2005 TCC 9, [2005] GSTC 5, at paragraph 4:

> [4] In my view, a person does not cease to be director of a company from the moment when that company ceases all commercial activities. I believe that it is necessary to refer to the provisions of the *Companies Act* to determine the moment when a person ceases to be a director. In that regard, section 123.76 of that Act sets out that, notwithstanding the expiry of his term, a director remains in office until he is re-elected, replaced, or removed. A director must resign from office by giving notice to that effect. …

[56] Even after Samrat ceased its activities, Shamsuddin was authorized to sign cheques, income tax returns and all documents leading a third party to believe that he was still Samrat's director. The company's Information Statement published at the Registraire des entreprises (see Exhibit I-3, Tab 1, page 3), dated July 30, 2012, indicated that Shamsuddin was still the sole director and president of Samrat at that date. Given the lack of proof of resignation, replacement or removal, I am not persuaded that Shamsuddin ceased to be Samrat's director. His claim is not convincing enough to contradict the registrar's registration. Shamsuddin has the burden of proving his resignation and the date of this resignation given the presumption of the assessment's validity. Therefore, the appellant never ceased to be Samrat's legal director.

De facto director

[57] The respondent also argued that the appellant Shamsuddin continued to act as *de facto* director. The concept of director was aptly explained by Justice Tardif in *Milani v. Canada*, 2011 TCC 488:

> [58] Even if a person has tendered a statutory resignation in proper form, the fact that the person continues to act as a director prevents him from availing himself of subsection 323(5) because he can be considered a *de facto* director in such a case. In this regard, it is helpful to cite Justice Proulx in *Hattem* [*Hattem v. Canada*, 2008 TCC 32], where he quotes from Paul Martel:
>
> > 33 A person who holds himself out to third parties as a director becomes by virtue thereof a de facto director. I quote author Paul Martel in *Précis de droit sur les compagnies au Québec*, 1st ed. (Montréal: Wilson & Lafleur, Martel Ltée, 2000), at pages 465 and 489:

> [TRANSLATION]…
>
> As the name suggests, a *de facto* director will be considered a director where, *in effect*, he usurps the position by engaging in acts that are normally reserved for directors, such as participating in meetings of the board of directors, signing resolutions of the board, making or taking part in management or disposition decisions, giving instructions on behalf of the company, holding himself out to third parties as a director, etc.
>
> …
>
> A director who resigns, but in fact continues to act, and hold himself out to third parties, as a director of the company, risks being considered a *de facto* director despite that resignation, and, as such, remaining subject to the responsibilities that the law imposes on directors.
>
> It should be emphasized, moreover, that resigning directors would do well to ensure that the notice of change of directors form indicating their resignation is duly filed in Quebec City or Ottawa because of the statutory presumption that persons designated as directors in the notice most recently filed with the Inspector General or Director actually hold that position: (QCA, s. 123.31(2) and (3); CBCA, s. 253(2); ALP, s. 62(6). This presumption is, however, rebuttable, and can only be relied upon by third parties who are in good faith.
>
> …
>
> 34 The evidence shows that the appellant continued to hold herself out as a director to the Minister's employees until June 2, 2005. Neither she nor her husband notified the Minister of her purported resignation. Even if this resignation had occurred on the date alleged, the appellant would nonetheless have remained a *de facto* director. The resignation could not have been set up against the Minister, who was unaware of it until the notice of objection. However, on the basis of the evidence in the instant case, it is my opinion that the resignation did not take place on March 22, 2002.

[59] According to the case law, a person cannot have ceased being a director if he acted as a *de facto director* during the period in question. [*Sandhu v. R.*, 2009 TCC 175 at para. 47]. This rule is so fundamental that it can negate all the effects and benefits of a proper resignation.

[60] This is obviously a clear provision that is very easy to understand. The resignation must be genuine, and the evidence of its genuineness must be decisive, reliable and credible.

[58] In this case, Shamsuddin never resigned and had never stopped managing the internal business of the company. The evidence shows that since the end of 2008, he continued to carry out a number of measures to manage Samrat's business. The respondent identified them as follows:

(a) on December 23, 2008, he signed a cheque in the amount of $60,000 issued by Samrat to his sister-in-law, Abida (see Exhibit I-3, Tab 4);

(b) on January 3, 2009, he signed a transfer voucher for $50,000 from Samrat to Abida (see Exhibit I-3, Tab 5);

(c) on September 8, 2009, he signed the Quebec income tax return for Samrat in which he declared that he was the director and president of this company for the fiscal year ending on December 31, 2008, accompanied by the company's financial statements also signed by Shamsuddin as "Director" (see Exhibit I-3, Tab 3, form CO-17 of 2008);

(d) on September 22, 2009, the "Déclaration de renseignements pour le registre des entreprises 2008" form for the year 2008 for the company was filed at the enterprise register without amendment (see Exhibit I-3, Tab 2);

(e) on November 2, 2009, the appellant personally closed Samrat's bank account (see Exhibit I-3, Tab 12);

(f) on February 15, 2010, he signed as president of Samrat, the "Power of Attorney, Authorization to Communicate Information, or Revocation" form to mandate a lawyer to represent it in the company's objection (see Exhibit I-5, Tab 2, second last page);

(g) on September 20, 2010, he signed the company's Quebec income tax return in which he declared that he was the director and president of Samrat for the fiscal year ending on December 31, 2009, accompanied by the company's financial statements also signed by Shamsuddin as "Director" (see Exhibit I-3, Tab 3, form CO-17 of 2009);

(h) on November 22, 2010, he signed the "Information Statement" form for the company in which he declared that he was director and

president of the company for 2009 at the Registraire des entreprises (see Exhibit I-3, Tab 2);

(i) on January 14, 2011, he filed the "Information Statement" form for 2009 for the company with the Registraire des entreprises (see Exhibit I-3, Tab 2);

(j) on December 12, 2011, he signed the company's Quebec income tax return in which he declared that he was the director and president of the company for the fiscal year ending on December 31, 2010, accompanied by the company's financial statements, also signed by Shamsuddin as "Director" (see Exhibit I-3, Tab 3, form CO-17 of 2010);

(k) on January 5, 2012, the "Déclaration de mise à jour annuelle" form for the year 2010 was filed with the Registraire des entreprises for the company.

[59] Therefore, we see that Shamsuddin continued to present himself as a director or officer of Samrat until January 5, 2012. In *Snively v. Canada*, [2011] T.C.J. No. 181 (QL), 2011 TCC 196, [2011] G.S.T.C. 78, Justice Paris of the Tax Court of Canada, referring to the decision in *Bremner v. Canada*, 2007 TCC 509, [2007] G.S.T.C. 113, affirmed by the Federal Court of Appeal [2009] T.C.J. No. 569 (QL), 2009 FCA 146, 393 N.R. 61, indicated at paragraphs 35 and 36, that it is not necessary for the director's activities to be extensive to show continued management of the corporation:

> [35] The Court of Appeal also specifically endorsed the finding that the activities of the deemed director need not be extensive to show continued management of the corporation:
>
> > 6. The Tax Court Judge found that in corresponding with the CCRA, the appellant demonstrated that he was still managing the actions of the Corporation, however minimal those actions may have been.
> >
> > 7. In our view, this finding is unassailable and is sufficient to dispose of the appeal, since it establishes that the two year limitation period for the assessment would not expire before April of 2003, a date subsequent to October 1, 2002, the date of the assessment.
>
> [36] In the case at bar, there is evidence to show that after October 10, 2003, the Appellant took a number of steps that I would characterize as management of JDR's affairs:

- he caused a Notice of Objection to be filed by JDR to the GST assessments that were made in February 2004 and instructed counsel on behalf of JDR in relation to the objection;

- he instructed JDR's accountants to prepare financial statements and tax returns for JDR;

- he signed those tax returns; and

- he signed the business consent form authorizing the CRA to disclose information about JDR to Inch Hammond;.

[60] Clearly, Shamsuddin never ceased to be the *de facto* director of the company since he engaged in actions and continued to act as the president and director of the company until January 5, 2012.

[61] I find that Shamsuddin never ceased to be the director of the company either in law or in fact. He performed, and/or made his brother responsible for performing on his behalf, multiple acts as director at least until January 5, 2012. Therefore, according to subsection 323(5) of the ETA, since his assessment was made on July 11, 2011, I must conclude that Shamsuddin continued to act as *de facto* director within two years prior to the assessment. I am of the view that the assessment was not statute barred and Shamsuddin cannot avail himself of the provisions of subsection 323(5) of the ETA.

The care, diligence and skill defence

[62] According to subsection 323(3) of the ETA, a director is not liable if he exercised the degree of care, diligence and skill to prevent the failure to pay the taxes that a reasonably prudent person would have exercised in comparable circumstances.

[63] In *Attia v. Canada*, 2014 TCC 46, my colleague Justice Bédard described the legal framework applicable to the defence set out in subsection 323(3) of the ETA:

> [10] The legal framework applicable to the care, diligence and skill defence set out in subsection 323(3) of the ETA was recently briefly explained as follows by the Federal Court of Appeal in *Canada v. Buckingham* and *Balthazard v. Canada*:
>
> a. The standard of care, skill and diligence required under subsection 323(3) of the *Excise Tax Act* is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461. This

> objective standard has set aside the common law principle that a director's management of a corporation is to be judged according to his or her own personal skills, knowledge, abilities and capacities. However, an objective standard does not mean that a director's particular circumstances are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard.
>
> b. The assessment of the director's conduct, for the purposes of this objective standard, begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.
>
> c. In circumstances where a corporation is facing financial difficulties, it may be tempting to divert these Crown remittances in order to pay other creditors and thus ensure the continuity of the operations of the corporation. That is precisely the situation which section 323 of the *Excise Tax Act* seeks to avoid. The defence under subsection 323(3) of the *Excise Tax Act* must not be used to encourage such failures by allowing a care, diligence and skill defence for directors who finance the activities of their corporation with Crown monies, whether or not they expect to make good on these failures to remit at a later date.
>
> d. Since the liability of directors in these respects is not absolute, it is possible for a corporation to fail to make remissions to the Crown without the joint and several, or solidary, liability of its directors being engaged.
>
> e. What is required is that the directors establish that they were specifically concerned with the tax remittances and that they exercised their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the amounts at issue [not that they show that they subsequently corrected the failures].

[64] In this case, the evidence shows that from the beginning, the company had financial difficulties, as it always operated at a deficit. The appellant Shamsuddin was certainly aware of its financial difficulties, because he was monitoring on a daily basis the operation of the restaurant. In such a context, it is up to the appellant to show diligence.

[65] Shamsuddin admits that he was not perfect and could have done better, taking detailed records of the inventory and drinks given in promotion; but he did not do so. Shamsuddin claims that this does not mean that he did not act with the

care, diligence and skill required by paragraph 323(3) of the ETA. He stated that he was still reasonably prudent by compiling himself the sales, regularly monitoring the restaurant's operations, hiring an accountant to make the statements and by keeping detailed accounting.

[66] In my view, the accounting was not complete and detailed. There was a lack of internal controls. The clients' bills were inadequate; they were not numbered and did not indicate when an alcoholic beverage was given to the client in promotion. The invoices for expenses were given to the accountant for accounting, but not the clients' sales bills. I must ask myself, why not? Shamsuddin had no documents in support of the inventory taking, not only for alcohol, but also generally. Shamsuddin kept no record of alcohol sold or given in promotions, or in free drinks, or drunk by employees or used in the kitchen. As I already indicated, alcohol has the potential to make large profits for a restaurant. I find it inconceivable that a restaurant would keep no record of sales, losses or promotion with respect to alcohol; especially when it is alleged that 30% to 35% of alcohol purchased leaves the restaurant, either in losses or promotions. It is up to Shamsuddin to show that alcohol not recorded was part of losses and promotions and not sales, which he did not succeed in doing. This lack of accounting shows that he had a lack of due diligence.

[67] I am of the view that Shamsuddin, as director of the restaurant, did not act with the care, diligence and skill that a reasonably prudent person would have shown to prevent Samrat's failure to pay the GST collected from the restaurant's clients. Therefore, he cannot rely on the defence set out in subsection 323(3) of the ETA.

[68] Following the concession made by the Minister in the Samrat case, the amount owed by the director on July 11, 2011, is $66,666.39, i.e. $43,497.78 in taxes, $8,590.38 in penalties and $14,578.23 in interest. Therefore, Shamsuddin is jointly and severally liable, with Samrat, to pay this amount to the Minister under section 323 of the ETA.

Conclusion

[69] Having considered all the evidence, I find, on a balance of probabilities, the following:

(a) The Minister was justified in using an indirect method to reconstruct Samrat's income. I am also of the view that the appellants did not

discharge their burden of proof to establish that Samrat's assessment is ill-founded. I am of the view that the assessment established with respect to the company Buffet Samrat Inc., in accordance with the consent judgment made by Justice Jorré of the Tax Court of Canada dated April 26, 2013, in case number 2011-1092(GST)G, is valid and I confirm the said assessment.

(b) I am of the view that the transfers totaling $110,000 that were made by Samrat directly to Abida were done without consideration. I am also of the view that at the time when the transfers were made, Samrat owed the Minister a GST debt. Under section 325(1) of the ETA, the appellant Abida is jointly and severally liable to pay the sums for which Samrat is liable under the ETA, for a maximum of $53,956.53.

(c) I find that the appellant Shamsuddin did not discharge his burden of proof to demolish the accuracy of the Minister's assumptions: see *Hickman Motors Ltd v. Canada*, [1997] 2 S.C.R. 336. I find that Shamsuddin never ceased to be the director of the company either in law or in fact. I am persuaded that Shamsuddin did not resign from the position of director, he was not replaced and he was not relieved of his powers and obligations as director of Samrat. Therefore, he was at all times a *de jure* director. I am also convinced that, despite the fact that Samrat ceased its commercial operations in December 2008, Shamsuddin performed and/or appointed his brother to perform on his behalf, multiple actions as director until January 5, 2012. Therefore, he was a *de facto* director at all relevant times. I am of the view that the assessment is not statute barred and the appellant Shamsuddin cannot avail himself of the provisions of subsection 323(5) of the ETA.

(d) I am of the view that the appellant Shamsuddin, as director of the restaurant, did not act with the care, diligence and skill that a reasonably prudent person would have shown to prevent Samrat's failure to pay the GST collected from the restaurant's clients. Therefore, he cannot avail himself of the defence provided in subsection 323(3) of the ETA.

[70] For these reasons:

(a) The appeal in the file numbered 2012-4656(GST)I regarding Abida Begum Syed is dismissed.

(b) The appeal in the file numbered 2012-2292(GST)I regarding Shamsuddin Syed is allowed in part. The matter is referred back to the Minister of National Revenue for reconsideration and reassessment so as to reflect the consent judgment made by Justice Jorré of this Court in the file of *Buffet Samrat Inc., (2011-1092(GST)G)*.

Signed at Kingston, Ontario, this 22nd day of October 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 31st day of March 2015
Catherine Jones, Translator

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COURT FILE NOS.:	2012-2292(GST)I 2012-4656(GST)I
STYLE OF CAUSE:	SHAMSUDDIN SYED v. HER MAJESTY THE QUEEN ABIDA BEGUM SYED v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
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