Docket: 2014-4563(GST)G

BETWEEN:

TRIPLE M METAL LP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 5, 2016, in Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Louise Summerhill
Counsel for the Respondent:	Meghan Cowan Charles Camirand

JUDGMENT

IN ACCORDANCE with the Reasons for Judgment attached THIS COURT ORDERS THAT:

1. the appeal is allowed;
2. the Appellant is a "selected person" within the meaning of section 236.01 of the *Excise Tax Act*, RSC 1985, c. E-15, as amended and related Regulations and agreements;
3. the Appellant is not required to recapture the specified provincial input tax credit for its baling and shredding operations for the reporting periods from August 1, 2010 to September 30, 2010;
4. the matter is referred back to the Minister for reconsideration and reassessment; and
5. the Court shall receive brief written submissions from the parties on the issue of costs within 30 days of the date of this judgment.

Signed at Ottawa, Canada, this 23rd day of December 2016.

"R.S. Bocock"

Bocock J.

Citation: 2016 TCC 293
Date: 20161223
Docket: 2014-4563(GST)G

BETWEEN:

TRIPLE M METAL LP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bocock J.

I. Introduction, Background and Issues

a) Harmonization of Provincial Retail Sales Tax and Federal goods and service tax

[1] In July of 2010, the Province of Ontario ("Ontario") integrated its provincial retail sales tax ("RST") with the federal goods and services tax ("GST"). The two systems were not symmetrical. This required coordination and compromise within the two merging regimes. This coordination was effected through a comprehensive integrated tax coordination agreement between Canada and Ontario (the "Agreement"). The compromises included forbearance of certain RST revenues by Ontario. Recoverable input tax credits ("ITCs") within the GST regime, *per se* a consumption tax ultimately exigible upon the final consumption of goods and services, meant certain RST previously collected by Ontario disappeared within the chain of production. This occurred because within the chain of production, a registrant GST taxpayer could deduct from GST owing on goods and services sold during a reporting period, the GST paid by it on goods and services acquired. Such GST paid by a supplier on goods and services it acquires is aggregated into a total ITCs for the reporting period. The RST regime knew no such tax credit. Integration

and compromise were required when the two tax systems met to form the harmonized sales tax regime ("HST").

b) Preserving Short-term Provincial RST Revenue through Recapture

[2] To the extent Ontario wanted to preserve its revenue from RST on certain sales within the new HST (and its component newly renamed provincial value added tax ("PVAT")), Ontario denied ITCs to certain large businesses ("prescribed persons") on a certain basis ("prescribed manner") for certain properties or services ("specified property or service"). Instead, it required those prescribed persons to recapture (or add back) a calculated amount ("specified provincial input tax credit or "SPITC") for a certain time ("ITC Repayment Period"). This complicated process was the compromise which ultimately allowed ITCs on HST in respect of all goods and services acquired, but only after Ontario preserved a portion of its former RST revenue for 5 years.

[3] Some of these defined terms were further specifically refined: (i) Annex C of the Agreement defined "specified property or services" as energy if not purchased by farms or used to produce goods for sale; (ii) "prescribed persons" were businesses with annual taxable sale in excess of $10 million; and, (iii) "specified production energy", was not subject to SPITCs and the related recapture.

[4] It is within this last exemption that certain "selected persons" were not required to recapture the ITCs on energy used in production (the "production exemption"), thereby reducing the mandated inclusion of the SPITC (the "SPITC Reduction") and thereby increasing the total ITCs which could be claimed for such users. This production exemption forms a primary topic in this appeal because, although selected persons must consume or use the energy in production, there is a further exception which states that selected persons means, among others, a person "that is <u>not</u> a scrap metal dealer" (the "scrap metal dealer exception").

[5] A further constraint on the scope of the denial of the production exemption was enacted. The Agreement incorporated by reference a "cap" on the specified persons, specified property and specified services. Annex C of the Agreement limited this scope of persons, property and services, to those denied input tax refunds ("ITRs") in the Province of Quebec as at a certain date.

c) Issues

[6] The Appellant ("Triple M") asserts that certain of its operations are not that of a scrap metal dealer. The Respondent says it is a scrap metal dealer, period. The general issue within this appeal is whether Triple M is subject to the temporary recapture of the full provincial portion (8/13) of the HST in respect of all its energy costs used in the processing of scrap metal for the reporting periods from August 1, 2010 to September 30, 2010 (the "reporting periods"). In short, does the scrap metal dealer exception apply to Triple M to deny the "production exemption" it utilized in respect of certain electricity purchased in its business?

II. The Appellant's Business

a) Generally

[7] Triple M's undertaking primarily relates to the collection, sorting, compacting and rendering of scrap metal for use in the production of steel. Within the rendering process, after sorting, shearing and compacting (the "aggregating activities") Triple M undertakes various baling and shredding processes which very effectively further separate, re-form, pulverize and collate ferrous and non-ferrous components of scrap metal (the "processing activities"). The ferrous, iron bales or "fill" are then sent to steel mills who use the compacted, pulverized and sorted iron in production. The non-ferrous or non-iron residue is sold to Triple M's other non-steel producing customers for various purposes. Triple M's primary undertaking remains the rendering of discarded automobiles, white goods and other machinery into ferrous and non-ferrous units for sale to distinct groups of subsequent producers who use the goods in two distinctly sorted ferrous and non-ferrous states for further production. As a complete business, this requires both aggregating activities and processing activities.

b) Specific Recycling Activities

[8] Triple M asserts that it is not required to recapture the SPITCs in respect of the energy costs solely for its baling and shredding operations because these processing activities make it a recycler. Such processing activities fall within the production exemption. Consistently, it has recaptured the SPITCs with respect to the balance of its other activities which include the mere aggregating activities. There is no dispute with respect to the quantum of the allocation between the processing activities comprising the baling and the shredding operations and the other activities in respect of which the SPITCs have been recaptured. The dispute is whether the ITCs related solely to the processing activities are or are not subject to recapture as SPITCs.

III. Legislative Background and Regime

[9] The legislative regime requires examination among legislation, regulations and agreements spanning three jurisdictions: Canada, Ontario and Quebec. Any decision in this appeal requires an incorporation of these source references, highlighted by underscoring below for emphasis.

a) ETA and the *Regulations*

[10] A main provision at issue in this case is subsection 236.01(2) of the *ETA*. It provides that:

> (2) If a sales tax harmonization agreement with the government of a participating province relating to the new harmonized value-added tax system allows for the recapture of input tax credits, in determining the net tax for the reporting period of a large business that includes a prescribed time, the large business shall add all or part, as determined in a prescribed manner, of a specified provincial input tax credit of the large business.

[11] In turn, the key terms (and specifically the SPITC) are further defined in subsection 236.01(1) of the *ETA* and relevant provisions in the *Regulations* as follows:

> 236.01 (1) The following definitions apply in this section.
>
> *large business* means a prescribed person or a person of a prescribed class. (grande entreprise)
>
> *specified property or service* means a prescribed property or service, or property or a service of a prescribed class. (bien ou service déterminé)
>
> *specified provincial input tax credit* means
>
> (a) the portion of an input tax credit of a large business in respect of a specified property or service that is attributable to tax under subsection 165(2) [provincial portion of the HST], section 212.1 or 218.1 or Division IV.1 in respect of the acquisition, importation or bringing into a participating province of the specified property or service; and
>
> (b) a prescribed amount in respect of an input tax credit of a large business that is attributable to tax under subsection 165(2), section 212.1 or 218.1 or Division IV.1 or in respect of an amount that would be such an input tax credit if prescribed conditions were satisfied in prescribed circumstances. (crédit de taxe sur les intrants provincial déterminé).

[12] A "prescribed person" for the purpose of the definition of a "large business" in subsection 236.01(1) of the *ETA* relevant to this appeal, in general, is "a registrant whose recapture input tax credit threshold amount in respect of the recapture period exceeds $10,000,000" pursuant to subsection 27(1) of the *Regulations*[1].

[13] The term "specified property or service" is further defined in paragraph 28(1)(e) of the *Regulations*:

> 28(1) For the purposes of the definition of *specified property or service* in subsection 236.01(1) of the Act, the following property and services are prescribed:
>
> …
>
> (e) specified energy that is acquired in, or brought into, a specified province other than qualifying heating oil, as defined in section 1 of the *Deduction for Provincial Rebate (GST/HST) Regulations*;
>
> …

[14] The amount of the "specified provincial input tax credit" (the "**SPITC**") subject to recapture refers to, in this case, the amount of the provincial portion of the HST, i.e. the 8/13 Ontario portion of the HST (tax under subsection 165(2) of the *ETA*) pursuant to subsection 29(1) of the *Regulations*, which states that:

> 29 (1) For the purposes of paragraph (b) of the definition *specified provincial input tax credit* in subsection 236.01(1) of the Act, a prescribed amount in respect of an amount that would be an input tax credit of a person in respect of a specified property or service attributable to tax under subsection 165(2) or section 212.1 or 218.1 of the Act or Division IV.1 of Part IX of the Act is all of the amount that would be such an input tax credit if
>
> (a) in the case where the specified property or service is acquired, or brought into a specified province, by the person for consumption, use or supply exclusively in the course of commercial activities and, as a result of the consumption, use or supply exclusively in the course of commercial activities, no tax under section 218.1 of the Act or Division IV.1 of Part IX of the Act is payable in respect of the acquisition or bringing in, tax under that section or that Division had been payable in respect of the acquisition or bringing in;

[1] Pursuant to subsections 27(3) and (4) of the *Regulations*, the "recapture input tax credit threshold amount" is generally the total of all consideration that became due or was paid to the registrant in the last fiscal year prior to the reporting period at issue that is subject to the recapture treatment.

…

[15] Subsection 31(3) of the *Regulations* sets out the "prescribed manner" pursuant to which a person who is a large business must add or recapture the SPITC under subsection 236.01(2) of the *ETA* in respect of "specified energy" consumed by the person in the course of commercial activities. The relevant portions of subsection 31(3) of the *Regulations* are as follows:

> (3) If, at any time during a reporting period of a person, the person is a large business, the particular time prescribed by section 30 in respect of a specified provincial input tax credit of the person in respect of specified energy is in the reporting period and the person is a large business at the particular time, for the purposes of subsection 236.01(2) of the Act, the amount to be added to the net tax of the person for the reporting period in respect of the specified provincial input tax credit is determined by the formula
>
> ***A*** × ***B***
>
> where ***A*** is
>
> …
>
> (d) in any other case, the amount that would be the specified provincial input tax credit in respect of the specified energy if the specified energy did not include specified production energy and specified research energy; and
>
> ***B*** is the recapture rate applicable at the specified time in respect of the specified provincial input tax credit.[2]

[16] In turn, the term "specified energy" is defined pursuant to section 26 of the *Regulations*: specified energy means (a) electricity, gas and steam; and (b) anything (other than fuel for use in a propulsion engine) that can be used to generate energy (i) by way of combustion or oxidization, or (ii) by undergoing a nuclear reaction in a reactor for the generation of energy. (forme d'énergie déterminée).

[17] Subsection 31(1) of the *Regulations* sets out the following definitions in respect of the application of the above-mentioned formula which the Minister argues excludes Triple M:

> *selected person* means a person that is not

[2] Pursuant to section 26 of the *Regulations*, the recapture rate in respect of the Ontario SPITC is 100% for the period from July 1, 2010 to June 30, 2015.

(a) a financial institution;

(b) a hotel, bar, coffee shop or restaurant;

(c) an auto repair shop; or

(d) a scrap metal dealer. (personne désignée)

specified production energy means the part of specified energy acquired in, or brought into, a specified province by a selected person for consumption or use by the selected person in the production of tangible personal property intended for sale or in the production of production equipment used to produce such tangible personal property, but does not include the part of the specified energy acquired in, or brought into, the specified province for consumption or use by the selected person in equipment for the air conditioning, lighting, heating or ventilating of the production premises or in other equipment if that consumption or use is not integral to that production. (énergie déterminée pour la production)

[18] The term "production" is defined in section 26 of the *Regulations*:

production means an activity (other than the assembling, processing or manufacturing of tangible personal property in a retail establishment or the storage of finished products) that is

(a) the assembling, processing or manufacturing of particular tangible personal property to create other tangible personal property that is different in nature or character from the particular tangible personal property;

...

b) Comprehensive Integrated Tax Coordination Agreement (the "Agreement")

[19] The Agreement is an example of a "sales tax harmonization agreement" contemplated under subsection 123(1) of the *ETA* and subsection 2(1) of the *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c F-8.

[20] The relevant provisions of the Agreement are as follows:

PART I
Interpretation

1. In this Agreement,

…

"PVAT", in respect of a participating province, means the provincial component of tax payable under Part IX of the Excise Tax Act that is imposed, in addition to the CVAT, in respect of the participating province;

…

3. The following are the Annexes that are attached to, and that form an integral part of, this Agreement:

Annex "A" - Revenue Allocation
Annex "B" - Provincial Flexibility in respect of Rebates
Annex "C" - Transitional Measures in respect of the Province

PART II
Implementation

4. Subject to the requisite legislative approvals, the Parties agree:
(a) to work collaboratively and in a timely manner towards the imposition of the PVAT in respect of the Province[3];
(b) that Canada will make best efforts to introduce, on or before March 31, 2010, the necessary legislative amendments to give effect to the Agreement;
(c) that the PVAT in respect of the Province will be implemented on July 1, 2010;
…

PART XVII
Province-Specific & Transitional Measures

55. The agreement of the Parties in respect of transitional assistance is set out in Annex "C".

56. The agreement of the Parties in respect of input tax credit recapture for PVAT in respect of the Province, including transitional revenues from such recapture, and in respect of other transitional measures, is set out in Annex "C".

…

ANNEX "C"
TRANSITIONAL MEASURES IN RESPECT OF THE PROVINCE

[3] Province refers to the Province of Ontario.

…

Input Tax Credit Recapture for PVAT in respect of the Province

17. Where the Province provides Canada, prior to the date this Agreement is entered into, with a defined class of specified persons in respect of whom, and a select list of specified property and specified services in respect of which, the Province desires a payment by each of those specified persons of an amount equivalent to input tax credits of the specified person, at a specified percentage, relating to PVAT in respect of the Province on the specified property and specified services, the Parties agree that, for a period of five years commencing on the Implementation Date (referred to as the "ITC Repayment Period"), an amount equivalent to those input tax credits will be paid at the specified percentage of 100% by those specified persons in respect of that specified property and those specified services if, with all the necessary changes that the circumstances may require, the scope of those specified persons, that specified property and those specified services, captured during the ITC Repayment Period, does not exceed the scope of the persons, property and services that are denied input tax refunds in respect of the Quebec Sales Tax, pursuant to An Act Respecting the Quebec Sales Tax, R.S.Q c. T-0.1, as it read on March 10, 2009.

…

22. On and from the Implementation Date, subject to the definitions mutually agreed upon between the Parties and unless otherwise amended in accordance with the Agreement, the Parties agree that in general terms the items on the select list of specified property and specified services will be:

(a) energy, except where purchased by farms or used to produce goods for sale;
(b) telecommunication services other than internet access or tollfree numbers;
(c) road vehicles weighing less than 3,000 kg (and parts and certain services) and fuel to power those vehicles; and
(d) food, beverages and entertainment.

23. On and from the Implementation Date, subject to the definitions mutually agreed upon between the Parties and unless otherwise amended in accordance with the Agreement, the Parties agree that in general terms the defined class of specified persons will be businesses with annual taxable sales in excess of $10 million and financial institutions.

c) Quebec ITR Restriction Regime

[21] The relevant provisions relating to the restriction of ITRs, as stated in section 17 of Annex "C" to the *Agreement*, *supra*, are set out in Part V, *An Act*

Respecting the Quebec Sales Tax, RSQ, T-0.1 ("***QSTA***") as it read on March 10, 2009. In particular, section 206.1 of the *QSTA*[4] sets out the relevant ITR restriction:

> **206.1.** In determining an input tax refund of a registrant, no amount shall be included in respect of the tax payable by the registrant in respect of the supply or bringing into Québec of the following property or services:
>
> …
>
> (3) electricity, gas, combustibles or steam;
>
> …

[22] However, section 206.3 of the *QSTA* provides for certain exemptions to the restriction stipulated under the above-mentioned paragraph 3 of section 206.1:

> **206.3** Paragraph 3 of section 206.1 does not apply to the portion of electricity, gas, combustibles or steam that is, without reference to sections 43 and 44, used for a purpose such that the exemption provided for in paragraph *aa* of section 17 of the Retail Sales Tax Act (chapter I-1) would apply in respect thereof but for section 49 of that Act.
>
> For the purposes of the first paragraph, the expressions "sales of electricity, gas or fuel" and "other than meals and services including telephone service" in paragraph aa of section 17 of the Retail Sales Tax Act (RSQ, chapter I-1) shall read as "sales of electricity, gas, combustibles or steam" and "other than property intended to be incorporated in an immovable by that person, meals, mobile homes and services including telephone service", respectively.

[23] Paragraph (aa) of section 17 of the Quebec *Retail Sales Tax Act*, c I-1 ("***QRSTA***")[5] provides a retail sales tax exemption in respect of the acquisition of certain energy used in the production of movable goods intended for sale (the "**RST Exemption**"):

> **17.** The tax provided for by this chapter does not apply to the following:

---

[4] Sections 206.1 and 206.3 of the *QSTA* were initially repealed by SQ 1995, c 63, s 350 effective August 1, 1995. The repeal is, however, only effective in respect of registrants that are small and medium-sized enterprises. The repeal of 206.1 and 206.3 of the *QSTA* were postponed indefinitely for large businesses pursuant to SQ 1997, c 85, s 729. As of March 10, 2009, the date stipulated in the *Agreement*, the above-mentioned provisions were still in force and effect for large businesses.

[5] The *QRSTA* has long been repealed and replaced by the *QSTA*, a non-cascading value-added tax system similar to the GST/HST. However, while the retail sales tax no longer applies to any sale after June 30, 1992, specific provisions in the *QRSTA* are still applicable to the extent that they have been incorporated into the *QSTA*.

…

(aa) … sales of electricity, gas or fuel which a person of a category other than those determined by the Minister under section 20 uses to produce movable property other than meals and services including telephone service, intended for sale or for the design or production of production equipment or conditioning materials used for the production of such movable property, either as an agent of production or to operate production equipment; this exemption does not apply to sales of electricity, gas or fuel used in equipment for the air conditioning, lighting, heating or ventilation of the production site;

...

[24] Section 20 of the *QRSTA* further provides that:

20. For the purposes of paragraphs z and aa of section 17, the categories of persons which the Minister may determine are those whose activities consist mainly of:

(a) rendering personal or professional services, or

(b) selling movable property they have not produced but to which they may have made certain changes before delivery to the consumer.

The determination provided for in the first paragraph shall be effected by publication of a notice in the *Gazette officielle du Québec* and shall have effect from the day of such publication.

[25] "Scrap metal dealers" were determined by the Minister of Revenue as an entity that falls within the confines of paragraph (b) of section 20 of the *QRSTA* pursuant to a notice published in the *Gazette officielle du Québec* in 1983 (the "**1983 Notice**"):[6]

Notice

Categories of persons whose principal activity is furnishing services or selling movable property

Retail Sales Tax Act (RSQ, c I-1, s. 20)

Under section 20 of the Retail Sales Tax Act, the Minister of Revenue has decided that:

[6] *Gazette officialle du Québec*, June 29, 1983, Vol 115, No. 28, at 2272.

(1) The categories of persons whose activities consist principally of supplying personal or professional services are the following:

…

financial institutions;

…

(2) That the categories of persons whose activities consist principally of selling movable property that they have not produced, but to which they may have made changes before delivery to the consumer are the following:

Operators of establishments within the meaning of the Meals and Hotels Tax Act (RSQ, c T-3);

…

Garage operators;

…

Scrap metal dealers;

…

A person who is in any of the categories mentioned may not enjoy the exemption prescribed by paragraphs z and aa of section 17 of the Retail Sales Tax Act.

[26] Pursuant to paragraph 23 of section 2 of the *QRSTA*, the term "consumer" under the *QRSTA* has the same meaning as that assigned by section 123 of the *ETA*, which states that:

"*consumer*" of property or a service means a particular individual who acquires or imports the property or service for the particular individual's personal consumption, use or enjoyment or the personal consumption, use or enjoyment of any other individual at the particular individual's expense, but does not include an individual who acquires or imports the property or service for consumption, use or supply in the course of commercial activities of the individual or other activities in the course of which the individual makes exempt supplies.

IV. Parties' Positions

a) Respondent

[27] The Respondent takes the position that Triple M was obligated, pursuant to subsection 236.01(2) of the *ETA* to recapture or repay the full provincial portion of the ITCs, *i.e.* 8/13 of the HST paid in respect of its electricity costs incurred in the course of its scrap metal processing activities because of the following:

> a. The Agreement between Canada and Ontario, a participating HST province, is a "sales harmonization agreement … [which] allows for the recapture of input tax credits"[7] pursuant to section 56 of the *Agreement* as well as Annex "C" to the *Agreement*.
>
> b. Triple M is a "large business" within the meaning of subsections 236.01(1) and (2) of the *ETA* since the "total of all consideration that was paid or became due to Triple M in the fiscal year ending before the periods at issue for the sale of scrap metal is over $10 million" and therefore Triple M met the required recapture input tax credit threshold amount for the purposes of the definition of "large business" in the *Regulations*.
>
> c. The electricity acquired and used by Triple M in Ontario falls within the definition of "specified property or service" under subsection 236.01(1) of the *ETA*[8].
>
> d. The provincial portion of the ITCs claimed by Triple M in respect of the electricity acquired in or attributable to Ontario is a SPITC within the parameters of subsection 236.01(1) of the *ETA* and subsection 29(1) of the *Regulations*.

[28] Therefore, pursuant to subsection 236.01(2) of the *ETA*, the SPITC in respect of the Triple M's ITCs claimed in relation to its electricity costs in Ontario "shall" be added, or recaptured by the Triple M in determining its net tax for the reporting periods.

[29] Section 31 of the *Regulations* prescribed that Triple M must add the full amount of the SPITC in respect of its electricity costs in its net tax as follows:

> a. … the amount of SPITC in respect of the Triple M's use of electricity shall be added is determined by the formula set out in paragraph 31(3)(d) of the *Regulations*. The formula is ***A x B,*** where ***A*** is the amount of SPITC in respect of specified energy that does not include "specified production energy" and ***B*** is the

[7] *ETA*, s 236.01(2).

[8] To assist with the need to continually page flip: "Electricity" falls under paragraph (a) of the definition of "specified energy" as set out in section 26 of the *Regulations*. "Specified energy" that is acquired in a "specified province", i.e. Ontario, is, in turn, a "prescribed" property or service within the definition of "specified property or service" pursuant to paragraph 28(1)(e) of the *Regulations* and subsection 236.01(1) of the *ETA*.

recapture rate applicable at the specified time in respect of the SPITC, i.e. 100%, as set out in section 26 of the *Regulations*.

b. Pursuant to subsection 31(1) of the *Regulations*, "specified production energy", which reduces *A* in the above-mentioned formula, is "the part of specified energy acquired … by a selected person for consumption or use by the selected person in the production of tangible personal property intended for sale …" (the "**SPITC Reduction**").

c. By its very definition, only a "selected person" can make use of the benefits of the SPITC Reduction in respect of "specified production energy". Pursuant to subsection 31(1) of the *Regulations*, a "selected person means a person that is *not* (a) a financial institution; (b) a hotel, bar, coffee shop or restaurant; (c) an auto repair shop; or (d) a scrap metal dealer."

d. Since Triple M is a scrap metal dealer, it is not a "selected person" under subsection 31(1) of the *Regulations*, and therefore it could not avail itself to the SPITC Reduction in respect of "specified production energy". In other words, Triple M must include or recapture the full amount of the SPITC in respect of its electricity costs.

[30] The term "scrap metal dealer" is not defined under the *ETA* or the *Regulations*. In alleging that Triple M is a "scrap metal dealer", and therefore not a "selected person", the Respondent relies on the ordinary definition of the term and makes the following factual assumptions regarding the Triple M's business activities as a "scrap metal dealer":

(d) Triple M operates many scrap metal yards in Ontario;

(e) As part of its operations, Triple M acquires scrap metal;

(f) The scrap metal is usually processed (shredded, baled or shorn) before it is sold as scrap metal;

(g) The processing of shredding, baling and torching are part of the normal operations of a scrap metal dealer.

[31] Lastly, in response to Triple M's argument, described below, that the *Agreement* incorporating the *QSTA* regime is applicable in this context, the Respondent takes the position that the terms of the *Agreement* were "subject to legislative approval" which is found in the dispositions of the *Ontario Act and the Regulations*", and the *Agreement* itself cannot supersede the language of the *ETA* and the *Regulations* to the extent that these particular terms of the Agreement were not enacted.

b) Appellant

[32] It should be noted that Triple M takes no issue with the way the provisions of the *ETA* and the *Regulations* operate to require the temporary recapture of ITCs for a large business. The central issue in dispute is the Minister's factual characterization of Triple M as a "scrap metal dealer" to the extent of its processing activities and, consequently, not a "selected person" under subsection 31(1) of the *Regulations* who can avail itself of the SPITC Reduction in respect of the cost of "specified production energy".

[33] Triple M relies on the interpretation limitation contained within the *Agreement*, which incorporates by reference the regime set out in the *QSTA*. Triple M submits that pursuant to section 17 of Annex "C" to the *Agreement*, the scope of "specified person", "specified property" and "specified services" that are subject to the temporary full ITC recapture for the Ontario portion of the HST "cannot exceed the scope of the persons, property and services that are denied input tax refunds ("ITRs") in respect of the *QSTA* as it read on March 10, 2009." Therefore, the Appellant would only be subject to the full recapture treatment under subsection 236.01(2) of the *ETA* if it would be similarly denied ITRs in respect of its electricity costs under the *QSTA* as it read on March 10, 2009.

[34] Pursuant to paragraph 3 of section 206.1 of the *QSTA*, a registrant that is a large business would normally be denied ITRs in respect of the supply of electricity, gas, combustibles or steam.

[35] However, pursuant to section 206.3 of the *QSTA*, the above-mentioned restriction of the ITRs for a large business in respect of its electricity costs does *not* apply if that same registrant can claim an exemption from the Quebec retail sales tax (the "**QRST Exemption**") as provided in paragraph aa of section 17 of the *QRSTA*.

> The QRST Exemption under paragraph aa of section 17 of the *QRSTA* applies to:
>
> (aa) … sales of electricity, gas or fuel <u>which a person of a category other than those determined by the Minister under section 20 uses to produce movable property</u> other than meals and services including telephone service, intended for sale or for the design or production of production equipment or conditioning materials used for the production of such movable property, either as an agent of production or to operate production equipment…[underlining added]

[36] In other words, the QRST Exemption in respect of the electricity or energy usage in a production process is available to persons who (i) produce movable property intended for sale; and (ii) do not fall within the scope of section 20 of the *QRSTA* as determined by the Quebec Minister of Revenue.

[37] In this case, Triple M submits that pursuant to a ministerial order issued by the Minister of Revenue, a "scrap metal dealer" was determined by the Minister to fall within paragraph (b) of section 20 of the *QRSTA*, as a person "whose activities consist mainly of … (b) selling movable property they have not produced but to which they may have made certain changes before delivery to the consumer" ("Aggregators").

[38] Therefore, a "scrap metal dealer" or mere Aggregator cannot avail itself of the QRST Exemption under section 17 of the *QRSTA*, and would be denied ITRs under paragraph 3 of subsection 206.1 of the *QSTA*, and, consequently, be subject to full SPITC recapture pursuant to section 17 of Annex "C" to the *Agreement* and section 236.01 of the *ETA*.

[39] However, Triple M argues that it, as a recycler ("Recycler"), does not fall within the class of Aggregators because:

> a. Triple M is a Recycler to the extent of baling and shredding ("proceesing" activities). Through baling and shredding, Triple M produces recycled metal, a product that is substantially changed in form and character as compared to the metal it has acquired. The precise submissions made by Triple M are stated as follows:
>
> i) to be subject to the restrictions, Triple M must be selling movable property that it has not produced, and must be delivering same to consumers (i.e. an Aggregator);
>
> ii) the recycled metal products which Triple M sells to the steel mills and foundries are movable property produced as opposed to simply altered;
>
> iii) the movable property is not sent to the steel mills in a form purchased by the Triple M. Through the shredding and baling process, substantively different movable property is created, one which is then, but which was not previously useable by the steel mills;
>
> iv) the activities undertaken by the Triple M are substantial and alter the character of the commingled scrap, producing substantially different products sold to two distinct groups of customers.

> b. Triple M does not deliver its products to a "consumer" as defined under section 123 of the *ETA*. It only sells to steels mills and foundries along the supply chain or its discarded material to other manufacturing.

[40] Triple M submits that, as a Recycler, it would otherwise be entitled to the RST Exemption under section 17 of the *QRSTA*. Consequently it would not have been denied the ITRs in respect of electricity costs related to its processing activities under the *QSTA* regime. By incorporating this limitation of scope language through reference, within section 17 of Annex "C" to the Agreement, Triple M is removed from the scope of the persons required to recapture 100% of the SPITCs. As a result, Triple M is therefore a "selected person" under subsection 31(1) of the *Regulations*, not required to recapture 100% of the SPITCs under section 236.01 of the *ETA* because it is entitled to the SPITC Reduction in respect of "specified production energy" in the manner prescribed under section 31 of the *Regulations*.

V. Analysis and Decision

Is Triple M a scrap metal dealer?

[41] The words scrap metal dealer are embedded with ambiguity from the outset; neither the *ETA* nor the *Regulations* define the term "scrap metal dealer". To assist, the modern general interpretation of statutes is embodied within *Canada Trustco Mortgage v. R.*[9]. Specifically at paragraph 10, the Court stated:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

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[9] 2005 SCC 54, [2005] 2 S.C.R. 601.

[42] For taxing statutes, *Canada Trustco* was adopted by virtue of *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*,[10] when the Court wrote:

> 23 The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, Principles of Canadian Income Tax Law (5th ed. 2005), at p. 569; Shell Canada Ltd. v. R., [1999] 3 S.C.R. 622 (S.C.C.). Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision. [underlining added]

[43] The Court further noted the mandatory examination of statutory provisions from this perspective when it stated:

> Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue.[11]

(i) Textual meaning of "scrap metal dealer"

[44] The most favourable definition is *Webster's Third New International Dictionary*, in which a "dealer" is defined as:

> … one who divides, distributes, or delivers; Negotiator, agent, go-between; One that acts or conducts himself in some specified way toward others; One that does business : TRADER, TRAFFICER, MIDDLEMAN: a person who makes a business of buying and selling goods esp. without altering their condition. [emphasis added]

In conjunction with definitions found in other dictionaries, the common theme within these sources is that a dealer must be engaged in the buying and selling of goods, but not in changing their condition. A scrap metal dealer therefore must be engaged in the buying and selling of scrap metal without materially changing the condition of the scrap metal it acquires.

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[10] 2006 SCC 20.

[11] *Ibid* at paragraph 24.

[45] As such, these dictionary authorities do not necessarily resolve the ambiguity inherent in the term. First, within the very Webster definition cited above, a "dealer" may be interpreted narrowly or it may be interpreted quite broadly as someone who either "divides, distributes, or delivers", or someone that simply "does business". The question remains as to which definition ought to be used in the context of the SPITC recapture regime. Second, by focusing only on the term "dealer", there exist substantial differences between the activities of a dealer in one industry as compared to another. Every industry is different. A scrap metal dealer may be required to do much more than just the buy and sell scrap metal in order to be competitive in that particular industry. There is no clear answer based merely on these dictionary definitions, which contain both broad and narrow interpretations.

[46] Several authorities referenced by the parties dealt with different industries and activities than those of scrap metal dealers or recyclers. In *Canbra Foods Ltd v Westersund* (1977),[12] the Alberta Supreme Court Appellate Division considered, *inter alia*, the meaning of a "grain dealer" in the context of the licensing requirements pursuant to the *Canadian Grain Act* ("***CGA***").[13] Under the *CGA*, a "grain dealer" was required to be licenced before it made any contract in respect of the purchase and sale of grain. The Court used a narrow definition similar to the Webster definition to find that the ordinary meaning of a "dealer" applied in that situation. A grain dealer was simply an entity that engaged in the buying and selling of goods, but not the alteration of their condition. As such, the Court would find that taxpayer, which used a process elevator, a crusher, and other industrial machinery to turn grapeseed into vegetable oil, margarine and other derivative products, was not merely a "grain dealer" because it purchased grapeseed as a raw material for processing into various other products.

[47] In *Vancouver Art Metal Works Ltd v Canada*,[14] the Federal Court of Appeal dealt with the term "traders or dealers in securities" in the context of the *Income Tax Act, R.S.C.*, 1985, c. 1 (5th supp.), as amended, and found that the ordinary meaning of the term should apply. Not only is the present situation a completely different industry, but the parties agree that the ordinary meaning of the term "scrap metal dealer" should apply, but only to the extent that an unambiguous ordinary meaning can be discerned.

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[12] 80 DLR(3d) 289.
[13] SC 1970-71-72, c-7.
[14] [1993] 2 FC 179 (FCA).

[48] Regrettably, even more factually proximate case law does not assist. Triple M submitted two additional cases in support of the proposition that a scrap metal "recycler" should be distinguished from a scrap metal "dealer", Triple M arguing that it is factually the former. Neither of the cases grappled with the issue in dispute to the case at bar. In *SNF LP v R*,[15] Justice Rip (as he then was) referenced a distinction between scrap metal recyclers, and its suppliers which included pedlars, pedlar-dealers, dealers and industrial suppliers. However, Justice Rip was actually simply citing a witness who made that distinction during testimony.[16] The main issue in the case was whether SNF LP was entitled to claim ITCs if these suppliers did not remit the GST and to that extent, the testimony of the witness was unrelated to the issue of whether a scrap metal "dealer" should be legally distinguished from a scrap metal "recycler" in the context of the SPITC recapture regime.

[49] Similarly, in *Budget Steel Limited v Canada*,[17] the taxpayer was in the scrap metal recycling business. The primary issue was whether the automobile scrap constituted "inventory" within the meaning of section 120(3)(b) of the *ETA*, as amended. If so, the taxpayer would qualify for the ITCs in respect of their acquisition in the course of its commercial activities. The Federal Court of Appeal confirmed the factual finding of the trial judge that the automobile scrap acquired by the taxpayer was distinct from the product that the taxpayer produced:

> … these hulks were not being held for sale "separately", but rather as the raw material for production of distinctly different end products, namely ferrous and non-ferrous material, for which there was obviously a demand in the United States. Further, we agree with the Trial Judge that the conversion of the hulks into a mass of shredded ferrous and non-ferrous materials involved the consumption of scrap automobiles and not their resale as such. Their identities as distinct hulks containing a mixture of materials were lost in this process.[18]

The factual finding as to inventory is therefore of only limited use to the Court in the present case.

[50] It was also submitted by Triple M that there is a general consensus or understanding within the scrap metal industry that a scrap metal dealer is different from a scrap metal recycler. The evidence in this regard is not convincing.

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[15] 2016 TCC 12.
[16] *Ibid*, at paragraph 22.
[17] [1996] GSTC 90, [1996] FCJ No 1621 (FCA).
[18] *Ibid* at para 3.

[51] First, Triple M's Vice-President of Engineering, Mr. Anderson, testified that there is an industry-wide distinction that is endorsed by the Canadian Association of Recycling Industries ("CARI"). A scrap metal dealer is different from a scrap metal recycler. A scrap metal dealer would buy, sort and sell scrap metal, but does not engage in any processing. A scrap metal recycler, on the other hand, would process scrap metal into some more saleable form to be used by downstream steel mills for further processing. However, no publications or trade journals from CARI were introduced in support of that distinction in order to show that such a demarcation was well known or commonplace. It appears more likely, according to the testimonies of Mr. Anderson and also from the witness in *SNF LP*, that there may well be a tacit and informal understanding within the industry of such a distinction, but assigning any considerable weight to it overstates its importance in the determination of specified energy, since the distinction between dealer and recycler, just as plausibly relates to size and scale rather than materially different activities.

[52] Second, Triple M indicated in its tax return that its North America Industry Classification System (NAICS) code used within CRA information returns corresponded to "primary metal manufacturing". This classification is again indeterminative. There was no evidence to show how this classification was determined or if other more specific classifications were even available, such as "metal recycling" or "scrap metal dealing". No evidence suggested this classification was anything other than self-selected from a pull-down computer menu. Even the party so selecting it remains uncertain. Little weight can be attached to this.

[53] Lastly, Triple M indicated in its tax returns and in numerous places on its website that it was self-described as a scrap metal "recycler". Fundamentally, the distinction between a scrap metal recycler and a dealer is not particularly helpful, absent a definitive and official demarcation. There is no red line prohibiting Triple M from or authorizing it to carry on both functions or from simply saying it does. As the evidence suggested, a business such as Triple M must necessarily engage in pedlar/dealer activities as well as processing activities. To Triple M's business, the aggregation and dealing activities are every bit as integral as the processing activities. In fact, without the former, Triple M lacks materials for processing activities.

[54] Based on a textual reading of the term "scrap metal dealer" in accordance with its ordinary meaning as shown from the dictionary definitions, the case law,

and the available industry descriptions, there is one common theme that may be extracted. That is, a scrap metal dealer, or a dealer in any type of goods, engages in little processing and production in the ordinary course of its buying and selling activities. However, these distinctions do not conclusively resolve the ambiguity inherent in the term in the context and the scheme of the SPITC recapture regime. The question in the case at bar remains whether Triple M, who is in the business of recycling scrap metal, is also a "scrap metal dealer" as contemplated under subsection 31(1) of the *Regulations*. Did Parliament and the Ontario legislature intend to make that fine distinction by using the word "dealer" instead of "recycler", not providing a definition and otherwise structuring the legislation in the fashion chosen? A textual reading of the provision provides two reasonable interpretations, one narrow and one broad. Resolution of that ambiguity requires an examination of the context and the purpose of the relevant provisions.

(ii) Context of the Statutory Regime and "scrap metal dealer" exception

[55] The surrounding provisions in respect of the "specified production energy" exemption, under subsection 31(1) of the *Regulations*, informs the statutory context. It defines specified production energy as energy acquired in "the production of tangible personal property intended for sale".

[56] For the purposes of this appeal, the definition of "specified production energy" suggests two main characteristics: (i) there must be a "selected person" who uses the energy; and (ii) the energy must be used in the "production of tangible personal property intended for sale". Both conditions must be met for the SPITC Reduction to apply. One condition puts the emphasis on the person or entity that uses the energy. The other condition puts the emphasis on the function or operation carried out with the energy by the user.

[57] As to the first quality, the term "selected person" is defined in the negative so as to exclude "a scrap metal dealer"."[19] With the exception of a "financial institution",[20] none of these enumerated entities are defined elsewhere in the *Regulations* or the *ETA*.

[58] As to the second, the term "production" is defined under section 26 of the *Regulations* to encompass the notion of "assembling, processing or manufacturing"

[19] *Regulations*, s. 31(1).
[20] "Financial institution" is defined in sections 123 and 149(1) of the *ETA*.

to create other property that "is different in nature on character" from the original. While this is the general statutory context of the exclusion of a "scrap metal dealer" from the SPITC Reduction, it does not assist with the meaning of this exclusion.

[59] In the contextual analysis, the presumption against tautology must be considered to the extent that the term "scrap metal dealer" would be rendered redundant or meaningless in the context of the surrounding statutory provisions. While possibly true in this case, this presumption may be rebutted where tautological definitions are used throughout in order to add clarity and certainty to the exclusions.

[60] In *Placer Dome*[21], *supra*, Lebel J. stated:

> 45. Under the presumption against tautology, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": see R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159. To the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant: *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 (U.K. H.L.), at p. 546, *per* Viscount Simon.
>
> 46. … the presumption is rebuttable where it can be shown that the words do serve a function, or that the words were added for greater certainty…[22]

[61] Imputing the ordinary definition as suggested by paragraph (b) of section 20 of the *QRSTA* into the definition of a "scrap metal dealer" would create a redundancy in the legislation and would seem to run afoul of the presumption against tautology. Any "scrap metal dealer" who merely buys or sells scrap metal without changing their condition (dictionary definition) or whose "activities consist mainly of … (b) selling movable property they have not produced but to which they may have made certain changes before delivery to the consumer" cannot be engaged in the kind of qualifying "production" activities that create "tangible personal property that is different in nature or character"[23] beyond the scrap metal it acquires. In fact, according to testimony, this is the precise distinction between a dealer and a recycler that is tacitly understood in the scrap metal industry in that a dealer carries out only aggregating activities.

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[21] *Placer Dome,* at paragraphs 45 and 46
[22] *Placer Dome,* at paragraphs 45-46.
[23] *Regulations*, s. 26, "production".

[62] Moreover, the presumption against tautology carries little weight in this case. It is rebutted as it appears that Parliament intended to both clarify and emphasize that certain excluded entities cannot avail themselves of the "specified production energy" exemption even when they undertake processing activities. To that extent, the fact that tautological definitions appear deliberately used in this statutory context helps to rebut the presumption.[24] For example, it is indisputable that other excluded entities under the definition of the "selected person" such as a hotel, bar, coffee shop or restaurant, or an auto repair shop are "retail establishments" that sell tangible personal property (e.g. coffee, food, drinks or repaired automobiles) directly to consumers. However, the definition of "production" as defined under section 26 of the *Regulations* expressly excepts an activity that is the "assembling, processing or manufacturing of tangible personal property in a *retail establishment*" from qualifying production. To the extent that large national and multi-national coffee shop chains incur electricity costs in the course of making coffee and food for sale directly to consumers, the provincial portion of the ITCs in respect of the electricity costs must be recaptured as such activities are not considered "production" within the meaning of section 26 of the *Regulations*. This would arguably apply even if, hypothetically, there were no exclusion of a coffee shop by virtue of the definition of the "selected person" under subsection 31(1) of the *Regulations*. Again, tautological drafting is prevalent.

[63] This deliberate emphasis on excepted entities, despite clear tautological language, in relation to the exceptions to the SPITC Reduction in respect of "specified production energy", can be contrasted with the other SPITC recapture exemption relating to "specified research energy".[25] This is also defined under subsection 31(1) of the *Regulations*, but without reference to any excluded entity. In fact, the latter is available to any "person" provided that other conditions are met:

> *specified research energy* means
>
> **(a)** in the case of specified energy acquired in or brought into Ontario by a person, the part of the specified energy for consumption or use by the person in the course of activities in Ontario that are eligible scientific research and experimental development activities for the purposes of the *Taxation Act, 2007*, S.O. 2007, c. 11, Sch. A, and in respect of which the person deducts an amount in computing the person's tax payable under that Act;

[24] *Placer Dome*, at paragraph 46. Also see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed. (2014) LexisNexis Canada, at paragraphs 8.30-8.31 (page 214 in the 5th Edition).
[25] *Regulations*, s. 31(3).

… [emphasis added][26]

[64] Several additional observations may be made within the statutory context to support the conclusion that Parliament did not implicitly intend: (i) that the qualifications under paragraph (b) of section 20 of the *QRSTA* into the definition of "scrap metal dealer" and (ii) that the *ETA* and the *Regulations per se*, would represent a complete code through which Parliament gave effect to the *Agreement*. Firstly, numerous terms, other than a "scrap metal dealer", are defined throughout the *ETA*. In particular in sections 26 and 31 of the *Regulations* such terms effect the temporary recapture of ITCs as agreed between Ontario and Canada in the *Agreement*. Secondly, where existing legislation needed to be referenced in the *Regulations*, Parliament did not hesitate to do so. For example, section 8 of the *Regulations* states that "(f) or the purposes of paragraph (d) of the definition *specified provincial tax* in section 220.01 of the Act, in the case of a vehicle registered in the province of Ontario, a prescribed tax is the tax imposed under the *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, as amended from time to time" [italics added].

[65] This statutory contextual analysis surrounding the undefined term "scrap metal dealer" does not adequately resolve the ambiguity at issue, as the presumption against tautological legislation is most likely rebutted given its deliberate use in the same immediate context. The redundant language is as likely a drafting technique to highlight and to add certainty to the excluded entities under the definition of the "selected person" despite being wholly unnecessary in light of the definition of "production".

(iii) Purposive Analysis of the legislative as a whole and the "scrap metal dealer" exception

[66] Even if the *Agreement*, the *QSTA* and the *QRSTA* do not form part of the statutory context of the provision at issue under the *Regulations*, they do certainly provide extrinsic aids in interpreting the purpose or the policy rationale for excepting a "scrap metal dealer" in relation to the "specified production energy" exemption. This is particularly so in light of the language of subsection 236.01(2) of the *ETA*, which expressly mentions "a sales tax harmonization agreement with the government of a participating province relating to the new harmonized value-added tax system [that] allows for the recapture of input tax credits". Within this

[26] *Regulations*, s. 31(1), "specified research energy".

Agreement, section 17 of Annex "C" specifically allows for the recapture of ITCs, to the equivalent extent of the ITR restrictions under the *QSTA* as it read on March 10, 2009.

[67] Viewed in light of the Quebec regime, and particularly in light of the 1983 Notice, the ambiguity surrounding the term "scrap metal dealer" may be resolved.

[68] Based upon the evidence, Triple M cannot be an entity which falls within the scope of a "scrap metal dealer" under the QRSTA and, consequently, under the Regulations that pertain to the SPITC recapture. Under section 20 of the *QRSTA* and the related 1983 Notice, "scrap metal dealers" are explicitly listed as a category of persons who are not eligible for the RST Exemption relating to the acquisition of energy for use in the production of "movable property … intended for sale" pursuant to paragraph (aa) of section 17 of the *QRSTA*. The policy rationale for this scrap metal dealer exception appears to be that such persons are engaged in activities that "consist principally of selling movable property that they have not produced, but to which they may have made changes before delivery to the consumer". Scrap metal dealers are excepted because they are not manufacturers or producers, but are rather Aggregators or entities that make some inconsequential changes to the scrap metal before re-sale. Factually this does not describe the processing activities of Triple M, but likely its aggregating activities. Factually, Triple M through its processing activities recycles discarded, waste or unusable scrap it acquires into a useable form through its processing activities: baling and shredding. The processing activities are necessary in order for its customers, steel mills, to deploy the useable scrap metal in producing steel, iron or some other kind of useable metal product. The consequence of the processing activities is transformative to the goods.

[69] The 1983 Notice, which not only lists "scrap metal dealers" but also all of the other entities that are excluded from the scope of the "selected person" under subsection 31(1) of the *Regulations* is meaningful to this determination. Pursuant to the 1983 Gazette, a financial institution is excluded as its activities "consist principally of supplying personal or professional services". "Operators of establishments within the meaning of the Meals and Hotels Tax Act (RSQ, c T-3)", which would include a hotel, bar, coffee shop or restaurant, and "garage operators[27]" which in turn, would include an auto repair shop, and "scrap metal

[27] If there is any confusion as to what a "garage operator" is, the French version of the 1983 Notice resolves that ambiguity. The French equivalent of the phrase is "les garagistes" which directly translates into car mechanics, as opposed to, what may be understood as, an owner of a parking garage that is in the business of renting out parking spots.

dealers" were also all excluded because their activities "consist principally of selling moveable property that they have not produced, but to which they may have made changes before delivery to the consumer."

[70] This could not be a mere coincidence. Rather, this should be viewed as a deliberate attempt by Parliament and Ontario to exclude these entities from qualifying for the SPITC Reduction in relation to "specified production energy" based on the same purpose and rationale as established by the 1983 Notice and section 20 of the *QRSTA*. In the case at bar, the combined operation of the presumption of knowledge and the presumption of consistent expression would suggest that this is the proper approach to take. The presumption of knowledge is largely implicit and is explained by Professor Sullivan as follows:

> §8.9 **presumed knowledge**. The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts and with mastery of existing law, common law and the *Civil Code of Quebec* as well as ordinary statute law, and the case law interpreting statutes. The legislature is also presumed to have knowledge of practical affairs. It understands commercial practices and the functioning of public institutions, for example, and is familiar with the problems its legislation is meant to address. In short, the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation. [footnotes omitted, emphasis added][28]

[71] The presumption of consistent expression was explained as follows:

> §8.32 It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation…
>
> §8.33 The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter. [emphasis added][29]

[72] With the first presumption, Parliament and the Ontario Legislature are presumed to have requisite knowledge and competence, at the time of entering into the *Agreement* which explicitly referenced the *QSTA* and by enacting the "selected

[28] Ruth Sullivan, Sullivan on the Construction of Statutes, 6th Ed. (2014) LexisNexis Canada, at §8.9 (page 205 in the 5th Edition).
[29] *Sullivan*, at §8.32-8.33 (page 215 in the 5th Edition).

person" and "specified production energy" provisions in the *Regulations*. Therefore, both knew and appreciated (i) the commercial practices and the business carried out by "scrap metal dealers" and these other excluded entities, (ii) the fact that such entities were excluded from the ITR regime under the *QSTA* which referenced the *QRSTA*, (iii) the numerous intricacies associated with the legislative amendments and notices published under the Quebec Gazette relating to section 20 of the *QRSTA*, including the important 1983 Notice; and (iv) that these entities listed under the 1983 Notice were excluded on the basis of either paragraph (a) or (b) of section 20 of the *QRSTA*. That is to say, such entities were excluded because they were mainly engaged in non-production activities, whether it be personal or professional services, or insignificant collection activities that made only superficial or packaging changes to the final product: aggregating services. This presumption is implied and since no evidence to the contrary was adduced, this presumption is not rebutted.

[73] With this unrebutted presumption of knowledge, the presumption of consistent expression would suggest that the "scrap metal dealer" excluded under the scope of the "selected person" should have the same or ascribed a similar meaning as the "scrap metal dealer" excluded under section 20 of the *QRSTA* and the 1983 Notice. The same term is used in the English versions of the *Regulations* and the 1983 Notice. The French versions are not exactly the same, but exhibit largely the same meaning. In the French version of the *Regulations*, scrap metal dealers are translated into "les commerçants en ferraille". In the French version of the 1983 Notice, scrap metal dealers are translated as "les marchands de ferraille". Both are essentially scrap metal merchants or re-sellers[30], with no material etymological difference. While the 1983 Notice is clearly not a statute, Parliament and Ontario are presumed to have turned their minds to the scope for the purposes of the SPITC Reduction. In deciding to use the same term "scrap metal dealer" to describe an entity that would be excepted from the scope of the "selected person", Parliament and Ontario are presumed to have intended that the same or a similar meaning be ascribed to the term "scrap metal dealer" under the *Regulations*.

[74] The term "scrap metal dealer" under the Regulations may have a similar but not identical meaning as the "scrap metal dealer" determined under section 20 of the *QRSTA*, based on a fundamental difference between the schemes of the *QRSTA* and the *ETA*. The *QRSTA* is a retail level sales tax that is levied on the final

[30] Multidictionnaire de la banque française defines marchand(e) as "Personne que fait profession d'acheter pour revendre avec bénéfice ». Again, this definition consistently contains the notion of little material change being undertaken to the goods.

consumer. The second component of the definition under paragraph (b) of section 20 of the *QRSTA* speaks of "delivery to the consumer" and the entities excluded from the RST exemption pursuant to section 20 of the *QRSTA* and the 1983 Notice are all direct suppliers to consumers of the goods that they supply, e.g. florists, operators of pet shops. As such, a scrap metal dealer contemplated under the *QRSTA* is necessarily limited in that regard. On the other hand, the *ETA* and, for that matter, the *QSTA* are both much broader sales tax regimes. They each imposed a value-added tax levied at every stage along the supply chain. Consequently, a "scrap metal dealer" under the *ETA* and the Regulations must necessarily be interpreted more broadly so as to ignore the second component of paragraph (b) of section 20 of the *QRSTA* that is simply anachronistically redundant for the purposes of the *ETA.*

[75] As well, ultimately there is reconciliation, which settles some consistency upon this multi-sourced, multi-jurisdictional legislative regime as a harmonious whole. This is rendered through: (i) the 1983 Notice, (ii) the *QRSTA* being consistent with the narrower interpretation offered by the dictionaries; and (iii) the case law, to the extent that such authorities are relevant. As well, the tacit industry understanding that a dealer in scrap metal is considered to engage only in the buying, selling and sorting of scrap metal comprising aggregating activities, regardless of whether it supplies directly to consumers or to other downstream processors or producers.

[76] Moreover, this interpretation is also consistent with the bi-lateral Agreement in respect of the SPITC Reduction. It accords with the "ceiling" on the increase in the scope of tax liability imposed by the *QSTA/QRSTA* regime in respect of the ITR restrictions, in turn referenced by section 17 of Annex "C" to the *Agreement*. Within this interpretation, the scope of entities excepted under the scope of "selected persons" is indeed not more expansive than the number of entities in the 1983 Notice that would not qualify for the RST Exemption under the *QRSTA* and the number that would not, consequently, qualify for the exemption in respect of the ITR restrictions as set out in the *QSTA.* The incorporation by reference ultimately has a harmonious purpose.

[77] In conclusion, the 1983 Notice and the *QRSTA* play a key role in informing the purpose of the exclusion of a "scrap metal dealer" under the SPITC recapture regime set out in the ETA and the *Regulations*. The ambiguity that remained after considering the ordinary definitions of the phrase, which may be narrow or broad, is resolved by preferring the narrower interpretation contained in the 1983 Notice. Purposively, this is more likely than not what Parliament and Ontario intended for

Triple M as a scrap metal recycler and their entitlement to the SPITC Reduction relating to the identifiable and limited processing activities.

VI. Summary and Conclusion

[78] The forgoing interpretation is not without some challenges. However, such challenges, to the extent same exist, cannot be used to overcome referential evidence directed to the scope of the "selected person" under the *Regulations*, as informed by the ordinary definitions and the 1983 Notice and the rationale embodied therein. Moreover, any latent unresolved ambiguity after the foregoing textual, contextual and purposive analysis, commands invocation of the residual presumption in favour of the taxpayer since none of Parliament, the legislature or the Minister provided an express definition of the ambiguous "scrap metal dealer". The dispute before this Court has been caused by that omission within the SPITC recapture regime. In the circumstances, as stated in *Placer Dome*, the residual presumption should apply in favour of a taxpayer such as Triple M, where the ordinary principles of statutory interpretation fail the resolve the issue[31]. Triple M, after all, engaged in no sort of complicated tax planning in order to gain the SPITC Reduction.

[79] Therefore, the appeal is allowed on the basis that Triple M is entitled to the SPITC Reduction in respect of its processing activities relating to baling and shredding for the reporting periods. This is because, during the reporting periods, it was a selected person within the meaning of section 236.01 of the ETA, the relevant regulations and referenced agreements. As such, its processing activities constituted production activity employing specified production energy, thereby falling within the production exemption for such processing activities.

[80] In light of the complicated legislative regime comprising Triple M's entitlement to the SPITC Reduction, given that no material facts were in dispute and while Triple M ought to be entitled to its full costs, the Court will entertain brief submissions in respect of same within 30 days of this judgment.

Signed at Ottawa, Canada, this 23rd day of December 2016.

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[31] *Placer Dome* at paragraph 24.

"R.S. Bocock"

Bocock J.

CITATION:	2016 TCC 293
COURT FILE NO.:	2014-4563(GST)G
STYLE OF CAUSE:	TRIPLE M METAL LP AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 5, 2016
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF JUDGMENT:	December 23, 2016

APPEARANCES:

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