

Docket: 2014-79(GST)G

BETWEEN:

GEM HEALTH CARE GROUP LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 26 and 27, 2016, at Halifax, Nova Scotia

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant: Bruce Russell, Q.C.
Brian Awad
Counsel for the Respondent: Martin Hickey

AMENDED JUDGMENT

These Appeals are allowed and the reassessments (the “Reassessments”) which are the subject of these Appeals are referred back to the Minister of National Revenue (the “Minister”) for reconsideration and reassessment in accordance with the attached Reasons, and, in particular, on the basis that, during the period from January 1, 2009 to September 30, 2011:

- a) the Appellant acted as the agent for and on behalf of Heart of the Valley Long Term Care Centre Limited, Whitehills Long Term Care Centre Limited and Admiral Long Term Care Centre Limited (collectively, the “Owners”) with respect to the development and construction of the nursing homes owned by the respective Owners, such that the Appellant did not supply construction services to any of the Owners, with the result that the Appellant was not required to collect or remit the goods and services tax and

harmonized sales tax (“GST/HST”) in respect of any such alleged construction services; and

- b) the management services supplied by the Appellant to Melville Ridge Holdings Limited (“Melville Ridge”) did not include any services performed by Syed Hussain, with the result that the Appellant properly calculated and charged the appropriate amount of consideration for those services and collected and remitted the correct amount of GST/HST in respect of those services.

In all other respects, the Reassessments are confirmed. In particular:

- a) the Appellant was not entitled to **input** tax credits in respect of the reduction, as of December 31, 2009, in the amount of the management fees charged to Melville Ridge and to the owner of the North Hills nursing home; and
- b) the Minister properly reassessed the Appellant for GST/HST in respect of parking fees charged by the Appellant to guests of the Garden Inn.

Costs, with a fee for second counsel for conduct of the hearing, are awarded to the Appellant in accordance with Tariff B of Schedule II to the *Tax Court of Canada Rules (General Procedure)*.

This Amended Judgment is issued in substitution of the Judgment dated January 25, 2017.

Signed at Ottawa, Canada, this **6th** day of **February**, 2017.

“Don R. Sommerfeldt”

Sommerfeldt J.

Citation: 2017 TCC 13
Date: 20170125
Docket: 2014-79(GST)G

BETWEEN:

GEM HEALTH CARE GROUP LIMITED,

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Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals by GEM Health Care Group Limited (“GEM”) in respect of various reassessments (the “Reassessments”) issued by the Canada Revenue Agency (the “CRA”) on behalf of the Minister of National Revenue (the “Minister”) on June 1, 2012, under Part IX of the *Excise Tax Act*.¹ The Reassessments were issued in two sets. One set was issued to GEM in respect of its business number 88325 9038 RT0001 (which was the business number for GEM’s long-term care facilities), and covered monthly reporting periods from January 1, 2009 through September 30, 2011.² The other set of Reassessments was issued in respect of business number 88325 9038 RT0002, covered monthly reporting periods in the months of December 2009, December 2010 and January through June, August and September 2011, and related to the commercial activities of Mahpal Developments (“Mahpal”), which was an unincorporated division of GEM.³

¹ *Excise Tax Act*, R.S.C. 1985, c. E-15, Part IX, as enacted by S.C. 1990, c. 45, and as subsequently amended (the “ETA”).

² This set of Reassessments is reproduced behind Tab 20 in Exhibit R-2.

³ This set of Reassessments is reproduced behind Tab 14 in Exhibit R-1.

[2] Notwithstanding that Mahpal is a division of, and thus forms part of the same legal entity as, GEM, the pleadings distinguished between Mahpal and GEM, as did much of the evidence that was presented. Accordingly, these Reasons will refer to both Mahpal and GEM, but it should be remembered that Mahpal is legally part of GEM.

II. MATTERS IN DISPUTE

[3] The Reassessments, to the extent that they are the subject of these Appeals, related to four matters:

- a) Some of the Reassessments imposed the goods and services tax and harmonized sales tax (“GST/HST”) in the context of construction services allegedly supplied by Mahpal to three wholly owned subsidiaries of GEM in respect of three new nursing homes.
- b) Some of the Reassessments imposed GST/HST in respect of the supply of management services by GEM to another wholly owned subsidiary of GEM.
- c) Some of the Reassessments denied input tax credits (“ITCs”) pertaining to a reduction in 2009 of management fees charged by GEM to two subsidiaries.
- d) Some of the Reassessments imposed GST/HST in respect of parking fees charged by GEM to guests of the Garden Inn, which was owned and operated by GEM.

In its Notice of Appeal and Amended Notice of Appeal, GEM challenged the correctness of the Reassessments, insofar as they pertained to the above matters.

[4] At the commencement of the hearing, counsel for GEM advised the Court that, as the amount of GST/HST in respect of the parking charges for guests of the Garden Inn was relatively small, that issue would not be contested further by GEM.

III. BACKGROUND

A. GEM Health Care Group Limited

[5] On January 1, 2000, GEM Management Holdings Limited, Gables Lodge Limited, Mahpal Developments Limited and 3001889 Nova Scotia Limited amalgamated to form an amalgamated corporation known as “GEM Health Care Group Limited”. That amalgamated corporation (or its successor) subsequently participated in two additional amalgamations, on January 1, 2014 and January 1, 2015. In each case, the newly amalgamated corporation retained the name “GEM Health Care Group Limited”.⁴

B. Mahpal Developments

[6] After the amalgamation that took effect as of January 1, 2000, the name “Mahpal Developments” was used to refer to the construction division of each of the three successive amalgamated corporations mentioned above. When the three nursing homes were developed and constructed, much of the work was done in the name of Mahpal Developments.⁵ It was acknowledged by all the parties that Mahpal Developments was a division or an unincorporated branch of GEM, such that anything done by Mahpal was actually done by GEM. However, Mahpal and GEM had separate bank accounts and separate business numbers.

C. Corporate Structure

[7] Syed Hussain and his wife, Gloria, are the only shareholders and directors of GEM. Mr. Hussain is the president and chief executive officer (“CEO”) of GEM. Gloria, who is a registered nurse, is the secretary and director of nursing of GEM. GEM, as well as various affiliates and/or subsidiaries, were all incorporated (or formed by amalgamation) under the laws of Nova Scotia.

[8] During the particular material times, GEM owned all the issued shares of the capital stock of various corporate bodies (the “Subsidiaries”), including Melville

⁴ In these Reasons, I will, as the context and the chronology may require, use the term “GEM” to refer to each of the three amalgamated corporations, which were formed respectively on January 1, 2000, January 1, 2014, and January 1, 2015 and each of which was named “GEM Health Care Group Limited”.

⁵ One of the significant issues in these Appeals is whether the work done in the name of Mahpal Developments, as well as the work done in the name of GEM, was done as principal or as agent.

Ridge Holdings Limited (“Melville Ridge”),⁶ Heart of the Valley Long Term Care Centre Limited (“HOTV Ltd.”), Whitehills Long Term Care Centre Limited (“Whitehills Ltd.”) and Admiral Long Term Care Centre Limited (“Admiral Ltd.”). Mr. Hussain was a director and the president and CEO of each of those four Subsidiaries. He acted on behalf of each Subsidiary when it entered into an agreement with another Subsidiary in the corporate group (the “Group”). Mr. Hussain stated that the practice within the Group was not to reduce intercorporate, intra-Group agreements to writing. Rather, those agreements were made orally. This was done because he was the decision-maker on both sides of the transaction.

[9] GEM provided various services to each of the Subsidiaries, including payroll services, union consulting and negotiating services, purchasing services, IT services, strategic planning, and human resource services (including hiring and firing) in respect of the senior management of each Subsidiary. The hiring and firing of lower-level staff was done by the respective Subsidiaries.

[10] Mr. Hussain was the employee of GEM who performed many of the activities constituting the services provided by GEM to the Subsidiaries. GEM paid a salary to Mr. Hussain for the services that he provided to GEM and for the services that he provided on behalf of GEM to the Subsidiaries.

[11] During the particular material times, the Group owned and operated 12 or 13 nursing homes. GEM owned a few of the nursing homes itself. Mr. Hussain provided services in respect of those nursing homes. As well, on behalf of GEM, he provided to most of the Subsidiaries services that were similar to the services that he provided in respect of GEM’s own nursing homes. The fee typically charged by GEM to a Subsidiary (other than Melville Ridge) for the management services provided by GEM was 5% of the gross revenue of the Subsidiary.

⁶ Melville Ridge was a predecessor corporation (as defined in subsection 87(1) of the *Income Tax Act*) in respect of the amalgamation that occurred on January 1, 2014, as referenced in paragraph 5 above.

D. New Nursing Homes

[12] In 2008, the Government of Nova Scotia embarked on a plan to replace various nursing homes in the province, including two that were then owned and operated by GEM. One of those nursing homes was to be replaced with two nursing homes, in different locations. Thus, over a period of time, GEM was involved in the development of three new nursing homes, known as Heart of the Valley Long Term Care Centre (“HOTV Centre”), Whitehills Long Term Care Centre (“Whitehills Centre”) and The Admiral Long Term Care Centre (“Admiral Centre”). In conjunction with the development of the new nursing homes, GEM arranged for three new Subsidiaries to be incorporated, one for each nursing home. The three new Subsidiaries (which will sometimes be referred to as the “Owners”) were, as indicated and defined above, HOTV Ltd., Whitehills Ltd. and Admiral Ltd. respectively. Mr. Hussain arranged for the particular parcel of land for each nursing home to be conveyed:

- a) by him alone to HOTV Ltd.,
- b) by his wife and him to Admiral Ltd., and
- c) by Melville Ridge to Whitehills Ltd.,⁷

by means of three Indentures, each dated June 2, 2009 and each signed by or on behalf of the respective grantors. The Indentures were not signed on behalf of the respective grantees (but I do not think that anything turns on that).

E. Development and Construction of Nursing Homes

[13] To provide the contractual framework for the development and construction of the three new nursing homes, Her Majesty The Queen in Right of the Province of Nova Scotia (the “Nova Scotia Crown”) entered into a Development Agreement and a Service Agreement with each of HOTV Ltd., Whitehills Ltd. and Admiral Ltd. respectively. The Development Agreement and the Service Agreement between the Nova Scotia Crown and HOTV Ltd. were signed by a representative of HOTV Ltd. on April 14, 2009 and by a representative of the Nova Scotia Crown on May 20, 2009. GEM was a party to the Development Agreements and the Service Agreements between the Nova Scotia Crown and Whitehills Ltd. and between the Nova Scotia Crown and Admiral Ltd. respectively (but was not a party to the agreements between the Nova Scotia Crown and HOTV Ltd.). The

⁷ See Exhibit A-1, Tabs 15-17.

Development Agreements and the Service Agreements among the Nova Scotia Crown, GEM and Whitehills Ltd. and among the Nova Scotia Crown, GEM and Admiral Ltd. were signed by representatives of GEM and Whitehills Ltd. or Admiral Ltd. (as the case may be) on November 19, 2009 and by representatives of the Nova Scotia Crown on November 24, 2009.

[14] In discussing the three Development Agreements, Mr. Hussain stated that each Development Agreement provided that GEM was to take responsibility for the construction of the particular nursing home. The reason for this requirement was that, at that time, the three Owners were new corporations, and had only minimal assets and no staff. Therefore, the Government of Nova Scotia wanted GEM to be responsible for the development.

[15] I am not certain that the HOTV Development Agreement contained the provision described in the previous paragraph. The Development Agreement pertaining to the HOTV Centre (Exhibit R-1, Tab 2) is between the Nova Scotia Crown and HOTV Ltd. GEM is not a party to that agreement. Having reviewed the HOTV Development Agreement, I did not find any reference therein to GEM or any provision stating that GEM was responsible for the construction of the HOTV Centre.

[16] The other two Development Agreements (Exhibit A-1, Tabs 11 and 13) each have three parties, the first two being the Nova Scotia Crown and GEM and the third being Whitehills Ltd. or Admiral Ltd., as the case may be. The Crown entered into evidence a complete copy of the Development Agreement pertaining to the HOTV Centre (Exhibit R-1, Tab 2). GEM entered into evidence copies of excerpts (containing the first page and the signing page) of each Development Agreement (Exhibit A-1, Tabs 9, 11 and 13). I was not provided with complete copies of the Development Agreements among the Nova Scotia Crown, GEM and either Whitehills Ltd. or Admiral Ltd., as the case may be. The first page and the signing page of the Whitehills Development Agreement and the Admiral Development Agreement appear to be similar to the corresponding pages of the HOTV Development Agreement, other than for the fact that the Whitehills and Admiral Development Agreements also show GEM as a party. The Whitehills Development Agreement and the Admiral Development Agreement define the term "Service Providers" as being both GEM and the particular Owner. There does not appear to be any effort in those agreements to differentiate between GEM and the particular Owner, particularly insofar as the respective duties of each might be concerned. Assuming that pages 2 through 23 of the Whitehills Development Agreement and the Admiral Development Agreement are the same as the corresponding pages in

the HOTV Development Agreement, I do not think that there will be anything in those agreements that indicates that GEM is to be treated differently than the particular Owner insofar as the responsibilities under the corresponding agreement are concerned.

[17] There do not appear to have been any documents that were prepared at the time of the development or construction of the nursing homes for the purpose of delineating the respective responsibilities of GEM on the one hand and each of the three Owners on the other hand. Based on the evidence, it does not appear as though, when the Development Agreements were drafted and signed, the parties gave any thought to the relationship between GEM and the three Owners or the capacity in which each would be functioning during the course of the development and construction of the nursing homes.

[18] In the early stages of the development and construction of the nursing homes, the three Owners were new corporations without significant assets and without employees (other than the designated officers). Accordingly, much of the work in respect of the development and construction of the nursing homes was done by employees of GEM. However, it is important to note that the senior officers of GEM were also senior officers of the three Owners.

[19] For each nursing home, GEM (including Mahpal) entered into contracts with an architect and with a general contractor, who entered into various subcontracts with the suppliers who provided labour and materials for the design and construction of the nursing homes. One of the fundamental issues in this Appeal is whether GEM entered into those contracts in its own right or whether it did so as agent for and on behalf of the three Owners.

F. Financing

[20] Mr. Hussain explained that, unlike previous nursing home projects, where the developer was required to obtain its own financing in the market place, in 2007, when the Government of Nova Scotia proposed its Continuing Care Strategy to renew or replace certain long-term care facilities, the Government was willing to provide financing for the construction costs. Accordingly, in conjunction with the proposed loans:

- a) on August 17, 2009, HOTV Ltd. and Nova Scotia Housing Development Corporation (“HDC”) entered into a Mortgage and a Security Agreement in

respect of a loan in the amount of \$16,271,963, to provide financing for the construction and outfitting of the HOTV Centre;

- b) on December 15, 2009, Whitehills Ltd. and HDC entered into a Mortgage and a Security Agreement in respect of a loan in the amount of \$19,550,936, to provide financing for the construction and outfitting of the Whitehills Centre; and
- c) on December 15, 2009, Admiral Ltd. and HDC entered into a Mortgage and a Security Agreement in respect of a loan in the amount of \$23,841,719, to provide financing for the construction and outfitting of the Admiral Centre.

It is significant that, in respect of each of the three loans, the borrower was the particular Owner, and not GEM or Mahpal.

IV. ANALYSIS

A. Construction of Nursing Homes

[21] GEM takes the position that, to the extent that any activities pertaining to the construction of the three nursing homes were performed in the name of GEM (including Mahpal), those activities were performed by GEM (including Mahpal) as agent for the respective Owners. On the other hand, the CRA takes the position that the Owners engaged the services of GEM (whose construction arm was Mahpal) to complete the construction of the nursing homes, and that GEM, in its own right, provided construction services to the Owners.

[22] There was no written agency agreement that expressly stated that GEM acted as the agent of any of the Owners. However, as an agency relationship may be express or implied, it is also necessary to determine whether there was an implied agency relationship between GEM on the one hand and any or all of the Owners on the other hand.

(1) Legal Principles

[23] As indicated by Hogg, Magee and Cook, the resolution of these Appeals will require a consideration of general law, as well as tax law:

The Income Tax Act relies implicitly on the general law, especially the law of contract and property.... Whether a person is an employee, independent contractor, partner, agent, beneficiary of a trust or shareholder of a corporation will usually have an effect on tax liability and will turn on concepts contained in the general law, usually provincial law.⁸

In these Appeals, it is necessary to consider not only the law of contract and the law of property, but also the law of agency.

[24] Before focusing on the legal principles pertaining to implied agency, it is useful to review a few fundamental principles concerning agency in general. In *The Queen v Merchant Law Group*,⁹ the Federal Court of Appeal enunciated the following principle:

It is settled at common law that for an agency relationship to exist the agent must be able to affect the principal's legal position with third parties by entering into contracts on the principal's behalf or by disposing of the principal's property....

This Court has previously recognized that an essential quality of agency is whether the putative agent has the capacity to affect the legal position of the principal....

... an essential quality of the agency relationship ... [is] the ability to affect the principal's legal position with respect to the particular transaction at issue.¹⁰

This principle is significant in the context of these Appeals, as will be noted below.

[25] Turning to the concept of implied agency in particular, the views of the CRA in respect of this concept are set out in a Policy Statement as follows:

Agency exists where one person (the principal) authorizes another person (the agent) to represent it and take certain actions on its behalf. The authority granted

⁸ P.W. Hogg, J.E. Magee and T. Cook, *Principles of Canadian Income Tax Law*, 3rd ed. (Toronto: Carswell, 1999), p.2; as quoted in *Will-Kare Paving & Contracting Ltd. v The Queen*, 2000 SCC 36, ¶31.

⁹ *The Queen v Merchant Law Group*, 2010 FCA 206.

¹⁰ *Ibid.*, ¶17, 22 and 28.

by the principal may be express or implied. In other words, an agency relationship may be created where one person explicitly consents to having another act on its behalf or behaves in such a way that consent is implied....

While two parties may agree that one party is to act as agent with respect to transactions undertaken on behalf of the other party, the absence of such an agreement is not sufficient to conclude that an agency relationship does not exist.

Although the intention of the parties is an important determinant of the nature of the relationship between the parties, case law supports the possibility that two parties may be engaged in an agency relationship without even being aware of it, provided their actions indicate that one party is acting as agent on behalf of another. In other words, agency is generally evident from the conduct of the parties.¹¹

[26] A leading textbook, *Canadian Agency Law*, discusses the creation of an agency relationship by implied contract in these terms:

As with other contracts, the agency relationship may be impliedly created by the conduct of the parties, without anything having been expressly agreed as to terms of employment, remuneration, *etc.*... The assent of the agent may be implied from the fact that he has acted intentionally on another's behalf. In general, however, it will be the assent of the principal which is more likely to be implied.... Such assent may be implied where the circumstances clearly indicate that the principal has given authority to another to act on his behalf. This may be so even if the principal did not know the true state of affairs. Mere silence will be insufficient. There must be some course of conduct to indicate the acceptance of the agency relationship. The effect of such an implication is to put the parties in the same position as if the agency had been expressly created.¹² [Footnote numbers omitted.]

¹¹ Canada Revenue Agency, *Agency*, GST/HST Policy Statement P-182R, p. 2 & 4. In *Merchant Law Group*, *supra* note 9, ¶15, the Federal Court of Appeal indicated that, although Policy Statement P-182R is not binding on the Court, it is “a useful tool in determining whether an agency relationship exists.” See also *The Queen v Glengarry Bingo Association*, [1999] GSTC 15 (FCA), ¶31. In P-182R, the CRA states that the essential qualities of an agency relationship are:

- i) consent of both the principal and the agent;
- ii) authority of the agent to affect the principal's legal position; and
- iii) the principal's control of the agent's actions.

The above principles were presumably taken from *Royal Securities Corp. Ltd. v Montreal Trust Co. et al.*, [1967] 1 OR 137, 59 DLR (2d) 666 (Ont. HC), and were also set out in *Kinguk Trawl Inc. v The Queen*, 2003 FCA 85, ¶36.

¹² G.H.L. Fridman, *Canadian Agency Law*, 2nd ed. (Markham: LexisNexis Canada Inc., 2012), p. 40-41.

[27] In the *Kinguk Trawl* case, the Federal Court of Appeal quoted the following textbook definition of the term “agency”:

... a fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.¹³

[28] In *Kinguk Trawl*, the relationships between two Canadian fishing corporations on the one hand and a Danish fish-marketing company on the other hand were governed by respective trade agreements pertaining to shrimp caught by the Canadian corporations and delivered to the Danish company. There was no written agency agreement between the respective parties, nor did either trade agreement appoint the Danish company as the agent of the particular Canadian corporation. The Federal Court of Appeal, after construing the trade agreements as a whole and considering the circumstances, concluded that the shrimp remained beneficially owned by the Canadian corporations until sold by the Danish company, from which it followed that the activities carried on by the Danish company under the trade agreements were conducted by the Danish company on behalf of the Canadian corporations as their agent.¹⁴ Thus, *Kinguk Trawl* illustrates that a finding of agency, depending on the circumstances (including any relevant agreements), may be made in a situation where two parties do not actually describe their relationship as an agency relationship and where there is no express appointment of one as the agent of the other.

[29] In *Fourney v The Queen*,¹⁵ Hogan J stated that “the test for finding an agency relationship in the absence of a written agreement is restrictive; it requires evidence of the necessary conduct.”¹⁶ He quoted portions of Professor Fridman’s comments in respect of implied agency, as set out in an earlier edition of the above-mentioned textbook on agency law, and stated a few principles pertaining to implied agency. Several of those principles are paraphrased as follows:

¹³ *Kinguk Trawl*, *supra* note 11, ¶35, quoting *Bowstead & Reynolds on Agency*, 17th ed. (London: Sweet & Maxwell, 2001).

¹⁴ *Ibid.*, ¶25, 33-34, 38.

¹⁵ *Fourney et al. v The Queen*, 2011 TCC 520.

¹⁶ *Ibid.*, ¶39.

- a) In the absence of a written agency agreement, a court must closely examine the conduct of the parties to determine whether there was an implied intention to create an agency relationship.¹⁷
- b) In reviewing the conduct of the alleged principal and the alleged agent, a key consideration is to determine the level of control which the former exerted over the latter.¹⁸
- c) The alleged principal's control over the actions of the alleged agent may be manifested in the authority given by the former to the latter. In other words, the concepts of authority and control sometimes overlap.¹⁹
- d) Where it is alleged that a corporation is acting as the agent of its shareholders, a high threshold of evidence is needed.²⁰

(2) Application to Facts: Conduct of the Parties

[30] Having examined the conduct of GEM and the Owners, in the light of the oral and documentary evidence, as explained in the paragraphs that follow, I have come to the conclusion that, in the context of the development and construction of the three nursing homes, GEM acted as the agent of the Owners. I will now turn to a discussion of the factors which led me to this conclusion.

(a) *Incomplete Understanding of Legal Relationships*

[31] I am not satisfied that Mr. Hussain had a complete understanding of the legal relationships among the various corporations in the Group. For instance, during his direct examination, Mr. Hussain seemed uncertain or confused as to the distinction between a subsidiary and a division, and whether Mahpal was a subsidiary or a division of GEM. He ultimately provided oral evidence that coincided with the documentary evidence (which showed that Mahpal was a division of GEM), but it

¹⁷ *Ibid.*, ¶43-44. In paragraph 43, Hogan J quoted an excerpt from the decision of Paris J in *Avotus Corp. v The Queen*, 2006 TCC 505, which stated that “It is only in the absence of a written agreement that the conduct of the parties must be examined for the purpose of determining whether an agency agreement may be implied.”

¹⁸ *Ibid.*, ¶45.

¹⁹ *Ibid.*, ¶36. See also *Kinguk Trawl*, *supra* note 11, ¶36.

²⁰ *Ibid.*, ¶47. In these Appeals, the Appellant submitted that it acted as the agent of the Owners, and not as the agent of its shareholders.

took him several false starts and a bit of time to arrive at that conclusion.²¹ However, later, in cross-examination, Mr. Hussain stated, “Mahpal is just a subsidiary.”²²

[32] Similarly, Mr. Hussain initially stated that neither Mahpal nor GEM had authority to bind the Owners.²³ Subsequently, near the conclusion of his direct examination, Mr. Hussain testified that GEM had the authority to bind the Owners.²⁴

[33] In making the above observations, I do not intend to be critical of Mr. Hussain. Rather, I am simply pointing out that, while he was undoubtedly highly skilled and successful in managing nursing homes, his understanding of legal concepts and legal relationships was at times incomplete and perhaps even incorrect. However, having an incomplete or incorrect understanding of a legal relationship does not negate the existence of the relationship.

(b) No Written Agency Agreement or Construction Agreement

[34] GEM did not enter into a formal agency agreement with any of the Owners. However, it should also be noted that, insofar as the evidence disclosed, there was no formal agreement between GEM and any Owner pursuant to which (as alleged by the Crown) GEM agreed to provide construction services to that Owner. Therefore, in order to determine the relationship between GEM and each Owner, it is necessary to examine the conduct of the parties.

(c) Ownership of Land

[35] As stated in paragraph 12 above, on June 2, 2009 the land on which each nursing home was to be constructed was conveyed to the Subsidiary that was to be the owner and operator of that nursing home. In each case, the conveyer (or transferor) of the land was a person or persons other than GEM. Apart from certain invoice-like documents (that are critical to the Crown’s theory of the case and that will be discussed below), there was no evidence to suggest that GEM, at any time, supplied any land to HOTV Ltd., Whitehills Ltd. or Admiral Ltd.

²¹ Testimony of Syed Hussain, *Transcript*, Tuesday, January 26, 2016, page 44, line 15 to page 46, line 6.

²² *Ibid.*, page 72, lines 14-15.

²³ *Ibid.*, page 55, lines 12-23.

²⁴ *Ibid.*, page 66, lines 7-9.

[36] After June 2, 2009, as HOTV Ltd., Whitehills Ltd. and Admiral Ltd. each owned the land on which its nursing home was constructed, each of those three Owners came within paragraph (a) of the definition of “builder” in subsection 123(1) of the *ETA*.

(d) Architect, General Contractor and Consultant

[37] SP Dumaresq Architect Ltd. (“Dumaresq”) was appointed as the architect to design the HOTV Centre, the Whitehills Centre and the Admiral Centre. As well, Dumaresq reviewed and approved for payment each progress billing submitted by the general contractors.²⁵

[38] A general contractor was engaged in respect of the construction of each of the three nursing homes. In particular, Roscoe Construction Limited was engaged as the general contractor in respect of the construction of the HOTV Centre,²⁶ Pomerleau Inc. was engaged as the general contractor in respect of the construction of the Whitehills Centre,²⁷ and Maxim 2000 Inc. was engaged as the general contractor in respect of the construction of the Admiral Centre.²⁸

[39] The Nova Scotia Department of Health (“DoH”) imposed a requirement that there be a consultant appointed in respect of each construction project. Accordingly, Costello Fitt Limited was appointed as the consultant, to provide project management services in respect of the HOTV Centre, the Whitehills Centre and the Admiral Centre.²⁹

[40] Given all the construction-related services provided by the architect, the general contractors and the consultant, if GEM was engaged to provide construction services to the Owners, as alleged by the Crown, it is not precisely clear what those services were. Mr. Hussain explained that two employees of GEM, George Oickle and Colin Bagnell, were involved in the construction of the nursing homes. Mr. Oickle supervised the construction projects, and Mr. Bagnell was a project manager. There was no evidence as to whether GEM, in its capacity as the employer of Mr. Oickle and Mr. Bagnell, was acting as a principal in its own right or was acting as an agent on behalf of the Owners. The Crown submitted that

²⁵ *Ibid.*, page 76, lines 2-12. See also Exhibit R-1, Tabs 4-6.

²⁶ *Ibid.*, page 76, lines 16-18. See also Exhibit R-1, Tab 4.

²⁷ *Ibid.*, page 77, lines 15-19. See also Exhibit R-1, Tab 5.

²⁸ *Ibid.*, page 78, lines 2-9. See also Exhibit R-1, Tab 6.

²⁹ *Ibid.*, page 76, line 19 to page 77, line 1. See also Exhibit R-1, Tabs 4-6.

the construction services provided by GEM consisted of compiling the services and materials that were needed and then managing the construction projects to completion. However, there was no evidence to confirm that GEM conducted those activities as principal, rather than as agent.

(e) Building and Other Permits

[41] On June 27, 2008, GEM applied to the Annapolis District Planning Commission for a building permit in respect of the HOTV Centre to be constructed in Middleton, Nova Scotia. The application showed GEM as the applicant and Syed Hussain as the registered owner.³⁰ The application for the building permit contained a declaration in which the applicant solemnly declared that “I am the owner/authorized agent of the owner named in this application...” It was clear that GEM was not the owner of the land, with the result that the statement just quoted must have indicated that GEM was declaring that it was the authorized agent of the owner (who was then Mr. Hussain, but which was subsequently HOTV Ltd.). Thus, the application contained an acknowledgment by GEM that it was acting as an agent in applying for the building permit. The application was annotated to indicate that the permit was requested for the foundations and site works only and that a subsequent application for a permit for construction of the building would be submitted in July.

[42] It appears that the subsequent application for a permit was not submitted to the Annapolis District Planning Commission until December 8, 2008, when an application for both a building permit and a development permit was submitted.³¹ This application also contained the same declaration as the first application, pursuant to which GEM solemnly declared that it was the authorized agent of Mr. Hussain. On June 15, 2009, the Commission granted permission to proceed beyond the foundation stage. By that time, HOTV Ltd. had become the owner of the land on which the HOTV Centre was to be built.

[43] On October 19, 2009, Halifax Regional Municipality granted a building permit, a development permit and a streets and services permit in respect of the Whitehills Centre.³² These permits, which are set out in a single document, show the applicant as being Mahpal and the property owner as being

³⁰ The application is reproduced behind Tab 18 in Exhibit A-1. Mr. Hussain did not convey the land in question to HOTV Ltd. until June 2, 2009.

³¹ This application is reproduced behind Tab 19 in Exhibit A-1.

³² This one-page document is reproduced behind Tab 20 in Exhibit A-1.

Whitehills Ltd. There is nothing on the permits that expressly describes or refers to the relationship between the applicant and the property owner. Given that GEM acted as the authorized agent of the landowner in applying for the building permit and development permit in respect of the HOTV Centre, it is conceivable that Mahpal similarly was acting as the authorized agent of Whitehills Ltd. in applying for the building permit, the development permit and the streets and services permit in respect of the Whitehills Centre. Furthermore, by applying for and obtaining the building permit, the development permit and the streets and services permit, Mahpal affected Whitehills Ltd.'s legal position (one of the hallmarks of an agency relationship is the ability of the agent to affect the principal's legal position³³). The permits contained the following statements:

Civic number must be posted prior to the issuance of an occupancy permit....
These permit(s) have been issued based on plans provided by the applicant.
Construction must be strictly in accordance with the approved plans.... Builder is responsible to prevent silt runoff into the street row and adjacent properties.³⁴

The statements quoted above set out obligations imposed by Halifax Regional Municipality on Whitehills Ltd., and are indicative of the manner in which Mahpal, by applying for the permits, affected the legal position of Whitehills Ltd. *vis-à-vis* Halifax Regional Municipality.

[44] On April 20, 2010, Halifax Regional Municipality issued a one-page document entitled "Permits," containing a building permit, a development permit and a streets and services permit, in respect of the Admiral Centre.³⁵ This document shows both the applicant and the property owner as being Admiral Ltd.

(f) Acquisition or Accession of Materials

[45] As the various general contractors and subcontractors (collectively, the "Contractors") worked on the nursing homes, they provided work and materials, the latter being incorporated into and affixed to the various nursing homes. At the conclusion of the hearing, I asked counsel to provide a submission explaining how title to the materials incorporated into a particular nursing home was transferred from a particular Contractor to the Owner of that nursing home (i.e., HOTV Ltd., Whitehills Ltd. or Admiral Ltd., as the case may be).

³³ See paragraph 24 above.

³⁴ Exhibit A-1, Tab 20.

³⁵ This one-page document is reproduced behind Tab 21 in Exhibit A-1.

[46] Counsel for GEM submitted that title to the materials passed by way of accession, upon the specific goods in question being appropriated to the contract and being delivered to or installed in a particular nursing home. In the context of appropriation, counsel for GEM referred me to Fridman's text entitled *Sale of Goods in Canada*, which states:

...provided goods answering to the description contained in the contract are in a deliverable state, the essential element in the transference of property in such goods is "appropriation to the contract" (subject to the consent of both parties to such appropriation)....

[Fridman then discussed a case dealing with a contract for the construction and sale of a ship, which specifically stated that property was to pass in things "appropriated" for the ship when the first instalment of the purchase price was paid.] The word "appropriated" was described as a "term of legal art," with a certain definite meaning. For appropriation to take place, there had to be some definite act, such as the affixing of the property to the vessel itself in the case in question, or some definite agreement between the parties which amounted to an assent to the property in the materials passing from one party, that is, in the instant case, the builders, to the other, the purchasers.³⁶

[47] With respect to the concept of accession, counsel for GEM referred me to two cases, the first of which is *Crown Tire Service Ltd. v The Queen*,³⁷ which stated the following:

In *Benjamin's Sale of Goods* (London, 1974), in considering the distinction between a contract of sale of goods and a contract for work and materials, it is stated:

Where work is to be done on the land of the employer or on a chattel belonging to him, which involves the use or affixing of materials belonging to the person employed, the contract will ordinarily be one for work and materials, the property in the latter passing to the employer by accession and not under any contract of sale.³⁸

³⁶ G.H.L. Fridman, *Sale of Goods in Canada*, 6th ed. (Toronto: Carswell, a Division of Thomson Reuters Canada Limited, 2013), p.81.

³⁷ *Crown Tire Service Ltd. v The Queen*, [1984] 2 FC 219 (FCTD).

³⁸ *Ibid.*, p.223.

The other case referred to me by counsel for GEM is the *Will-Kare Paving* case, which referred to *Crown Tire* and quoted the above passage.³⁹

[48] Counsel for the Crown submitted that the materials in the nursing homes were deemed, by subsection 191(3) of the *ETA*, to have been transferred from GEM to the respective Owners upon substantial completion of the nursing homes.⁴⁰ More specifically, counsel for the Crown submitted that the transfer of title occurred when the nursing homes were substantially completed and GEM issued itemized invoices to the respective Owners.⁴¹ This suggests that title to the materials for a particular nursing home passed only as that nursing home was substantially completed. However, elsewhere in his submissions, counsel for the Crown submitted that GEM provided construction services to the Owners, that such construction services encompassed multiple supplies of property and services, and that the provision of the materials was incidental to the supply of those construction services.⁴² This proposition seems to suggest that title to the materials would have passed from GEM to the Owners in stages, as the construction progressed. Thus, there seems to be some inconsistency in the Crown's position. Furthermore, counsel for the Crown has not explained how title to the materials supposedly came to be acquired by GEM before GEM purportedly transferred title to those materials to the Owners.

[49] Counsel for the Crown submitted that the transfer of title to the materials occurred by reason of the deeming provisions in subsection 191(3) of the *ETA*. However, an analysis of subsection 191(3) of the *ETA* shows that that provision applies only for the purposes of Part IX of the *ETA*, and, thus, does not apply for the purposes of general law, including the law of property. Hence, the deeming provision in subsection 191(3) of the *ETA* cannot form the basis pursuant to which title to the materials passed from the various Contractors to HOTV Ltd., Whitehills Ltd. or Admiral Ltd., as the case may be. Rather, the basis for the transfer of title must arise under the applicable principles of general law, including the law of contract, the law of property and the law of agency.⁴³

³⁹ *Will-Kare Paving*, *supra* note 8, ¶21.

⁴⁰ Respondent's Supplementary Submissions dated and filed March 30, 2016, ¶3 & 5.

⁴¹ Respondent's Supplementary Submissions, ¶5 & 18-19. Counsel for the Crown was referring to the invoice-like documents reproduced behind Tabs 40, 41 and 42 of Exhibit A-1.

⁴² Respondent's Supplementary Submissions, ¶11.

⁴³ In paragraph 17 of the Respondent's Supplementary Submissions, counsel for the Crown submitted that, "In regards to the timing of transfer of the chattel elements from the

[50] Even if the limitation in the opening words of subsection 191(3) of the *ETA* could be overcome, subsection 191(3) provides that the particular builder (and not some other person) is deemed to have made and received a taxable supply by way of sale of the multiple unit residential complex in question. In other words, subsection 191(3) contemplates that, at the time that the deeming provision becomes operative, the builder is already the owner of the complex. Subsection 191(3) does not provide for a deemed transfer of property from one person to another, but rather deems the same person (i.e., the builder) to both make and receive a taxable supply by way of sale. Therefore, subsection 191(3) cannot form the basis pursuant to which a builder acquires title to the materials that are used in constructing a multiple unit residential complex. Hence, subsection 191(3) cannot be the means pursuant to which title to the materials was transferred from the various Contractors to HOTV Ltd., Whitehills Ltd. or Admiral Ltd., as the case may be.

[51] Counsel for the Crown submitted that GEM provided to the Owners construction services consisting of the compilation of needed materials and services and the management of the particular construction project to completion, and further submitted that the provision of the materials would be of little assistance to the Owners without the corresponding construction services provided by GEM. According to counsel for the Crown, a single supply of construction services was provided by GEM to the Owners, and in the process of providing those construction services to the Owners, GEM also transferred the materials to

Appellant to the respective subsidiaries, the *Act* [i.e., the *ETA*] supersedes any provisions that may exist in the *Sale of Goods Act*.” However, if counsel for the Crown was suggesting that there is a conflict or incompatibility between the federal *ETA* and the provincial *Sale of Goods Act*, he did not explain the nature of the conflict or incompatibility. In particular, he did not point to an operational conflict between the two statutes (because it is impossible to comply with both statutes), nor did he suggest that, although it is possible to comply with both statutes, the operation of the provincial statute frustrates the purpose of the federal statute. See *Alberta (Attorney General) v Moloney*, 2015 SCC 51, ¶16 & 18; and *Canadian Western Bank v Alberta*, 2007 SCC 22, ¶75. Counsel for the Crown did not lay the groundwork for, nor did he invite me to apply, the doctrine of federal paramountcy. My own view is that subsection 191(3) of the *ETA* and the Nova Scotia *Sale of Goods Act* do not come into conflict because the opening words of subsection 191(3) of the *ETA* indicate that the subsection applies for the purposes of Part IX of the *ETA*. As there is no suggestion in the *ETA* that subsection 191(3) applies for other purposes, I do not think that it conflicts with provincial law.

them, the deemed timing of which is provided for in subsection 191(3) of the *ETA*.⁴⁴

[52] If a landowner and a contractor enter into a contract for work and materials, of the type described in *Benjamin's Sale of Goods*, for the purposes of the *ETA*, the supply of the work and the materials may well constitute a single supply. However, this analysis does not answer the question of how, in these Appeals, title to particular materials passed from a Contractor to an Owner. It seems logical that title would have passed pursuant to a one-step process in which GEM was the agent of the Owner. If title to the materials were to have passed pursuant to a two-step process, GEM would have needed first to have acquired title to the materials from the Contractor before transferring such title to the Owner.

[53] Having considered the submissions of both counsel and having considered the evidence, I have not seen anything to indicate that the Contractors first transferred title to their respective materials to GEM, and that GEM subsequently transferred title to those materials to the three Owners. Rather, it appears to me that title to the materials passed directly from the Contractors to the respective Owners pursuant to the principle of accession, when those materials were appropriated and incorporated into the respective nursing homes. Thus, it seems that GEM affected the legal position of the Owners with the Contractors.

[54] For the purposes of these Appeals, I do not think that I need to make a definitive decision as to whether title to the materials that were used in constructing each nursing home passed from the applicable Contractors to the Owner of the nursing home pursuant to a contract for work and materials or pursuant to a contract of sale of goods. I am satisfied that, one way or the other, title to those materials passed from the Contractors to HOTV Ltd., Whitehills Ltd. or Admiral Ltd., as the case may be. Counsel for GEM submitted that, by reason of GEM being the agent of each Owner, title to the materials provided by a particular Contractor for the construction of a particular nursing home passed directly from the Contractor to the Owner of that nursing home. Counsel for GEM submitted that, if GEM were to have acted as principal, rather

⁴⁴ Respondent's Supplementary Submissions, ¶6, 13 and 14. During her cross-examination, Barbara Power, who was the CRA auditor whose audit led to the Reassessments, described the services allegedly provided by GEM to the Owners by saying, "There was a supply of a service, a supply of a service of managing and constructing a residential complex." See Testimony of Barbara Power, *Transcript*, Wednesday, January 27, 2016, page 35, lines 1-3. Apart from this statement by Ms. Power, there was no evidence to suggest that it was GEM that constructed the nursing homes.

than as agent, title to such materials would have had to pass first from the Contractor to GEM, and then from GEM to the Owner of the nursing home.⁴⁵ As I reviewed the documentary evidence, I did not see anything to suggest that there were two contractual steps (i.e., a contract whereby title to the materials passed from a Contractor to GEM and a subsequent contract whereby title passed from GEM to an Owner).

[55] To summarize, I prefer the submission of counsel for GEM that GEM facilitated the transfer of title to the materials from the Contractors directly to the Owners, rather than the submission of counsel for the Crown that the transfer of title to the materials occurred by reason of the deeming provisions in subsection 191(3) of the *ETA*. Thus, it is my view that GEM affected the legal position of the Owners, *vis-à-vis* the Contractors, by arranging for title to the materials to pass from the Contractors to the Owners. As noted above,⁴⁶ this is an essential quality of an agency relationship.

⁴⁵ Appellant's Supplementary Submissions, dated and filed February 29, 2016, ¶15. During her cross-examination, when asked if it was the position of the CRA that there was a resupply of goods and services from GEM to the Owners, Ms. Power did not acknowledge that there was a resupply, but instead said, "There was a supply of a service. The goods and services that Mahpal or GEM incurred in the course of providing that service constituted inputs to the supply of the service that they provided. They supplied construction services." See *Transcript*, Wednesday, January 27, 2016, page 34, line 20 to page 35, line 9. Ms. Power did not explain how, in her view, Mahpal or GEM incurred goods and services (or what she meant by using that phrase), nor did she explain what she meant by the word "inputs." It appears that she may have been suggesting that GEM acquired goods and services, which entitled it to claim ITCs. If this is the case, it seems that it was the position of the CRA that there was a two-step mechanism whereby GEM first acquired goods (i.e., property) and then transferred that property to the Owners (although Ms. Power did not acknowledge that there was a resupply of goods and services).

⁴⁶ See paragraph 24 above.

(g) Builders' Lien Considerations

[56] As work progressed on the three nursing homes, and as various Contractors⁴⁷ provided work or materials, the Contractors generally acquired a lien on the land to which they had provided work or materials. Such lien attached upon the estate or interest of the Owner in that land.⁴⁸ Hence, to the extent that GEM arranged for work or materials to be provided to the nursing home of a particular Owner, GEM was affecting the Owner's legal position with respect to the Contractor who had supplied the work or material. As noted above, this is one of the hallmarks of agency.

(h) Contractor Invoices and Progress Claims

[57] From time to time, during the construction of a particular nursing home, the Contractors issued invoices in respect of the work and materials which they provided. Based on the specimen invoices that were entered into evidence, it does not appear as though there was strict consistency in the manner in which the invoices were addressed. However, it seems that most of the invoices were addressed to GEM or to Mahpal. A few of the invoices were addressed to a particular Owner. Mr. Hussain testified that, on occasion, some Contractors addressed their invoices to Mr. Oickle, who was the engineer supervising the various construction projects.

[58] The invoices were generally sent by Contractors to 1046 Barrington Street, Halifax, which was GEM's address. It was also the address of the head office of each of HOTV Ltd., Whitehills Ltd. and Admiral Ltd.⁴⁹ Mr. Hussain explained that invoices could be sent only to that address or to the construction site, which was not recommended because invoices sometimes went missing if sent to a construction site.

[59] From time to time, GEM submitted progress claims to DoH, together with a schedule listing the invoices that were the subject of the particular progress claim and copies of those invoices. Sample progress claims were entered into evidence.⁵⁰ The sample progress claims were prepared on a standardized form stipulated by

⁴⁷ As indicated above, I have defined the term "Contractors" so as to include the general contractors and the subcontractors.

⁴⁸ *Builders' Lien Act*, RSNS, 1989, c.277, subsections 6(1) and 8(1).

⁴⁹ See the addresses set out on the first page of the respective Development Agreements and Service Agreements, which are reproduced in Exhibit A-1, Tabs 9-14.

⁵⁰ See Exhibit A-1, Tab 31; and Exhibit R-1, Tabs 4-6.

DoH. The caption of each progress claim stated, “RE: Progress Claim # [the number of the particular claim was set out] for GEM - [the name and location of the particular nursing home was stated].” The first paragraph of each progress claim began with the phrase, “Enclosed please find a draw request by [the name and location of the particular nursing home was stated] for work completed on the above noted construction project up to [the cut-off date for the claim was stated].” The sender of the progress claim was shown as “GEM – [the name of the particular nursing home was stated].” Each progress claim was signed by Colin Bagnell, who was a project manager.

[60] The progress claims were neither explicit nor abundantly clear as to who was sending them to DoH. Some of the other documents entered in evidence (such as the T4 slips) indicate that the phrase “GEM - [abbreviated name]” was used to refer to a particular corporate entity. For instance, on the T4 slips issued by GEM to Mr. Hussain, the employer’s name was shown as “GEM – GEM Healthcare” and on the T4 slips issued by Melville Ridge to Mr. Hussain, the employer’s name was shown as “GEM – Melville Ridge.” If the same terminology was intended in the progress claims, the wording of the caption in each claim and the name of the sender in each claim would suggest that the claims were sent by HOTV Ltd., Whitehills Ltd. or Admiral Ltd., as the case may have been. On the other hand, it is possible that the sender of each progress claim was GEM itself, and not one of the Owners, particularly as the person who signed each claim, Colin Bagnell, was a project manager employed by GEM.⁵¹ Each progress claim sent to DoH in respect of an Owner’s project had an impact on the liability of that Owner under the Mortgage and the Security Agreement entered into by that Owner with HDC. As progress claims were submitted, and as funds were advanced under the particular loan documents by HDC to an Owner, the indebtedness of the Owner increased. Thus, if the progress claims were submitted to DoH by GEM, I find that, because the Owner’s legal position in respect of its indebtedness to HDC was affected, this was consistent with GEM acting as the agent of the Owner.

⁵¹ Testimony of Syed Hussain, *Transcript*, Tuesday, January 26, 2016, page 41, lines 18-19.

(i) Flow of Funds

[61] Mr. Hussain testified that, if DoH was satisfied with a progress claim submitted to it, it authorized the Nova Scotia Department of Housing⁵² to issue a cheque in payment of the progress claim. Mr. Hussain also stated that “the cheque comes into the name of the facility,”⁵³ by which I assume that he meant that each cheque was payable to the particular Owner.

[62] Upon receiving a cheque from HDC, the Owner deposited the cheque into its bank account, from which funds were transferred to GEM, which used the transferred money to pay the invoices submitted by the Contractors. Mr. Hussain stated that GEM did not make written draw requests to a particular Owner; rather, the money was simply transferred by the Owner to GEM by means of “an internal transfer with a cheque.”⁵⁴

[63] Mr. Hussain also testified that, although the Owners had their own bank accounts, they did not pay the general contractors directly because they did not have the office staff to verify the payments. Consequently, GEM took responsibility for processing the payments because, as Mr. Hussain explained, “overall GEM is responsible for everything what [*sic*] the other facilities are doing.”⁵⁵ Given that GEM, in making payments to the general contractors, used money provided by the Owners, I am of the view that GEM, in so doing, was acting as the agent of the Owners.

(j) Invoice-Like Documents

[64] While each of the three nursing homes was being constructed, GEM recorded the acquisition of work and materials on its books. GEM took the position that it was doing so for and on behalf of each of the three Owners. The CRA took the position that GEM was acting on its own behalf.

⁵² *Ibid.*, page 52, lines 15-17. I assume that Mr. Hussain meant to refer to Nova Scotia Housing Development Corporation (defined above as “HDC”), as HDC was the entity that had agreed to loan money to each of the three Owners.

⁵³ *Ibid.*, page 52, lines 19-20.

⁵⁴ *Ibid.*, page 53, lines 10-11. Ms. Power acknowledged that the funds flowed in the general manner described above; see *Transcript*, Wednesday, January 27, 2016, page 41, lines 12-21.

⁵⁵ Testimony of Syed Hussain, *Transcript*, Tuesday, January 26, 2016, page 53, lines 22-23.

[65] As each of the three construction projects drew to an end, it was determined by GEM and each Owner that the cost of the work and materials (or, as John Yuan called it, the “asset value”) pertaining to the particular nursing home should be recorded on the books of the applicable Owner. In order to do that, Mahpal prepared a document, in the form of an invoice, containing various entries, three of which were described as “Billing Address,” “Invoice Date” and “Invoice No.” respectively, in respect of each of the three nursing homes. The CRA took the position that these documents were invoices in the usual sense of the word. GEM took the position that the documents were merely accounting documents intended to move the asset value from GEM’s books to the Owners’ books and that the documents were not calls for payment and were not invoices in the usual sense of the word.⁵⁶

[66] John Yuan, who was GEM’s Director of Finance, testified that the reason for which the asset values were initially recorded on GEM’s books was that, when the construction of the nursing homes was commenced, HOTV Ltd., Whitehills Ltd. and Admiral Ltd. did not yet have any employees to do the bookkeeping or to process the payments made to the Contractors. Mr. Yuan explained that, given the large number of Contractors and the significant number of adjustments to be anticipated as construction progressed, due to back orders, change orders and the like, the accounting was quite extensive and it was easier to “put it together”⁵⁷ (presumably meaning to centralize the accounting in GEM). As well, Mr. Yuan stated that it made it easier to manage the cost and the accounting.

[67] It is curious that each of the invoice-like documents contained a heading “Terms” and beneath that heading the phrase “Net 30 Days,” which might suggest that a payment was expected within 30 days. However, no payment was actually expected, and none was made. As explained by Mr. Hussain and Mr. Yuan, whenever it was necessary to pay a progress claim submitted by one of the general contractors, funds from a mortgage advance were paid by the applicable Owner to GEM. Thus, most, if not all, of the construction costs had been paid by the Owners to GEM and by GEM to the general contractors long before the invoice-like documents were prepared and issued by Mahpal.

⁵⁶ Testimony of John Yuan, *Transcript*, Tuesday, January 26, 2016, page 97, line 24 to page 100, line 11, and page 104, line 23 to page 106, line 2.

⁵⁷ *Ibid.*, page 99, lines 6-28.

[68] The invoice-like document issued by Mahpal to HOTV Ltd. was dated February 28, 2011⁵⁸ and itemized the following amounts:

Building Cost	\$12,286,733.62
Furniture & Equipment	783,852.35
Non-Taxable Bed	150,000.00
Paving	230,471.53
Computer	<u>24,178.01</u>
Sub-Total	\$13,475,235.51

The document also contained an entry identified as “Taxable Total” in the amount of \$13,325,235.51, which represented the aggregate of the construction and equipment costs less the cost of the beds, which were not subject to GST/HST. Below the entry for Taxable Total, there was an entry for HST, at the rate of 15%, and in the amount of \$1,998,785.33, resulting in a total amount of \$15,474,020.84.

[69] On June 30, 2011, Mahpal prepared a similar invoice-like document in respect of the Whitehills Centre.⁵⁹ Notably, this document was addressed to the Whitehills Centre and not to Whitehills Ltd. The itemized amounts in this document are:

Land	\$498,300.00
Building	12,903,015.49
Furniture & Equipment (Non-Tax Bed: \$174,000)	1,222,853.29
Paving & Landscaping	393,456.08
Computer	31,409.44
Software	<u>23,472.02</u>
Sub-Total	\$15,072,506.32

[70] A curious feature in respect of this document is the inclusion of the land cost, given that the land for the Whitehills Centre was acquired by Whitehills Ltd. from Melville Ridge, and not from Mahpal or GEM. This fact lends support to the submission that the purpose of each invoice-like document was to set up the cost of the particular nursing home on the books of the applicable Owner, and not to document a sale by GEM to that Owner. In other words, the

⁵⁸ This document is reproduced behind Tab 40 in Exhibit A-1.

⁵⁹ This document is reproduced behind Tab 41 in Exhibit A-1.

invoice-like documents were not representative of actual transactions between GEM and the Owners.

[71] On August 2, 2012, Mahpal prepared an invoice-like document in respect of the Admiral Centre.⁶⁰ Similar to the Whitehills document, this document was addressed to the Admiral Centre and not to Admiral Ltd. The amounts itemized on this document were:

Building	\$16,715,517.15
Equipment & Furniture	455,797.56
Furniture – Bed (Non-HST)	195,000.00
Computer hardware	38,532.45
Computer software	28,687.07
Inventory (Nursing Supplies)	14,970.91
Land	<u>1,193,029.20</u>
Sub-Total	\$18,641,534.34

[72] Like the Whitehills document, the Admiral document contained an entry for land, notwithstanding that Admiral Ltd. acquired its land from Mr. and Mrs. Hussain, and not from GEM or Mahpal. Thus, I view this document (like the other two documents discussed above) as having an accounting function, rather than a transactional function.

[73] The document prepared by Mahpal in respect of the Admiral Centre itemized the HST at three rates, recognizing that the Government of Nova Scotia was increasing the rate of HST on an annual basis. The HST amounts are shown as:

HST (13%)	\$463,085.36
HST (14%)	12,459.90
HST (15%)	<u>2,219,301.00</u>
Total	\$2,694,846.26

[74] Mr. Yuan explained that the total amount shown at the bottom of each of the invoice-like documents represented the total amount of financing provided by HDC to the particular Owner and paid to the various general contractors in conjunction with the progress claims processed from time to time.⁶¹ In other words,

⁶⁰ This document is reproduced behind Tab 42 in Exhibit A-1.

⁶¹ Testimony of John Yuan, *Transcript*, Tuesday, January 26, 2016, page 105, lines 15-18.

there was no mark-up in respect of the amounts shown on the invoice-like documents. If GEM or Mahpal had been providing construction services in its own right (i.e., as principal) to each Owner, as alleged by the Crown, one would have expected GEM or Mahpal to have included a mark-up or some other profit factor in the invoice-like documents.

[75] If the invoice-like documents were actual invoices, as the Crown alleges, they would seem to suggest that GEM sold, to each of the Owners, a completed nursing home in its entirety, together with (depending on the particular document) the land (in the case of the Whitehills Centre and the Admiral Centre), paving (in the case of the HOTV Centre and the Whitehills Centre), landscaping (in the case of the Whitehills Centre), furniture (including beds), equipment and computers. In other words, the three invoice-like documents do not suggest that construction services were provided by GEM to the Owners. If those documents are to be treated as actual invoices, they suggest that the completed and furnished nursing homes were sold by GEM to the respective Owners; however, that clearly did not happen.

[76] In my view, the issuance of the invoice-like documents may not have been the best way to move the so-called asset value in respect of the three nursing homes from GEM's books to the Owners' books, particularly as those documents seem to have misdirected the CRA. Nevertheless, for the reasons set out above, I have concluded that the three invoice-like documents were prepared by GEM for the purpose of recording the cost of each nursing home on the books of the applicable Owner. In other words, the invoice-like documents had an accounting function, and not a transactional function.⁶²

(k) No ITCs Claimed by GEM or Mahpal

[77] As GEM or Mahpal processed progress claims from time to time and made payments to the general contractors on behalf of the three Owners, neither GEM nor Mahpal claimed any ITCs in respect of the GST/HST paid by them on behalf

⁶² In *Otte & Associates Contractors Inc. v The Queen*, 2016 TCC 162, ¶43, I stated that “an invoice is an accounting document, and not a transactional document, with the result that an invoice merely reflects transactions, and does not create them.” See also ¶39 of that decision.

of the Owners to the general contractors.⁶³ The non-claiming of ITCs is consistent with GEM's submission that it was acting as the agent of the Owners.

(1) GST/HST Returns

[78] As indicated above, counsel for the Crown took the position that subsection 191(3) of the *ETA* applied so as to deem the title to the various materials to have been transferred to the respective Owners when the particular nursing homes were substantially completed and GEM issued itemized invoices to the Owners. I acknowledge that subsection 191(3) of the *ETA* was applicable, but not in the manner suggested by counsel for the Crown.

[79] The relevant provisions of subsection 191(3) of the *ETA* during the reporting periods in question read as follows:

191(3) For the purposes of this Part, where

- (a) the construction ... of a multiple unit residential complex is substantially completed,
- (b) the builder of the complex
 - (i) gives, to a particular person who is not a purchaser under an agreement of purchase and sale of the complex, possession or use of any residential unit in the complex under a lease, licence or similar arrangement entered into for the purpose of the occupancy of the unit by an individual as a place of residence, ...
 - (ii) ..., and
- (c) ... the particular person ... is the first individual to occupy a residential unit in the complex as a place of residence after substantial completion of the construction ...,

the builder shall be deemed

- (d) to have made and received, at the later of the time the construction ... is substantially completed and the time possession or use of the unit is so given to the particular person ..., a taxable supply by way of sale of the complex, and

⁶³ Testimony of Barbara Power, *Transcript*, Wednesday, January 27, 2016, page 18, lines 26-27.

- (e) to have paid as a recipient and to have collected as a supplier, at the later of those times, tax in respect of the supply calculated on the fair market value of the complex at the later of those times.

[80] Counsel for the Crown submitted that each Owner was a “builder” and each nursing home was a “residential complex,” as those terms are defined in subsection 123(1) of the *ETA*. I concur with those submissions.

[81] Thus, by reason of subsection 191(3) of the *ETA*, when a nursing home was substantially completed and one of the residential units in the nursing home was occupied by the first occupant, the deeming provision in paragraph 191(3)(d) of the *ETA* was triggered, such that the Owner of that nursing home was deemed to have made and received, at the later of the time when the construction was substantially completed and the time when the first occupant took possession of his or her unit, a taxable supply by way of sale of the complex. Furthermore, by reason of the deeming provision in paragraph 191(3)(e) of the *ETA*, GST/HST was deemed to have been paid and collected, at the later of those times, in respect of the so-called self-supply of the nursing home. In keeping with the self-supply rule in subsection 191(3) of the *ETA*, each Owner filed a GST/HST return.⁶⁴

[82] In particular, on March 31, 2011, HOTV Ltd. filed a GST/HST return for the reporting period beginning on February 1, 2011 and ending on February 28, 2011, in conjunction with the deemed taxable supply by way of sale of the HOTV Centre, pursuant to paragraph 191(3)(d) of the *ETA*.⁶⁵ In that return, HOTV Ltd. reported sales revenue in the amount of \$12,557,205.00 (which was the approximate total of the building cost in the amount of \$12,286,733.62 and the paving cost in the amount of \$230,471.53).⁶⁶ On the same GST/HST return, HOTV Ltd. reported GST/HST paid in the amount of \$1,877,580.77 (i.e., 15% of \$12,517,205.15).⁶⁷ As well, HOTV Ltd. reported that it had collected GST/HST in the amount of \$1,883,580.77, which was \$6,000 greater than the amount of

⁶⁴ Those returns are reproduced behind Tabs 37, 38 and 39 in Exhibit A-1.

⁶⁵ While there was no specific evidence in this regard, it appears as though HOTV Ltd. was endeavouring to comply with the obligation to report the self-supply of the HOTV Centre pursuant to subsection 191(3) of the *ETA*.

⁶⁶ The precise total of the building cost in the amount of \$12,286,733.62 and the paving cost in the amount of \$230,471.53 is \$12,517,205.15. The difference between \$12,557,205 (which was the amount of sales and other revenue reported on the GST/HST return) and \$12,517,205.15 is \$39,999.85, which, when rounded to the nearest dollar, is \$40,000, which apparently represents the value of the land provided by Mr. Hussain to HOTV Ltd. See the Appellant’s Supplementary Submissions, ¶29.

⁶⁷ Testimony of John Yuan, *Transcript*, Tuesday, January 26, 2016, page 115, lines 7-25.

GST/HST reported as having been paid. The difference of \$6,000 represents 15% of \$40,000, which was the value of the land provided by Mr. Hussain to HOTV Ltd. (see paragraph 12 above). However, as HOTV Ltd. did not pay \$40,000 to Mr. Hussain for the land, it did not claim an ITC in respect thereof.⁶⁸

[83] Similarly, on August 31, 2011, Whitehills Ltd. filed a GST/HST return for the reporting period from July 1, 2011 to July 31, 2011, in which it reported sales revenue in the amount of \$13,794,772.00.⁶⁹ While the same level of detail was not provided in oral evidence in respect of Whitehills Ltd. as in respect of HOTV Ltd., it is my understanding that the reported sales revenue in the amount of \$13,794,772.00 was the approximate total of the land cost in the amount of \$498,300.00, the building cost in the amount of \$12,903,015.49 and the paving and landscaping cost in the amount of \$393,456.08, which were set out in the invoice-like document dated June 30, 2011 and which were the items that were the subject of the taxable supply by way of sale that was deemed to have occurred by reason of paragraph 191(3)(d) of the *ETA*. On the GST/HST return, Whitehills Ltd. reported that it had both paid and collected GST/HST in the amount of \$2,069,215.74 (which represented 15% of \$13,794,771.57 and which was presumably the amount of GST/HST that was deemed to have been paid and collected pursuant to paragraph 191(3)(e) of the *ETA*).

[84] In like manner, on or about September 28, 2012, Admiral Ltd. filed a GST/HST return for the reporting period from August 1, 2012 to August 31, 2012, in which it reported sales and other revenue in the amount of \$17,923,839.00. It is my understanding that the total of the cost of the land (i.e., \$1,193,029.20) and the cost of the building (i.e., \$16,715,517.15) was \$17,908,546.35, which was slightly less than the amount of revenue that was reported. The difference was \$15,292.65 (i.e., \$17,923,839.00 – \$17,908,546.35), and apparently arose because Admiral Ltd. treated a small portion of the cost of the furniture and equipment as forming part of the real property which was the subject of the self-supply rule.⁷⁰ On the GST/HST return, Admiral Ltd. reported that it had collected GST/HST in the

⁶⁸ I am not certain that HOTV Ltd. properly dealt with the deemed GST/HST in respect of the land. Paragraph 191(3)(e) of the *ETA* provides that a builder is deemed to have paid GST/HST on the fair market value of the particular complex. In other words, it is the deemed GST/HST, and not the actual GST/HST, that is to be reported in respect of the self-supply that is deemed to have occurred by reason of subsection 191(3) of the *ETA*.

⁶⁹ Testimony of John Yuan, *Transcript*, Tuesday, January 26, 2016, page 115, line 26 to page 116, line 11.

⁷⁰ Appellant's Supplementary Submissions, ¶24.

amount of \$2,688,575.95, which was 15% of \$17,923,839.00. Admiral Ltd. also reported that it had paid GST/HST in the amount of \$2,617,439.60.⁷¹

[85] While it appears that there may have been a few discrepancies or errors in respect of the three GST/HST returns that were filed, I am of the view that HOTV Ltd., Whitehills Ltd. and Admiral Ltd. filed their respective returns with the intention of complying with the self-supply rule in subsection 191(3) of the *ETA*. If the three Owners had purchased the respective nursing homes from GEM, the self-supply returns would not have been necessary. Thus, I find that the preparation and filing of those returns by the Owners is consistent with the position that they have taken that GEM was their agent and that they acquired the work and materials that went into those nursing homes as principals, pursuant to the contracts that GEM had made, on their behalf and as their agent, with the various Contractors.

(m) Rental Property Rebate Applications

[86] HOTV Ltd., Whitehills Ltd. and Admiral Ltd. each filed with the CRA a GST/HST New Residential Rental Property Rebate Application (Form GST 524) (each, an “NRRPR Application”). The NRRPR Applications filed by HOTV Ltd. and Admiral Ltd. were entered into evidence.⁷² In section C of the respective NRRPR Applications, HOTV Ltd. and Admiral Ltd.⁷³ each identified itself as a builder and landlord, rather than as a purchaser and landlord. This seems to be consistent with the position taken by GEM, that it was an agent of the Owners, and not a vendor of the nursing homes.

[87] Although the NRRPR Application of Whitehills Ltd. was not entered into evidence, I was provided with a copy of a letter dated May 22, 2013, from the CRA to Whitehills Ltd., which acknowledged that the CRA had audited

⁷¹ The reason given for the amount of GST/HST paid being less than the amount of GST/HST collected was that, as the Admiral Centre was being constructed, in 2010 GST/HST was paid at the rate of 13% and in 2011 GST/HST was paid at the rate of 14%. Accordingly, the amount reported on the GST/HST return was the amount of GST/HST actually paid, rather than the amount that was deemed by paragraph 191(3)(e) of the *ETA* to have been paid. This may not have been the correct treatment of the GST/HST; see footnote 68.

⁷² See Tabs and 10 and 12 of Exhibit A-2.

⁷³ In the box for the claimant’s legal name in section A of each NRRPR Application, the claimants were shown as the HOTV Centre and the Admiral Centre respectively. However, as the business numbers of HOTV Ltd. and Admiral Ltd. were also set out in section A of each NRRPR Application, it appears that the intention was that the corporate entities (and not the nursing homes) were to be the claimants.

the GST/HST returns and the NRRPR Application of Whitehills Ltd. In that letter, the CRA identified various errors in the NRRPR Application filed by Whitehills Ltd., and also noted that Whitehills Ltd. had claimed the rebate twice. The CRA acknowledged that there had been a self-supply of the Whitehills Centre; however, the CRA took the position that the self-supply date was June 29, 2011, rather than July 1, 2011, as apparently indicated by Whitehills Ltd. in its NRRPR Application.

(3) Summary

[88] By reason of the foregoing factors, I have concluded that, to the extent that GEM supervised or managed the development and construction of the nursing homes, it did so as agent for and on behalf of the three Owners. Consequently, I have also concluded that GEM, as principal, did not supply construction services to the Owners.

B. Management Fee Charged to Melville Ridge

[89] In 2009, 2010 and 2011, Mr. Hussain was an employee of both GEM and Melville Ridge.⁷⁴ During the relevant reporting periods, GEM provided various management services to Melville Ridge (in keeping with the general arrangement described in paragraphs 9 and 11 above). However, as the services provided by GEM to the other Subsidiaries included services performed by Mr. Hussain, and as Mr. Hussain was an employee of Melville Ridge (as well as an employee of GEM), GEM did not provide the services of Mr. Hussain to Melville Ridge. Accordingly, GEM reduced the management fee charged to Melville Ridge by an amount corresponding to the salary paid by Melville Ridge to Mr. Hussain. GEM collected GST/HST in respect of the reduced management fee only.

[90] The CRA took the position that the arrangement between GEM and Melville Ridge constituted two separate supplies, one being a supply of services (including services performed by Mr. Hussain in his capacity as an employee of GEM) supplied by GEM to Melville Ridge, and the other being a supply of services (including services performed by Mr. Hussain in his capacity as an employee of

⁷⁴ See the Statements of Remuneration Paid (Form T4) issued to Mr. Hussain by Melville Ridge and GEM for 2006 through 2013, as reproduced behind Tabs 6 and 7 respectively of Exhibit A-2.

Melville Ridge) supplied by Melville Ridge to GEM.⁷⁵ The CRA also took the position that the consideration provided by Melville Ridge to GEM for the services provided by GEM had both a cash component (being 5% of the gross revenues for the particular month, less the amount of the salary paid by Melville Ridge to Mr. Hussain for that month) and a non-cash component (being the value of the services provided by Melville Ridge to GEM).⁷⁶

[91] The approach taken by the CRA is based on the premise that the services of Mr. Hussain flowed in both directions (i.e., GEM provided the services of Mr. Hussain to Melville Ridge, and Melville Ridge provided the services of Mr. Hussain to GEM), and seems to suggest an element of circularity. Furthermore, the CRA's approach seems peculiar in that, as Mr. Hussain was an employee of GEM, there was no reason for Melville Ridge to make the services of Mr. Hussain available to GEM in the manner suggested by the CRA, and, as Mr. Hussain was an employee of Melville Ridge, there was no reason for GEM to make the services of Mr. Hussain available to Melville Ridge.

[92] There was no evidence to suggest that Melville Ridge provided any services (particularly the services of Mr. Hussain) to GEM. In particular, Mr. Hussain testified that Melville Ridge did not provide any management services to GEM.⁷⁷ Therefore, I find that the management services supplied by GEM to Melville Ridge did not include any services performed by Mr. Hussain and that GEM properly calculated and charged the appropriate amount of consideration for those management services. As well, I find that GEM collected and remitted the appropriate amount of GST/HST in respect of that consideration.

C. Reduction in Management Fees Charged to Certain Subsidiaries

[93] As mentioned above,⁷⁸ GEM provided various services to each of its Subsidiaries, and typically charged a management fee of 5% of the gross revenue of the particular Subsidiary (except in the case of Melville Ridge, where the amount of the fee was reduced by the amount of the salary paid by Melville Ridge to Mr. Hussain). In 2009, four of the nursing homes had reduced

⁷⁵ Letter dated February 9, 2012 from the CRA to GEM Management Group Ltd. (*sic*), pages 2-4, which is reproduced behind Tab 18 in Exhibit R-2.

⁷⁶ Testimony of Barbara Power, *Transcript*, Wednesday, January 27, 2016, page 27, lines 4-8.

⁷⁷ Testimony of Syed Hussain, *Transcript*, Tuesday, January 26, 2016, page 65, lines 2-4.

⁷⁸ See paragraphs 9 and 11 above.

revenue due to low occupancy⁷⁹ and they had a poor performance level due to significant maintenance costs.⁸⁰ Therefore, GEM's management decided to reduce the management fees charged in respect of those nursing homes. Accordingly, effective as of December 31, 2009, the management fees charged in respect of the following nursing homes were reduced by the following amounts:⁸¹

Melville Lodge	\$78,829.00
Melville Heights	29,631.00
Melville Gardens	81,541.00
North Hills	<u>146,000.00</u>
Total	\$336,001.00

[94] In conjunction with the above fee reductions, GEM posted the following entries effective as of December 31, 2009:⁸²

Management fees (reduction in management fees) ⁸³	\$297,346.00
GST collected (reduction in management fees)	<u>38,655.00</u>
Total	\$336,001.00

[95] Throughout 2009, GEM had provisionally invoiced Melville Ridge (which owned and operated the Melville Lodge, Melville Heights and Melville Gardens nursing homes) and the entity that owned the North Hills nursing home. Apparently, GEM had collected and remitted GST on the management fees as originally calculated. When the reductions in management fees were implemented as of December 31, 2009, rather than using the procedure set out in section 232 of the *ETA*, GEM claimed an additional ITC corresponding to an amount of GST/HST calculated by reference to the amount of the reduction in the management fees.

[96] Subsection 232(2) of the *ETA* provides that, where a particular person has charged to, or collected from, another person GST/HST calculated on the

⁷⁹ Testimony of Syed Hussain, *Transcript*, Tuesday, January 26, 2016, page 83, line 16 to page 85, line 11.

⁸⁰ Testimony of John Yuan, *Transcript*, Tuesday, January 26, 2016, page 102, lines 7-10.

⁸¹ See Exhibit A-2, Tabs 2-5.

⁸² See Exhibit A-2, Tab 1.

⁸³ The phrases in parentheses are paraphrased entries from the G/L Transactions Listing and the G/L Batch Listing.

consideration for a supply and, for any reason, the consideration is subsequently reduced, the particular person may, if the tax has been charged but not collected, adjust the amount of tax, or, if the tax has been collected, refund or credit the excess tax to the other person. Where this is done, paragraph 232(3)(a) of the *ETA* requires the particular person to issue to the other person a credit note, containing prescribed information, unless the other person issues a debit note, containing prescribed information. As well, paragraph 232(3)(b) of the *ETA* provides that an amount corresponding to the excess tax may be deducted in determining the net tax of the particular person for the reporting period of the particular person in which the credit note is issued or the debit note is received.

[97] As indicated above, GEM did not avail itself of the procedure set out in section 232 of the *ETA*, but rather, claimed an ITC, presumably to recover an amount of GST/HST calculated by reference to the reduction in the management fees. The claiming of an ITC in this situation was not in accordance with subsection 169(1) of the *ETA*, which provides that an ITC is available where a person acquires or imports property or a service or brings it into a participating province. Subsection 169(1) does not permit an ITC to be claimed where the consideration for a supply is subsequently reduced.

[98] In my view, section 232 of the *ETA* sets out the procedure that should have been used by GEM to adjust the GST/HST corresponding to the management fees that were ultimately reduced in 2009.⁸⁴ There was no evidence that GEM issued credit notes or that Melville Ridge and the owner of the North Hills nursing home issued debit notes. In my view, the issuance by a supplier of a credit note in a situation such as this is critical, as it enables the recipient to ascertain whether the supplier will reduce or refund (as the case may be) the GST/HST, or whether it will be necessary for the recipient to apply for a rebate of tax under section 261 of the *ETA*. The issuance of a credit note, where required by paragraph 232(3)(a) of the *ETA*, is not a mere procedural formality that may be ignored. Counsel for GEM submitted that the year-end adjusting entries in the accounts of GEM were the equivalent of a credit note; however, as those adjusting entries did not contain the prescribed information required by the *Credit Note and Debit Note Information (GST/HST) Regulations*, those entries were not sufficient to satisfy the requirement

⁸⁴ While not directly on point, the decisions in *Bondfield Construction Company (1983) Limited v The Queen*, 2005 TCC 78, *Said Joaillier Ltée v The Queen*, 2006 TCC 3, and *Vivaconcept International Inc. v The Queen*, 2013 TCC 336, suggest that the issuance of a credit note or a debit note under paragraph 232(3)(a), rather than the claiming of an ITC under subsection 169(1), is the appropriate procedure to be used where the consideration for a supply is subsequently reduced.

of paragraph 232(3)(a) of the *ETA*.⁸⁵ Accordingly, I am of the view that GEM was not entitled to claim an ITC in respect of an amount of GST/HST calculated by reference to the amount of the reduction in the management fees.

V. Conclusion

[99] These Appeals are allowed and the Reassessments are referred back to the Minister for reconsideration and reassessment in accordance with these Reasons, and, in particular, on the basis that, during the period from January 1, 2009 to September 30, 2011:

- a) GEM acted as the agent for and on behalf of the Owners with respect to the development and construction of the three nursing homes, such that GEM did not supply construction services to any of the Owners, with the result that GEM was not required to collect or remit GST/HST in respect of any such alleged construction services; and
- b) the management services supplied by GEM to Melville Ridge did not include any services performed by Mr. Hussain, with the result that GEM properly calculated and charged the appropriate amount of consideration for those services and collected and remitted the correct amount of GST/HST in respect of those services.

[100] In all other respects, the Reassessments are confirmed. In particular:

- a) GEM was not entitled to ITCs in respect of the reduction, as of December 31, 2009, in the amount of the management fees charged to Melville Ridge and to the owner of the North Hills nursing home; and
- b) the Minister properly reassessed GEM for GST/HST in respect of parking fees charged by GEM to guests of the Garden Inn.

[101] As GEM has been substantially successful in these Appeals, costs, with a fee for second counsel for conduct of the hearing, are awarded to GEM in accordance with Tariff B of Schedule II to the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 25th day of January, 2017.

⁸⁵ See *Bondfield Construction*, *supra* note 84, ¶35 and 125.

“Don R. Sommerfeldt”

Sommerfeldt J.

CITATION: 2017 TCC 13

COURT FILE NO.: 2014-79(GST)G

STYLE OF CAUSE: GEM HEALTH CARE GROUP LIMITED
AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: January 26 and 27, 2016

REASONS FOR JUDGMENT BY: The Honourable Justice Don R.
Sommerfeldt

DATE OF AMENDED
JUDGMENT: **February 6, 2017**

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