Docket: 2006-181(GST)G

BETWEEN:

LABRANCHE, MONTPETIT,
ST-JEAN INVESTISSEMENTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 12 and 13, 2008, at Montréal, Quebec.

Before: The Honourable Justice Pierre Archambault

Apearances:

Counsel for the appellant;	Christopher Mostovac
Counsel for the respondent:	Benoit Denis

AMENDMENT TO JUDGMENT

Whereas this Court rendered judgment on July 7, 2008, and issued written reasons on August 27, 2008, of the judgment delivered orally at the June 13, 2008, hearing;

And whereas counsel for the respondent advised the Court that an error not affecting the substance of the judgment appeared in the table that was part of the first paragraph of the judgment and paragraph 20 of the above-noted reasons for judgment;

This Court modifies the table as follows:

40,869.55 litres	for 2000
42,134.00 litres	for 2001
38,513.00 litres	for 2002
35,434.30 litres	for 2003

Signed at Montréal, Quebec, this 22nd day of September 2008.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 18th day of November 2010.

François Brunet, Revisor

Citation: 2008 TCC467
Date: 20080922
Docket: 2006-181(GST)G

BETWEEN:

LABRANCHE, MONTPETIT,
ST-JEAN INVESTISSEMENTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

AMENDED REASONS FOR JUDGMENT

(Delivered orally from the bench on June 13, 2008
at Montréal, Quebec and modified for clarity and precision,
but with no significant amendments.)

Archambault J.

[1] Labranche, Montpetit, St-Jean Investissements Inc. (LMS), is appealing from an assessment made by the Ministère du Revenu du Québec (the MRQ) as an agent of the Minister of National Revenue (the Minister) regarding the period of May 1, 1999 to April 30, 2003 (relevant period) under the *Excise Tax Act* (the Act).

[2] The issue is in regard to the application of the goods and services tax (GST) on understated sales. In the Reply to the Notice of Appeal, the amount in question following the assessment resulting from the objection is $86,287. (See also, Exhibit A-1). This amount represents $85,727 in total GST collected and collectable but not remitted, and $559.50 in non-allowed input tax credits (ITC).

[3] After the lodging of the appeal, the parties came to an agreement on other modifications. Certain errors, from the Minister's calculations in the application of the indirect method for determining understated sales, were corrected. This method

was selected because LMS had used a blanking module for sales when operating its restaurant. This method involved calculating a coefficient to determine what the sales would have been based on the taxpayer's purchases. Therefore, for each litre of drinks purchased (essentially wine and beer, including draft beer), total sales were determined to be $30.76. These amounts were very similar from one period to another and can be found in Exhibit I-1, an agreement of facts, in which the coefficients for the relevant period are specified.

[4] Following a pre-hearing conference (the contents of which were not revealed to me), in the agreement of facts, the parties agreed that the only remaining issue was the amount of the loss relevant for the purposes of calculating the understated sales. By estimating these sales using wine and beer purchases, the amount of the loss of these drinks, inevitable when operating a restaurant, had to be considered. The controversy before the Court bore on this issue. Following the corrections made by the Minister, the amount in question went from $86,287 to $62,472.75, which is the total of the $62,458 in GST collected or collectable for the understated sales, and the $14.26 in ITC.

[5] At the very start of the hearing, counsel for the Respondent announced that, in addition to the prior concessions made, he was ready to reduce the GST collected or collectable from $62,458 to a round number, $50,000, to take into consideration that the losses calculated by the Minister, around 2% of beverages sold (various brands of beer and wine), may not have been sufficient and that all "liquids" should be considered. According to my calculations, this $50,000 would allow for higher losses, on average 5.11% for the relevant period. This figure was calculated using the total litres purchased, 156,405,[1] multiplied by the sales coefficient of 30.76 (calculated by the Respondent), giving estimated sales before losses of $4,811,018. From this amount, I subtracted the sales of $3,850,887, claimed by LMS. The difference before losses was $960,162. Additional sales according to the Respondent were $714,286 (50,000/.07), leaving a difference of $245,876[2] granted by the Respondent as losses, corresponding to 5.11% ($245,876\4, 811, 018).

[6] To establish the amount of its losses, LMS offered in evidence the fact that it faced problems during the relevant period, mainly in regard to the refrigeration of draft beer. There were also high losses from the pouring and handling of the draft beer. This situation could warrant the higher than normal losses, estimated at 15.32% (736,941\4,811,018) representing the average figure for the relevant period. This

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1 156,405 = 38,445 + 42,050 + 38,502 + 37,408. See Exhibit A-15.

2 245,876 = 960,162 – 714,286

figure was determined by the use of the estimated actual sales, $4,811,018, from which declared sales of $4,074,077[3] were subtracted, giving a difference before losses of $736,941. For the Appellant, this difference was the amount of their losses.

[7] At the hearing, one of the crucial elements, in my opinion, for establishing the amount of LMS's loss was to first determine its actual sales. To do so, Mr. St-Jean, one of LMS's shareholders, testified to submit his calculation papers to justify the amount of the LMS's actual sales.

[8] Counsel for the Respondent objected to the testimony and submission of the table because the Court was not presented with the best evidence. I allowed the witness to continue testifying on his word that he had consulted his own records to establish the figures discussed during his testimony, the admissibility of which counsel for the Respondent argued against, particularly that the best evidence was not being presented.

[9] In my opinion, Mr. St-Jean's evidence regarding the actual sales is insufficient because the best possible evidence was not presented, namely the records themselves or spreadsheets created at the time to account for sales being erased by the blanking module commonly called a "zapper." It can be concluded that (i) the evidence is inadmissible, or (ii) if admissible, its evidentiary weight is insufficient. In my reasons, I incorporate the majority of counsel for the Respondent's arguments regarding the issue of the inadequacy of the evidence submitted. First, the best evidence was not presented. Moreover, there were contradictions in the testimony, particularly regarding the dates the "zapper" was introduced. When we rely on our memory because there is no sufficient corroborating evidence, it is easy to make mistakes, either in good or bad faith. This is why it is unwise to appear in court without the best evidence. These two arguments, in my opinion, justify my finding that the amount of the losses during the relevant period was not successfully or precisely quantified.

[10] I will restate my comments to counsel for LMS during the submissions, namely that I find this situation very ironic. The fundamental issue raised by this assessment was the amount of the actual sales, including those that were understated when GST claims were filed because of the erasing by the "zapper." That was the issue. However, to establish the amount of the loss required to complete the MRQ's

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[3] In fact, the description of these figures was inversed when the reasons were issued. The amount of $4,811,018 represents the estimated sales according to the indirect method and the $4,074,077 represents the actual sales according to LMS's evidence. (See Exhibit A-14.)

calculation method, we were informed during the hearing that a contemporaneous, parallel accounting method was used that allowed Mr. St-Jean to set the actual amount of all sales during his testimony. It seems to me that this evidence could have been submitted, and would have established the actual amounts of the sales.

[11] I will recall the comments of Bowman J. in *Ramey v. The Queen*, which I cited in *André Léger*, [2001] DTC 471, at page 474, where he wrote that the only truly effective method of challenging an assessment by net worth is to proceed with a complete reconstruction of the taxpayer's income. It seems to me that this would have been the appropriate way to establish the actual amount.

[12] I also share counsel for the Respondent's point of view on the inadequacy of the company's accounting records. When financial statements do not adequately reflect total sales, the taxpayer is open to an audit, which can lead the MRQ to use less precise methods for establishing the understated sales amounts. The Minister was justified here, considering the evidence submitted before me, in using an indirect method.

[13] I agree with the approach followed by Tardif J. in *Bastille v. Her Majesty the Queen*, 99 DTC 431, also cited in *Léger* at paragraph 14[4]. The burden of proof is on the taxpayer and it is not sufficient to challenge certain aspects of an assessment established using a subsidiary method to challenge an assessment. I am in complete disagreement with the argument of counsel for LMS, according to which there was a partial reversal of the burden of proof because of the presumption of the validity of the assessments. According to counsel, the fact that a number of significant errors appeared in the auditor's calculations results in a reversal of the burden of proof. The reality is that once the Minister was informed of these errors, they were granted. It was not necessary to come to court to defend the undefendable, to use what I think is an expression counsel for the Respondent often uses before the Court.

[14] The rationale for the rule by which the burden of proof is on the appellant must be recalled. First, as Hugessen J. stated in a case whose style of cause I now forget, any applicant who appears before any court must establish the facts that justify the findings being sought. The second reason is that the appellant is best suited to offer evidence because he has knowledge of the relevant facts. In my opinion, challenging an assessment by arguing an alleged reversal of onus is an unwarranted procedural

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[4] See also many decisions cited by counsel for the Respondent, in particular one rendered by Tardif J. in *9010-9869 Québec inc. v. Her Majesty the Queen*, 2007 TCC 365, in particular paragraphs 46 to 52, 60 and 61, 63, 66, 69, 70 and 72.

tactic. I do not know of any decision in which this approach was followed. In my opinion, this argument must be dismissed.

[15] When LMS appeared before me yesterday and today, it was to provide evidence of the 23% loss it alleged at paragraph 21 of its Notice of Appeal. LMS attempted to establish the loss by subtracting the declared sales from the amount of actual income it claims it earned during the relevant period; the difference was, according to the Appellant, its losses. The percentage, as mentioned above, was 15.32% (and not 23%).

[16] For the reasons I already mentioned, the taxpayer has failed to do so. However, the evidence showed that there were circumstances that justified a loss higher than the one the Minister granted when establishing the assessment, of 2%. It was probably fair, as I suggested to counsel for LMS, that the Respondent agreed, at the very start of the hearing, to grant an amount higher than 2% that had not been granted for certain products sold. First, the calculation was to take into consideration all "liquid" products. Moreover, a higher percentage was to be granted, which I quantified at around 5.11%.

[17] I understand the significant and financial difficulties faced by the shareholders of LMS to operate LMS. They first tried to distribute the repayment of certain debts, in particular, tax debts, as many company administrators do in similar circumstances. However, when those companies declare bankruptcy, it is to their detriment because the administrators can be held responsible for some of the tax debts. Here, unfortunately, LMS overstepped the limit of what is acceptable by choosing to deliberately understate its sales. For this, there was a price to pay. The deletion of accounting records may make a taxpayer vulnerable during an audit. This is what happened here. As long as there is no evidence to the contrary, and despite the arguments that sales could have been reconstructed with the "zapper," I do not believe the evidence is clear enough on the actual sales figures and the testimonial evidence is also not sufficient to establish the actual figure of the income earned. I accept counsel for the Respondent's arguments on the issue of witness credibility, the contradictions already mentioned, namely about the date the data eraser module was set up.

[18] LMS challenged the Minister's calculations when he applied the indirect method. They succeeded in having some modifications made, which were satisfactory except for the amount of loss. This is the amount to be determined. What is a reasonable amount that should be determined?

[19] From LMS's witness testimony, I am persuaded that there was a serious issue with the handling of the draft beer during the relevant period. It seems reasonable to me to split the difference and conclude that the losses were halfway in between the 15% requested by LMS and the 5% the Respondent granted from the beginning, for 10%. Clearly, when I noticed the appeals officer made a similar offer, this reassured me in my decision.

[20] The appeal from the assessment established under the Act, notice number 3020139, dated November 30, 2005, is allowed, and the assessment is referred back to the Minister of National Revenue for review and reassessment to allow for the admissions in the agreed statement of facts, submitted as Exhibit I-1, and in the calculation of the understated sales according to the Respondent's indirect method, to take into consideration that the Appellant has the right to losses equal to 10% of the total beer and wine purchases (before losses) in litres, in the following amounts:

40,869.55 litres	for 2000
42,134.00 litres	for 2001
38,513.00 litres	for 2002
35,434.30 litres	for 2003

[21] The issue of costs will be handled during another hearing to be set at a later date.

Signed at Montréal, Quebec, this 22nd day of September 2008.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 18th day of November 2010.

François Brunet, Revisor

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APPEARANCES:

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