Docket: 2010-2002(GST)I

BETWEEN:

CONSTRUCTION BIAGIO MAIORINO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 4, 2012, at Montreal, Quebec.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the appellant:	Lise Massicotte
Counsel for the respondent:	Khashayar Haghgouyan

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* (ETA), notice of which is dated August 9, 2007 (and which includes six distinct periods between July 1, 2003, and December 31, 2005) is allowed with respect to the management fees.

The assessment is maintained with respect to the other questions in issue.

Without costs.

Signed at Ottawa, Canada, this 28th day of November 2012.

"Johanne D'Auray"

D'Auray J.

Citation: 2012 TCC 416
Date: 20121128
Docket: 2010-2002(GST)I

BETWEEN:

CONSTRUCTION BIAGIO MAIORINO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

[1] On August 9, 2007, the appellant was assessed for six (6) periods under Part IX of the *Excise Tax Act* (**ETA**). The assessment covered the years 2003, 2004 and 2005.

[2] There are three questions in issue:

- Management fees. The Minister of Revenue Quebec or the Quebec Revenue Agency on behalf of the Minister of National Revenue (**Minister**) assessed an amount of $44,023 on account of goods and services tax (**GST**) in relation to management fees not reported by the appellant.

- GST collected but not reported. Following a reconciliation between the appellant's working papers and the GST returns filed by the appellant, the Minister assessed an amount of $13,343.27 on account of GST collected but not reported on taxable supplies. The Minister also added $10,547.37 as input tax credits. This resulted in a net GST amount of $2,795.90. A penalty of $698.97 was levied pursuant to section 285 of the ETA.

– GST not collected. The Minister assessed an amount of $10,874.85 as GST not collected, and therefore not remitted, after analyzing the taxable supplies reported in the financial statements.

MANAGEMENT FEES

[3] The Minister assumed that the appellant acted as manager for the construction contracts and/or carried out the construction contracts for the following buildings:

Date	Project	Owner	Municipal assessment
2003-08-30	2225 des Laurentides Laval, QC	Concetta Calderone	$806,600.00
2004-05-30	2227 des Laurentides Laval, QC	Concetta Calderone	$806,600.00
2005-06-11	8480 Perras Blvd. Montréal, QC	Arcobelli	$349,300.00
2005-06-11	8490 Perras Blvd. Montréal, QC	Arcobelli	$349,300.00
2004-01-30	9150 Perras Blvd. Montréal, QC	Arcobelli	$492,700.00

Date	Project	Owner	Renovations established at:
2004-06-11	190 de Pierre-Fontaine	Concetta Calderone	$68,000.00

[4] In this regard, the Minister determined that the appellant should have received management fee income equal to 20% of the buildings' municipal assessments. Therefore, the Minister assessed GST on the management fees on account of taxes not collected and not reported.

Project	Municipal assessment	20% management fee	GST collectible
2225 des Laurentides Laval, QC	$806,600.00	$161,320.00	$11,292.40
2227 des Laurentides Laval, QC	$806,600.00	$161,320.00	$11,292.40
8480 Boul. Perras Montréal, QC	$349,300.00	$69,860.00	$4,890.20
8490 Boul. Perras Montréal, QC	$349,300.00	$69,860.00	$4,890.20
9150 Boul. Perras Montréal, QC	$492,700.00	$98,540.00	$6,897.80

Project	Renovations established at		GST collectible
190 de Pierre-Fontaine	$68,000.00	x 7% (GST)	$4,760.00

[5] The following persons testified for the appellant:

- Biagio Maiorino is the appellant's director and sole shareholder;
- Giovanni Maiorino is Biagio Maiorino's brother;
- Concetta Calderone is Giovanni Maiorino's spouse and is therefore Biagio Maiorino's sister-in-law; and
- Elio Arcobelli is Biagio Maiorino's brother-in-law.

[6] Quebec Revenue Agency's (**QRA**) auditor Charles-André Lussier and QRA's audit director Michel Pelletier testified for the respondent.

[7] Biagio Maiorino lives at 1700, his father at 1708 and his brother, Giovanni at 1704 Paul Broca Street, in Laval. The evidence at the hearing discloses that the family is very close. They see each other almost every day and have dinner together every weekend. At these meetings, they discuss their projects and give each other advice.

[8] Biagio and Giovanni's father was in the construction industry. The two brothers learned their father's trade: Biagio has had a contractor's licence in his personal capacity since 1977, and, as for Giovanni, he said at the hearing that he was a building manager.

[9] The appellant's witnesses gave the same testimony. There were no contradictions even though a witness exclusion order was issued.

[10] During the years 2003 and 2004, Biagio Maiorino was the caretaker for the building owned by his sister-in-law Concetta Calderone. The building was located at 7950 St-Michel Boulevard in Montréal. It was semi-commercial: the first floor housed a CLSC and a daycare centre and the other floors were made up of roughly 14 apartments.

[11] Biagio Maiorino stated that, in his capacity as caretaker, he looked after rent collection, building maintenance and any other problems that might arise. He worked 40 hours a week and was on call 24 hours a day, seven days a week.

[12] As compensation, Concetta Calderone and her spouse Giovanni Maiorino testified that they paid all of Biagio Maiorino's personal expenses, including mortgage payments, cell phone bills, heating costs, electrical costs, food expenses and automobile expenses.

[13] Biagio Maiorino incorporated the appellant on April 2, 2003 (see Exhibit A-1). Concetta Calderone lent Biagio Maiorino the $20,000 that the appellant needed as security under the laws applied by the Régie du bâtiment du Québec.

[14] Biagio Maiorino also took courses in 2003 so that the appellant could obtain a contractor's licence from the Régie du bâtiment du Québec. In this regard, the appellant obtained its contractor's licence in August 2003.

[15] The appellant claims that it received no management fees in relation to the buildings in question. It argues that it did not act as construction project manager and did not carry out construction contracts for the buildings in question. In the appellant's submission, the 20% management fees that the QRA imposed on the municipal assessments of the buildings are fictitious. Consequently, the appellant had no duty to collect and remit GST on amounts that it never received.

[16] Mr. Biagio Maiorino, on behalf of the appellant testified that the appellant lent its contractor's licence to his brother and his brother-in-law for the construction of

their buildings. He testified that the appellant never asked his relatives to pay for the use of the licence.

[17] As for the building located at 2225 Boulevard des Laurentides, Concetta Calderone and her spouse testified that since the appellant had not yet obtained its general contractor's licence when construction of the building began, she and her spouse borrowed Arthur Doucet's contractor's licence to construct the building. They allegedly paid $2,000 per month to use Mr. Doucet's licence. As soon as the appellant obtained its licence, Biagio Maiorino lent them the appellant's licence for no consideration. They allegedly did the same thing for 2227 Boulevard des Laurentides, and for the window replacements at 190 Pierre-Fontaine Street.

[18] Giovanni Maiorino further explained that he also had experience in the construction field, and that this was not his first building. Without the contractor's licence, he could not construct the building. He clearly stated that his brother Biagio Maiorino and/or the appellant were not involved in the construction or renovation of these buildings.

[19] However, he said that during weekend family gatherings, Biagio Maiorino gave him advice as well as names of subcontractors to contact. In this regard, he also stated that his brother replaced him on the construction site a few times and when he was sick. He also said that he occasionally used the appellant's name when dealing with suppliers. His brother was known in the construction industry and it was easier to obtain credit. He added that his spouse Concetta Calderone paid all the bills related to the construction of the buildings.

[20] Giovanni Maiorino explained that it was normal that notices of offence regarding the buildings were made out to the appellant, since the appellant was the general contractor of record (see Exhibits I-1 and I-2). He also stated that Concetta Calderone paid for these notices of offence under the *Act respecting occupational health and safety* and the *Act respecting labour relations, vocational training and workforce management in the construction industry*.

[21] As for the buildings located on Perras Boulevard in Montréal, Elio Arcobelli testified that he was also very familiar with the construction industry. His father, Vincenzo Arcobelli, worked as a cement finisher for 25 years. He said that he began constructing buildings with his father in 1986, well before he knew Biagio Maiorino.

[22] He confirmed Biagio Maiorino's testimony, stating that he borrowed the appellant's contractor licence without compensation. He said that Biagio Maiorino

and/or the appellant never supervised the work or ordered the materials. He said that Biagio Maiorino's involvement was limited to giving him advice and names of contractors to contact.

[23] The respondent submitted that Concetta Calderone paid Biagio Maiorino's personal expenses in exchange for the services that the appellant rendered in managing the construction of the buildings or in performing certain construction work. However, Mr. Lussier of the QRA admitted that he was not aware that Biagio Maiorino had worked as a caretaker in 2003 and 2004 for the building located at 7950 St-Michel Boulevard in Montréal.

[24] In this regard, the respondent did not challenge the testimony given by Biagio Maiorino, Giovanni Maiorino and Concetta Calderone, that during the years 2003 and 2004, Biagio Maiorino worked 40 hours per week and as retribution, his personal expenses were paid (see paragraph 11 and 12 of my reasons).

[25] The respondent also stressed that the appellant filed nil GST returns for the years ending March 31, 2003, and March 31, 2004. The appellant argued that it only obtained its contractor's licence in August 2003, and therefore needed to become known. As for 2004, the appellant explained that it was under the impression that it did not have to file GST returns because its revenues were under $30,000. The appellant reported $143,854 in revenues for the year ended March 31, 2005; according to the respondent, it was the audit that led the appellant to report this amount, an assertion contested by the appellant.

[26] The respondent further argued that the notices of offence were issued to the appellant. As explained by the witnesses, they used the appellant's licence to build; the notices of offence therefore had to be issued to the appellant.

[27] The respondent also adduced a contract between Vincenzo and Elio Arcobelli as contractor and Les Constructions Depian Inc. as subcontractor for the building located at 9160 Perras Boulevard (see Exhibit I-3). According to clause 7 of Appendix B of the contract, Biagio Maiorino had to approve the extras. The clause states that "no extra to contract shall be valid unless authorized by written change order signed by Mr. Biaggio [*sic*] Maiorino (paid hourly rate per employee)." However, I note that this contract pertains to a building that is not part of the assessment for management fees. The assessment pertains to 8480, 8490 and 9150 Perras Boulevard, not 9160 (see Exhibit I-6).

[28] The respondent tendered the audit report in evidence (see Exhibit I-7). This report was signed by Mr. Romain. Mr. Romain did not attend and therefore did not testify at the hearing, for personal reasons that I am not questioning. Mr. Lussier, as witness for the QRA, explained that he was involved in the audit but did not write the audit report. Most of the facts set out in the audit report were not brought to my attention during the examinations in chief or the cross-examinations of the witnesses. Moreover, these facts were not raised in the argument. Therefore, I cannot accord importance to these factual assertions. I agree with the respondent that the lending of a contractor's licence can have repercussions on the appellant and Biagio Maiorino; the contractor's licence can be revoked by the Régie du bâtiment. However, that is not the question to be decided in this dispute.

[29] In *Hickman Motors Ltd. v. Canada*,[1] Justice L'Heureux-Dubé of the Supreme Court of Canada made the following remarks regarding the burden of proof that is borne by the taxpayer with regard to the assumptions of fact alleged by the Minister in support of his assessment:

> 92 It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 D.T.C. 1102 (T.C.C.), at p. 1106. The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.
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> 93 This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case: *Kamin v. M.N.R.*, 93 D.T.C. 62 (T.C.C.); *Goodwin v. M.N.R.*, 82 D.T.C. 1679 (T.R.B.). In the case at bar, the appellant adduced evidence which met not only a *prima facie* standard, but also, in my view, even a higher one. In my view, the appellant "demolished" the following assumptions as follows: (a) the assumption of "two businesses", by adducing clear evidence of only one business; (b) the assumption of "no income", by adducing clear evidence of income. The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions: see for example *MacIsaac v. M.N.R.*, 74 D.T.C. 6380 (F.C.A.), at

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[1] [1997] 2 S.C.R. 336.

> p. 6381; *Zink v. M.N.R.*, 87 D.T.C. 652 (T.C.C.). As stated above, all of the appellant's evidence in the case at bar remained unchallenged and uncontradicted. Accordingly, in my view, the assumptions of "two businesses" and "no income" have been "demolished" by the appellant.
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> 94 Where the Minister's assumptions have been "demolished" by the appellant, "the onus . . . shifts to the Minister to rebut the *prima facie* case" made out by the appellant and to prove the assumptions: *Magilb Development Corp. v. The Queen*, 87 D.T.C. 5012 (F.C.T.D.), at p. 5018. Hence, in the case at bar, the onus has shifted to the Minister to prove its assumptions that there are "two businesses" and "no income".
>
> 95 Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed: see for example *MacIsaac*, *supra*, where the Federal Court of Appeal set aside the judgment of the Trial Division, on the grounds that (at p. 6381) the "evidence was not challenged or contradicted and no objection of any kind was taken thereto". See also *Waxstein v. M.N.R.*, 80 D.T.C. 1348 (T.R.B.); *Roselawn Investments Ltd. v. M.N.R.*, 80 D.T.C. 1271 (T.R.B.). Refer also to *Zink*, *supra*, at p. 653, where, even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's appeal was allowed as the Minister failed to present any evidence as to the source of income. I note that, in the case at bar, the evidence contains no such "gaps". Therefore, in the case at bar, since the Minister adduced no evidence whatsoever, and no question of credibility was ever raised by anyone, the appellant is entitled to succeed.

[30] I analyzed paragraph 5 of the respondent's Reply to the Notice of Appeal, which sets out the assumptions of fact on which the minister relied in making the assessment concerning the management fees. In light of the evidence at the hearing, I am of the opinion that the appellant has made a *prima facie* case. Therefore, the burden of proof has been reversed. The testimony of all the persons involved was to the same effect. According to that testimony, the appellant lent out its contractor's licence and received no money on account of management fees.

[31] The respondent did not adduce evidence based on which it could be concluded on a balance of probabilities that the appellant received money for lending out its contractor's licence. The respondent has not succeeded in impeaching the credibility of the testimonial evidence given on behalf or the appellant.

[32] Thus, in light of the evidence adduced at the hearing, I allow the appeal with respect to the management fees.

RECONCILIATION - GST COLLECTED BUT NOT REPORTED

[33] In his testimony, QRA auditor Lussier stated that a reconciliation for the year 2005 was done between the appellant's working papers and the GST returns that it filed.

[34] Mr. Lussier stated that the appellant's GST returns underestimated the GST to be remitted. The appellant reported $5,925 in GST, whereas its own working papers showed $19,268.27 in GST, a discrepancy of $13,343.27. As for the input tax credits, the appellant reported $4,821 in such credits, whereas its own working papers showed $15,368.37. The QRA allowed $10,547.37 on account of input tax credits. The appellant was therefore assessed in the amount of $2,795.90:

$13,343.27 in GST payable
-$10,547.37 input tax credit
$2,795.90

[35] The QRA also added a penalty of $698.97 under section 285 of the ETA.

[36] In my opinion, the appellant has not succeeded in showing that the QRA did not assess it correctly.

[37] No evidence, whether testimonial or documentary, was submitted by the appellant in this regard. For the purposes of the reconciliation, the QRA relied on working papers prepared by Biagio Maiorino and remitted to his accountant, Mr. Bastone, C.A., for the purposes of financial statement preparation. In addition, Mr. Lussier stated that the numbers found in the working papers were confirmed by Mr. Bastone.

[38] Consequently, I am dismissing the appeal with respect to this question. I will analyze the penalty under a separate heading in this judgment.

RISK ANALYSIS - GST NOT COLLECTED ON SUPPLIES REPORTED IN THE FINANCIAL STATEMENTS

[39] The QRA also assessed an amount of $10,874.85 on account of GST not collected on supplies reported in the financial statements. During the year 2005, the appellant performed work for a corporation called CRC 2000 Industrielle Inc. (**CRC 2000**). Biagio Maiorino is the president of CRC 2000. Biagio Maiorino admitted that the appellant did not collect GST because he believed that since

CRC 2000 collected GST, the appellant did not have to do so. In the appellant's submission, this was a wash transaction — that is to say, it had no tax consequences.

[40] I do not agree that this was a wash transaction. Subsection 156(2) of the ETA is clear in this regard. In order for a transaction to be a wash, the specified members must make a joint election so that every taxable supply made between them is deemed to have been made for no consideration.

> **(2) Election for nil consideration --** For the purposes of this Part, if a specified member of a qualifying group elects jointly with another specified member of the group, every taxable supply made between them at a time when the election is in effect is deemed to have been made for no consideration.

[41] The appellant and CRC 2000 submitted no joint election. The appellant did not even adduce evidence that it was part of a qualifying group for the purposes of section 156 of the ETA.

[42] Consequently, under subsection 221(1) of the ETA, the appellant had to collect the tax on taxable supplies billed to CRC 2000, and the amount of that tax was $10,874.85 (see Exhibit I-6).

[43] The appeal is therefore dismissed with respect to this issue.

PENALTIES

[44] Penalties were levied under section 280 of the ETA. During the years in issue, section 280 read as follows:

> **280.** (1) Subject to this section and section 281, where a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay on the amount not remitted or paid
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> (*a*) a penalty of 6% per year, and
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> (*b*) interest at the prescribed rate,
>
> computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

[45] At the hearing, the appellant submitted a memorandum published by the Canada Revenue Agency regarding the reduction of penalties and interest in "wash transaction". She asked that I reduced the interest and penalties levied under section 280 of the ETA in accordance with this memorandum. I cannot apply an administrative policy.

[46] Pursuant to the Act and the interpretation of section 280 of the ETA by the Courts, I have no authority to cancel the interest owing under the section. However, in the decision of *Canada v. Consolidated Canadian Contractors Inc.*[2], Justice Robertson, in an unanimous judgment of the Federal Court of Appeal, stated that a taxpayer can mount a due diligence defence to defeat a penalty levied under section 280 of the ETA. See also *Pillar Oilfield Projects Ltd.*[3]

[47] In the case at bar, Biagio Maiorino stated that he prepared the GST returns of the appellant with his spouse. No evidence of due diligence was provided on behalf of the appellant by Biagio Maiorino, except to say that he did his best and is not a professional or a manager. The evidence discloses that the appellant's bookkeeping was very shoddy. Biagio Maiorino has been doing business in the construction field for several years, well before the appellant's incorporation. He was aware of the appellant's obligations with respect to the GST. The fact that he did his best and was not a manager or a GST professional is not a defence of due diligence. Biagio Maiorino on behalf of the appellant took no positive action to prevent the failure to remit.

[48] Chief Justice Bowman as he then was, stated in *Pillar Oilfield Projects Ltd.* That "*innocent good faith in the making of unintentional errors is not tantamount to due diligence. That defence requires affirmative proof. That all reasonable care was exercised to ensure that errors are not made*".

[49] Consequently, it is my opinion that the penalties levied pursuant to section 280 of the ETA must be maintained.

[50] A penalty under section 285 of the ETA in the amount of $698.97 was levied. As we have seen, the appellant reported $5,925 in GST, even though his own working papers showed that the GST was $19,268.27, a discrepancy of $13,343.27. As for the input tax credits, the appellant reported $4,821 whereas his own working

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2 [1999] 1 F.C. 209.

3 [1993] G.S.T.C. 49.

papers showed input tax credits of $15,368.37. The QRA allowed $10,547.37 on account of input tax credits. The 25% penalty was levied on the difference:

25% x ($13,343.27 - $10,547.37) = $698.97

[51] Section 285 of the ETA states:

> 285. **False statements or omissions --** Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which is in this section referred to as a "return") made in respect of a reporting period or transaction is liable to a penalty of the greater of $250 and 25% of the total of
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> (a) if the false statement or omission is relevant to the determination of the net tax of the person for a reporting period, the amount determined by the formula
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> A – B
>
> where
>
> A is the net tax of the person for the period, and
>
> B is the amount that would be the net tax of the person for the period if the net tax were determined on the basis of the information provided in the return,
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> (*b*) if the false statement or omission is relevant to the determination of an amount of tax payable by the person, the amount, if any, by which
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> (i) that tax payable
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> exceeds
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> (ii) the amount that would be the tax payable by the person if the tax were determined on the basis of the information provided in the return, and
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> (*c*) if the false statement or omission is relevant to the determination of a rebate under this Part, the amount, if any, by which
>
> (i) the amount that would be the rebate payable to the person if the rebate were determined on the basis of the information provided in the return
>
> exceeds
>
> (ii) the amount of the rebate payable to the person.

[52] In *Haniff v. The Queen*, 2011 TCC 112, Justice Boyle of this Court explains the concept of gross negligence at paragraphs 25 and 26 of his reasons, making reference to the Federal Court's decision in *Venne,* [1984] F.C.J. No. 314 (QL) :

> 24. The remaining issue is whether the penalties assessed for income tax and GST purposes were warranted.
>
> 25. The classic description of the circumstances in which so-called gross negligence penalties are warranted is set out by the Federal Court of Appeal [*sic*] in *Venne v. The Queen*, 84 DTC 6247:
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> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[53] The appellant showed indifference with respect to his GST obligations. It reported GST amounts arbitrarily and did not even see fit to reconcile its own working papers with its GST returns. The monetary discrepancy is significant. In my opinion, the conduct of the appellant in the case at bar was not merely negligent; it was tantamount to gross negligence. The penalty of $698.97 is maintained.

[54] Consequently, the appeal is allowed with respect to the management fees, but the assessments related to the other questions in issue, detailed below, are maintained:

- $2,795.50 on account of GST collected and not reported;
- $10,874.85 on account of GST not collected on supplies reported in the financial statements;
- the interest and penalties under section 280 of the ETA, except with respect to the management fees; and
- the penalty of $698.97 under section 285 of the ETA.

No costs are awarded.

Signed at Ottawa, Canada, this 28th day of November 2012.

"Johanne D'Auray"

D'Auray J.

CITATION:	2012 TCC 416
COURT FILE NO.:	2010-2002(GST)I
STYLE OF CAUSE:	CONSTRUCTION BIAGIO MAIORINO INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 4, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	November 28, 2012

APPEARANCES:

Counsel for the appellant:	Lise Massicotte
Counsel for the respondent:	Khashayar Haghgouyan

COUNSEL OF RECORD:

For the appellant:

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Firm:	Lise Massicotte, Attorney Laval, Quebec
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