

Docket: 2011-1216(GST)G

BETWEEN:

2411-3250 QUEBEC INC.

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on June 6 and 7, 2013, at Montréal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the appellant: Marc-André Paquin  
Counsel for the respondent: Louis Riverin

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**JUDGMENT**

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated April 20, 2010, for the reporting periods between February 1, 2006, and October 31, 2009, is dismissed, with costs.

Signed at Montréal, Quebec, this 29th day of August 2013.

“Lucie Lamarre”

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Lamarre J.

Translation certified true  
on this 10<sup>th</sup> day of December 2013

Francois Brunet, Revisor

Citation: 2013 TCC 272  
Date: 20130829  
Docket: 2011-1216(GST)G

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### **REASONS FOR JUDGMENT**

Lamarre J.

[1] The appellant is appealing from an assessment made on April 20, 2010, by the Deputy Minister of Revenue of Quebec for the Commissioner of the Canada Revenue Agency (Minister) under Part IX of the *Excise Tax Act* (ETA), for \$23,718.32 in goods and services tax (GST) including interest and penalties for reporting periods between February 1, 2006, and October 31, 2009 (Exhibit I-1)

[2] The appeal pertains more specifically to the reporting periods from November 1, 2008, to April 30, 2009, and from August 1, 2009, to October 31, 2009 (Exhibit I-1, pages 7 to 9), for which the Minister disallowed the appellant's input tax credits (ITCs) and imposed a penalty under section 285 of the ETA regarding the GST that the appellant allegedly remitted starting in June 2008 to the companies 4411463 Canada Inc., operating as Le Portail du Personnel, and 4488377 Canada Inc., known operating as Comptabilité Express. The respondent argues that the invoices issued by these two companies to the appellant and filed as Exhibit A-3 are accommodation invoices, for which no services were actually rendered.

## The Facts

[3] The appellant's president and sole shareholder, Jean-Charles Neveu and an employee who worked during the period at issue, Sébastien Fortier, testified for the appellant. It also called as witnesses Lise Lacasse, who was mandated by the appellant to keep its books, as well as Denis Champagne, the business's external accountant.

[4] Mr. Neveu first explained that he bought the grocery store operated by the appellant in Laverlochère, Témiscamingue, from his cousin in 1986. Mr. Neveu, who did not finish high school, had no experience in the grocery business. He has operated the business for 27 years now in his small village of 900 people, which is about 11 hours' drive from Montréal. He has always managed the grocery store himself with the help of one of his employees, who was there before he had even bought the business, Sylvie Beaulé. The appellant has about eight permanent employees, who have been there for 20 years, and some casual employees. Ms. Beaulé, who works as a cashier, compiles each employee's hours of work every week. Between 2005 and June 2008, she forwarded this compilation of hours to Lise Lacasse, who was also responsible for employee remuneration. Ms. Lacasse's office is in Ville-Marie, 20 km from Laverlochère. Employees are paid by direct deposit and are given their paystubs indicating their gross pay as well as their net pay after source deductions (SDs). Employees' hourly wages are determined by Mr. Neveu. Ms. Lacasse charged \$240 per month for her services, including pay services for employees.

[5] According to Mr. Neveu's testimony, a certain Bernard Ratelle, whom he did not know, contacted him in mid-April 2008. He apparently told him that he specialized in personnel placement services and that he took care of employee pay services including all SDs and remittances to the government.

[6] Said Mr. Ratelle allegedly came to Laverlochère on May 1, 2008, with a personnel placement contract in hand, which he had Mr. Neveu sign that same day (Exhibit A-1). The parties to the contract are Le Portail du Personnel (the lessor), whose office is located in Laval, and the appellant (the lessee). In this contract, the lessee retains the lessor's services in order to receive personnel placement services for operating a grocery store in Laverlochère. As remuneration, the lessee undertakes to pay to the lessor [TRANSLATION] "fees established based on the personnel needed and their hourly wages pre-established between the parties, including all usual benefits and other charges to the employer except CSST contribution fees, which

shall continue to be assumed by the Lessee (given the definition of employer at the CSST), every week” (paragraph 2.1 of the contract). Paragraph 2.2 of the contract provides that [TRANSLATION] “said amount will be paid every week by the lessee upon presentation of the billing for the period in progress, with the amount of fees billed by the Lessor for the provision of the service supply”.

[7] Paragraph 4 of the contract provides that the lessor’s obligations are to provide to the lessee the personnel needed, according to the criteria listed by the lessee and to ensure that the personnel sent to the lessee are replaced if they are unable to do the work required.

[8] The parties could terminate the contract with merely a written notice, and the agreement would be terminated within seven days of receipt of said notice (paragraph 5).

[9] Mr. Neveu found this service worthwhile, especially since, according to him, it allowed him to save \$150 to \$200 per month (corresponding to the approximate amount paid to Ms. Lacasse for this service) and since he no longer had to worry about payroll services. He also added that he was able to terminate the contract at any time. Therefore, Mr. Neveu asked Lise Lacasse to transfer, starting on June 1, 2008, all of the payroll services to a Ms. Teresa, who worked for Le Portail du Personnel in Montréal.

[10] Ms. Lacasse said that she had transferred the names of all employees and pay balances to that person. However, she continued to do the appellant’s bookkeeping. She received the same remuneration of \$240 per month, even though she no longer took care of employee pay. According to Mr. Neveu, Ms. Beaulé continued to compile employee work hours, but, starting on June 1, 2008, she faxed those hours to Le Portail du Personnel. Employees were still paid by direct deposit and still received their paystubs in the same way as before.

[11] Mr. Neveu filed in evidence a series of employment contracts that were apparently signed by the employees with Le Portail du Personnel (Exhibit A-2). These contracts indicate that Le Portail du Personnel became the employer.

[12] Sébastien Fortier, who had worked as a handyman at the grocery store from the age of 13 until mid-June 2010 acknowledged that he had also signed an employment contract with Le Portail du Personnel on June 2, 2008, at Mr. Neveu’s request (Exhibit A-6). He understood that this entity was the new employer, but that nothing had really changed except the pay service. He personally has never spoken to

anyone from Le Portail du Personnel and has not met Thérèse Simard, who signed the contract for the employer. He said that, at the time that Mr. Neveu spoke to him of the change, he was a little worried about getting paid, but his concern was alleviated when he realized he was receiving his pay regularly. He received his paystubs as before. The employees remained the same, the work did not change and he still worked under Mr. Neveu's supervision. Ultimately, everything remained the same. The only difference was the name of the employer.

[13] Mr. Neveu stated in his testimony that Le Portail du Personnel also took care of terminating employees' employment. He spoke with Mr. Ratelle only once more after signing the personnel placement contract, and apparently it was about a document that was not filled out concerning a termination of employment. According to Mr. Neveu, Mr. Ratelle settled this issue quickly, and the termination of employment document was filled out by Le Portail du Personnel shortly thereafter. However, counsel for the respondent filed in evidence four records of employment; two of them are dated before June 2008, and the other two are dated after June 2008. On the first two, the name of the employer was that of the supermarket, the contact person was Mr. Neveu and the name of the person who signed the record was Lise Lacasse. On the other two records of employment, the employer's name is Le Portail du Personnel, but the contact person is Sylvie Beaulé, and the name of the person who signed the record is not printed (Exhibit I-2).

[14] Furthermore, Mr. Neveu recognized the invoices that had been prepared by Le Portail du Personnel and Comptabilité Express during the period at issue, which are at issue in this appeal. These invoices, filed as Exhibit A-3, establish the fees requested from the appellant.

[15] These fees actually correspond to the sum of net salaries paid to employees and the SDs deducted from the gross salaries, on which the appellant was charged GST and Quebec sales tax (QST). Clearly, Mr. Neveu recognized that his business was reimbursing Le Portail du Personnel the salaries and SDs of its own employees, on the total of which GST and QST was calculated. He confirmed that Le Portail du Personnel did not claim any fees for managing employee pay.

[16] Mr. Ratelle allegedly implied to him that he was entitled to grants and that he placed them in bank deposits, which brought in income. For his part, Mr. Neveu was quite aware that in doing so he recovered GST, which he paid to Le Portail du Personnel (these are the ITCs that are at issue in this appeal).

[17] In addition, Mr. Neveu admitted that he did not inquire as to who Bernard Ratelle was or what Le Portail du Personnel really did, nor did he verify this business's GST and QST registration number. He also acknowledged that Le Portail du Personnel never recommended a single employee or conducted any interviews in order to hire one. He also admitted that, since the office of Le Portail du Personnel was located in Montréal (that is, about an 11-hour drive from Laverlochère), the company could not provide staff when an employee was absent. If an employee was sick or had to be absent, he or she informed Mr. Neveu directly, who continued to manage his grocery store and his employees as before. He also said that Le Portail du Personnel gave no training on food safety standards as there were no such standards at the time. Indeed, Mr. Neveu said that he had never had any problem with his employees and had never used the services of Le Portail du Personnel regarding hiring and work of the employees.

[18] On February 14, 2010, Mr. Neveu terminated his contract with Le Portail du Personnel (Exhibit A-5) following the audit undertaken by the Minister in November 2009. Since then, he has asked the office of his external accountant, Denis Champagne, to manage his pay.

[19] Mr. Champagne explained that he had prepared the appellant's unaudited financial statements since the 1980s. When he learned of the subcontract with Le Portail du Personnel when he was preparing the financial statements for the fiscal year ending on January 31, 2009, he verified whether this corporation existed with the Enterprise Register. He saw that it existed legally and was active. He discussed the contract with Mr. Neveu because it is rare in Témiscamingue to see such subcontracts. The contract appeared to him to be compliant, and the remittances to the government seemed to be done properly. Indeed, although he did not audit the invoices (his mandate being only to prepare unaudited financial statements), the difference between the amount of tax remitted and the ITCs conformed to the data appearing in the business's ledger. He did not dig deeper to better evaluate Le Portail du Personnel. Mr. Neveu told him that that company paid itself from the grants that it received and the investment income generated from those grants, and that explanation was sufficient to him. He thought that the services offered were comparable to the pay service that could be offered by a Caisse populaire in some cases.

[20] Sylvie Beaulé, who seems to have played an important role in this whole story, did not testify. Mr. Neveu explained her absence by saying that she was taking care of her 80-year-old father, who was sick, and that she could not leave him. No sworn statement made by Ms. Beaulé to that effect was filed in evidence.

[21] The respondent called as witness Jacques Champagne, the auditor from the Agence du Revenu du Québec (ARQ) assigned to the file; Mathieu Doyon, tax audit technician at ARQ, who analyzed the employment relationship of the employees; and Luc Jolicoeur, who conducted the tax audit of Le Portail du Personnel for the ARQ.

[22] Jacques Champagne conducted the audit of GST remitted and ITCs claimed by the appellant following an exchange of internal information resulting from an investigation of a matter concerning accommodation invoices in which Le Portail du Personnel and Comptabilité Express were involved. Since the appellant claimed ITCs relative to invoices from these two entities, which were under investigation, Jacques Champagne was mandated to further examine the relationship between these two entities, the appellant and the employees who worked for the appellant's business.

[23] Jacques Champagne visited the premises of the appellant's business. He was shown the contract concluded between it and Le Portail du Personnel (Exhibit A-1), the invoices regarding which ITCs were claimed as well as the employee chart showing their hourly wages, their gross and net remuneration and the SDs. He was not, however, shown the contracts of employment signed by each employee with Le Portail du Personnel (Exhibit A-2). He saw the contracts for the first time at the hearing. Jacques Champagne also saw the cheques issued by the appellant to the order of Le Portail du Personnel and Comptabilité Express. He noted that those cheques had been cashed in a cheque-cashing centre and therefore were not deposited in a bank account.

[24] Jacques Champagne then asked Mathieu Doyon to analyze the true relationship that bound the employees working at the grocery store operated by the appellant with Le Portail du Personnel. The analysis was made to assess whether Le Portail du Personnel really provided personnel placement services or whether this was a scheme in order to claim ITCs related to accommodation invoices in this case.

[25] Mr. Doyon met with Mr. Neveu and his accountant, Denis Champagne, as well as Sylvie Beaulé, Simon Bergeron (the manager) and a third employee. He met with the three employees individually.

[26] The appellant's answers to a questionnaire (Exhibit I-4) reveal that it was Mr. Neveu who actually hired employees, who determined their work schedules, the work to be done and their vacations. Employees informed Mr. Neveu of absences for illness or other reasons. Mr. Neveu was in charge of employee training. On one



occasion, an employee had to receive food safety training, and it was Mr. Neveu who assumed the costs.

[27] As for employee remuneration, it was allegedly paid by Le Portail du Personnel by direct deposit into each employee's bank account. But the source of the remuneration was the appellant, which, according to the invoices (Exhibit A-3), reimbursed Le Portail du Personnel. If there was an error in an employee's pay, the employee informed Sylvie Beaulé. None of the employees have ever spoken to anyone from Le Portail du Personnel. The employees still received their pay weekly based on the hourly rates determined by Mr. Neveu.

[28] Mr. Doyon came to the conclusion that there was no true contract of personnel placement service between the appellant and Le Portail du Personnel and that the appellant had always remained the only employer of its employees.

[29] In addition, Mr. Doyon noted during his investigation that Le Portail du Personnel had remitted no SDs, GST or QST to the government.

[30] The auditor, Jacques Champagne, thus concluded that there were no services rendered by Le Portail du Personnel and that the appellant had directly or indirectly participated in a scheme to receive ITCs on the salaries paid to its employees, which it could not legally do.

[31] In rendering his decision, Jacques Champagne took into account the following facts: the employees have been the same since 2004 and live in Laverlochère or surrounding area; a very long distance separates the area where the appellant's grocery store is operated from the office of Le Portail du Personnel; the appellant is registered as the employer for the purposes of the CSST; the names on the records of employment are those of Sylvie Beaulé or Mr. Neveu, both of whom represent the appellant; Mr. Neveu did not seek to find out whether Mr. Ratelle or Le Portail du Personnel really carry on a commercial activity (Audit Report, Exhibit I-3, page 5).

[32] In addition, Luc Jolicoeur investigated Le Portail du Personnel. He noted that the cheques (about twenty of them issued by the appellant between June 2008 and May 2009) had been cashed at a cheque cashing centre. These cheques were paid in cash minus a percentage ranging from 3 to 5 percent. He visited the premises indicated as being those of the office of Le Portail du Personnel and noted that there was no business of the type in question at the address indicated.

[33] Mr. Jolicoeur was unable to speak to any senior officer at Le Portail du Personnel, saw no accounting books for the business, saw no commercial activity and finally noted that Le Portail du Personnel had made no remittances (SDs on the salaries paid to employees or GST/QST remittances) to the government.

### Relevant Statutory Provisions of the ETA

#### DIVISION I - INTERPRETATION

**123. (1) Definitions** – In section 121, this Part and Schedules V to X,

...

“commercial activity” of a person means

(a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

...

“consideration” includes any amount that is payable for a supply by operation of law;

...

“recipient” of a supply of property or a service means

(a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

(b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and

(c) where no consideration is payable for the supply,

(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,

(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(iii) in the case of a supply of a service, the person to whom the service is rendered,.

and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

...

“supply” means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

...

“taxable supply” means a supply that is made in the course of a commercial activity;

...

### **Subdivision b – Input Tax Credits**

**169. (1) General rule for credits** – Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

where

A

is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B

is

(a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,

(b) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

...

**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

(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

$$A - B$$

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,

(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

(i) that tax payable

exceeds

(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

(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.

### Respondent's submissions

[34] The respondent maintains that no real personnel placement services were provided to the appellant by Le Portail du Personnel. Consequently, the respondent considers fictitious the invoices presented by the appellant in support of the ITCs that it is claiming, which are disallowed. The respondent adds that the appellant has always remained the real employer of the employees who worked at the grocery store during the period at issue, thus arguing that Le Portail du Personnel was only a fictitious employer.

[35] The respondent cites subsection 169(1) of the ETA and argues that, to be entitled to an ITC, the person who claims the tax credit must receive a service. Yet, in this case, the appellant submitted in support of its claim a personnel placement services contract while, in reality, on the basis of the evidence, no such services were ever rendered. According to the respondent, this was proven by the fact that the appellant has always remained the only and the real employer exercising control over its employees and doing the hiring, determining the work hours, assigning tasks and training the staff, even if we accept that the remuneration may have been transferred through Le Portail du Personnel (for this point, the respondent is citing the Supreme Court of Canada's decision in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, which confirmed the statements of the Court of Appeal of Québec relative to identifying the real employer in tripartite relationships).

[36] In addition, the respondent submits that it is incumbent on the appellant to prove that the sub-contractors whose registration numbers are on the invoices in question are in fact the suppliers of services since it is claiming ITCs relative to these invoices (see *Les Entreprises DRF Inc. v. The Minister of National Revenue*, 2013 TCC 95, rendered by Justice Angers of this Court on June 17, 2013). In this case, the respondent is of the view that this was not shown by the appellant.

[37] The respondent also alleges that the invoices submitted by the appellant do not contain a sufficient description identifying each supply that is part of the ITC claim, which is required under sub-paragraph 3(c)(iv) of the *Input Tax Credit Information (GST/HST) Regulations* (the Regulations). She argues that the author of the sheets attached to the invoices filed as Exhibit A-3 was not identified and that no witnesses from Le Portail du Personnel testified regarding this, which warrants a negative inference on the probative value of these documents.

[38] Finally, the respondent considers that the penalties imposed are fully justified and that the appellant filed no evidence that could support its position that it had acted with reasonable care. According to the respondent, Mr. Neveu did not demonstrate that he had taken all reasonable precautions to avoid the error of blindly agreeing to do business with Mr. Ratelle with the consequences we already know.

#### Appellant's submissions

[39] First, the appellant submits that the respondent did not state in the assumptions of fact used to make the assessment in the Reply to the Notice of Appeal (Reply), that the invoices did not contain a sufficient description under the Regulations.

Regardless of this, the appellant argues that the auditor, Jacques Champagne, finally acknowledged in his testimony that the sheets attached to the invoices (Exhibit A-3) gave a sufficient description.

[40] The appellant also argues that it did not obtain any unfair advantage by contracting with Le Portail du Personnel and has always acted in good faith. The employees received a net salary and the appellant paid the SDs and taxes to Le Portail du Personnel. The appellant argues that the fraud committed by that company cannot make it liable for the fraudulent scheme hatched by Le Portail du Personnel.

[41] Regarding the respondent's argument that no services were provided by Le Portail du Personnel, it noted the inconsistency of the respondent's statements in the Reply. At paragraph 22 of the Reply, the respondent described the pay management services provided by Le Portail du Personnel. At paragraph 19, the respondent argues, however, that the company did not have the resources necessary to render said services.

[42] The appellant argues that by filing the personnel placement contract (Exhibit A-1) and employee contracts of employment (Exhibit A-2) as well as by establishing the undisputed fact that the employees received their salaries, it has made a *prima facie* case that services were indeed provided by Le Portail du Personnel. It argues that it cannot be held liable for the fraud committed toward the government in the absence of bad faith or collusion on its part (see *Joseph Ribkoff Inc. v. The Queen*, 2003 TCC 397, [2003] G.S.T.C. 104; *Airport Auto Limited v. The Queen*, 2003 TCC 683, [2003] G.S.T.C. 151).

[43] The facts, according to the appellant, are different from those in *Systematix Technology Consultants Inc. v. The Queen*, 2007 FCA 226, [2007] G.S.T.C. 74, where the supplier did not have a valid registration number, or in *Comtronic Computer Inc. v. The Queen*, 2010 TCC 55, [2010] G.S.T.C. 13, where the suppliers used names and registration numbers belonging to corporations with which they had no connection. In those two cases, it was decided that it was the taxpayer who had to bear the risks related to the fraud and to the unlawful acts committed by co-contractors. The appellant argues that, in this case, a verification was made and that Le Portail du Personnel was indeed registered and had a valid registration number.

[44] The appellant also considers that the question of who is the real employer is irrelevant in that, if services were provided and tax was paid by the appellant on

those services, the appellant is entitled to the ITCs regardless of who the real employer is.

[45] The appellant also argues that the respondent is trying to amend the business decisions made by the appellant under the pretext that the personnel placement contact was a sham. The appellant submits that the evidence does not show that it was a sham and that in the circumstances the respondent may not intervene to prevent the transfer of employees from one company to another (see *Central Springs Ltd. v. The Queen*, 2010 TCC 543, 2010 DTC 1358, [2010] G.S.T.C. 153).

[46] Finally, the appellant submits that the penalties are not justified in that it was involved in a fraudulent scheme unknowingly. Since it was a victim of a swindler, it cannot be found grossly negligent or wilfully blind.

### Analysis

[47] Under subsection 169(1) of the ETA, an ITC of a person relative to a service he or she receives corresponds to the tax payable in respect of a supply of this service in the course of his or her commercial activities. Thus, to be entitled to the ITCs it is claiming, the appellant must demonstrate that the ITCs are connected to a service it received for which it paid tax in the course of its commercial activities. To be a recipient of a service under subsection 123(1), the appellant must show that it was bound to pay consideration under the contract to supply services. If no consideration was payable, it must show that a service was provided to it. However, a supply of services by the supplier of services will be taxable if it is done in the course of a commercial activity.

[48] It is incumbent on the appellant to make a *prima facie* case demolishing the accuracy of the assumptions made by the Minister in making the disputed assessment in respect of the disallowed ITCs. A *prima facie* case is one “supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. . . .” (*Amiante Spec Inc. v. The Queen*, 2009 FCA 139, [2009] G.S.T.C. 71, paragraphs 15 and 23).

[49] In addition, “the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted” considering that “[i]t is the taxpayer’s business”. Indeed, the taxpayer “knows how and why it is run in a particular fashion rather than in some other ways. He [or she] knows and possesses information that the Minister

does not. He [or she] has information within his [or her] reach and under his [or her] control.” (*Amiante Spec, supra*, paragraph 24).

[50] The Minister’s main assumptions for disallowing the ITCs are found at paragraphs 18 to 21 of the Reply.

[51] At paragraph 18 of the Reply, the Minister stated that the appellant had not provided any supporting documents or evidence on the balance of probabilities in support of the ITC claim concerning the placement of personnel in his business in that

[TRANSLATION]

- (a) All of the appellant’s former employees, which it had since 2004, were the same as those supposedly hired by the Agency.
- (b) All the employees live in Laverlochère or surrounding area.
- (c) The address of the Placement Agency is in the Montréal area;
- (d) The appellant assumes coverage under the CSST for the employees;
- (e) The names on the records of employment (Relevé: 1), are Sylvie Beaulé and Jean-Claude Neveu at the time of the assessments respectively Senior Cashier and president and sole shareholder of the appellant.
- (f) There were no changes with respect to the number of employees before or after the agencies’ intervention;
- (g) The total payroll remained the same from year to year.

[52] In her assumptions, the respondent also referred to the fact that the two companies that provided invoices regarding which the appellant is claiming ITCs are suppliers of accommodation invoices. In the case of Le Portail du Personnel, she states this at paragraph 19 of the Reply:

[TRANSLATION]

- (i) This business does not have a management team in place to manage such a business;
- (ii) This business has no office that would make it possible to receive and serve clients;
- (iii) This business has no site or office equipment that would allow it to manage contracts;
- (iv) Several cheques issued to these companies are cashed in a cheque-cashing centre;
- (v) The corporation did not file any tax returns or income tax returns;



- (vi) No source deductions were reported to the Deputy Attorney General for employees;
- (vii) The corporation has no vehicles registered with the Société d'Assurance Automobile du Québec.

[53] In the case of Comptabilité Express, the respondent wrote the following at paragraph 20 of the Reply:

[TRANSLATION]

20. The corporation 4488377 Canada Inc., is deemed to have supplied accommodation invoices in that
- (a) it has filed no tax returns, except for one period, and no income tax returns;
  - (b) there were no source deductions reported to the Deputy Attorney General of Canada;
  - (c) the corporation has no vehicles registered with the Société d'Assurance Automobile du Québec;
  - (d) the corporation has no employees or equipment to do the work and provide the services for which it is hired.

[54] The Minister therefore concluded that the appellant had acted in bad faith and disallowed the ITCs claimed in respect of those invoices.

[55] The appellant filed in evidence the personnel placement contract that it had signed with Le Portail du Personnel (Exhibit A-1) to show that it had indeed signed a formal contract in good faith.

[56] The contract, in view of its title and its substantive clauses, provides that the appellant calls on Le Portail du Personnel to receive personnel placement services. The lessor's obligations were to provide the personnel needed, to ensure the replacement of personnel sent to the appellant and to assume all tax obligations of employees that it sent to the appellant.

[57] Yet, the evidence is very clear that Le Portail du Personnel never provided or sent a single employee to the appellant. All employees who worked for the grocery store were hired by Mr. Neveu directly at Laverlochère without ever going through Le Portail du Personnel. In addition, the records of employment produced by the respondent (Exhibit I-2) tend to show that it was still Sylvie Beaulé, not Le Portail du Personnel, who continued to do this task.

[58] The contract, in itself, does not *prima facie* satisfy me that there is evidence on the balance of probabilities that supports the ITC submission concerning the placement of personnel since the terms of the contract as such were not met. The services for which Le Portail du Personnel was retained were never, on the balance of probabilities, provided by it.

[59] Even if we assume the gullibility of Mr. Neveu, who agreed to do business with someone he did not know at all to the point of entrusting to him the task of hiring as well as the tax obligations related to employee pay, despite his lack of education, it is hard to believe that with all the years of experience he had he seriously believed that Le Portail du Personnel would be able to provide personnel if for no other reason than because of the distance separating them.

[60] I would add that Mr. Neveu's credibility is also undermined by the fact that Mr. Neveu said that he had agreed to entrust employee pay to Le Portail du Personnel in order to save money. Yet, Ms. Lacasse mentioned that her fees were not reduced even though she did not take care of the pay service.

[61] To beef up its evidence, the appellant also filed the employment contracts signed by the employees with Le Portail du Personnel. I believe these contribute nothing more. First, these contracts appeared for the first time at the hearing and had not been brought to the auditors' attention during the investigation. Second, only one employee attested to the authenticity of his signature, and he stated that he had not signed the contract in the presence of the representative of Le Portail du Personnel. That employee has never met anyone from that company and said that, except for the employer's name, everything remained the same. No witnesses from Le Portail du Personnel were called by the appellant, which contented itself with placing all the blame on Mr. Ratelle and referring to his criminal record.

[62] In addition, the remuneration requested by Le Portail du Personnel under the contract was the reimbursement of salaries to be paid and the SDs. Mr. Neveu saw fit to ask Mr. Ratelle how he financed his activities. Even with his lack of education, it may be understood that he did realize that Le Portail du Personnel made no profit from the services it offered by just being reimbursed the salaries and the SDs of the employees.

[63] How, then, can it be believed that the appellant paid consideration for receiving a service or a taxable supply while it paid essentially only the salaries and SDs of its employees? In addition, in my view, the fact that the employees received their salaries regularly contributes nothing to the evidence. Indeed, if we accept, as

the respondent seems to have done at paragraph 22 of her Reply, that Le Portail du Personnel managed pay, it received no consideration from the appellant for this alleged service. In addition, according to the evidence, it is difficult to say that that entity provided a service in the course of real commercial activity.

[64] The least we can say is that the evidence is very nebulous on what really transpired. I would add that the testimony of Sylvie Beaulé, who seems to have played an important role in this whole affair, would have been very helpful, and the explanation given by Mr. Neveu regarding her absence would have been more credible if it had been supported with a sworn statement justifying Ms. Beaulé's absence.

[65] In addition, it would have been to the appellant's advantage to produce the cheques issued to Le Portail du Personnel. The respondent's evidence that these cheques were cashed in a cheque-cashing centre as well as the absence of important witnesses are certainly elements that one may take into account to decide on the probative value of the appellant's evidence as well as on its credibility (*Les Pro-Poseurs Inc. v. The Queen*, 2012 FCA 200, 2012 DTC 5114, paragraphs 14 to 16).

[66] It is very difficult, in the circumstances, to conclude that the evidence brought by the appellant raises such a degree of probability in its favour that it must be believed. I am of the view, in this case, that the appellant did not discharge its initial burden to show that the invoices presented reflected real receipts under the contract for the supply of services filed in evidence. Therefore, it cannot claim to be entitled to ITCs on the basis of these invoices.

[67] With respect to the penalties, the Federal Court of Appeal wrote the following at paragraphs 27 to 30 of *Corporation de l'École polytechnique v. The Queen*, 2004 FCA 127, [2004] G.S.T.C. 39, with regard to reasonable care:

#### Penalty

**27** This Court has held that there is no bar to the defence argument of due diligence, which a person may rely on against charges involving strict liability, being put forward in opposition to administrative penalties. In particular, it has held that section 280 of the *Excise Tax Act*, by its wording and content, gives rise to that defence: *Canada (A.G.) v. Consolidated Canadian Contractors Inc.*, [1999] 1 F.C. 209 (F.C.A.). It may be worth reviewing the principles governing the defence of due diligence before applying them to the facts of the case at bar.

**28** The due diligence defence allows a person to avoid the imposition of a penalty if he or she presents evidence that he or she was not negligent. It involves considering whether the person believed on reasonable grounds in a non-existent state of facts which, if it had existed, would have made his or her act or omission innocent, or whether he or she took all reasonable precautions to avoid the event leading to imposition of the penalty. See *The Queen v. Sault Ste-Marie*, [1978] 2 S.C.R. 1299; *The Queen v. Chapin*, [1979] 2 S.C.R. 121. In other words, due diligence excuses either a reasonable error of fact, or the taking of reasonable precautions to comply with the Act.

**29** The defence of due diligence should not be confused with the defence of good faith, which applies in the area of criminal liability, requiring proof of intent or guilty knowledge. The good faith defence enables a person to be exonerated if he or she has made an error of fact in good faith, even if the latter was unreasonable, whereas the due diligence defence requires that the error be reasonable, namely, an error which a reasonable person would have made in the same circumstances. The due diligence defence, which requires a reasonable but erroneous belief in a situation of fact, is thus a higher standard than that of good faith, which only requires an honest, but equally erroneous, belief.

**30** A person relying on a reasonable mistake of fact must meet a twofold test: subjective and objective. It will not be sufficient to say that a reasonable person would have made the same mistake in the circumstances. The person must first establish that he or she was mistaken as to the factual situation: that is the subjective test. Clearly, the defence fails if there is no evidence that the person relying on it was in fact misled and that this mistake led to the act committed. He or she must then establish that the mistake was reasonable in the circumstances: that is the objective test.

[68] In my opinion, the respondent has shown that the appellant did not take the reasonable precautions that it should have taken before committing itself as it did in order to be able to claim that it had been diligent and thus avoid penalties. Mr. Neveu did not make even a minimum verification when he signed the contract with Mr. Ratelle in May 2008. It was only in the following year that his accountant took a few steps. He was not, however, mandated to verify the authenticity of invoices and cheques on which the appellant relies in claiming the ITCs in question here. I believe that the inconsistencies, inaccuracies and contradictions raised above show that the appellant was negligent, which justifies the imposition of penalties.

[69] The appeal is dismissed with costs.

Signed at Montréal, Quebec, this 29th day of August 2013.

“Lucie Lamarre”

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Lamarre J.

Translation certified true  
on this 10<sup>th</sup> day of December 2013

Francois Brunet, Revisor

CITATION: 2013 TCC 272

COURT FILE NO.: 2011-1216(GST)G

STYLE OF CAUSE: 2411-3250 QUÉBEC INC. v. HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 6 and 7, 2013

WRITTEN SUBMISSIONS  
OF THE APPELLANT: June 19, 2013 (arguments)  
June 20, 2013 (reply)

WRITTEN SUBMISSIONS  
OF THE RESPONDENT: June 19, 2013 (arguments)  
June 28, 2013 (reply)

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: August 29, 2013

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