Docket: 2017-1860(GST)G

BETWEEN:

MELP ENTERPRISES LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeals heard on October 16, 17 and 18, 2023, at
Saskatoon, Saskatchewan and written submissions received on
January 15, 2024

Before: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Lane Zabolotney
Counsel for the Respondent:	John Krowina Sonia Lee

JUDGMENT

Having considered the evidence and the submissions presented by the parties, and in accordance with the attached Reasons for Judgment (the "Reasons"), the Appeals are allowed, and the reassessments that are the subject of the Appeals are referred back to the Minister of National Revenue for reconsideration and reassessment, on the basis that:

(a) The fees that the Appellant billed, collected, temporarily held for and on behalf of LIMARP (as described in the Reasons), and then, whether as an agent, a bare trustee, a conduit or some other form of intermediary, remitted to LIMARP, belonged to LIMARP, and not to the Appellant, with the result that those fees did not form part of the consideration received by the Appellant

for the services that it supplied, and with the further result that the Appellant was not required to collect the goods and services tax ("GST") or the harmonized sales tax ("HST") in respect of those fees.

(b) To the extent that any moneys seized or otherwise obtained by the Canada Revenue Agency, as part of its collection efforts, were, at the time of the seizure, being held by the Appellant, with the intention of forwarding those moneys to LIMARP after the applicable surgeries had been performed, those moneys belonged to LIMARP, and not to the Appellant, with the result that those fees did not form part of the consideration received by the Appellant for the services that it supplied, and with the further result that the Appellant was not required to collect GST or HST in respect of those fees.

(c) The making of travel arrangements by the Appellant for its clients was undertaken by it in the course of its own commercial activities, such that any GST or HST paid by the Appellant in respect of such travel arrangements gave rise to input tax credits, assuming that all other requirements under section 169 of the *Excise Tax Act* were satisfied.

No costs are awarded to either party.

Signed at Ottawa, Canada, this 8th day of October 2024.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2024 TCC 130
Date: 20241008
Docket: 2017-1860(GST)G

BETWEEN:

MELP ENTERPRISES LTD.,

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Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals instituted by MELP Enterprises Ltd. ("MELP"), pursuant to section 306 of the *Excise Tax Act* (the "ETA"),[1] in respect of 12 reassessments (the "Reassessments") for 12 consecutive reporting periods (the "Reporting Periods"), beginning May 27, 2010 and ending February 28, 2013. Collectively, the Reassessments impose net tax in the amount of $351,807.67.[2]

II. BACKGROUND

[2] The Appellant (i.e., MELP), which was incorporated, under the laws of Saskatchewan, on May 25, 2010, was initially named "101164027 Saskatchewan Ltd." On June 22, 2011, it changed its name to "Weight Loss Forever Ltd." On December 31, 2012, it changed its name to "MELP Enterprises Ltd."[3] MELP used the trade names "Weight Loss Forever" and "WLF Medical".[4] At the time of the trial, MELP was no longer operating.[5]

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[1] *Excise Tax Act*, RSC 1985, c. E-15, Part IX, as enacted by SC 1990, c. 45, and as subsequently amended.
[2] Exhibit R-16.
[3] Exhibit R-1, p. 1 & 3.
[4] Transcript, vol. 1 (October 16, 2023), p. 23, line 25 to p. 24, line 2; and Exhibit R-1, p. 2-3.
[5] Transcript, vol. 1 (October 16, 2023), p. 18, lines 15-16.

[3] On September 15, 2017 (which is the date of a Profile Report obtained from Saskatchewan Corporate Registry in respect of MELP), Melanie Wildman owned all of the 100 issued Class A1 Shares and all of the 1,465,000 issued Class E Shares in the capital of MELP, and MELP Management Ltd. owned the only issued Class B1 Share in the capital of MELP.[6]

[4] Ms. Wildman was the director, president and chief executive officer of MELP. MELP did not have any other directors or officers.[7] Although Ms. Wildman's husband "was in the finance role" and provided advice from time to time, Ms. Wildman was the ultimate decision maker.[8]

[5] Ms. Wildman's background was in communications, marketing and graphic design.[9] There is no evidence to suggest that she has any credentials or training in any field of health care.

[6] Sometime before 2010, Ms. Wildman underwent bariatric surgery in Mexico. While there was a successful outcome, with a beneficial result, the overall experience was "rather traumatic". The level of care that she received at the surgical facility in Mexico was not up to Canadian standards. She returned to Canada with a significant infection, but without any surgical or health records from Mexico, which made it difficult for her Canadian physician to treat the infection. Consequently, "it was a very difficult time."[10]

[7] During her recovery, she met other people who were in a similar situation, so she started a support group, which led to her hearing and asking questions, conducting additional research, and obtaining more information. She discovered (too late) that her Mexican surgeon, while qualified as a general surgeon, did not specialize in bariatric surgery. She also learned that most people desiring to obtain bariatric surgery in Canada faced very lengthy wait times.[11]

[8] Desiring to help Canadian prospective bariatric patients, Ms. Wildman decided to search for a bariatric surgeon and surgical facility in Mexico that would provide care comparable to that which was available in Canada. Ironically, when

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[6] Exhibit R-1, p. 2. No documentary evidence was adduced in respect of the shareholder(s) of MELP Management Ltd., nor was any documentary evidence adduced concerning MELP's shareholder(s) during the Reporting Periods.
[7] Exhibit R-1, p. 1.
[8] Transcript, vol. 1 (October 16, 2023), p. 19, line 18 to p. 20, line 1.
[9] Transcript, vol. 1 (October 16, 2023), p. 17, lines 27-28.
[10] Transcript, vol. 1 (October 16, 2023), p. 21, lines 1-21.
[11] Transcript, vol. 1 (October 16, 2023), p. 21, line 22 to p. 22, line 19.

Ms. Wildman was in Mexico for her own surgery, she had come across an article about Dr. Liza Pompa, a bariatric surgeon who had trained at the Mayo Clinic and who was board-certified in the United States, and LIMARP,[12] which was Dr. Pompa's 12-bed state-of-the-art surgical facility in Tijuana, Mexico, about a twenty-minute drive from the San Diego airport.[13]

[9] In some places in the exhibits and the oral testimony, the above-mentioned 12-bed surgical facility was referred to as a *hospital*. In other places, it was referred to as a *surgical unit*. In these Reasons, I will generally use the term *hospital*, but only because it was the term used more often in the exhibits. In choosing the term *hospital*, I have not intended to make any qualitative or quantitative distinction between a *hospital* and a *surgical unit*, particularly as those terms were used by Ms. Wildman and others when describing the facility.

[10] In early 2010, Ms. Wildman reached out to Dr. Pompa by email, and subsequently travelled to Tijuana to meet Dr. Pompa and to tour the hospital. Ms. Wildman's objective was to find and provide a means whereby Canadian bariatric patients would have the support that she had not had in respect of her own surgery.[14]

[11] Dr. Pompa was welcoming, and spent many hours with Ms. Wildman, as they discussed their respective business objectives. Dr. Pompa said that she was endeavoring to have LIMARP (i.e., the hospital, herself, as the surgeon performing bariatric surgery in the hospital, and her surgical practice, including pre-operative and post-operative care) designated by Surgical Review Corporation ("SRC") as an International Center of Excellence for Bariatric Surgery ("ICE").[15] However, it was difficult for LIMARP to meet SRC's criteria for long-term patient follow-up.[16]

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[12] In some places in the exhibits and the oral testimony, the term *LIMARP* (which was derived from the name of Dr. Liza Maria Pompa) was used to refer to the 12-bed surgical facility described above. In other places the term was used to refer to the person or entity that owned and operated that facility. In these Reasons, unless the context makes it clear that I have used *LIMARP* to refer to that facility, I will use the term to refer to the owner-operator of the facility. No evidence was presented about the corporate or other nature, or ownership, of LIMARP, other than a general indication that Dr. Pompa was an (or the) owner thereof.

[13] Transcript, vol. 1 (October 16, 2023), p. 22, line 20 to p. 23, line 7; p. 24 lines 3-16; p. 29, lines 1--14; Exhibit A-2; and Exhibit R-9.

[14] Transcript, vol. 1 (October 16, 2023), p. 26, line 23 to p. 27, line 10.

[15] The second paragraph of Exhibit A-7 indicates that, in designating an ICE, SRC reviewed the hospital, the surgeon and the surgical practice.

[16] Transcript, vol. 1 (October 16, 2023), p. 27, lines 10-17; Exhibit A-7, p. 1, #10; and Exhibit R-9. Given that many of LIMARP's patients travelled lengthy distances for their surgeries, it was presumably not practical, because of those distances, for Dr. Pompa and LIMARP to provide significant ongoing long-term post-operative care.

[12] Ms. Wildman and Dr. Pompa decided to start working together.[17] They embarked on a business arrangement, without actually discussing the legal nature of MELP's and LIMARP's business relationship, and without putting a label on it, until the relationship had completely disintegrated.[18] MELP and LIMARP did not have a written contract between them that set out the nature or details of their business relationship.[19]

[13] When asked, in direct examination, about her understanding of the business relationship, Ms. Wildman replied as follows:

> … I would have described it … as having a common goal … and a common vision, and that we were both really passionate about trying to help people who … suffered with obesity and lived with it … for many years. Really, … we were that network, or that support *conduit* between … being alone and not knowing where to go, to having a successful surgery … at LIMARP.[20] [*Emphasis added*.]

[14] Elsewhere in her direct examination, when asked to explain how MELP and LIMARP worked together, Ms. Wildman responded as follows:

> Well, we both had the same goal in mind, which was we wanted patients to have a really positive experience and the best outcome possible in the safest environment possible. So I would describe us … as the *conduit* or … the link between our patients in Canada … and our hospital and LIMARP.[21] [*Emphasis added*.]

[15] In 2016, after the relationship between Ms. Wildman and Dr. Pompa had ruptured, the latter posted a three-page statement on her Facebook account.[22] That statement included the following paragraph:

> In 2009 we decided to bring our mission and commitment to Canada with the purpose of helping Canadians suffering from obesity overcome their health issues; to accomplish this goal we teamed with a company called *WLF (Weight Loss Forever)*, aka *WLF Medical*, who proved to share our values and mission at the time. Our venture was a simple one: *WLF* would promote our bariatric and plastic surgery programs, book appointments and supposedly take care of the follow-up phase; LIMARP would perform the surgeries and provide complete and multidisciplinary medical care. *WLF* served as an external agent for LIMARP and

[17] Transcript, vol. 1 (October 16, 2023), p. 27, lines 19-20.
[18] Transcript, vol. 1 (October 16, 2023), p. 39, lines 2-10.
[19] Transcript, vol. 1 (October 16, 2023), p. 46, lines 17-20.
[20] Transcript, vol. 1 (October 16, 2023), p. 39, lines 13-21.
[21] Transcript, vol. 1 (October 16, 2023), p. 29, line 27 to p. 30, line 7. Note that Ms. Wildman referred to the hospital as "our hospital", which was done on other occasions, as well.
[22] Exhibit A-2; and Transcript, vol. 1 (October 16, 2023), p. 39, line 22 to p. 40, line 27.

> nothing more, they where [*sic*] in no way involved with medical board, surgical treatments or decisions.[23] [*Italics in the original*.]

[16] Given the hearsay concerns expressed by the Crown, as well as my own similar concerns, I admitted the above document into evidence, only as indicating that the statement had been made, but not as being probative of the truth of the contents of that statement.[24]

[17] During direct examination, counsel for MELP referred Ms. Wildman to the above quotation, and then asked her whether it was an accurate statement of the business relationship between MELP and LIMARP.[25] Ms. Wildman responded affirmatively, as follows:

> Yeah. I mean, it's a little harsher than how I would put it certainly. But at the end of the day, we were not involved in the medical decisions, and I certainly didn't sit on her medical board … in Mexico, … and ultimately every medical decision was made by herself and Dr. Vázquez and her medical team.[26]

[18] Returning to the nature and development of MELP's business, within a short time after the initial meeting of Ms. Wildman and Dr. Pompa, many of LIMARP's patients were persons who had been referred by MELP.[27]

[19] A major contribution made by MELP was to develop an online database, called "OPIS" or "Online Patient Information System", which enabled both MELP and LIMARP, from their respective locations, to compile and access patient information, medical records, contracts and consent forms, to track the progress of patients through the pre-operative, surgical and post-operative processes, to view all of the surgery slots and bookings, to schedule surgical appointments with LIMARP, to keep track of payments by patients for their surgeries, to monitor post-operative follow-up, and otherwise to oversee each patient's situation.[28]

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[23] Exhibit A-2, p. 1.

[24] Transcript, vol. 1 (October 16, 2023), p. 42, lines 12-17. While expressing his concerns about the admissibility of Dr. Pompa's statement, counsel for the Crown said that the Crown was "willing to allow it to go in … [for] a descriptive purpose only to show that LIMARP made this statement … but … not for the truth of its contents." See Transcript, vol. 1 (October 16, 2023), p. 42, lines 3-11.

[25] Transcript, vol. 1 (October 16, 2023), p. 43, lines 4-24.

[26] Transcript, vol. 1 (October 16, 2023), p. 43, line 25 to p. 44, line 3. Dr. Vázquez was LIMARP's chief internist; he "did all of the patient medical history reviews." See Transcript, vol. 1 (October 16, 2023), p. 34, line 27 to p. 35, line 4.

[27] Transcript, vol. 1 (October 16, 2023), p. 29, lines 3-5.

[28] Transcript, vol. 1 (October 16, 2023), p. 29, lines 3-9; p. 31, lines 15-18; p. 37, lines 1-6; p. 49, lines 9-15; p. 50, lines 20-26; and p. 125, line 9 to p. 126, line 5.

[20] With the assistance of a lawyer, MELP and LIMARP collaborated on the drafting of a 23-page composite document (the "Contractual Document") titled "Informed Consent & Contract for the Bariatric Patient — Risks and Limitations of Treatment".[29] The document contained various parts, respectively titled "Current Medical Health Statement" (pages 2-3), "Agreement" (pages 4-19), "Medical Disclosure Acknowledgement" (pages 20-21), and "Companion Agreement" (pages 22-23). There were various places for signatures, but the only persons designated as signatories were the patient, a companion and a witness. There was no provision for a representative of either MELP or LIMARP to sign the document. However, the logos of Weight Loss Forever, LIMARP, ICE and WLF Medical were in the upper left and center margin of each page, and Weight Loss Forever Ltd.'s name, address, telephone number and other contact information were in the upper right margin of each page.[30]

[21] There were phrases and terms in the Contractual Document which suggested that MELP and LIMARP were conducting a combined operation, such as the phrase (in an exclusionary clause) "any facility other than Weight Loss Forever's LIMARP Surgical Unit" and the term "our hospital".[31]

[22] There were other provisions in the Contractual Document which suggested that MELP and LIMARP were operating independently. For instance:

(a) In the Agreement forming part of the Contractual Document, the first paragraph of Schedule "C", titled "Basic Contractual Terms", stated:

> Weight Loss Forever shall arrange, perform or provide the Services [which was defined on page 6 of the Contractual Document as meaning the "packages requested herein", which was presumably a reference to one or more of the Bariatric Package, the Companion Package and the Comfort Package] for the benefit of the Client…. With regard to the arranging of the surgical team and the provision of surgical services, Weight Loss Forever shall exercise reasonable skill, care and diligence in selecting a qualified physician and quality facility in the circumstances. Weight Loss Forever shall have no liability or responsibility to the Client for any acts, omissions, negligence or

[29] Exhibit A-3.
[30] Exhibit A-3. As indicated above, from June 22, 2011 to December 30, 2012, MELP's former name was "Weight Loss Forever Ltd." SRC subsequently advised LIMARP that the ICE logo could not be used on the Contractual Document.
[31] Exhibit A-3, p. 5.

> malfeasance caused directly or indirectly by the attending physician(s), nurses or facility.[32]

(b) The sixth paragraph of the above-mentioned Schedule "C" stated:

> Weight Loss Forever has undertaken an extensive review of the Bariatric Surgery options and has confidence that the surgeons it selects are qualified to provide the surgical care and treatment expected…. Weight Loss Forever's sole warranty in respect of any physician services provided as part of the Services shall be that Weight Loss Forever exercised reasonable skill, care and diligence expected in selecting a qualified physician and quality facility in like circumstances.[33]

(c) In the Agreement forming part of the Contractual Document, one of the provisions in Schedule "D", titled "Informed Consent for Bariatric Surgery", stated:

> I have further been informed that Weight Loss Forever, [*sic*] has nothing to do with the actual procedure of weight loss surgery; only provide [*sic*] a reference and I hereby fully agree to hold Weight Loss Forever Ltd. and Weight Loss Forever, either in whole or in part, free from any and all liability associated with my undergoing surgery with Dr. Pompa, M.D., Ph.D., AFACS, or the hospital that the procedure is done in.[34]

(d) Another provision in the above-mentioned Schedule "D" stated:

> Disclosure Statement: I hereby agree to indemnify and hold harmless Weight Loss Forever against any and all liability, claims, suits, losses, costs and/or legal fees caused by, arising out of, and/or resulting from any negligent act or omission in the performance and/or failure to perform by Dr. Pompa, M.D., Ph.D., AFACS, anyone on her staff, under her control or anyone associated with the procedure at hand, or the hospital and its staff and/or anyone under their control.[35]

[23] Notwithstanding that the Contractual Document contained a few internal inconsistencies, and did not actually describe the nature of the relationship between MELP and LIMARP, on balance, my view is that, although the document endeavored to portray MELP and LIMARP as working together, it also contemplated that MELP and LIMARP were carrying on separate businesses. As

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[32] Exhibit A-3, p. 11, ¶1.
[33] Exhibit A-3, p. 12, ¶6.
[34] Exhibit A-3, p. 17.
[35] Exhibit A-3, p. 18.

submitted by counsel for the Crown, MELP likely "saw the business … as an integrated whole."[36] However, the overall impression given by the Contractual Document, at least from a legalistic perspective, was that MELP and LIMARP had separate roles and separate businesses, and neither was liable or responsible for the actions of the other. Counsel for the Crown suggested that the relationship between MELP and LIMARP was perhaps an informal joint venture[37] (a proposition with which I do not disagree).

[24] MELP undertook both pre-operative and post-operative activities. The pre-operative activities included the following:

(a) MELP promoted and marketed Dr. Pompa and LIMARP, across Canada (but not in the United States).[38]

(b) MELP had a screening tool, titled "Am I a Candidate?", on its website, which was used to screen out prospective patients for whom bariatric surgery was not suitable, and to identify candidates for whom bariatric surgery might be a viable possibility.[39]

(c) Each surgical candidate was then assigned, on a geographical basis, to a patient facilitator employed by MELP. MELP's patient facilitators, who were all former bariatric-surgery patients of Dr. Pompa, had received particularized training, so that they could support new patients before and after their surgery.[40]

(d) MELP (primarily by means of the patient facilitators) compiled and reviewed patient information, including an in-depth medical history, an ECG,[41] a pharmacological report from the patient's local pharmacy, and a note from the patient's primary care physician or family doctor. All of this medical information was uploaded to OPIS, for review by LIMARP.[42]

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[36] Transcript, vol. 3 (October 18, 2023), p. 60, lines 14-15.
[37] Transcript, vol. 2, (October 17, 2023), p. 70, line 24 to p. 71, line 3; and vol. 3 (October 18, 2023), p. 52, line 16 to p. 53, line 22. See also Exhibit R-3, p. 1, last paragraph; and Transcript, vol. 2 (October 17, 2023), p. 158, line 24 to p. 159, line 16.
[38] Transcript, vol. 1 (October 16, 2023), p. 28, lines 6-27.
[39] Transcript, vol. 1 (October 16, 2023), p. 31, line 10 to p. 32, line 23.
[40] Transcript, vol. 1 (October 16, 2023), p. 32, line 24 to p. 33, line 5.
[41] "ECG" is the term that was used by Ms. Wildman. I assume that she was referring to an electrocardiogram.
[42] Transcript, vol. 1 (October 16, 2023), p. 34, lines 10-25; and p. 35, line 2-4. Hereafter, I will use the term "family doctor" as meaning either the patient's primary care physician or the patient's family doctor.

(e) After receiving the go-ahead from LIMARP, MELP scheduled the surgeries for the patients who had been approved by LIMARP.[43]

(f) Shortly before a patient's scheduled surgery, MELP made travel arrangements for the patient and a companion to fly to San Diego, where they were met by a driver arranged by LIMARP.[44]

[25] When a patient's file was complete, OPIS flagged that file for LIMARP, whereupon its chief internist, Dr. Vázquez, reviewed the patient's medical records. After reviewing a patient's file, Dr. Vázquez usually asked additional questions and conducted a further assessment, before approving the patient for surgery. Sometimes Dr. Vázquez determined that it would not be safe for the patient to undergo surgery, with the result that LIMARP declined to operate on that patient. Occasionally, a patient was in good health and approved for surgery, without the need for a further assessment.[45]

[26] Patients who were approved for surgery were placed on a pre-operative diet, for up to two months, in order to reduce the amount of intra-abdominal fat, so as to make the surgery easier and safer. Dr. Pompa reviewed each patient's pre-operative situation, and then provided instructions to the applicable patient facilitator.[46]

[27] After Dr. Vázquez and Dr. Pompa had approved a patient for surgery, and after the patient had signed the consent form and contract, and had paid for the surgery, a surgery date was booked, whereupon MELP made travel arrangements for the patient and a companion (if applicable).[47]

[28] Each week that one or more of MELP's clients received bariatric surgery at LIMARP's hospital, MELP sent a patient facilitator to Tijuana, to provide onsite support to those clients. While they were working at LIMARP's hospital, the patient facilitators were under the supervision of Dr. Pompa.[48]

[29] After a patient's surgery had been completed, and the patient had been discharged from LIMARP's hospital and had returned to Canada, MELP undertook

[43] Transcript, vol. 1 (October 16, 2023), p. 125, lines 9-17.
[44] Transcript, vol. 1 (October 16, 2023), p. 36, lines 1-6; p. 107, lines 7-9; and vol. 2 (October 17, 2023), p. 32, lines 17-21.
[45] Transcript, vol. 1 (October 16, 2023), p. 34, line 27 to p. 35, line 24.
[46] Transcript, vol. 1 (October 16, 2023), p. 36, lines 1-27.
[47] Transcript, vol. 1 (October 16, 2023), p. 37, lines 1-8.
[48] Transcript, vol. 1 (October 16, 2023), p. 29, lines 10-11; and p. 32, line 24 to p. 33, line 17.

a series of post-operative follow-up steps, some of which were required by SRC and the ICE designation.[49] MELP's post-operative activities included the following:

(a) MELP provided instructions for the recommended post-operative diet, and offered diet-related support.[50]

(b) MELP provided, or arranged for, exercise classes, including a two-week free membership at a gym.[51]

(c) MELP organized, or arranged for, support groups, both online and in person.[52]

(d) MELP provided tracking, and behavioural and nutrition counselling.[53]

(e) MELP provided referrals to clinical psychologists and other therapists, as needed.[54]

(f) MELP provided a 24-hour telephone service to answer patient questions and address problems.[55]

(g) MELP took post-operative photographs of each patient who desired such a photograph.[56]

[30] In 2016, the Minister of National Revenue (the "Minister"), as represented by the Canada Revenue Agency (the "CRA"), reassessed MELP and seized the funds in its bank account, which prevented MELP from sending LIMARP's fees to it in respect of recently performed surgeries. Consequently, LIMARP severed its business relationship with MELP. Upon deterioration of the business relationship, some of MELP's patient facilitators started an organization known as "ESA Health", which attempted to establish a relationship with another hospital in Mexico.[57] This

[49] Transcript, vol. 1 (October 16, 2023), p. 37, lines 10-13.
[50] Transcript, vol. 1 (October 16, 2023), p. 37, line 14 to p. 38, line 8.
[51] Transcript, vol. 2 (October 17, 2023), p. 30, lines 3-6; Exhibit R-2; and Exhibit A-3, p. 4.
[52] Transcript, vol. 2 (October 17, 2023), p. 30, lines 7-9; Exhibit A-4; and Exhibit R-2, p.1. MELP permitted individuals who had had bariatric surgery elsewhere to participate, free of charge, in the support groups; Transcript, vol. 1 (October 16, 2023), p. 38, lines 13-27.
[53] Exhibit A-11, p. 1; and Exhibit R-7, p. 1.
[54] Transcript, vol. 2 (October 17, 2023), p. 29, line 28 to p. 30, line 1; Exhibit R-2, p. 1; Exhibit A-3, p. 4; and Exhibit A-5, p. 8.
[55] Exhibit A-3, p. 4; and Exhibit R-2, p. 1.
[56] Transcript, vol. 2 (October 17, 2023), p. 28, lines 1-5; Exhibit R-2, p. 1; and Exhibit A-3, p. 4.
[57] Transcript, vol. 1 (October 16, 2023), p. 44, line 23 to p. 45, line 2.

exacerbated the situation and prompted Dr. Pompa to post the above-mentioned document on Facebook.[58]

III. **ISSUES**

[31] The issues in these Appeals are:

(a) What was the nature of the relationship between MELP and LIMARP?

(b) Did MELP operate LIMARP in accordance with section 2 of Part II of Schedule V to the ETA?

(c) Was MELP the agent of LIMARP for the supply of services which were exempt under section 2 of Part II of Schedule V to the ETA?

(d) Was MELP the agent of LIMARP in accordance with section 5 of Part V of Schedule VI to the ETA?

(e) Was MELP the agent of LIMARP for the purposes of collecting payment from the patients for the surgeries and related health care in Mexico?

(f) Was MELP the agent of the patients for the purpose of paying LIMARP for the surgeries?

(g) Did the Minister correctly determine MELP's input tax credits ("ITCs") for the Reporting Periods?

(h) Did the Minister correctly determine MELP's net tax under the ETA for the Reporting Periods?

IV. **ANALYSIS**

A. **Procedural Comments**

[32] As noted above, the 12 Reassessments related to the 12 Reporting Periods, which (as a whole) began on May 27, 2010 and ended on February 28, 2013. The first Reassessment related to a five-day Reporting Period, from May 27, 2010 to May 31, 2010. The other 11 Reassessments related to quarterly Reporting Periods,

[58] See paragraph 15 and footnote 23 above.

with the first of those beginning June 1, 2010 and ending August 31, 2010, and the last of those beginning December 1, 2012 and ending February 28, 2013.

[33] The Reassessments were embodied in a 16-page composite Notice of (Re)Assessment (the "Notice of Reassessment"), dated January 27, 2017.[59] The first page of that document was a summary of the aggregate results of the Reassessments, which were set out on the next 12 pages of the document. The 14th page of the document contained MELP's name and business number (which had been redacted in Exhibit R-16), the beginning and ending dates of the total period covered by the Reporting Periods, the title "Notice of (Re)Assessment", and a reference to the goods and services tax ("GST") / Harmonized Sales Tax ("HST"). The last two pages of the document were blank.

[34] Each of pages 2 through 13 of the Notice of Reassessment was itself titled "Notice of (Re)Assessment", bore a distinctive serial number, and related to a specific Reporting Period. Each of those pages showed the amount of the previous assessment for the particular Reporting Period and the amount of the revised assessment for that same period.

[35] Paragraph 296(1)(a) of the ETA states that "[t]he Minister may assess … the net tax of a person under Division V for a reporting period of the person…." This provision indicates that the net tax for a reporting period is to be assessed specifically for that period, and implies that the net tax for multiple reporting periods should be assessed on a period-by-period basis.

[36] Subsection 300(2) of the ETA states that "[a] notice of assessment may include assessments in respect of any number or combination of reporting periods…." Subsection 300(2) suggests that, even though there might be only one notice of assessment, if multiple reporting periods are covered by that notice, it is appropriate for the Minister, in that notice, to issue multiple assessments (presumably, a separate assessment for each reporting period).

[37] Subsection 301(1.1) of the ETA states that "[a]ny person who has been assessed and who objects to *the assessment* may … file with the Minister a notice of objection in the prescribed form and manner setting out the reasons for *the objection* and all relevant facts [*emphasis added*]." This provision suggests that an objection

[59] Exhibit R-16.

relates to a particular assessment.[60] However, given that a notice of assessment may include assessments relating to more than one reporting period,[61] and given that a notice of appeal may relate to more than one assessment,[62] it is reasonable to permit a notice of objection to include objections in respect of more than one assessment.

[38] Section 306 of the ETA states that "[a] person who has filed a notice of objection to *an assessment* … may appeal to the Tax Court to have *the assessment* vacated or a reassessment made … but no *appeal* under this section may be instituted after the expiration of ninety days after the day notice is sent to the person under section 301 that the Minister has confirmed *the assessment* or has reassessed [*emphasis added*]." Therefore, an appeal relates to a particular assessment.[63] Notwithstanding subsection 33(2) of the *Interpretation Act*,[64] it seems to me that section 306 implies that there is to be a separate appeal for each assessment or reassessment.[65]

[39] Section 25 of the Rules states that "[a] person may join in a notice of appeal all assessments under appeal…." Therefore, if a person desires to appeal in respect of more than one assessment or reassessment under the ETA, the person may join the various appeals and their respective assessments in a single notice of appeal.

[40] Subsection 309(1) of the ETA states that "[t]he Tax Court may dispose of *an appeal* from *an assessment* by … dismissing it; or … allowing it and … vacating *the assessment*, or … referring *the assessment* back to the Minister for reconsideration and reassessment [*emphasis added*]." Thus, on the conclusion of an appeal, the disposition or remedy available from this Court relates to the assessment that was the subject of that appeal. Hence, where more than one assessment is joined in a notice of appeal, the assessments, throughout the judicial process in this Court, retain their separate identities as individual assessments for specific reporting periods.[66]

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[60] See *3488063 Canada Inc. et al. v. The Queen*, 2016 FCA 233, ¶46, which dealt with (among other statutory provisions) subsection 165(1) of the *Income Tax Act* (the "ITA"), which, in substance, is somewhat similar to subsection 301(1.1) of the ETA.

[61] Subsection 300(2) of the ETA.

[62] Section 25 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"). See paragraph 39 below.

[63] See *3488063 Canada*, *supra* note 60, ¶46, which dealt with (among other statutory provisions) subsection 169(1) of the ITA, which, in substance, is somewhat similar to section 306 of the ETA.

[64] *Interpretation Act*, RSC 1985, c. I-21, as amended. Subsection 33(2) thereof states, "Words in the singular include the plural…."

[65] Subsection 123(1) of the ETA provides that, in Part IX of the ETA, the word *assessment* means an assessment under that Part and includes a reassessment under that Part.

[66] See *3488063 Canada*, *supra* note 60, ¶48, which dealt with (among other statutory provisions) subsection 171(1) of the ITA, which, in substance, is somewhat similar to subsection 309(1) of the ETA.

[41] Consequently, the Notice of Appeal filed by MELP on April 18, 2017 and the Amended Notice of Appeal filed by MELP on May 24, 2017 related to 12 Appeals, in respect of the 12 Reassessments.[67]

B. **Nature of the Relationship between MELP and LIMARP**

[42] In resolving the issues in these Appeals, one of the underlying elements is the determination of the nature of the relationship between MELP and LIMARP. MELP asserts that it was an agent of LIMARP. The Crown submits that there was no such agency relationship.

(1) Agency Principles

[43] Professor Fridman has provided the following definition of "agency":

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property.[68]

[44] In *Kinguk Trawl*, the Federal Court of Appeal noted that the essential ingredients of an agency relationship are the following:

> 1. The consent of both the principal and the agent;
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position;
>
> 3. The principal's control of the agent's actions.
>
> In reality, points 2 and 3 are often overlapping, as the principal's control over the actions of his agent is manifested in the authority given to the agent.[69]

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[67] The comments in paragraphs 35-40 above expand upon, and further develop, the comments made in paragraph 2 and footnote 3 of the Reasons for Judgment in *International Hi-Tech Industries Inc. v. The Queen*, 2018 TCC 240.
[68] G.H.L. Fridman, *Canadian Agency Law*, 3rd ed. (Toronto: LexisNexis Canada Inc., 2017), p. 5. This definition, as set out on page 4 of the first edition of Professor Fridman's treatise, was quoted by Justice D'Arcy in *Roberge Transport Inc. v. The Queen*, 2010 TCC 155, ¶53. An earlier, but similar, version of this definition was quoted by Justice Paris in *Artistic Ideas Inc. v. MNR*, 2008 TCC 452, ¶104. See also *Kinguk Trawl Inc. v. The Queen*, 2003 FCA 85, ¶35, which quoted a somewhat similar (but not identical) definition of "agency", as set out in *Bowstead & Reynolds on Agency*, 17th ed. (Sweet & Maxwell, 2001).
[69] *Kinguk Trawl*, *ibid*, ¶36; quoting *Royal Securities Corp. Ltd. v. Montreal Trust Co. et al.*, 59 DLR (2d) 666, ¶53.

[45] An agency relationship may be created impliedly, by the conduct of the parties.[70] In such a situation, the particular court must scrutinize the conduct of the parties to ascertain whether there was an implied intention to create an agency relationship. In undertaking such scrutiny, a key consideration is to determine the level of control that the purported principal exerted over the purported agent.[71]

[46] In his treatise, Professor Fridman summarizes the concept of implied agency as follows:

> 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…. The requisite implication [of the principal's assent] can be made even if the principal did not know the true state of affairs. However, 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.[72] [*Footnotes omitted*.]

(2) Application

[47] As there was no agency agreement between MELP and LIMARP, nor any other agreement that specifically set out the nature of the relationship between those two entities, it is necessary to determine whether there was an implied intention to create an agency relationship. In other words, did MELP and LIMARP, by their conduct, impliedly create an agency relationship?

(a) Consent

[48] As indicated above, in 2010, after a meeting between Ms. Wildman and Dr. Pompa, MELP and LIMARP began to work together. MELP undertook a variety of activities to find, attract and screen prospective candidates for bariatric surgery, to collect and review patient information and make that information available to

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[70] Fridman, *supra* note 68, p. 44; *Fourney v. The Queen*, 2011 TCC 520, ¶44-47; and *Lohas Farm Inc. v. The Queen*, 2019 TCC 197, ¶62-67.

[71] *Vocan Health Assessors Inc. v. The Queen*, 2021 TCC 49, ¶54; *Anand v. The Queen*, 2019 TCC 119, ¶60-61; and *Zheng v. The Queen*, 2017 TCC 132, ¶26-29.

[72] Fridman, *supra* note 68, p. 44-46. See also *Lohas Farm*, *supra* note 70, ¶64, in which Justice D'Auray quoted the corresponding, but slightly different, paragraph from the second edition of Professor Fridman's treatise.

LIMARP, to assist patients in their preparations for surgery, to collect fees from the patients and to wire LIMARP's portion of the fees to it,[73] to arrange travel to San Diego, to provide long-term patient follow-up (as required by SRC in respect of the ICE designation), to arrange for post-operative exercise, tracking and support groups, and otherwise to care for the patients and assist LIMARP. This arrangement continued until mid-2016, and ended only when the CRA seized MELP's bank account, which precluded MELP from sending several thousand dollars of LIMARP's fees to it.

[49] Within a short while of MELP and LIMARP implementing the above arrangement, a majority of LIMARP's patients were Canadians, all of whom were clients of MELP.[74] Whenever a prospective Canadian patient contacted LIMARP directly, LIMARP referred the patient to MELP.[75] One notable example occurred on August 12, 2014, when Liliana Pompa González (Dr. Pompa's sister and LIMARP's head of administration), in a reply to a prospective patient, stated:

> Thank [y]ou for your interest in LIMARP International [C]enter of Excellence for Obesity. For Canadian patients we only work through WLF Medical[.] [T]hey provide the patient with an extensive pre and postoperative bariatric support program.
>
> Please contact them at:
>
> [MELP's contact information is then set out.]
>
> I sent your information to WLF Medical.[76]

At approximately the same time, Ms. González sent to Julie Creelman, one of MELP's patient facilitators, an email setting out the contact information and other particulars in respect of the person referred by Ms. González to MELP.[77]

[50] As indicated above, Ms. González's emails were dated August 12, 2014, which was after the Reporting Periods had ended. However, as the relationship between MELP and LIMARP continued from 2010 to mid-2016, I think that the emails are representative of the overall period.

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[73] Exhibits A-15, A-18, A-23, A-24, A-26, A-28, A-29, A-31 and A-32.
[74] Transcript, vol. 1 (October 16, 2023), p. 29, lines 3-5.
[75] Exhibits A-33; A-34 and A-35; and Transcript, vol. 1 (October 16, 2023), p. 91, lines 6-27.
[76] Exhibit A-34.
[77] Exhibit A-33.

[51] The above course of conduct makes it clear that both MELP and LIMARP consented to the arrangement that had been put in place, whereby MELP acted on behalf of LIMARP in recruiting and caring for Canadian patients.

[52] From a monetary perspective, more or less on a weekly basis, LIMARP advised MELP as to which patients had received their surgeries, whereupon MELP wired to LIMARP funds equivalent to the fees that had previously been agreed upon by LIMARP and the respective patients. This established routine shows that LIMARP consented to MELP collecting the fees payable by patients to LIMARP, holding the fees on behalf of LIMARP while waiting for the surgeries to be performed, and then remitting those fees to LIMARP after the surgeries had been performed.

(b) Authority

[53] The above course of conduct also indicates that MELP had been authorized by LIMARP to recruit and screen prospective bariatric surgery patients, to gather and review confidential health care information from them and make that information accessible by LIMARP, and to collect LIMARP's fees from the patients, hold those fees temporarily, and then remit those fees (after the surgeries) to LIMARP.

[54] One of the things that attracted Dr. Pompa and LIMARP to MELP was MELP's ability to provide long-term post-operative follow-up for Canadian patients. As many of LIMARP's patients came from outside Mexico, before Dr. Pompa met Ms. Wildman, LIMARP had encountered challenges in providing such post-operative care.[78] The fact that LIMARP received the ICE designation after LIMARP began to work with MELP indicates that LIMARP had authorized MELP to provide such long-term follow-up on LIMARP's behalf. Further confirmation that LIMARP had authorized MELP to provide long-term patient follow-up comes from an email discussed below, in the context of the *control* criterion.

(c) Control

[55] MELP did not have any physicians, surgeons, nurses, nutritionists or other health care professionals on its staff.[79] Consequently, all medically related decisions were made by Dr. Pompa, Dr. Vázquez or someone else at LIMARP.[80] On two

[78] Transcript, vol. 1 (October 16, 2023), p. 27, lines 10-20.
[79] Transcript, vol. 2 (October 17, 2023), p. 92, line 1 to p. 93, line 6.
[80] Transcript, vol. 1 (October 16, 2023), p. 43, line 25 to p. 44, line 3.

occasions, Dr. Pompa travelled to Saskatoon to provide training to MELP's staff, including the patient facilitators.[81] From time to time, Dr. Pompa sent emails to Ms. Wildman, setting out additional screening guidelines and other instructions for Ms. Wildman and the patient facilitators working in LIMARP's hospital.[82]

[56] LIMARP would not schedule surgery for a patient until the patient's required information (including a medical history, ECG, pharmacological report, family doctor's letter and any additional information requested by Dr. Vázquez) had been received and reviewed by Dr. Vázquez, and until the patient had paid LIMARP's fee to MELP.[83] Furthermore, a proposed surgery date could not be scheduled until it had been approved and confirmed by LIMARP.[84]

[57] During the interval while MELP held the fees that it had collected from patients, it viewed itself as holding LIMARP's share of those fees on behalf of LIMARP, and not on its own behalf.[85]

[58] LIMARP controlled the remittances of its fees to it. On a regular basis, LIMARP advised MELP of the surgeries that had been performed, and requested that the applicable fees be remitted.[86]

[59] An illustration of LIMARP's control over MELP (as well as the authority granted by LIMARP to MELP) is found in an email sent on December 6, 2013 by Dr. Pompa to Ms. Wildman. An excerpt from that email is set out below:

> Also wanted to tell you about recertification, as next year is going to be crucial for the 2015 recertification with SRC and they will pick some patients from the initial certification to verify follow-up to this point, we will start our designation of the 12 month period of medical files they are gonna review for 2014, do you have an idea on how followup is going? Please send me your input, and also who is in charge of the followup, so we can have all the credentials in place!!![87] [*Spelling and punctuation coincides with the original*.]

[81] Transcript, vol. 1 (October 16, 2023), p. 87, line 12 to p. 88, line 17.
[82] Transcript, vol. 1 (October 16, 2023), p. 78, line 20 to p. 79, line 16; and Exhibits A-8, A-9, A-10 and A-36.
[83] Transcript, vol. 1 (October 16, 2023), p. 34, line 15 to p. 35, line 24; and Exhibit A-1.
[84] Transcript, vol. 1 (October 16, 2023), p. 125, lines 9-24.
[85] Transcript, vol. 1 (October 16, 2023), p. 92, lines 3-12; vol. 2 (October 17, 2023), p. 150, lines 2-11; and p. 159, lines 22-26.
[86] Transcript, vol. 2 (October 17, 2023), p. 158, lines 1-9; and Exhibits A-14, A-17, A-19, A-20, A-21, A-22, A-25, A-27 and A-30.
[87] Exhibit R-13, p. 1, email sent at 2:51 p.m.

Shortly thereafter, in her reply to Dr. Pompa, Ms. Wildman stated, "I will go over our follow up with our team and send you a report."[88]

[60] LIMARP's computer engineer, while monitoring its web security, discovered a gap in the contact forms completed by patients, which enabled outsiders to see the patients' confidential information. Dr. Pompa (on behalf of LIMARP) brought this to MELP's attention and requested that a fix be implemented,[89] further illustrating that LIMARP had control over MELP.

(d) Another Factor

[61] As noted above, after the breakdown of the relationship between MELP and LIMARP, Dr. Pompa posted a statement on Facebook, in which she referred to MELP as "an external agent for LIMARP and nothing more".[90] I admitted that statement into evidence, not for the truth of its contents, but to show that it had been made. During her testimony, although Ms. Wildman did not actually use the term *agency* or any related term, she did concur with Dr. Pompa's description of the relationship between MELP and LIMARP.[91]

(e) Finding

[62] By reason of the factors considered above, I am of the view that, from 2010 to mid-2016, there was an implied agency relationship between MELP and LIMARP. The scope of the agency relationship included MELP's activities in recruiting patients, compiling, reviewing and forwarding patient information, billing and collecting LIMARP's fees from patients and (after the surgery) forwarding those fees to LIMARP, preparing patients for surgery, scheduling appointments, organizing support groups, and providing long-term post-operative patient follow-up. It seems to me that some of MELP's activities (such as taking photographs, and perhaps making travel arrangements) were performed by MELP as part of its own business, and not as LIMARP's agent.

[63] As a consequence of the above agency relationship, when MELP billed and collected fees from its clients, it did so on its own behalf (to the extent of the fees that it had charged for its services), and on behalf of LIMARP (to the extent of the fees charged by LIMARP for the surgeries, the stays in LIMARP's hospital and the

[88] Exhibit R-13, p. 1, email sent at 3:09 p.m.
[89] Exhibit R-4, p. 2.
[90] Exhibit A-2, p. 1.
[91] Transcript, vol. 1 (October 16, 2023), p. 43, line 25 to p. 44, line 3.

adjacent hotel, and related services). A further consequence was explained by Justice D'Arcy in *Club Intrawest*, as follows:

> Where an agent is acting for a principal when acquiring property or a service from a third party supplier, the agent is not making a supply of the property or service to its principal, but is merely acting as a conduit.[92]

(f) Alternative Finding

[64] If my finding of an agency relationship is incorrect, I am of the view that, for the purposes of billing, collecting, temporarily holding and then forwarding LIMARP's fees, MELP was a bare trustee, conduit or other intermediary. This alternative finding is based on the following:

(a) The Contractual Document states:

> If I reschedule my surgery for any reason, I understand that my payment will be held in trust with Weight Loss Forever and will be applied to the cost of my new surgery date.[93]

(b) Ms. Wildman acknowledged that money collected by MELP in respect of fees payable to LIMARP did not belong to MELP.[94]

(c) Albeit in a different context, Ms. Wildman indicated that MELP functioned as a conduit between MELP's clients and LIMARP.[95]

(d) Typically every week (but sometimes every other week), MELP sent to LIMARP a wire-transfer of funds collected on behalf of LIMARP.[96]

(e) A principle similar to that expressed by Justice D'Arcy in *Club Intrawest*, and by Justice Hogan in *Anand*, is applicable here.[97] It is clear from the evidence that MELP was authorized to collect the fees payable by LIMARP's patients (who were also MELP's clients). MELP collected those fees, not on its own behalf, but on behalf of LIMARP.

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[92] *Club Intrawest v. The Queen*, 2016 TCC 149, ¶71. See also *Anand*, *supra* note 71, ¶62-63.
[93] Exhibit A-3, p. 8, ¶11.
[94] Transcript, vol. 1 (October 16, 2023), p. 91, line 28 to p. 92, line 12; p. 150, lines 2-11; and p. 159, lines 22-26.
[95] See paragraphs 13 and 14 and footnotes 20 and 21 above.
[96] Transcript, vol. 1 (October 16, 2023), p. 92, lines 3-12.
[97] See paragraph 63 and footnote 92 above.

(f) In *Calgary Board of Education*, Justice Jorré stated, "For someone to act as a conduit[,] it is not necessary that there be a contract of agency or a trust."[98]

(g) Other Considerations

[65] Counsel for MELP submitted that LIMARP indirectly paid remuneration to MELP for the services provided by MELP. According to counsel, this was done by permitting MELP to keep a portion of the fees collected by MELP from the patients.[99] Relying on *Artistic Ideas*,[100] MELP's counsel then submitted that an agent's remuneration need not be by way of commission, and that it is not required that an agent's remuneration be paid directly by the principal to the agent.[101]

[66] The *Artistic Ideas* case, which dealt with sales of lithographic prints (i.e., goods) may be distinguished from the present Appeals (which deal with the supply of services). In *Artistic Ideas*, a non-resident person agreed to pay a commission to Artistic Ideas Inc. for selling the prints, as the agent of the non-resident person, to a wide array of purchasers. In these Appeals, there was no written agreement between MELP and LIMARP that set out MELP's duties or remuneration.

[67] Ms. Wildman explained the process whereby the amounts of MELP's fees were set by her. Typically, she waited for LIMARP to tell her the amount of the fee that it would charge a particular patient for the surgery (including the stay in LIMARP's hospital and in the adjacent hotel), and then Ms. Wildman generally decided that MELP would charge an identical amount to the patient as a fee for its services.[102] On occasion, if a particular patient's situation was more complicated than usual, LIMARP increased the amount of the standard fee. Sometimes the additional fee went entirely to LIMARP; other times it was split between LIMARP and MELP.[103] When communicating with the patient about the fees, the only amount that the patient was told was the combined amount, i.e., the total of the fees charged

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[98] *Calgary Board of Education v. The Queen*, 2012 TCC 7, ¶40. In commenting on this case, David Sherman took a contrary view, arguing that "there is no known legal concept of 'conduit'" independent of a trust or agency relationship. See "GST & HST Case Notes," Release No. 193 (April 2012), at 1.
[99] Transcript, vol. 3 (October 18, 2023), p. 17, line 17 to p. 18, line 28.
[100] *Artistic Ideas*, *supra* note 68.
[101] Transcript, vol. 3 (October 18, 2023), p. 19, line 2 to p. 20, line 28.
[102] Transcript, vol. 2 (October 17, 2024), p. 156, line 13 to p. 157, line 6.
[103] Transcript, vol. 1 (October 16, 2023), p. 92, line 16 to p. 93, line 3; p. 114, lines 7-19; p. 120, line 25 to p. 121, line 5; and p. 121, line 27 to p. 122, line 15.

by both MELP and LIMARP. MELP refused to provide patients with a breakdown of the combined fees.[104]

[68] Based on the manner in which MELP set its fees and billed its clients, in conjunction with billing and collecting LIMARP's fees, and based on my understanding of MELP's operations, it is my understanding that MELP and LIMARP each carried on its own business, but the two businesses were intertwined. Some of the services supplied by MELP to its clients were provided by MELP as the agent of LIMARP. Other services supplied by MELP to its clients were provided by MELP on its own behalf.

[69] For marketing purposes, MELP and LIMARP made a concerted effort to portray a united front to the public,[105] while recognizing themselves that they were, in fact, separate. This becomes evident upon reviewing an exchange of Facebook messages on July 19, 2013, in the context of a difference of opinion concerning MELP's use of LIMARP's logo on certain merchandise. At 6:14 p.m. on that date, Ms. Wildman sent the following message to Dr. Pompa:

> When you needed our data for the COE and you needed them to see us as the same, then you requested we add the limarp logo to everything, which was good because patients see and understand the continuity of care. We certainly aren't competing for merchandise since 100% of the funds go completely to you! … Also, the tshirts and phone cases etc were for Canadian patients to feel like they are a part of something special when they have surgery and to promote you and the surgery — it's intent is NOT for making money. It's a way for them to feel connected to both wlf and to limarp in their journey. I've replaced all the logos with wlfLoveLife and that will show up over the next 24 hours as they post the changes, but I think it's actually short-sighted since it makes our patients feel separate from limarp. We spend a lot of time and resources promoting you and limarp (never just wlf) here in Canada, and that's what makes what we both do work so well and that's a big reason why we are busy. If we start making it separate, patients will see that and that speaks volumes — it makes us the same as every other medical tourism outfit. That's my thoughts.[106] [*Punctuation and capitalization (or lack thereof) are in the original*.]

[70] Replying later the same day, Dr. Pompa sent the following message:

> … We are all one, it is just that we are selling the same products with the same logo on it and we have registered the fundation [*sic*] to sell them and make them tax deductible, legally and through accounting we cannot have other products that have

[104] Transcript, vol. 1 (October 16, 2023), p. 94, line 20 to p. 95, line 2.
[105] For example, see Exhibit R-9.
[106] Exhibit R-6, message sent at 6:14 p.m.

> the logo we registered on another cause…. It is also not my intention to make a separation…. We have always been together and it is my full intention to continue that way.[107]

(h) Summary

[71] Overall, it seems that, between 2010 and mid-2016, MELP and LIMARP were operating as an informal joint venture, in which MELP performed some activities as an agent for and on behalf of LIMARP, and MELP performed other activities on its own behalf. Both MELP and LIMARP operated independently, but cooperatively. While MELP and LIMARP endeavored to give the impression that they conducted a single integrated operation, MELP and LIMARP each had its own separate business. MELP had a relationship with each of its clients, and LIMARP had a different relationship with each of its patients,[108] even though those clients and patients were the same persons. MELP was not a general contractor that hired LIMARP as a subcontractor.[109]

[72] In particular, the fees that MELP billed, collected, temporarily held for and on behalf of LIMARP, and then remitted (whether as an agent, a bare trustee, a conduit or some other form of intermediary) to LIMARP, belonged to LIMARP, and not to MELP.[110] Those fees did not form part of the consideration received by MELP for the services that it supplied. Therefore, MELP was not required to collect GST or HST in respect of those fees.

[73] The making of travel arrangements (which, by their nature, did not relate directly to a patient's health care in the same manner as did many of the other services provided by MELP, such as reviewing an ECG or a pharmacological report) was an administrative activity performed by MELP in the course of its own commercial activities. Therefore, any GST or HST paid by MELP in respect of those travel arrangements gave rise to input tax credits ("ITCs"), assuming that all other requirements under section 169 of the ETA (including the documentation

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[107] Exhibit R-6, message sent at 6:35 p.m.

[108] A fundamental coterminous aspect of the relationship between LIMARP and each of its patients was the doctor-patient relationship between Dr. Pompa and each of those patients; see Transcript, vol. 2 (October 17, 2023), p. 161, lines 9-12. Given that MELP did not employ, or otherwise have on its staff, any physicians or surgeons, there was not a doctor-patient relationship between any employee of MELP and any of its clients; see Transcript, vol. 2 (October 17, 2023), p. 149, lines 19-23, and p. 161, lines 6-8.

[109] Transcript, vol. 2 (October 17, 2023), p. 159, lines 17-21.

[110] This was MELP's understanding, as well. See Transcript, vol. 1 (October 16, 2023), p. 92, lines 3-12; vol. 2 (October 17, 2023), p. 150, lines 2-11; and p. 159, lines 22-26.

requirements in subsection 169(4) of the ETA and section 3 of the *Input Tax Credit Information (GST/HST) Regulations*[111]) were satisfied.

C. **Operator of a Health Care Facility**

[74] Section 2 of Part II of Schedule V to the ETA provides that "[a] supply of an institutional health care service made by the operator of a health care facility" is an exempt supply "if the institutional health care service is rendered to a patient or resident of the facility." Section 1 of Part II of Schedule V to the ETA defines the term "health care facility" as including "a facility … operated for the purpose of providing medical or hospital care…."[112] Section 1 of Part II of Schedule V to the ETA defines the term "institutional health care service" as including "the use of operating rooms … or anaesthetic facilities …", certain "medical or surgical equipment or supplies", "accommodation", "meals" and "services rendered by persons who receive remuneration therefor from the operator of the facility", but only "when [the above goods and services are] provided in a health care facility".[113]

[75] In its Notice of Appeal and its Amended Notice of Appeal, MELP pleaded that it "operated LIMARP in accordance with section 2 of Part II of Schedule V of the ETA".[114] The term "LIMARP" was not defined in either of those pleadings, so it is not clear whether the term was used to refer to the 12-bed hospital where Dr. Pompa worked, or whether the term was used to refer to the entity that owned and operated that hospital.

[76] In its Reply, the Crown defined "LIMARP" as meaning "LIMARP Surgical Unit", and pleaded that, in determining MELP's net tax liability, the Minister had assumed that MELP "was not an operator of LIMARP".[115] One of the grounds on which the Crown relied was that, for the purposes of section V-II-2 of the ETA, MELP "was not an operator of a health care facility during the" Reporting Periods.[116]

[77] At the commencement of the trial, counsel for MELP advised the Court that MELP was no longer advancing the argument under section V-II-2 of the ETA.[117]

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[111] *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45, as amended.
[112] See paragraph (a) in the definition of "health care facility" in section V-II-1 of the ETA.
[113] See paragraphs (c), (d), (f), (g) and (h) in the definition of "institutional health care service" in section V-II-1 of the ETA.
[114] Subparagraph (f)(i) of the Notice of Appeal and subparagraph (f)(i) of the Amended Notice of Appeal.
[115] Subparagraphs 8.i) and 8.r) of the Reply.
[116] Paragraph 12 of the Reply.
[117] Transcript, vol. 1 (October 16, 2023), p. 6, line 21 to p. 7, line 5.

D. **Supply by Agent of an Institutional Health Care Service**

[78] Notwithstanding the above statement made by MELP's counsel, I note that, in its pleadings, MELP raised an additional issue, suggesting that MELP was the agent of LIMARP for the supply of services that were exempt under section V-II-2 of the ETA.[118]

[79] In its Reply, without distinguishing between the *agency* issues raised by MELP in respect of both sections V-II-2 and VI-V-5 of the ETA, the Crown submitted that MELP was "not an agent of LIMARP", with the result that all of MELP's supplies were taxable supplies.[119]

[80] As noted above, I have found that MELP was the agent of LIMARP for certain purposes. If it is assumed (for the purpose of analyzing the section V-II-2 agency argument) that the scope of the agency extended to the supply of services coming within section V-II-2 of the ETA, it becomes necessary to determine whether MELP satisfied the requirements of section V-II-2.

[81] As noted above, section V-II-2 of the ETA exempts the supply of an institutional health care service made by the operator of a health care facility. In order to be an institutional health care service, as defined in section V-II-1 of the ETA, the service must be provided in a health care facility.[120] While LIMARP's hospital in Tijuana was a health care facility, there is no evidence to suggest that MELP's business premises in Saskatoon, or any other location in Canada where a patient facilitator met with a patient, was a health care facility.

[82] As indicated above, each week that one or more of MELP's clients received bariatric surgery at LIMARP's hospital, one of MELP's patient facilitators worked at the hospital to support those clients. While the services provided by the patient facilitators in LIMARP's hospital satisfied the statutory requirement of being "provided in a health care facility",[121] there was no evidence concerning the allocation of the working hours of the patient facilitators between the duties performed in LIMARP's hospital and the duties performed in Canada. Nor was there any evidence concerning the allocation of the consideration paid to MELP by its

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[118] Subparagraph (d)(ii) of the Notice of Appeal and subparagraph (d)(ii) of the Amended Notice of Appeal.
[119] Paragraph 15 of the Reply.
[120] See the opening line of the definition of "institutional health care service" in section V-II-1 of the ETA. See also *Buccal Services Ltd. v. The Queen*, [1994] GSTC 70 (TCC), ¶9; *Riverfront Medical Evaluations Ltd. v. The Queen*, [2001] GSTC 80 (TCC), ¶29; affirmed 2002 FCA 341, [2002] GSTC 110; and *Vocan*, *supra* note 71, ¶89 & 92.
[121] See the first line of the definition of "institutional health care service".

clients between the services provided by MELP in LIMARP's hospital and the services provided in Canada.

[83] Accordingly, even though MELP was LIMARP's agent, apart from the services provided by the patient facilitators in LIMARP's hospital, MELP has not shown that it satisfied the statutory requirement that the services provided by it must have been provided in a health care facility, and it has not adduced sufficient evidence to identify the portion of its services that were performed by its patient facilitators in LIMARP's hospital. Therefore, MELP has not proven that it provided institutional health care services on behalf of LIMARP.

[84] Consequently, in the context of this argument, the finding that MELP was LIMARP's agent does not assist MELP.

E. **Supply to a Non-Resident of a Service of Acting as an Agent**

[85] At the commencement of the trial, counsel for MELP advised the Court that the only argument that MELP would be making is that, for the purposes of section VI-V-5 of the ETA, MELP was the agent of LIMARP.[122] As noted above, the Crown submits that MELP was "not the agent of LIMARP".[123]

[86] Section 5 of Part V of Schedule VI to the ETA provides that a zero-rated supply includes "[a] supply made to a non-resident person of a service of acting as an agent of the person or of arranging for, procuring or soliciting orders for supplies by or to the person, where the service is in respect of:

(a) a supply to the person that is included in any other section of this Part; or

(b) a supply made outside Canada by or to the person."

[87] Section VI-V-5 of the ETA may apply to either a service of acting as an agent of a non-resident person, or a service of arranging for, procuring or soliciting orders for supplies by or to a non-resident person. When section VI-V-5 was originally enacted, its scope was limited to agents of the non-resident person. However, by reason of a 1997 amendment, the scope of section VI-V-5 was expanded to cover certain persons who were not agents (such as a purchasing representative or a sales

[122] Transcript, vol. 1 (October 16, 2023), p. 6, line 26 to p. 7, line 1; and p. 7, lines 5-7.
[123] Paragraph 15 of the Reply.

representative) and who arranged for, procured or solicited orders for supplies by or to the non-resident person.[124]

[88] To come within section VI-V-5, the particular service must satisfy the criterion set out in either paragraph (a) or (b) of that section. In other words, the particular service must be in respect of either a zero-rated supply to the non-resident person, or a supply made outside Canada by or to the non-resident person.

[89] There was no evidence to suggest that MELP made any zero-related supplies of services to LIMARP, with the result that paragraph VI-V-5(a) of the ETA was not satisfied. Turning to paragraph VI-V-5(b) of the ETA, it becomes necessary to determine whether MELP made any supplies of services to LIMARP where the services were in respect of a supply made outside Canada by LIMARP or to LIMARP.

(1) Supplies *by* LIMARP

[90] In the context of paragraph VI-V-5(b) of the ETA, and looking first at the services supplied *by* LIMARP, its most obvious services were the bariatric surgeries and other treatment and care in LIMARP's hospital, which were supplied in Tijuana, Mexico, which was clearly outside Canada. However, before coming to any overall conclusion about the place of LIMARP's supplies, it is necessary first to consider the rules set out in sections 142 and 143 of the ETA.

[91] In the context of these Appeals, it is necessary to consider both subsections (1) and (2) of section 142, as well as section 143, of the ETA. While subsection 142(1) is subject to section 143, subsection 142(2) is not. In *Paradigm Ventures*, Justice Hershfield confirmed that subsection 142(2) and section 143 operate independently:

> … section 143 … [and] subsection 142(2) … each afford the Appellant a basis for claiming that its supplies are zero-rated. If a supply is deemed to be outside Canada under subsection 142(2), it does not lose the benefit of that provision just because it is not deemed to be outside of Canada under section 143[,] and if a supply is deemed to be outside Canada under section 143, it does not lose the benefit of that provision just because it is not deemed to be outside of Canada under subsection

[124] *Amendments to the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the Income Tax Act, the Debt Servicing and Reduction Account Act and Related Acts: Explanatory Notes* (July 10, 1997), p. 229, re: section VI-V-5, "Agents' Services". In these Reasons, I sometimes refer to a person who arranges for, procures or solicits orders as an "order facilitator".

> 142(2). Once a supply is deemed to be outside Canada, the existence of another deeming provision is irrelevant where neither is subject to the other.[125]

(a) Paragraph 142(1)(g)

[92] Paragraph 142(1)(g) of the ETA states that, subject to section 143 of the ETA (and two other sections that are not relevant here), and, apart from two irrelevant types of services,[126] a supply of a service is deemed to be made in Canada if the service is, or is to be, performed in whole or in part in Canada.

[93] As I have found that MELP was the agent of LIMARP, and that the scope of the agency relationship extended to MELP being the agent of LIMARP for the purposes of carrying out many of the pre-operative and post-operative activities, the situation was as though such activities had been carried out by LIMARP. This result flows from a fundamental principle of agency law, succinctly summarized in a GST/HST Policy Statement, as follows:

> In a sense, an agent is an extension of a principal, so the actions of the agent are those of the principal.[127]

[94] Given that the services constituting the pre-operative and post-operative activities were performed in Canada, the result was that the supply of those services was deemed to be made in Canada. The further consequence was that paragraph VI-V-5(b) of the ETA was not satisfied.

[95] If my finding that MELP was LIMARP's agent is incorrect, or if the scope of the agency relationship did not extend to the supply of services coming within section VI-V-5, and if MELP was instead a representative (i.e., an order facilitator)[128] which arranged for, procured or solicited orders for bariatric surgery performed by Dr. Pompa in LIMARP's hospital, a portion of the services constituting the pre-operative activities might possibly have come within section VI-V-5. As noted above, this aspect of section VI-V-5 pertains only to the service of arranging for, procuring or soliciting orders. MELP's pre-operative activities of promoting and marketing Dr. Pompa and LIMARP, recruiting potential

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[125] *Paradigm Ventures, Inc. v. The Queen*, 2010 TCC 646, ¶22.

[126] Paragraph 142(1)(d) of the ETA sets out a rule for a supply of a service in relation to real property, which is not applicable in the context of these Appeals. Paragraph 142(1)(f) of the ETA refers to a supply of a prescribed service, but no services have yet been prescribed for this purpose.

[127] Government of Canada (Canada Revenue Agency), *Agency*, GST/HST Policy Statement P-182R, issued June 23, 1995, revised July 2003, p. 5/30. During his oral submissions, counsel for MELP referred me to this Policy Statement; Transcript, vol. 3 (October 18, 2023), p. 9, lines 4-8.

[128] See footnote 124 above.

bariatric surgery candidates, and screening out persons for whom such surgery was not suitable likely came within the phrase "a service … of arranging for, procuring or soliciting orders."[129] However, it is not clear that other services that were also part of the pre-operative activities, such as compiling and reviewing patient information (e.g., a medical history, an ECG, a pharmacological report and a family doctor's letter) or explaining and monitoring the recommended pre-operative diet, related to the service of arranging for, procuring or soliciting orders for the surgery. It also seems that the services constituting the post-operative activities did not relate to the service of arranging for, procuring or soliciting orders for the surgery.

[96] The evidence adduced by MELP does not contain an allocation of MELP's fees between the pre-operative activities and the post-operative activities, or an allocation of the fees for the pre-operative activities between the services that arranged for, procured or solicited orders for surgery and the services that readied a patient for the surgery.

[97] Consequently, if the *order-facilitator* aspect (rather than the *agent* aspect) of section VI-V-5 is applicable, there is not sufficient evidence to enable me to determine the value of the consideration for the supply of the services that arranged for, procured or solicited orders for surgery. Therefore, MELP cannot succeed on the basis of this argument.

[98] The services provided by MELP's patient facilitators in LIMARP's hospital in Tijuana to LIMARP's Canadian patients were clearly provided outside Canada. If MELP, in providing the services of its patient facilitators in LIMARP's hospital, was acting as the agent of LIMARP, we again encounter the same evidentiary concern mentioned above, i.e., there was no evidence that enables me to allocate the fees received by MELP, for its services, between the services provided by its patient facilitators in LIMARP's hospital and all the other services provided by MELP. Therefore, MELP cannot succeed in respect of the services provided by its patient facilitators to Canadian patients in LIMARP's hospital in Mexico.

(b) Paragraph 142(2)(g)

[99] Turning to paragraph 142(2)(g) of the ETA, this provision states that, apart from two irrelevant types of services,[130] a supply of a service is deemed to be made

[129] See the opening portion of section VI-V-5.

[130] Paragraph 142(2)(d) of the ETA sets out a rule for a supply of a service in relation to real property, which is not applicable in the context of these Appeals. Paragraph 142(2)(f) of the ETA refers to a supply of a prescribed service, but no services have yet been prescribed for this purpose.

outside Canada if the service is, or is to be, performed wholly outside Canada. Similar to the above comments, as MELP was the agent of LIMARP for the purposes of carrying out many of the pre-operative and post-operative activities, it was as though such activities had been carried out by LIMARP. Given that the services constituting the pre-operative and post-operative activities were performed in Canada, the result was that LIMARP's services (which included, not only its surgical and hospital services provided in Tijuana, but also the services provided in Canada by MELP, as LIMARP's agent) were not performed wholly outside Canada, such that paragraph 142(2)(g) did not deem the supply of MELP's services (as agent) to have been made outside Canada. The further consequence was that paragraph VI-V-5(b) of the ETA was not satisfied.

(c) Subsection 143(1)

[100] Subsection 143(1) of the ETA provides that a supply of a service made in Canada by a non-resident person is deemed to be made outside Canada, unless one of four exceptions applies. The only exception that might possibly have application, in the context of these Appeals, is found in paragraph (a), which refers to a supply made in the course of a business carried on in Canada.

[101] Section 253 of the *Income Tax Act* (the "ITA")[131] sets out an extended meaning of the phrase "carrying on business in Canada". Notably, paragraph 253(b) indicates that a non-resident person who, in a taxation year, "solicits orders or offers anything for sale in Canada through an agent or servant" is, for the purposes of the ITA, deemed to have been carrying on business in Canada in the year.

[102] Section 253 of the ITA does not have a corresponding counterpart in the ETA. Therefore, I do not consider MELP's promotional and recruiting activities on behalf of LIMARP, by themselves, to have resulted in LIMARP having carried on business in Canada.

[103] On the other hand, as I have found that MELP was the agent of LIMARP, to the extent that MELP supplied services on behalf of LIMARP,[132] by performing health-related activities for LIMARP's patients, such as compiling and reviewing medical histories, ECGs, pharmacology reports and family-doctor letters, or explaining and monitoring pre-operative diets, or providing post-operative care and long-term patient follow-up, I am of the view that LIMARP, by reason of its agent's

[131] *Income Tax Act*, RSC 1985, c. 1 (5th Supplement), as amended.
[132] In other words, the services supplied by MELP on behalf of LIMARP are viewed as supplies made by LIMARP.

activities, was carrying on business in Canada. Therefore, the supply of those services by MELP was not deemed by subsection 143(1) of the ETA to have been made outside Canada. Consequently, paragraph VI-V-5(b) of the ETA was not satisfied.

(2) Supplies *to* LIMARP

[104] In the context of paragraph VI-V-5(b) of the ETA, and turning now to a consideration of services supplied *to* LIMARP, most of the services provided by MELP, as LIMARP's agent, were performed in Canada. Therefore, the supply of those services did not come within paragraph VI-V-5(b).

[105] To the extent that MELP provided services to LIMARP, by arranging for a patient facilitator to work in LIMARP's hospital, the supply of those services was made outside Canada. However, we encounter the same evidentiary deficiency mentioned above, i.e., no evidence was provided to enable me to determine the value of the consideration for that supply.

(3) Summary

[106] As explained above, MELP is unable to succeed in its argument based on section VI-V-5 of the ETA, either because of the intricate and complex requirements of that section, coupled with the results that flowed from MELP being LIMARP's agent, such that LIMARP was found to be carrying on business (through its agent) in Canada, or because of an evidentiary deficiency which precluded me from determining the value of the consideration for the supplies of services that may have come within section VI-V-5 (i.e., the services of arranging for, procuring or soliciting orders (but only if MELP was not the agent of LIMARP), and the services provided by MELP's patient facilitators in LIMARP's hospital).

V. CONCLUSION

[107] The Appeals are allowed, and the Reassessments are referred back to the Minister for reconsideration and reassessment, on the basis that:

(d) The fees that MELP billed, collected, temporarily held for and on behalf of LIMARP, and then, whether as an agent, a bare trustee, a conduit or some other form of intermediary, remitted to LIMARP, belonged to LIMARP, and not to MELP, with the result that those fees did not form part of the consideration received by MELP for the services that it supplied, and with the

further result that MELP was not required to collect GST or HST in respect of those fees.

(e) To the extent that any moneys seized or otherwise obtained by the CRA, as part of its collection efforts, were, at the time of the seizure, being held by MELP, with the intention of forwarding those moneys to LIMARP after the applicable surgeries had been performed, those moneys belonged to LIMARP, and not to MELP, with the result that those fees did not form part of the consideration received by MELP for the services that it supplied, and with the further result that MELP was not required to collect GST or HST in respect of those fees.[133]

(f) The making of travel arrangements by MELP for its clients was undertaken by it in the course of its own commercial activities, such that any GST or HST paid by MELP in respect of such travel arrangements gave rise to ITCs, assuming that all other requirements under section 169 of the ETA were satisfied.

[108] I assume that MELP and the CRA have books, records and other documents that will enable them to calculate the amount of the fees referred to in subparagraphs 107(a) and (b) above. However, if such is not the case, I think that the approximate (if not the precise) amount of those fees may be calculated by reference to the aggregate fees (the "Aggregate Fees") collected by MELP, from its clients, in respect of both MELP's fees and LIMARP's fees. As noted above, MELP generally charged a fee for its services equal to the fee charged by LIMARP for the surgery and related expenses. Occasionally, if there were unusual complexities, LIMARP sometimes charged an additional fee (colloquially called a "revision fee" or a "high BMI price"), which typically went entirely to LIMARP, although, on occasion, there was some splitting of that amount. As there is no detailed evidence concerning the manner in which the additional fees were split, for the purposes of the calculations contemplated by subparagraphs 107(a) and (b), I have concluded that 50% of the Aggregate Fees were collected by MELP on its own behalf and for its own account, and 50% of the Aggregate Fees were collected by MELP on behalf of LIMARP, and were remitted by MELP (as an agent, bare trustee, conduit or other intermediary) to LIMARP (or would have been so remitted but for the CRA's seizure of MELP's bank account).

[133] As the Tax Court of Canada is a statutory court, with only limited jurisdiction, I do not have the jurisdiction to order the payment of those moneys by the CRA to MELP (as agent for and on behalf of LIMARP).

[109] As success in these Appeals is divided, I do not make any award concerning costs.

Signed at Ottawa, Canada, this 8th day of October 2024.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2024 TCC 130
COURT FILE NO.:	2017-1860(GST)G
STYLE OF CAUSE:	MELP ENTERPRISES LTD. v. HIS MAJESTY THE KING
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATES OF HEARING:	October 16, 17 and 18, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF JUDGMENT:	October 8, 2024

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