Docket: 2011-3056(GST)G

BETWEEN:

KOSMA-KARE CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 26, and 27, 2013, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Louis-Frédérick Côté
Counsel for the Respondent:	Claudine Alcindor

JUDGMENT

The appeal from the assessment made pursuant to Part IX of the *Excise Tax Act*, the notice of which is dated March 3, 2011, for the taxation periods between April 1, 2006, and June 30, 2010, is dismissed, with costs.

Signed at Ottawa, Canada, this 14th day of January 2014.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 29th day of August 2014.

Erich Klein, Revisor

Citation: 2014 TCC 13
Date: 20140114
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REASONS FOR JUDGMENT

Lamarre J.

[1] The appellant is appealing from an assessment dated March 3, 2011, made by the Minister of Revenue of Quebec (Minister) pursuant to Part IX of the *Excise Tax Act* (ETA), whereby input tax credits (ITCs) of $59,560.40 claimed by it for the period from April 1, 2006, to June 30, 2010, were disallowed.

[2] The Minister submits that these disallowed ITCs are related to the acquisition of supplies of services from employment agencies that the appellant did not in fact acquire and for which it received false invoices or accommodation invoices. More specifically, the ITCs disallowed were those claimed by the appellant with respect to invoices for $29,886.46 and $29,673.94 from two separate suppliers, 9167-4523 Québec Inc. (9167) and 9199-9201 Québec Inc. (9199), also known as Solutions Oxford, respectively (see subparagraph 15f) of the Reply to the Notice of Appeal).

Facts

[3] I heard a number of witnesses and I will summarize their testimony below.

Hassan Chaouki: president and owner of the appellant

[4] According to Mr. Chaouki's testimony, the appellant has been carrying on business since 1989 as a manufacturer of first aid products and cosmetic cotton products. Its clients are large pharmacies across Canada and a few in the United States. The financial statements entered in evidence as Exhibit A-1, Tab 4, show that the appellant earned good profits until 2008 (around half a million dollars per year on average). In 2009 and 2010, sales dropped by 3 or 4 million dollars and the appellant found itself in a loss position. Mr. Chaouki's salary was reduced by more than half in 2009 and 2010, to slightly over $150,000 over those two years (Exhibit A-1, Tab 5). This, Mr. Chaouki explained, was in order to avoid reducing employee wages.

[5] During the period at issue, the appellant had around 50 regular employees, who were paid every two weeks. Mr. Chaouki handled sales, but was not involved in the daily activities of the appellant. He was the one who chose the employment agencies he agreed to deal with for the purpose of hiring additional labour according to the needs of the business. So it was that, some fifteen years ago, he began doing business with one Enzo Chioda, who owned the Placement Inter Globe employment agency. When he died in 2005, his son Eric Chioda took over. Mr. Chaouki admitted that the names of the agencies had changed a few times since then, but said that for him the important thing was finding workers to fill the orders.

André Frenette: vice-president, finance, of the appellant

[6] Mr. Frenette explained that he verified whether the employment agencies that billed the appellant for services were indeed registered with the Canada Revenue Agency (CRA) and the Agence du Revenu du Québec (ARQ). He then approved the payment by cheque of the invoices sent by the agency each week. He said that it was originally Mr. Chaouki's cousin, Ramez Chawky, who supervised production and assessed the need for additional labour. Subsequently this duty was given to Nancy Tremblay. Mr. Frenette submitted as evidence a document he prepared just over a year ago (Exhibit A-1, Tab 8). In that document, he compared the hourly rate paid to the two agencies that are the subject of this dispute for each worker (which varied on average between $8.50 and $11.50 or $13 for a few workers) with the hourly minimum wage in the province of Quebec (varying between $7.75 and $9.50) during the period at issue. He noted in the document in question that the hourly rate paid to those two agencies exceeded the hourly minimum wage by approximately 16 to 29 percent on average. Mr. Frenette also calculated the difference for another agency, Prohad Personnel (Prohad), with which the appellant also did business for a period of 8 months, from September 2008 to April 2009, and which is not the subject of any

challenge by the Minister. It can be seen that the hourly rate paid to this agency for each worker was $14 compared to the hourly minimum wage of $8.50 for that period, a difference of 65 percent.

[7] Mr. Frenette also filed a service agreement between the appellant and Solutions Oxford (Exhibit A-1, Tab 10). This agreement was signed by him on behalf of the appellant and by Eric Chioda for Solutions Oxford at the time the ARQ audit was taking place in the spring of 2010. However, they backdated the agreement to September 15, 2008. Mr. Frenette said that through negligence they had failed to sign the agreement earlier. He said he had received it from Mr. Chioda in 2008 and had had it verified by the appellant's counsel. In the meantime, the appellant needed labour and turned to the services of Solutions Oxford even though nothing had yet been signed. Mr. Frenette said that Mr. Chioda had brought him a document from the Registraire des entreprises du Québec (**REQ**), and everything seemed to be in order. During a previous Revenu Québec audit in 2005, the appellant was apparently asked to provide a sufficient description of the workers sent by the employment agencies (namely, the workers' records showing their social insurance numbers (SIN) and addresses). Mr. Frenette mentioned that the agencies involved in the present case refused to disclose this information about their workers. Mr. Frenette stated that he then consulted the appellant's counsel, who told him that the appellant could not legally provide the description required by the ARQ was requesting because these workers were not its employees but the employment agencies' employees and the agencies held this information on a privileged basis. No such legal opinion was submitted in evidence, however, and we do not know on exactly what information this opinion would have been based. Eric Chioda apparently provided Mr. Frenette with an article written by the law firm Lavery, de Billy (submitted as Exhibit A-1, Tab 11, and purporting to be a general legal analysis regarding the determination of the true employer when a business uses an employment agency, but not a specific analysis of the appellant's situation) and told him that his lawyers had confirmed that the service agreement was valid and legal.

[8] In cross-examination, Mr. Frenette acknowledged that the Prohad agency, with which he also did business (and which is not the subject of any challenge by the Minister), provided the SINs and addresses of the workers in the records sent to him (Exhibit I-1, pages 9-16, 9-23 et seq.). However, he stated that this agency had trouble finding employees and he stopped doing business with it after a few months. He also admitted that Prohad, unlike the agencies concerned in the present case, sent its invoices by mail without first receiving the Excel table (which was the compilation of the workers' hours of work) prepared by the appellant's representatives. Prohad prepared its invoices itself according to the hours worked by

the employees it selected to work for the appellant. Mr. Frenette paid Prohad by cheque within 15 days following receipt of the invoice. As for 9199 and 9167, it was the person who drove the employees who went to get the appellant's cheque in the same week the invoice was received by fax; this invoice reproduced the information that the appellant gave in its Excel table. On the work sheets attached to these two agencies' invoices, the worker's full name did not always appear.

[9] Mr. Frenette acknowledged moreover that the employees recruited by these agencies were primarily immigrants since, he stated, Quebeckers did not want to do such work for the salary being offered. He did not know whether these workers were protected by the Commission de la santé et de la sécurité du travail (CSST**)** in the event of a workplace accident. It was not the appellant that covered this.

Eric Chioda: the incorporator of 9199

[10] Eric Chioda, another of the appellant's witnesses, explained for his part that he had worked in the past for his father, Enzo Chioda, who operated an employment agency called Placements Inter Globe. Enzo Chioda died in January 2005. At that time, Eric Chioda changed the name of the company to Placements Inter Montréal. This was short-lived because he went bankrupt in April 2006 after an audit of his business by Revenu Québec, which culminated in the disallowance of ITCs on accommodation invoices. He therefore decided to work in construction, which he did until 2008. Apparently, it was one Aimé Mokonda, whom he says he does not know who took over his agency in 2006. In 2008, Mr. Chioda incorporated 9199 under the name Solutions Oxford, and he went to see his former clients to offer his services again, but this time as an intermediary between the clients and the employment agencies. He no longer wanted to have employees. He wanted to act only as a human resources broker, taking a small percentage so that he could make a living. He went to see a lawyer who specializes in the field (with the law firm Lavery, de Billy), who prepared for him the service agreement referred to above. Apparently, Mr. Chioda worked with two secretaries, Patricia Martinez and Beatriz Jimenez. Clients he recruited would call them and they would then get in touch with the employment agencies. They told the agencies where the employees were to go; Eric Chioda did not take care of their transportation. He paid the employment agencies the amount billed to the appellant minus a small percentage of profit that he kept for himself. He had seven or eight clients. When Revenu Québec conducted another audit, his ITCs were disallowed and he went bankrupt again.

[11] On cross-examination, he said he billed the appellant on behalf of Solutions Oxford (9199) a total amount of around $500,000 for services provided. According to him, the appellant was not his biggest client. His main client was Pasta Romana, which he billed for $2 million in his first year of operation. He did not make any report with respect to this client in his second year of operation.

[12] Eric Chioda said he contracted with two employment agencies, Entreprise SDE Inc. (SDE) and Agence Nafran Inc. (Nafran), for the workers sent to the appellant. He said that he did not go to their places of business and did not sign any contracts with them.

[13] He stated that he arranged things so that he would make a profit varying form 15¢ to 50¢ per hour per employee. Thus, he explained, he billed the appellant $14.00 an hour and paid the employment agency $13.75.

[14] He himself did not know which workers were assigned to the appellant by the employment agencies he dealt with, but he knew how many. Thus, he said, he paid SDE more than $2 million but the ITCs with respect to the payments were disallowed on the ground that the invoices were, again, accommodation invoices. Eric Chioda said he normally verified in the Quebec business register whether the employment agencies were validly registered, but he could not say he had done so for SDE, which presented itself as operating a janitorial and business service, not an employment agency.

Nancy Tremblay: former employee of the appellant

[15] Nancy Tremblay, who also testified at the appellant's request, supervised the production employees in 2006 and 2007. In the subsequent years, until 2011, when she stopped working there, she also took care of planning. She ordered the raw materials for the production of the requested products. If she saw that there were not enough employees on site to fill the orders, she called the employment agencies chosen by Mr. Chaouki to have them send workers. Ms. Tremblay said she spoke to a Patricia, and another woman named Andrea. She never saw them. She also met once or twice a person named Aimé who did some transportation or went to pick up the payment cheque for the agency. The workers the agencies sent were women to work at the packaging tables for hygiene products. They would put the bandages in boxes. Men were hired for transportation. The decision whether additional workers were required was made on a day-to-day basis. If a worker did not have the necessary skills, Ms. Tremblay would simply ask the agency not to send that person again.

[16] It was Ms. Tremblay who prepared, using Excel, a summary of the time sheets of the workers sent by the agencies. For the men, she would indicate the time each worked according to their time cards, and for the women, she would fill out the time sheets herself, indicating their last names (although sometimes only first names appeared) and the hours they were present. The women would then initial the time sheets. Ms. Tremblay explained that the women's work relating to packaging and cosmetics required a highly variable number of workers and it was easier to enter their hours this way instead of using too many time cards. There were women who worked during the day and others worked at night. Once the Excel table was completed with all the hours of each worker, Ms. Tremblay sent it to the agency by fax. The agency would then promptly send back an invoice, which was given to Mr. Frenette for payment to the agency once he had given his approval. This was done once a week. She herself did not know the hourly wage paid to the workers from the agencies.

[17] In cross-examination, Ms. Tremblay stated that she had in fact only called one agency, Solutions Oxford (9199), which Eric Chioda and the woman named Patricia took care of.

Ramez Chawky: employee of the appellant

[18] Ramez Chawky also testified at the appellant's request. He was the production manager in 2005 and 2006, and from 2006 to 2008 he was in charge of the supervisors of each division. He also was the one who contacted the agencies to hire additional labour. He would speak to someone named Patricia or to Eric Chioda to get workers for the next day. During Mr. Chioda's two-year absence, Mr. Chawky called someone named Aimé (whom he only saw once), but also spoke to Patricia and Beatriz, Mr. Chioda's secretaries. Mr. Chawky stated that he made sure he obtained the number of employees needed to complete the work to be done, but said that it was not he who negotiated prices. He did not know who took care of transportation for the workers the agencies sent. He said that he did not use a specific number of additional workers on a regular basis every week, because it depended on how busy they were and on the product. Sometimes, he needed an equal number of day and night employees; other weeks, he did not need anyone. Apparently, the appellant's regular employees handled the machines when they were in operation. The labour from the agencies [TRANSLATION] "filled" the machines when they were stopped and had the job of packaging the bandages. During those years, Mr. Chawky worked with his assistant, Nancy Tremblay, who stood in for him when he was

absent. She was a workshop supervisor and provided him with a production report. Mr. Chawky did the billing in the same manner as that described by Ms. Tremblay. He left his job in 2008 but has been working for the appellant again for almost a year.

Maria Luisa Aguilar: former employee of the appellant

[19] Maria Luisa Aguilar, the appellant's last witness, had previously worked for the agencies and became a regular employee of the appellant in 2006. She retired in July 2012. She was a supervisor in the bandage division. She had to ensure that the machines were in good operating condition and that there were enough employees to fill the orders. In recent years, she had been asked to call the agencies directly to obtain additional labour, as she speaks Spanish. She would speak to someone named Andrea and subsequently to another person, whose name was Maria. She also knew Patricia. She said she always contacted the Solutions Oxford agency, but did not know either Eric Chioda or Aimé Mokonda. She also stated that her husband sometimes drove the employees and he might take the cheque payable to the agency when he returned.

Annie Haché: ARQ auditor in the appellant's file

[20] Ms. Haché's audit report was submitted as Exhibit I-2. She acknowledged that the appellant's books and reports were consistent with the financial statements. The only point at issue in her view concerned the employment agencies for which she disallowed the invoices submitted for the purpose of obtaining ITCs. She compared how the two agencies in question here operated with how Prohad operated, Prohad being, according to the ARQ, an agency that did things properly. Thus, she compared the hourly rate paid for workers from 9167 and 9199, which, according to her investigation report, was between $8.50 and $11.00 during the period at issue, whereas the hourly rate paid to Prohad employees during that period was $14 (Exhibit I-2, page 5). Then, she observed that 9167 and 9199 billed the appellant for their services by fax on the basis of an Excel table completed by the appellant itself, that the cheque was issued the following day and cashed two days later. In the case of Prohad, the cheque was issued 15 to 20 days after billing, which was not based on an Excel table prepared by the appellant. Finally, neither 9167 nor 9199 provided records making it possible to identify the employees (SIN, address), whereas Prohad provided such records for their employees. Neither 9167 nor 9199 had a certificate of compliance from the CSST while Prohad had a number of such certificates for its employees. During a prior audit, the appellant had been advised that it had to keep a

record for each employee sent to it by the agencies, but Mr. Frenette disregarded this because, in his opinion, it was not up to him to do the government's job (Exhibit I-2, pages 5-6).

[21] Moreover, the payroll of 9167 and 9199 (as reported to the CSST) was much lower than the amount billed to the appellant for labour. Thus, the payroll 9167 reported from 2006 to 2008 totalled around $54,000 annually, whereas it apparently billed the appellant $238,328 in 2006, $160,152 in 2007 and $101,063 in 2008. As for 9199, it reported a payroll of $9,800 in 2008 and billed the appellant $77,088 that same year; in 2009, it reported a payroll of $57,070 and billed the appellant $295,182 (see audit report, Exhibit I-2, pages 5 and 8). Furthermore, according to Ms. Haché, the same Patricia Martinez worked for 9167 and 9199 in different years. On the invoices, she identified a number of workers who were from both 9167 and 9199. She deduced therefrom that 9167 was nothing more then the [TRANSLATION] "continuation of the agencies managed by Enzo and Eric Chioda" (Exhibit I-2, page 6).

[22] Moreover, with the help of a table, Ms. Haché observed that the hourly rate billed by 9167 and 9199 did not allow them to pay employees the minimum wage and cover operating costs. Therefore, according to this table found in her report (Exhibit I-2, page 9, and Exhibit A-1, Tab 16), the employer's minimum hourly cost per employee (taking into account 4 percent vacation pay and the employer's share of contributions to such things as employment insurance, the Régie des rentes du Québec (RRQ), and the CSST) is either higher or barely lower than the hourly rate billed for each employee. Taking into consideration as well that the majority of the cheques drawn by the appellant were cashed at a cheque-cashing centre that charges a 3 percent fee, Ms. Haché came to the conclusion that the appellant must have known it was paying a clearly insufficient amount for the wages of the workers sent by the two agencies, 9167 and 9199. Indeed, one reason Mr. Frenette gave Ms. Haché for no longer doing business with the Prohad agency was that he found it too expensive (see audit report, Exhibit I-2, page 6). Mr. Chaouki allegedly gave Ms. Haché to understand that although he found that there was something odd with regard to the agencies in question, he had to use them: he had no choice because he could not find anyone who would accept such work at minimum wage, whereas these agencies could provide employees. Without the agencies, the appellant would not have been able to fulfil its contracts (Exhibit I-2, page 9). Indeed, from the expense accounts in the general ledger Ms. Haché determined that the appellant increased the number of employees from agencies between 2007 and 2010 and proportionally decreased the hiring of its own employees (Exhibit I-2, page 7).

[23] Moreover, the CRA had also conducted an audit of the subcontractors with which 9199 allegedly had contracts, namely SDE and Nafran. As I will summarize below in discussing the testimony of two other ARQ auditors, those auditors determined that these two subcontractors were not able to provide the services billed to the appellant. Ms. Haché therefore concluded that, since 9199 was acting as an intermediary between these two subcontractors and the appellant, it could not have provided the services for which it was claiming payment from the appellant. Conversations she had with the appellant's representatives led her to conclude that the agencies mainly recruited illegal immigrants or welfare recipients, who were paid in cash. Mr. Frenette allegedly acknowledged that he suspected the workers from these agencies were illegal workers paid under the table, but said he had no choice: he had to deal with agencies that were perhaps not entirely above-board in order to reduce costs (Exhibit I-2, page 9). So, according to Ms. Haché, by receiving accommodation invoices from the agencies 9167 and 9199, the appellant tried to recover from the ARQ ITCs on wages paid illegally in cash, which it would certainly not have been able to claim if these workers had been treated like its own employees. In her opinion, there was no genuine commercial transaction between the appellant and 9167 and 9199.

[24] In cross-examination, Ms. Haché admitted that, in calculating the cost of an employee for an employer, the CSST rate that applies for the services of warehouse, workshop or plant staff was used (for 2008, for example, the rate used was 7.45% according to Exhibit A-1, Tab 15, page 20, and Tab 16). Referring to the table of CSST rates provided in Exhibit A-1, Tab 15, for 2008 for example, counsel for the appellant suggested to Ms. Haché that a lower rate could have been used, such as the one applicable to the manufacture of personal care products or drugs (a rate of 1.30 percent, page 10) or to storage services or to services relating to wrapping, packaging, boxing, and product labelling and label changing (a rate of 4.29 percent, page 18). Ms. Haché replied that she had relied on the rate used by her auditor without verifying herself whether it corresponded to the work of the employees in question.

[25] Moreover, the three employees with whom Ms. Haché was able to speak during her visit in May 2010 (because there was a lack of cooperation, according to her testimony) did not have a SIN or any identification card and said they collected their pay at the agency that contacted them. One of them said he was paid $9 an hour, another said $7, and the third did not know his hourly rate (these rates were below the minimum wage, which was $9.50 an hour in May and June 2010 according to the table the appellant provided in Exhibit A-1, Tab 8). She spoke to another employee, who now officially works for the appellant as a regular employee. He stated that he

was paid $7 an hour in cash when he was sent by the agency, and that since being employed directly by the appellant, he was earning $10.50 an hour for 40 hours a week (Exhibit A-1, Tab 17, and Exhibit I-2, page 10). Ms. Haché noted in cross-examination, however, that she had been unable to confirm either the number of hours of work of these employees or the fact that they collected their pay at the agency. She did confirm, however, despite an insinuation to the contrary by counsel for the appellant in a question posed by him in cross-examination, that the employees sent by Prohad were not necessarily specialized labour. An example of an invoice prepared by Prohad shows that they charged $14 an hour to subcontract employees, and the invoice was supported by time cards and time sheets (Exhibit I-3). Employment application forms from Prohad also show that the workers (who may have earned specialized diplomas in their home country) submitted very general applications that did not correspond to the diplomas, if any, that they held. All these workers provided their address and had a SIN or a temporary work permit issued by Immigration Canada (Exhibit I-1).

Etienne Marcoux: ARQ auditor in 9199 file

[26] Etienne Marcoux, ARQ auditor, testified to explain the audit he conducted in the file of 9199 (Solutions Oxford) for the period from August 2008 to July 2010. He submitted his report as Exhibit I-4. Actually, he was working on the file of another business, called Pasta Romana, which had claimed a significant amount of ITCs with respect to invoices paid to 9199. These contained an insufficient description of the services provided, were not accompanied by a list of employees and did not mention any specific period.

[27] Mr. Marcoux therefore decided to audit 9199. It was in this context that he met Eric Chioda, 9199's sole shareholder, at the Pasta Romana offices. He asked Mr. Chioda to provide a list of employees, as he had observed that 9199 was billing Pasta Romana $20,000 every two weeks. When Mr. Chioda replied that he was merely an intermediary, Mr. Marcoux asked him for a list of the subcontractors he contacted. Mr. Chioda did not remember. Neither could he give the name of any client other than Pasta Romana. Mr. Marcoux then met with 9199's accountant, who gave him the invoices sent by the subcontractors. Apparently 9199 had no bills showing current expenses such as rent, telephone and electricity. Mr. Marcoux saw that there were five subcontractors (including SDE and Nafran, referred to above) that billed 9199 a total of $3 million during the audit period. Mr. Marcoux therefore verified whether it was possible for these businesses to have provided the services billed,

whether they had the material, financial and human capacity as well as the expertise to do so.

[28] His investigation showed that 9199's first subcontractor (Vêtements Just Pants Inc.) operates a textile business at a place of business with a different address than the one that appears on the invoices provided by 9199. The representative of that business allegedly told Mr. Marcoux that it had never done business with 9199 and that its sales did not correspond at all to the figure presented by 9199 (Exhibit I-4, pages 9-10). Moreover, the invoices 9199 provided, which supposedly came from that business, contain very few details considering the significant amount they represent (nearly $40,000 for the audit period). There is no employee name, no number of hours, no hourly rate, and no resource person. Mr. Marcoux concluded that there had been identity theft and that the invoices 9199 issued in Just Pants' name were fraudulent (Exhibit I-4, pages 12-13).

[29] As for 9124-8518 Québec Inc. (**9124**), the second subcontractor whose name was given by 9199, the investigation showed that this business declared a variety of activities with the REQ, but none involved employee placement. Similarly a number of the activities indicated are exactly the same as those mentioned by the third subcontractor, International Plastiques & Polysac Inc./R.H.I Inc. (**IPP**), with which 9199 claimed to work. Moreover, 9124 was no longer registered for GST and QST purposes—and this was retroactive to April 1, 2007 (no tax return was filed either, after that date)—as a result of fraudulent activity. It had not declared any employees or filed any tax returns since 2006 (Exhibit I-4, pages 13-14). Yet, for the audit period, 9199 claims it paid a total of just over $490,000 to 9124 for employee placement services. Here as well, the invoices are incomplete as they do not provide a sufficient description of the services rendered, and the address provided does not exist. The cheques issued to pay 9124 were allegedly cashed at a cheque-cashing centre. Additionally, 9124 was registered for CSST purposes as operating an electrical products manufacturing business and had not recorded any activity since November 24, 2006. Lastly, Eric Chioda stated that he found 9124 in the Yellow Pages although the business was apparently never listed there. Mr. Marcoux concluded that the invoices in the name of 9124 were false (Exhibit I-4, pages 15-16).

[30] The third subcontractor, IPP, indicated, among a variety of activities declared to the REQ, employee placement. However, IPP did not report any tax collected or any employee for the period during which it allegedly billed 9199 a total of nearly $180,000 before taxes in 2009. The invoices were incomplete, as was the case with the first two subcontractors, and the address shown on these invoices is that of a

dental clinic. All the cheques allegedly used to pay IPP were cashed at a cheque-cashing centre. The CSST has no file on IPP. Mr. Marcoux concluded that the invoices in that entity's name were false (Exhibit I-4, pages 17, 21-23).

[31] The fourth subcontractor, SDE, is the one that allegedly sent employees to the appellant on behalf of 9199. The economic activity that SDE declared for sales tax purposes was providing janitorial and maintenance services, not employee placement. Moreover, the investigation showed that SDE and 9199 were incorporated at about the same time and that they have the same fiscal year. During a surprise visit to the small office at the address indicated on an SDE business card, which Eric Chioda gave him, Mr. Marcoux (who was not alone during that visit) met Beatriz Jimenez, who had also previously been employed by 9199. She said she looked after the completing of job application forms and answering the telephone. She did not have either the name or telephone number of her boss. After Mr. Marcoux's visit, the office became unoccupied and the telephone number indicated on the business card was no longer in service. Accompanied by a co-worker, Mr. Marcoux then went to meet with the declared director of SDE at his residence. He said the director stated that SDE was no longer in operation and gave them the card of a trustee in bankruptcy. The director was unable to answer any questions regarding SDE's management. Mr. Marcoux came to the conclusion that this director was simply acting as a front man. Furthermore, SDE reported to the CSST a negligible payroll ($1,800 for December 2009 and $35,514 for 2010) compared to the amounts billed to 9199 for employee placement services, which totalled more than $2 million during the audit period when the declared activities include no mention at all of this type of service. Mr. Marcoux therefore concluded that the invoices in SDE's name were false and the ITCs claimed by 9199 on these invoices were refused (Exhibit I-4, pages 23-25, 26-28).

[32] As for the fifth and final subcontractor, Nafran, an agency also allegedly used by 9199 to provide services to the appellant, the investigation showed that it had no employees registered with the CSST. The addresses given for this agency were false and the GST and QST numbers attributed to it had been revoked following fraudulent activities. Nafran had no accounting records and did not file any tax returns. In light of all this, Mr. Marcoux concluded that the invoices issued by Nafran were also false (Exhibit I-4, pages 28-31).

[33] As for 9199 itself, it allegedly had seven clients, including the appellant, during the audit period. Mr. Marcoux observed, without conducting an in-depth investigation into the relationship between 9199 and the appellant, that there was no contract between them at the time of his investigation in 2010. The hourly rate 9199

charged and the number of hours billed to the appellant were not indicated on the invoices. After February 16, 2009, the periods for which services were provided were no longer indicated. In cross-examination, Mr. Marcoux admitted that he had not seen the documents that accompanied the invoices submitted as Exhibit A-1, Tab 13 and on which this information is indicated, because he was not shown those documents. Mr. Marcoux found that the invoices 9199 issued to the appellant did not contain a sufficient description for it to be said that services had actually been provided (Exhibit I-4, page 37).

[34] As a general conclusion, Mr. Marcoux found that neither 9199 nor its subcontractors had the material, financial or human capacity to provide the employee placement services it had billed to its clients, including the appellant. He concluded his report by stating that 9199 had participated in a scheme through the provision of, among other things, accommodation invoices and that it did not enter into any genuine commercial transaction either with its alleged subcontractors or with its clients (Exhibit I-4, page 44).

Denis Therrien: CRA auditor in the 9167 file

[35] Mr. Therrien submitted his report as Exhibit I-5. He audited the company Aliments Da Vinci, which said it did business with 9167 for the supply of personnel. Accordingly, in July 2008 he spoke with the president and sole shareholder of 9167, Aimé Mokonda. They met in a commercial basement that apparently served as 9167's place of business, although there was no sign identifying the place as a commercial establishment. Aimé Mokonda gave various versions of 9167's commercial activities. Moreover, the income reported in the financial statements of this business was considerably lower than the bank deposits and the amounts from cheque-cashing centres.

[36] In addition, Mr. Therrien calculated the number of person-days 9167 needed to meet the needs of all the clients billed. That number is obtained by dividing the payroll 9167 reported (excluding the director's salary) by the wages paid, at the minimum wage in effect, for an 8-hour day. Thus, according to this calculation, 9167 was able to provide 637 person-days in 2006 and 428 person-days in 2007 to all of its clients. That was clearly insufficient to meet the labour needs of those clients. In 2007, for example, 9167 had to provide 26,065 person-days to meet the demand, since it apparently billed $1,853,525 that year. This number is much higher than the

428 person-days available according to the salaries reported by 9167 in 2007. In fact, 9167 only reported 6 employees in 2007 and 13 in 2006. There were apparently no employees in 2008. Moreover, according to the information obtained, 9167 did not actually use the services of subcontractors as the subcontractors to which Aimé Mokonda referred did not have valid tax numbers and carried on no commercial activity (Exhibit I-5, page 10).

[37] Mr. Frenette also allegedly told Mr. Therrien that 9167 provided him with three or four employees. Yet, the time sheets prepared by the appellant for 9167's services show an average of 26 people per week from that business. Moreover, all the cheques from the appellant were cashed at a cheque-cashing centre (Exhibit I-5, page 6).

[38] Mr. Therrien therefore concluded, considering all of the inconsistencies noted during his investigation (including contradictory information given by Aimé Mokonda and Mr. Frenette), that 9167 was a company that provided false invoices for the purpose of accommodating a number of companies, including the appellant (Exhibit I-5, page 11). In court, he concluded his testimony by stating that the advantage for a company of using accommodation invoices was being able to hire employees at below minimum wage and without making source deductions.

Parties' arguments

[39] The appellant submits first of all that the period of April 1, 2006, to February 2007, is statute-barred and that the onus is on the respondent to prove that the appellant made a misrepresentation that is attributable to neglect, carelessness or wilful default under subsections 298(1) and 298(4) of the ETA, which the respondent does not dispute.

[40] The appellant submits that it made huge profits until 2008 and that it was not in order to save money that it sought additional labour from agencies, but rather did so because it was not easy to find people willing to work in the manufacturing sector. As for the amounts paid to the agencies for the workers, they were generally slightly higher than the minimum cost, calculated by the ARQ in Exhibit I-2, page 9, for an employer with respect to an employee. Additionally, the minimum cost was calculated using a very high rate of CSST contributions (which contributions account for 45 percent in the calculation of the employer's cost), when a lower rate could very well have been used. As can be seen in the table of CSST rates, in Exhibit A-1, Tab 15, the rates vary a great deal depending on the activity chosen. This caused the

appellant to state that it did not have the impression that it was paying an unreasonable amount to the agencies for the workers they were sending. It did not feel that it took advantage of these individuals or that it acted with wilful blindness.

[41] Regarding due diligence at the time it entered into contracts with the two agencies in question, Mr. Frenette said that he had lawyers verify the contract the appellant ultimately signed in 2010, retroactively to 2008, with Solutions Oxford (9199). As for 9167, the appellant asked for the documentation required for the GST and QST and found it satisfactory.

[42] As for the comparison with the Prohad agency, the appellant submits that this evidence is not relevant. According to the appellant, the fact that it only had a contract with Prohad during a period of 9 months over a 4-year audit period, and that Prohad hired somewhat more specialized labour, which meant that it could not meet the appellant's personnel needs, shows that the situation is not comparable.

[43] As regards the warning the ARQ gave the appellant in 2005, after a first audit, to ask the agencies for the SINs and addresses of the employees in order to be able to provide a sufficient description concerning the ITCs claimed, the appellant submits that it received advice from lawyers that the agencies could not be required to provide this information because the employees were those of the agencies and not the appellant's and the appellant did not control them. This also emerged from the evidence, which showed that the workers were not the appellant's employees.

[44] The appellant feels it provided probative and uncontradicted evidence that it actually did use the services of the two agencies for the supply of personnel, for which it paid the agencies entirely in good faith. Moreover, it claims that the ARQ auditors confirmed that they had met with the representatives of these agencies, which, according to the appellant, corroborated its version of the facts. Additionally, neither Mr. Marcoux nor Mr. Therrien conducted an in-depth verification of the relationships between the appellant and 9199 or the appellant and 9167.

[45] The appellant, referring to the *Input Tax Credit Information (GST/HST) Regulations* (Regulations), considers that all the internal documents submitted as Exhibit A-1, Tab 13, namely the time sheets, time cards and invoices, constitute a sufficient description. The copies of cheques and bank statements also show, according to the appellant, that it actually did make payments to the agencies following the supply of personnel. The fact that 9167 or 9199 may have been accomplices in a fraud does not alter the fact that they truly provided services to the appellant for which the appellant paid adequate consideration. The appellant submits

that there is no probative evidence that it was complicit in any fraud or that it was involved in any fraud.

[46] As for the respondent, she essentially repeats the testimony of the ARQ auditors in submitting that neither 9199 nor 9167 could provide the services in question without the assistance of subcontractors. She adds that there is abundant evidence to show that the subcontractors either did not exist or were unable to provide these services. Moreover, the respondent questions the appellant's good faith, as the appellant itself acknowledged that it had signed a retroactive contract at a time when it was being audited. In addition, the respondent argues that the change in name of the agencies when it was the same people who were controlling them should have alerted the appellant who, by remaining silent, became complicit in a way in the wrongdoing of these agencies. The respondent is of the opinion that the appellant should have been aware that it was underpaying employees, and that the appellant collaborated in the producing of accommodation invoices (notably by preparing itself the time sheets to support the billing of these agencies). In the respondent's view, the appellant did not prove that there was a genuine commercial transaction. She does not agree with the appellant's submission that the comparison with Prohad is not relevant. She relies on Exhibits I-1 and I-3, which tend to show that it is false to claim that this agency only provided specialized labour.

Legislative provisions

> ***EXCISE TAX ACT***
>
> **Subdivision b — Input Tax Credits**
>
> **169. (4) Required documentation** — A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,
>
> > (*a*) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed . . .
>
> **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

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

. . .

298. (1) Period for assessment — Subject to subsections (3) to (6.1), an assessment of a person shall not be made under section 296

(*a*) in the case of

(i) an assessment of net tax of the person for a reporting period of the person,

. . .

more than four years after the later of the day on or before which the person was required under section 238 to file a return for the period and the day the return was filed

. . .

298. (4) Exception — An assessment in respect of any matter may be made at any time where the person to be assessed has, in respect of that matter,

(*a*) made a misrepresentation that is attributable to the person's neglect, carelessness or wilful default;

(*b*) committed fraud

(i) in making or filing a return under this Part,

(ii) in making or filing an application for a rebate under Division VI, or

(iii) in supplying, or failing to supply, any information under this Part; or

(*c*) filed a waiver under subsection (7) that is in effect at that time.

INPUT TAX CREDIT INFORMATION (GST/HST) REGULATIONS

2. Interpretation — In these regulations,

. . .

"intermediary" of a person, means, in respect of a supply, a registrant who, acting as agent of the person or under an agreement with the person, causes or facilitates the making of the supply by the person; (intermédiaire)

. . .

"supporting documentation" means the form in which information prescribed by section 3 is contained, and includes

(*a*) an invoice,

(*b*) a receipt,

(*c*) a credit-card receipt,

(*d*) a debit note,

(*e*) a book or ledger of account,

(*f*) a written contract or agreement,

(*g*) any record contained in a computerized or electronic retrieval or data storage system, and

(*h*) any other document validly issued or signed by a registrant in respect of a supply made by the registrant in respect of which there is tax paid or payable; (pièce justificative)

3. Prescribed information — For the purposes of paragraph 169(4)(*a*) of the Act, the following information is prescribed information:

. . .

(*b*) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $30 or more and less than $150,

(i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business, and the registration number assigned under subsection 241(1) of the Act to the supplier or the intermediary, as the case may be,

(ii) the information set out in subparagraphs (*a*)(ii) to (iv),

. . .

> (*c*) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $150 or more,
>
> (i) the information set out in paragraphs (*a*) and (*b*),
>
> (ii) the recipient's name, the name under which the recipient does business or the name of the recipient's duly authorized agent or representative,
>
> (iii) the terms of payment, and
>
> (iv) a description of each supply sufficient to identify it.

Analysis

[47] The period at issue is from April 1, 2006, to June 30, 2010. For the first part of this period, that is, from April 1, 2006, to February 2007, the onus is on the respondent to prove that the appellant made a misrepresentation that is attributable to neglect, carelessness or wilful default in order to establish the Minister's right to make an assessment after the normal assessment period (subsection 298(4) ETA). I will come back to this later.

[48] For the second part of the period at issue, namely from March 2007 to June 30, 2010, the appellant must prove that the assessment is erroneous. To do so, it must put forward a *prima facie* case showing the inaccuracy of the assumptions relied on by the Minister when making the assessment. Such a case is supported by evidence which creates 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 (*Stewart v. Canada*, [2000] T.C.J. No. 53 (QL). If the appellant makes such a *prima facie* case, the Minister must then refute that *prima facie* case and prove the assumptions he relied upon (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336). However, the initial burden of proof put on the taxpayer cannot be lightly, capriciously or casually shifted, since the taxpayer has information within his reach and under his control (*Orly Automobiles Inc. v. Canada*, 2005 FCA 425, [2005] G.S.T.C. 200).

[49] In this case, the Minister's assumptions are that the appellant did not acquire the services it says it acquired from 9167 and 9199, namely the supply of personnel, through genuine commercial transactions, that the workers in question were in fact the appellant's employees and that the supporting documents are accommodation invoices intended to enable it to claim ITCs to which it is not entitled (audit report, Exhibit I-2, pages 3 and 10).

[50] What I take from the evidence is that services were provided by workers for the appellant's benefit and that the appellant paid compensation for these services. This compensation was to all appearances paid through 9167 and 9199 (according to the supporting bank statements and cheques).

[51] However, I am of the opinion that the respondent has shown that these workers could not have been employees of either 9167 or 9199, or of the subcontractors (SDE and Nafran) with which 9199 claims to have done business. Thus, the appellant did not convince me *prima facie* that it received employee placement services from the agencies in question since the evidence is clear that 9167 and 9199 themselves acted neither as employment agencies nor as intermediaries in dealing with subcontractors in that field. Indeed, there is solid evidence showing that the subcontractors with which these agencies allegedly dealt in order to provide workers to the appellant did not have the capacity to provide this labour. Moreover, there is also strong evidence that 9199 and its representative, Eric Chioda, as well as 9167 and its representative, Aimé Mokonda, acted fraudulently in light of a history of providing accommodation invoices. Mr. Chioda apparently went bankrupt twice following ARQ audits with regard to that activity and Aimé Mokonda apparently lied in his statements, apparently cashed almost all of the payment cheques at cheque-cashing centres, had no experience in employee placement and did not report a payroll that corresponded to the invoices issued for the supply of personnel (see audit report, Exhibit I-5, page 11). He fell off the radar once the ARQ audit began.

[52] This does not really seem to be challenged by the appellant. That being so, the question is whether the appellant must take responsibility, since, it argues, it was not involved at all in this fraudulent scheme.

[53] Indeed, it could be said that this situation was not a problem for which the appellant had any responsibility since 9167 and 9199 could have been acting as direct intermediaries between the appellant and the workers, without the workers necessarily being their employees and without the fraudulent employment agencies being resorted to. The appellant could claim, and it does, that, in turning to 9167 and 9199 to find additional labour, it acted entirely in good faith without knowing it was participating in an illegal scheme.

[54] However, the evidence does not allow me to draw the conclusion sought by the appellant. Mr. Chaouki and Mr. Frenette have been doing business with Eric Chioda since 2005. Mr. Mokonda, a mysterious person whom all of the appellant's witnesses said they did not really know and who disappeared just as mysteriously, got involved between 2006 and 2008 by taking over the agency Mr. Chioda left in

2006. He apparently kept the same secretaries and recruited some of the same workers.

[55] On the one hand, I consider Eric Chioda as having no credibility. The two ARQ officers showed this in their reports and in their testimony before me. I note that certain statements in Mr. Chioda's testimony were contradicted by the documentary evidence. He said, for example, that he billed the appellant $14 an hour and paid $13.75 to the employment agencies. Yet the invoices submitted in evidence for 9199, a company that he represented, show, rather, that he charged at most $11 an hour for the majority of the appellant's workers during the period at issue (Exhibit A-1, Tab 13A).

[56] In addition, Mr. Chioda admitted that he had been the subject of two audits since 2005, and that each time the ITCs he had claimed were disallowed on the ground that the invoices he had submitted were accommodation invoices.

[57] On the other hand, Mr. Chaouki said he had done business with Eric Chioda since 2005, and with his father for years before that. He was aware that the name of the agencies changed, but that mattered little to him, as long as he got workers. As for his explanation that it was not for financial reasons but rather because it was virtually impossible to find employees to do that work at minimum wage, it was weakened by the information obtained by Ms. Haché during her audit. In fact, the statements Ms. Haché received from Mr. Frenette clearly suggest that he was aware, or at least had strong suspicions, that the labour obtained consisted of illegal workers working under the table, but he felt that he had no choice; he had to do business with agencies that were not entirely above-board in order to reduce costs so as to be competitive. Mr. Chaouki apparently told Ms. Haché that there was something strange about these agencies (Ms. Haché's report, Exhibit I-2, page 9). Moreover, according to Mr. Therrien's report and testimony, Mr. Frenette provided false information regarding the number of workers for which 9167 was billed by significantly minimizing that number (see Exhibit I-5, page 6). These statements, which are part of the documentary evidence, were not contradicted during the hearing, at which all the individuals involved were present.

[58] I understand from this that the workers in question very likely did not have the legal status to officially receive remuneration. Add to this Ms. Haché's calculation (which, in my opinion, was largely unshaken by the appellant's evidence) showing that the appellant likely did not even pay these workers minimum wage (Exhibit A-1, Tab 16), along with the fact that it reduced the number of its own employees and turned increasingly to this inexpensive labour (Exhibit I-2, page 7), and it all leads

me to believe that the appellant cannot claim to have been unaware of 9167 and 9199's illegal activities and to have derived no illegal benefit from the fact that it dealt with these businesses (contrary to the court's finding in *Système Intérieur GPBR inc. c. ARQ*, a decision rendered by the Court of Quebec on October 15, 2013, sent by counsel for the appellant after the hearing of the present case). I come to this conclusion even though Mr. Chaouki stated he did not receive any financial benefit. The mere fact that the appellant was underpaying illegal workers for its own advantage is in itself an illegal benefit.

[59] Considering the low credibility of Eric Chioda, who was the person the appellant dealt with in 2005-2006 and again as of 2008, and considering that Mr. Chioda was the subject of an ARQ audit in 2005-2006 when the appellant was one of his clients and that his ITCs were disallowed because he had to admit that he had participated in an accommodation invoice scheme, it is difficult to believe that Mr. Chaouki and Mr. Frenette could have blindly trusted him. In fact, the appellant was also the subject of an initial ARQ audit in 2005 and it was advised to be careful to ensure that it received certain minimum information about the workers. However, it was not seen fit to heed this advice. The reason Mr. Frenette gave Ms. Haché for not complying with this request by the ARQ was that it was not his responsibility to do the government's work (Exhibit I-2, pages 5-6). In court, the reason given by the appellant was that it had received a legal opinion. That opinion was not adduced as evidence nor was it elaborated upon in evidence and it therefore cannot be assessed with regard to the specific information provided to the legal counsel. Mr. Chaouki and Mr. Frenette also made no attempt to determine who exactly was Mr. Mokonda, who acted on behalf of 9167 and concerning whom it was pointed out that he had taken over Mr. Chioda's business and conducted it according to the same dubious standards. They also failed to do any verification when Eric Chioda returned in 2008. Although he provided a contract, it was not signed until 2010, at the time of the new ARQ audit, and they worked together without waiting for their lawyers' legal opinion on the subject.

[60] With regard to the testimony of Nancy Tremblay, Ramez Chawky and Maria Luisa Aguilar, I have no reason to doubt the truth of their statements. I consider, rather, that, because they confirmed that they had themselves prepared the invoices for the two agencies at issue (unlike the situation with Prohad, which took care of its invoicing itself), all three operated according to an established plan that was approved by the appellant's officers. In my opinion, this strengthens the respondent's theory that the appellant participated indirectly in an illegal scheme.

[61] As justification for their actions, Mr. Chaouki and Mr. Frenette told Ms. Haché, the CRA officer, that they had no choice, that they had to use these people if they wanted to fill their orders. By Mr. Frenette's own admission, it was impossible to recruit Quebeckers who would accept the same conditions.

[62] This is easy to explain when one realizes that the price the appellant paid necessarily had to be below the minimum wage or on the minimum wage borderline considering the costs associated with hiring an employee. It is therefore unlikely that the appellant would have been able to legally hire people at the rate it paid.

[63] Moreover, the fact that the appellant stopped doing business with Prohad, which charged $14 an hour in its contract, [TRANSLATION] "that is, an additional 40% on a salary paid of $10/hr, plus the GST and QST" (Exhibit I-1, page 9-16), speaks volumes. It can be seen that by only charging $10 or $11 an hour, 9167 and 9199 could hardly have paid the workers minimum wage. The appellant's representatives gave Ms. Haché to understand that the price Prohad charged was not competitive and much too high.

[64] As for the issue counsel for the appellant raised regarding the CSST rates Ms. Haché used to establish the minimum cost per employee for an employer, the appellant did not adduce with respect thereto any specific evidence to which I could give sufficient weight to conclude, *prima facie* and considering the other evidence, that the Minister's assumptions that the wages paid to the workers were below minimum wage were erroneous.

[65] In *Orly Automobiles*, *supra*, at paragraph 26, the Federal Court of Appeal noted that the ETA and its Regulations were devised for bona fide transactions between bona fide business people. Thus, a business will be entitled to claim ITCs when the information required under subsection 169(4) of the ETA is provided and the ITCs result from a transaction in which it participated in good faith (see also *Système Intérieur GPBR*, *supra*, at paragraph 88).

[66] Furthermore, in *Comtronic Computer Inc. v. The Queen*, 2010 TCC 55, [2010] G.S.T.C. 13, at paragraph 29, Justice Boyle added that even businesses acting in good faith must bear the risk related to fraud and illegal acts and that the strict approach of the Federal Court of Appeal in *Systematix Technology Consultants Inc. v. Canada*, 2007 FCA 226, [2007] G.S.T.C. 74, requires them to implement risk management measures in their relationships with suppliers in order to determine what information provided by these suppliers may require additional research.

[67] Without wishing to rule on the measures businesses acting in good faith should take, I believe that the strict approach referred to above certainly applies when the evidence tends to show that the two parties were in fact not acting in good faith.

[68] In the present case, the evidence showed that the two agencies, 9167 and 9199, and 9119's two subcontractors (SDE and Nafran) did not have the capacity or legal attributes to act as employment agencies or as intermediaries for such agencies and that the appellant was not completely unaware of this. This is not a case where, as in *Système Intérieur GPBR*, *supra*, the Minister kept the taxpayer in ignorance of its supplier's tax file. On the contrary, during an initial audit in 2005, the appellant was warned by the ARQ. The appellant was not asked to collect a great amount of information, but simply the workers' SINs and addresses, in a context in which the workers paid through the agencies did not report any income and did not appear in the returns filed by these agencies (Exhibit I-2, page 11).

[69] The warning by the ARQ, combined with all the other elements submitted as evidence by the respondent, leads me to believe there is a very high probability that the appellant knew that the services were being provided by illegal workers during the years in question. Therefore, in my opinion, this is indeed a case in which the appellant should have implemented risk management measures. Yet this was not done. Even the contract supposedly approved by Mr. Chioda's lawyers was not signed in 2008. All this casts serious doubt, beyond mere suspicions, on the appellant's good faith and the existence of a legitimate commercial transaction between the parties. In my opinion, the appellant received an illegal benefit from this scheme.

[70] In light of the evidence, I cannot find that 9167 and 9199 legally operated an employment agency or acted as intermediaries with employment agencies such that they could legally acquire a registration number under the ETA.

[71] As stated by the Federal Court of Appeal in *Systematix Technology Consultants Inc.* cited above, at paragraph 4, and Justice Boyle of this Court in *Comtronic*, also cited above, at paragraph 26, the ETA requires persons who have paid GST to make sure they provide valid registration numbers in respect of the suppliers when claiming ITCs, which means that the GST registration numbers must have been validly assigned to these suppliers.

[72] Justice Paris of this Court agreed with this, emphasizing that the GST number that appears on an invoice must have been validly assigned to the supplier in order

for there to be entitlement to an ITC (*9088-2945 Québec Inc. v. The Queen*, 2013 TCC 58, [2013] G.S.T.C. 28, paragraph 16).

[73] In the circumstances and on the evidence before me, I find that the appellant did not make a *prima facie* case that the Minister's assumptions—i.e., (1) that the appellant did not receive the services it claims to have received from 9167 and 9199, namely the supply of personnel within the framework of genuine commercial transactions, (2) that the workers in question were in fact the appellant's employees, and (3) that the supporting documentation submitted consists of accommodation invoices whose purpose was to enable the appellant to claim ITCs to which it is not entitled—are erroneous. It is therefore the appellant that must bear the responsibility for the loss of entitlement to its ITCs with respect to the amounts paid to these two agencies.

[74] As for the statute-barred period, the respondent must prove that the appellant made a misrepresentation attributable to neglect, carelessness or wilful default as contemplated by subsection 298(4) of the ETA. There is neglect if the appellant did not act with reasonable care (*Venne v. Canada (Minister of National Revenue)*, [1984] F.C.J. No. 314 (QL), 1984 CarswellNat 210, 84 DTC 6247). As regards the penalty imposed under section 285 of the ETA, the respondent must prove that the appellant knowingly, or under circumstances amounting to gross negligence, made a false statement or omission in a return (this implies negligence greater than a lack of reasonable care).

[75] In my opinion, the respondent showed that the appellant did not act with reasonable care. The respondent has satisfied me that Mr. Chaouki and Mr. Frenette did not act in all innocence. As stated above, they gave the ARQ officers to understand that they realized that the workers may well have been illegal or people who did not want to report their income officially. They even said that they really did not have any choice if they wanted to fill their orders on time.

[76] Despite the warning the ARQ gave the appellant in 2005 regarding workers supposedly from the agencies in question here, it agreed to work with people without concerning itself with whether these individuals had work permits from the Department of Immigration or a SIN or an official address, thinking that the blame would be placed on the agencies with which they were dealing. The legal opinion they allegedly received was not submitted nor were clear explanations provided as to the exact information on which the opinion would have been based. To my mind, the respondent showed that the appellant did not act with care or with a minimum of due diligence and thereby displayed wilful blindness. In my opinion, that was a

demonstration of indifference as to compliance with the ETA that can be defined as negligence amounting to gross negligence (*Venne*, *supra*, at paragraph 37 CarswellNat, page 6256 DTC). In my view, the appellant must accept the serious consequences of its actions.

[77] The appellant's claim for ITCs must therefore be rejected for the above-stated reasons. It should however be mentioned that, if the appellant had not known about the illegal scheme and had not been warned by the ARQ, the outcome of this case may have been different. I do not, however, have to rule on this question.

[78] I would dismiss the appeal with costs.

Signed at Ottawa, Canada, this 14th day of January 2014.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 29th day of August 2014.

Erich Klein, Revisor

CITATION:	2014 TCC 13
COURT FILE NO.:	2011-3056(GST)G
STYLE OF CAUSE:	KOSMA-KARE CANADA INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 26 and 27, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	January 14, 2014

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