

Input Tax Credits for Expenditures on Dubious Suppliers

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Construction SYL Tremblay Inc v The Queen, [2013 TCC 406](#)

At issue was whether the taxpayer actually acquired supplies from 6 "dubious" suppliers, and whether the invoices from these "dubious" suppliers meet the requirements set out in the [Excise Tax Act](#) and the [Input Tax Credit information \(GST/HST\) Regulations](#). This turned on whether the Appellant was able to demolish the Minister's Assumptions.

The TCC held on the evidence that the supplies were not in fact made and, even if made, the invoices did not meet the mandatory requirements in regards to information required by the Regulations.

[NOTE: it is uncertain what, if any, relevance the fact that employee's could not remember corporate directors' names and that employer's used cheque cashing businesses ought to have in determining whether supplier were made. A corporation's directors are often NOT the persons employees interact with, managers and sometimes officers are, and it is likely that many employee's would not know who the directors of their employer companies are. Also, the use of a legal business to cash cheques is indicative of many things, and not necessarily of dubious practices.]

FACTS

The taxpayer was reassessed on a number of issues, but the appeal was in respect of the input tax credits (ITCs) related to suppliers of goods and services allegedly acquired from 6 suppliers.

The Appellant operates a post-disaster repair business, dealing with insurance companies, and only made use of sub-contractors (had no employees). The sub-contractors were always paid by cheque, but did not perform any verification of the dubious sub-contractors before granting them a sub-contract, did not verify where the cheques were cashed, and did not even verify whether their GST/HST registration numbers were valid.

The CRA claimed that its sub-contractors were "suppliers of invoices of convenience" (there was no actual transaction or the invoices were non-compliant). Specifically, the suppliers were all in default of at least one tax law, the invoices provided did not specify the supply in sufficient detail, certain supporting documents do not have a numerical sequence, and many of the cheques were cashed at a cheque cashing business.

ANALYSIS

1. GST/HST Informational Requirements

The purpose of the GST/HST regulations is to protect the revenue against both fraud and

innocent incursions, and are mandatory requirements (*Key Property Management Corp. v. The Queen*, [2004 TCC 210](#)). They cannot be sidestepped and all technical requirements must be met (*Davis v. The Queen*, [2004 TCC 662](#); *Systematix Technology Consultants Inc. v. Canada*, [2007 FCA 226](#)). Specifically:

Section 3 of the Regulations state the following:

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

(a) 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 less than \$30,

(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,

(ii) 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,

(iii) where an invoice is not issued in respect of the supply or the supplies, the date on which there is tax paid or payable in respect thereof, and

(iv) the total amount paid or payable for all of the supplies;

(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),

(iii) where the amount paid or payable for the supply or the supplies does not include the amount of tax paid or payable in respect thereof,

(A) the amount of tax paid or payable in respect of each supply or in respect of all of the supplies, or

(B) where provincial sales tax is payable in respect of each taxable supply that is not a zero-rated supply and is not payable in respect of any exempt supply or zero-rated supply,

- (I) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of each taxable supply, and a statement to the effect that the total in respect of each taxable supply includes the tax paid or payable under that Division, or
- (II) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of all taxable supplies, and a statement to the effect that the total includes the tax paid or payable under that Division,
- (iv) where the amount paid or payable for the supply or the supplies includes the amount of tax paid or payable in respect thereof and one or more supplies are taxable supplies that are not zero-rated supplies,
- (A) a statement to the effect that tax is included in the amount paid or payable for each taxable supply,
- (B) the total (referred to in this paragraph as the “total tax rate”) of the rates at which tax was paid or payable in respect of each of the taxable supplies that is not a zero-rated supply, and
- (C) the amount paid or payable for each such supply or the total amount paid or payable for all such supplies to which the same total tax rate applies, and
- (v) where the status of two or more supplies is different, an indication of the status of each taxable supply that is not a zero-rated supply; and
- (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.

With regards to sufficiency of descriptions of suppliers, the court stated that a description is sufficient when:

- it allows the CRA to identify the work performed by the suppliers
- it allows the CRA to identify the exact place where the services were rendered (street address)

- it allows the CRA to identify the exact nature of the supplies (or refer to estimates that provide the exact nature of the work)

In this case, the taxpayer did not meet the burden by failing to show that the invoice contained the required description.

2. Burdens and Evidence

The Court re-stated the burdens on the taxpayer and the Minister. Where the Minister relies on assumptions, the taxpayer has the initial burden of demolishing those assumptions (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336). The taxpayer does this by making out at least a *prima facie* case, at which point the burden shifts onto the Minister to prove the assumptions on a balance of probabilities.

A *prima facie* case is one with evidence that established one fact until the contrary is proven. The TCC said, at paragraph 13:

In *Stewart v. M.N.R.*, [2000] T.C.J. No. 53 (QL), Judge Cain stated that "[A] *prima facie* case is one supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved." Moreover, in *Orly Automobiles Inc. v. Canada*, 2005 FCA 425, at paragraph 20, the Federal Court of Appeal stated that "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering "[i]t is the taxpayer's business." The Federal Court of Appeal also stated in the same decision that it is the taxpayer who "knows how and why it is run in a particular fashion rather than in some other ways... He has information within his reach and under his control."

The court, in determining whether the Minister's assumptions were demolished noted:

- there was a failure to call certain individuals to testify (directors of the dubious sub-contractors, experts in the types of disasters involved, estimators, owners of the damaged homes);
- there was a failure to submit documentary evidence (plans for work to be done, estimated by dubious suppliers); and
- failure to show that steps were taken to contact the individuals who did not testify

In regards to weighing evidence the court referred to authority at paragraph 15:

In *Blatch v. Archer*, (1774), 1 Cowp. 63, at p. 65, Lord Mansfield stated:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

The application of this maxim has led to a well-recognized rule that the failure of a party

or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.

In the case of a plaintiff who has the evidentiary burden of establishing an issue, the effect of such an inference may be that the evidence led will be insufficient to discharge the burden. ([*Lévesque et al. v. Comeau et al.* \[1970\] S.C.R. 1010](#), (1971), 16 D.L.R. (3d) 425).

The court rejected the evidence of the witnesses on grounds, including: the evidence was too vague and unverifiable; the witnesses could not provide information that one would expect given their positions (eg Directors' names for companies they were supervisors for), their employer's were in violation of many tax laws (eg. had registration numbers cancelled), and employer's cashed substantial number of cheques using cheque cashing businesses. (see paras 16-17).

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