Docket: 2010-699(GST)G

BETWEEN:

9103-4348 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 12 and 13, 2014, and March 30, 2015,
at Granby, Quebec.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Robert Jodoin
Counsel for the Respondent:	Claudine Alcindor
	Catherine-A. Boisvert

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* for the fiscal periods between October 1, 2005, and March 31, 2008, the notice of which is dated April 3, 2009, and bears no identifying number, is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that an amount of $1,147.17 must be deducted from the amount that the appellant was required to collect as GST for the periods between October 1, 2007, and March 31, 2008.

In all other respects, the appeal is dismissed and costs are awarded to the respondent.

Signed at Ottawa, Canada, this 10th day of September 2015.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 27th day of July 2016.

Erich Klein, Revisor

Citation: 2015 TCC 220
Date: 20150910
Docket: 2010-699(GST)G

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and

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REASONS FOR JUDGMENT

D'Auray J.

I. Facts

[1] By notice of assessment dated April 3, 2009, the Minister of Revenue of Quebec (the Minister) adjusted the goods and services tax (the GST) collectible by 9103-4348 Québec Inc. (the appellant) by $14,189.91 for the periods between October 1, 2005, and March 31, 2008.

[2] Moreover, the Minister calculated interest and penalties for late remittance of $3,228.73 pursuant to section 280.1 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA).

[3] On December 8, 2009, following the filing of a notice of objection on or about May 4, 2009, the Minister confirmed the assessment for the period in question.

[4] At the beginning of the hearing, the respondent cancelled an amount of $1,147.17 for the periods between October 1, 2007, and March 31, 2008, owing to a calculation error.

[5] During the periods at issue, that is, the periods from October 1, 2005, to September 30, 2006, from October 1, 2006, to September 30, 2007, and from October 1, 2007, to March 31, 2008, the appellant operated a restaurant and bar by the name of Golden Pub.

[6] During those periods, all the supplies made by the appellant in carrying on its business activities were taxable supplies.

[7] From 2005 to 2008, the appellant used in its establishment two different sales recording systems, namely, the "Maitre'D" system, until May 2006, and the "Veloce" system, as of June 2006. For accounting data entry, the appellant used a program called "Acomba."

Choice of alternative audit method

[8] During the examination-in-chief of Ms. Gendron, a manager[1] at the Agence du Revenu du Québec (ARQ), by Mr. Jodoin, counsel for the appellant, Ms. Gendron provided the background to the file.

(a) Ms. Gendron indicated that, following a preliminary analysis, it was decided that the appellant's file would be audited.

(b) To that end, Ms. Matthews was assigned to the appellant's file as an ARQ auditor. Ms. Gendron was Ms. Matthews' manager.

(c) On May 12, 2008, Ms. Matthews went to the appellant's place of business to begin the audit.

(d) Ms. Matthews did not find any notable discrepancies in the appellant's books of account. The amounts in the general ledger matched the income amounts in the financial statements and in the "Veloce" sales recording system.

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[1] Ms. Gendron indicated that around 1998 or 1999, when she was employed with the ARQ, she began conducting audits in the restaurant industry. She subsequently provided training to auditors in that industry, in Montreal and Quebec City. In 2008, Ms. Gendron obtained a manager's position. In that capacity, she had under her supervision, among other people, an audit team in the restaurant industry at the Sherbrooke office.

(e) Ms. Gendron decided, on the recommendation of Ms. Matthews, to apply an alternative audit method in the appellant's file for the following reasons, *inter alia*:[2]

(1) according to the ARQ, the purchases-to-sales ratio was outside the norm; food purchases represented 44.13% of sales and beverage purchases represented 55.48% of sales, whereas, according to the ARQ, the percentage for this type of restaurant and bar should have been between 30% and 35%;

(2) according to the ARQ, the percentage of input tax credits (ITCs), i.e., 46.6%, was too high in relation to the GST remittances made by the appellant;

(3) the gross margin was between 52% and 55%, whereas, according to the ARQ, it should have been between 65% and 70%;

(4) there was no copy of the back-up tape from the "Maitre'D" sales recording system that the appellant had used for most of 2006; thus, the sales data were missing for that period;

(5) the appellant had not provided the ARQ with documents, namely, inventory control sheets, indicating liberalities, free items, employee discounts, "two-for-one" specials and losses owing to broken or unusable bottles; for the sake of concision, I will refer to all of these terms as [TRANSLATION] "complimentary items and losses;"

(6) an analysis of the meal bills revealed that the bill numbers were not consecutive; in addition, for the period from October 1, 2006, to September 30, 2007, 9.15% of bills were missing.

Alternative audit method used

[9] In the present case, the Minister used the sales-per-litre ratio method to determine the taxable supplies and, consequently, the GST the appellant was required to collect.

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[2] Some of the criteria used in deciding to employ an alternative audit method were also used to determine whether the ARQ would audit the appellant.

[10] The amount of alcohol purchases for the periods at issue was not disputed by the appellant. On the basis of the purchases, in this case, of litres of bottled beer and of wine, the Minister determined the number of litres of alcohol available for resale for the periods at issue.

[11] The Minister relied on the sales recorded in the appellant's "Veloce" sales recording system to determine, for each period, the ratio generated by one litre of alcohol sold. In his calculations, the Minister allowed for a percentage for [TRANSLATION] "complimentary items and losses."

[12] For the period during which the appellant used the "Maitre'D" sales recording system, that is, prior to May 2006, since the data were missing, the Minister used the data from 2007, calculating a 2% downward adjustment.

[13] Paragraphs 16(f) to 16(r) of the Reply to the Notice of Appeal explain in detail the alternative audit method that the Minister used to determine the taxable supplies and the GST collectible.

> [TRANSLATION]
>
> 16. . . .
>
> > (f) in order to determine the amount of GST the appellant collected or was required to collect during the period in question, the amount of taxable supplies made by the appellant was reconstructed using the appellant's annual sales and discounts report, namely, the report from the Maitre'D system prior to May 2006 and the Veloce system as of May 2006, which were the systems used by the appellant;
> >
> > (g) the Minister considered all alcohol sales for each of the products to determine, on a per-year basis, the ratio generated by one litre of alcohol sold;
> >
> > (h) the Minister identified the number of litres of alcohol purchased by the appellant from brewers and the Société des alcools du Québec;
> >
> > (i) the Minister determined that for each litre of beer and wine combined that the appellant supplied by way of sale, the appellant made taxable supplies in the amount of $110.96 for the period from October 1, 2006, to September 30, 2007, and in the amount of $126.24 for the period from October 1, 2007, to March 31, 2008;

(j) since the appellant could not provide all its documents for the period from October 1, 2005, to September 30, 2007, the Minister used a ratio of $108.74, namely, the ratio calculated for the period ending September 30, 2007, allowing a 2% downward adjustment to cover the increased selling price of goods [$110.96 X 2% less];

(k) more specifically, the Minister identified all the litres of beer and wine sold and accounted for by the appellant in order to determine the ratio of the sales noted above to purchases, namely:

October 1, 2005, to September 30, 2006	7,700.770 litres
October 1, 2006, to September 30, 2007	6,404.600 litres
October 1, 2007, to August 31, 2008	2,361.489 litres

(l) the amounts mentioned in the above subparagraphs for the entire period in question, from mid-May 2006 onward, have been established on the basis of all the available accounting data submitted by the appellant to the Minister; they were very detailed data taken from the "VELOCE SYSTEM";

(m) from the purchase invoices that the appellant submitted to him or the data from the brewers and the SAQ,[3] the Minister identified the quantities, converted to litres, of wine and beer purchased by the appellant that the appellant supplied by way of sale for each of the three fiscal years included in the period in question, including some adjustments to account for losses incurred by the appellant (the quantities used in the kitchen or consumed by staff, the complimentary items provided to patrons and losses of any nature, put at approximately 5%);

(n) the amount of taxable supplies made by the appellant so reconstructed by the Minister is $837,400.72 for the period between October 1, 2005, and September 30, 2006 (7,700.700 litres x $108.74, to within approximately $27.00), $710,665.30 for the fiscal year ending September 30, 2007 (6,404.600 litres x $110.96, to within approximately $10.00), $298,113.43 for the period ending March 31, 2008 (2,361.489 litres x $126.24, to within approximately $0.94);

(o) the amount of GST that the appellant collected or that it was required to collect during the period in question was:

period from October 1, 2005, to September 30, 2006:	$55,829.51

[3] At the hearing, it was established that the auditor used the appellant's data and not those of the SAQ to determine the purchases of bottles of wine.

period from October 1, 2006, to September 30, 2007 :	$42,639.92
period from October 1, 2007, to March 31, 2008:	$16,276.99
Total	$114,746.42

(p) the appellant filed its net tax returns, reporting an overall amount of $100,556.39 in GST collected or collectible in calculating its net tax for the period in question;

(q) the appellant did not therefore report, in calculating its net tax for the period in question, an amount of $14,190.03 ($114,746.42 - $100,556.39) as GST collected or collectible (there is a discrepancy of $0.12 in the appellant's favour in the assessed amount of $14,189.91);

(r) a review of all the documents shows that the appellant did not report, during the period in question, each and every sale that was made and for which tax at the rate of 7% (6% for supplies made after June 2006 and 5% for supplies made after December 2007) on the value of the consideration for the supplies was payable by the recipients to the appellant, who was required to collect it.

II. Issues

[14] (i) Is Ms. Gendron's testimony hearsay?

(ii) Was the Minister justified in using an alternative audit method?

(iii) Did the Minister correctly assess the appellant by adding in his calculation of net tax an amount of $14,189.91 as GST that the appellant allegedly did not account for and remit to the Receiver General?

III. Positions of the parties and legal analysis

(i) Is Ms. Gendron's testimony in her examination-in-chief by counsel for the respondent, Ms. Alcindor, hearsay?

[15] At the beginning of Ms. Gendron's examination-in-chief by Ms. Alcindor, counsel for the appellant, Mr. Jodoin, objected to all questions pertaining to the work done by the auditor in this case, Ms. Matthews. According to Mr. Jodoin, the great majority of the questions posed by Ms. Alcindor to Ms. Gendron elicited

hearsay, because Ms. Gendron had no first-hand knowledge of the audit work performed by Ms. Matthews.

[16] Ms. Alcindor indicated that Ms. Matthews, the auditor responsible for the appellant's file, had retired from the ARQ five or six years earlier and that it was decided not to have her testify, as it would have been too complicated for Ms. Matthews to reacquaint herself with the file.

[17] Furthermore, according to Ms. Alcindor, Ms. Gendron could testify because, as Ms. Matthews' manager, she was the one who had authorized the use of the alternative audit method. Also, she had closely overseen the file and had been involved at every stage. Moreover, Ms. Gendron had attended meetings with Ms. Matthews, Mr. Drummond (the appellant's representative and shareholder) and counsel for the appellant to discuss the appellant's file.

[18] I reserved my decision on the objection and asked the parties to put forward at the argument stage their positions on the hearsay issue.

[19] It should be noted that, at the hearing, Ms. Gendron was examined in chief by Mr. Jodoin. Counsel for the respondent, Ms. Alcindor, chose not to cross-examine her and instead conducted an examination-in-chief of Ms. Gendron.

[20] In its submissions, the appellant argued that most of Ms. Gendron's testimony was hearsay. The appellant's argument is that Ms. Gendron did not go to the premises of the appellant's restaurant and bar, that the data were compiled by Ms. Matthews and that the worksheets and T-20 Audit Report were prepared by Ms. Matthews. Furthermore, it was Ms. Matthews who checked the records and meal bills and who read the sales reports in the "Veloce" sales recording system. The appellant argues that no valid reason was provided by the respondent for Ms. Matthews' absence in court. The appellant also argues that none of the hearsay exceptions applies in this case.

[21] The appellant therefore argues that the appeal must be allowed on the basis that the respondent is unable to provide justification for selecting the alternative audit method in this case.

[22] As for the respondent, she asserts that at the time of the hearing Ms. Matthews had been retired from the ARQ for five or six years. It would have been complicated for Ms. Matthews to come out of retirement and review the file, and so a decision based on expediency was made.

[23] Furthermore, the respondent argues that Ms. Gendron has first-hand knowledge of the file. As Ms. Matthews' manager, Ms. Gendron was the only one who could authorize the use of the alternative audit method. Also, all data used by Ms. Matthews were taken from the appellant's documents that are an integral part of the ARQ's file. For instance, the copy of the appellant's "Veloce" sales recording system is an integral part of the file. All of Ms. Matthews' worksheets are in the ARQ's file. All the calculations of ratios by Ms. Matthews are evident upon reading the documents from the appellant. The only figure from the ARQ is the percentage of [TRANSLATION] "complimentary items and losses." In that regard, the respondent argues that the percentage was determined by the ARQ because the appellant had not provided the inventory control sheets establishing the percentage of [TRANSLATION] "complimentary items and losses." Furthermore, the percentage was determined by the ARQ following meetings attended by Ms. Gendron along with Ms. Matthews as well as, for the appellant, the appellant's counsel and Mr. Drummond.

[24] The respondent therefore argues that Ms. Gendron's testimony is admissible because it is reliable for the following reasons: Ms. Gendron had first-hand knowledge of the file given her involvement in the case. Furthermore, the data came from the appellant's documents. Ms. Gendron had access to those documents; her testimony could not be hearsay, as it was reliable.

[25] The respondent also argues that Ms. Gendron's testimony is admissible in evidence as the appellant consented to its admissibility by undertaking its own examination-in-chief of Ms. Gendron.

[26] I will begin with the respondent's last argument, namely, that by conducting an examination-in-chief of Ms. Gendron, the appellant implicitly consented to hearsay evidence.

[27] I am of the view that having conducted an examination-in-chief of Ms. Gendron on the facts surrounding both the choice of the alternative audit method and the assessment in the case at bar, counsel for the appellant cannot

object, during the examination-in-chief of Ms. Gendron by counsel for the respondent, to questions also pertaining to the facts surrounding the choice of the alternative audit method and the assessment.

[28] It is apparent from the case law and doctrine that the appellant cannot introduce hearsay evidence which it later argues is inadmissible. Professor Ducharme explains, in *Précis de la preuve*, 6th ed. (Montreal: Wilson & Lafleur, 2005), the nuances to be considered with respect to consent to hearsay evidence:

> [TRANSLATION]
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> 1438. Contrary to what some authors assert, in the case of hearsay evidence, a distinction must be made between waiver, that is, not objecting, and consent. A party may refrain for a number of reasons from objecting to a witness's relating another's statement. It may do so in particular because it believes, rightly or wrongly, that what is being presented is a fact relevant to the dispute, and not because it intends to consent to the statement being used as testimony. In order for a party's refraining from objecting to evidence being led of a statement to amount to consent within the meaning of article 2869 C.C.Q, it is necessary that the party could not have failed to appreciate that the evidence was being adduced as testimony. Consent should be presumed where a party has itself produced, as testimony, an adverse statement.
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> [Emphasis added.]

[29] In *Construction Nelson inc c Centre de rénovation Gervais Roch inc*, 2013 QCCQ 7618, the defendant, by examining Mr. Massicotte for discovery on the specifics of the loan and by filing that examination for discovery in its entirety in the Court record, waived the possibility of raising an objection to evidence of a loan. Judge Landry of the Court of Québec states the following at paragraphs 55 to 58 of his reasons:

> [TRANSLATION]
>
> [55] In his treatise entitled *La preuve civile*, Professor Royer[25] writes in this regard (at page 1426):
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> > *Litigants who consent to the production of evidence or who introduce or use evidence cannot subsequently object to that evidence by relying on admissibility rules whose sanction is not contrary to public order, in particular those set out in articles 2860 to 2868 of the Civil Code of Québec. Thus, a defendant who has examined a plaintiff on the existence or content of a juridical*

> *act cannot subsequently prevent the adverse party from proving the juridical act through testimony, even if such testimony contradicts a validly executed instrument. A party who has examined the adverse party on that party's affidavit and who has filed that examination in the record cannot object to the admissibility of the testimony by affidavit. Such waivers of the sanction of a rule on admissibility have often occurred in examinations for discovery under articles 397 or 398 C.C.P.*
>
> (Emphasis added.)

[56] There have been a number of judgments to the same effect,[26] including that of the Court of Appeal in *Sabourin c. Charlebois*:

> *In the present case, counsel for the appellant decided to examine the respondent before the filing of the pleading (article 397 C.C.P.); the deposition thus taken forms part of the record (article 396 C.C.P.). On that occasion, counsel for the appellant introduced himself the evidence to which he will seek to object during the trial.*
>
> (Emphasis added.)

[57] In *Barrest*,[27] Judge Bachand summarized the state of the law on the issue as follows:

> *By virtue of Iarrera c. Guinta Iarrera 1987 RDJ 223 (CA) and the judgment in Via Route inc. c. Zawahry J.E. 97-197 (CS), a party that itself introduces inadmissible evidence, such as testimonial evidence, by filing an examination for discovery, cannot subsequently object to such evidence.*
>
> (Emphasis added.)

[58] Consequently, this argument by the defendant for the dismissal of the action is ill-founded. The motion to dismiss must accordingly be considered on the basis that the alleged loan has been established.

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25 4th edition (Cowansville: Les Éditions Yvon Blais Inc., 2008), 1891 pages.

26 *Sabourin c. Charlebois* [1982] C.A. 361; *Via Route inc. c. Zawahry* J.E. 97-197 (C.S.); *Iarrera c. Guinta Iarrera* [1987] RDJ 223 (C.A.); *Barrest c. Dumoulin* B.E. 2006BE-110.

27 Cited in preceding footnote.

[30] Therefore, Ms. Gendron's testimony is admissible as to the facts relating to the alternative audit method and the Minister's assessment. The appellant's objection is dismissed.

[31] In light of this finding, I therefore need not consider whether the hearsay exception under the principled approach set out by the Supreme Court of Canada applies to Ms. Gendron's testimony.[4]

(ii) Was the Minister justified in using an alternative audit method?

[32] The appellant argues that it is up to the respondent to justify the Minister's choice to use an alternative audit method for assessment purposes, and that if the Court were to decide that the use of the alternative audit method by the Minister was not justified, the presumption of validity of the assessment would no longer stand.

[33] Contrary to the appellant, the respondent argues that it is the appellant who has the burden of proof and that it is up to the appellant to show why the Minister was not justified in using an alternative audit method for assessment purposes. The respondent cites in that regard subsection 299(3) of the LTA:

> 299(3) An assessment, subject to being vacated on an objection or appeal under this Part and subject to a reassessment, shall be deemed to be valid and binding.

[34] I agree with the respondent. As indicated by the Federal Court of Appeal in *Amiante Spec Inc v Her Majesty the Queen*, 2009 FCA 139, the taxpayer has the initial burden of demolishing the Minister's assumptions. In *Amiante Spec Inc*, Justice Trudel stated the following at paragraphs 15, 23 and 24 of her reasons.

> [15] *Hickman* reminded us that the Minister proceeds on assumptions in order to make assessments and that the taxpayer has the initial burden of demolishing the exact assumptions stated by the Minister. This initial onus is met where the taxpayer makes out at least a *prima facie* case that demolishes the accuracy of the assumptions made in the assessment. Lastly, when the taxpayer has met his or her onus, the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and prove the assumptions (*Hickman*, supra, at paragraphs 92, 93 and 94).
>
> . . .
>
> [23] 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. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than

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4 *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787.

> the one established by that evidence" (*Stewart v. Canada*, [2000] T.C.J. No. 53, paragraph 23).
>
> [24] Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that "[i]t is the taxpayer's business" (*Orly Automobiles Inc. v. Canada*, 2005 FCA 425, paragraph 20). This Court stated that the taxpayer "knows how and why it is run in a particular fashion rather than in some other ways. He [or she] knows and possesses information that the Minister does not. He [or she] has information within his [or her] reach and under his [or her] control" (*ibid.*).

[35] The appellant also argues that the Minister was not justified in using the alternative audit method because its records and books of account and financial statements were adequate and reliable.

[36] The appellant argues that the standards established by Ms. Gendron and Ms. Matthews[5] are arbitrary. During her testimony, Ms. Gendron explained that the percentage of purchases versus sales should be between 30% and 35% for both food and beverages. According to the appellant, that percentage is unfounded as it is not based on solid statistical data or recognized expertise in the restaurant industry. Moreover, the appellant refers to Ms. Gendron's testimony in which she indicated that, during the periods at issue, the ARQ had no reference guide setting standards in the restaurant industry.

[37] According to the appellant, the Minister could not take into account the ratios in this case, namely, a ratio of 44.13% for purchases/sales of food and a ratio of 55.48% for purchases/sales of beverages, to justify the use of the alternative audit method. The appellant asserts that Ms. Gendron could not rely on her audit experience pertaining to the restaurant industry to determine that the appellant's purchases/sales ratios were too high.

[38] According to the appellant, the other ratios used by the ARQ, namely, the gross margin ratio and the percentage of input tax credits claimed compared to the GST collected by the appellant, are also arbitrary.

[39] The appellant also argues that a number of witnesses explained why certain invoices were missing for the periods at issue. They all testified to the same effect, that is to say, that there were a number of invoice redistributions and cancellations.

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5 See Exhibit A-1.

The appellant argues as well that the "Veloce" system had a technical issue that was known to the ARQ. The system skipped invoices and this explained why the invoice numbers were not in sequence. In addition, the "Veloce" system did not store the redistributed or cancelled invoices. Thus, the ARQ could not use this as a criterion for resorting to the alternative audit method.

[40] The appellant also argues that if the auditor (Ms. Matthews) or other persons at the ARQ had requested the inventory control sheets for the periods at issue, the appellant would have provided such documents establishing the percentage of [TRANSLATION] "complimentary items and losses."

[41] As for the missing documents, namely, the copy of the backup tape from the "Maitre'D" sales recording system for most of 2006, according to the appellant the ARQ could have made a copy of the hard drive.

[42] Thus, according to the appellant, the Minister was not justified in using the alternative audit method.

[43] For her part, the respondent argues that the Minister could use the alternative audit method because, as evidenced by the document filed by the appellant as Exhibit A-1, the gross margin ratio and the purchases/sales ratios for food and for beverages were outside the norm and the percentage of ITCs claimed by the appellant was high compared to the GST collected by it.

[44] Furthermore, the respondent argues that the appellant did not provide the inventory control sheets establishing the percentage of [TRANSLATION] "complimentary items and losses" for the periods at issue. In addition, the appellant did not have a copy of the backup tape from the "Maitre'D" sales recording system that it had used for most of 2006; thus, the appellant was unable to provide most of the sales data for 2006. Furthermore, according to the respondent, invoices were missing. While redistribution may explain part of the missing invoices, the rate of 9.15% established following three days of sampling was high. The respondent also argues that the appellant did not lead evidence as to the invoice redistribution percentage during the periods at issue.

[45] Consequently, the respondent argues, the accounting books and records were not reliable as the appellant was unable to provide supporting documentation relating to inventory and documentation pertaining to sales was missing for most

of 2006. The respondent thus contends that the Minister was justified in not relying on the appellant's books, accounting records and financial statements.

[46] I am of the view that in this case the Minister was justified in using an alternative audit method to assess the appellant. It does not suffice that books and accounting records exist and are consistent with one another; they must also be reliable. The appellant did not provide any document establishing the percentage of [TRANSLATION] "complimentary items and losses" for the periods at issue. Furthermore, no data were provided concerning sales for the period covering most of 2006.

[47] Subsection 299(1) of the ETA provides that the Minister is not bound by any return, application or information provided by or on behalf of any person and may make an assessment, notwithstanding any return, application or information so provided or that no return, application or information has been provided.

[48] In *9100-8649 Québec Inc v The Queen*, 2013 TCC 160, Justice Favreau reiterates the applicable principle allowing the tax authorities to apply an alternative audit method. At paragraph 39 of his reasons for judgment, he writes as follows:

> [39] Courts allow tax authorities to use alternative audit methods not only in cases where the taxpayer does not have adequate accounting records, but also when the books, registers and financial statements are not reliable.

[49] Justice Tardif, in *9010-9869 Québec Inc v The Queen*, 2007 TCC 365, wrote as follows at paragraphs 49 and 52 with respect to the Minister's use of an alternative audit method:

> [49] Indeed, unless there is adequate accounting and all vouchers are available, an alternative audit method will have to be used, and it is a foregone conclusion that such a method cannot be as reliable as a direct audit method, which is made possible by an accounting system that follows standard practices and the provisions of the Act.
>
> . . .
>
> [52] Thus, unless the registrant can show that the approach used was abusive and vindictive, that it was not serious, and that it was tainted by arbitrariness and unacceptable work methods, the registrant will have to live with the financial consequences, however painful they may be.

[50] In *9100-8649 Québec Inc*, the appellant, as in this case, had no documents in support of the inventory counts. Justice Favreau indicated that, in the circumstances, it was not open to the appellant to argue that its books, registers and financial statements were complete, adequate and reliable. Justice Favreau determined that the alternative audit method was justified.

[51] The appellant also asserts that the Minister did not send it any request in writing concerning the missing documents. In my view, it matters little whether the appellant received or did not receive a request in writing requiring the missing documents. The obligation to keep books and records is found in subsection 286(1) of the ETA, which provides that every person who carries on a business in Canada "*shall keep records . . . in such form and containing such information as will enable the determination of the person's liabilities and obligations under this Part*." This obligation falls on the taxpayer. It is therefore the taxpayer's responsibility to produce all information and justifications supporting his or her claims.

[52] Accordingly, the Minister was justified in using the alternative audit method for assessment purposes.

[53] I would also note that it is important to make a distinction between what led the Minister to use the alternative audit method and the facts on which the Minister relied in making the assessment in this case. The profit margin ratios, the purchases-to-sales ratios, the ITCs claimed compared to the GST collected, the missing invoices, the absence of inventory control sheets for [TRANSLATION] "complimentary items and losses" and the absence of documents from the "Maitre'D" sales recording system served only as indicia that led the Minister to use the alternative audit method; those elements were not used to assess the appellant. Thus, the appellant's argument that the ratios established by the ARQ could not be relied on by the Minister as justifying the use of the alternative audit method, since these ratios had been determined on the basis of the experience acquired by Ms. Gendron in auditing restaurants, does not stand up. The ratios were merely some indicia among other indicia that raised doubts about the reliability of the books, accounting records and financial statements. The Minister's decision to use the alternative audit method rested on a number of indicia.

[54] In the case at bar, the Minister made the assessment using the number of litres of beer and wine purchased by the appellant during the periods at issue. There is no dispute regarding the number of litres of beer and wine purchased, as the appellant admitted the figures with respect thereto. Using the sales recorded in the "Veloce" sales recording system, the Minister proceeded to establish the ratio that is generated by each litre of beer and wine sold. From those data, the appellant's taxable supplies were reconstructed. As indicated by Justice Favreau at paragraph 37 of his reasons for judgment in *9120-1616 Québec Inc v The Queen*, 2014 TCC 4, this audit method has been approved by a number of decisions of this Court:

> . . . The indirect audit method used by the Minister was approved by a number of decisions of our Court, including those rendered in *9100-8649 Québec Inc. v. The Queen*, 2013 TCC 160 (on appeal to the Federal Court of Appeal), *Restaurant Place Romaine Inc. v. The Queen*, 2010 TCC 347 and *9110-1568 Québec Inc. v. The Queen*, 2009 TCC 554 . . . .

(iii) Did the Minister correctly assess the appellant by adding in the calculation of net tax an amount of $14,189.91 as GST that the appellant allegedly did not account for and remit to the Receiver General?

[55] The appellant did not take issue with the reliability of the alternative audit method used by the Minister. Thus, the only possibility for the appellant is to contest the percentage determined for it with respect to [TRANSLATION] "complimentary items and losses," whose effect is to decrease sales.

[56] Several people who worked for the appellant during the periods at issue testified for the appellant. They indicated that, under Mr. Drummond (the shareholder), everything that was sold had to be entered in the sales recording systems. If, at the end of a shift, inventory did not balance with sales, the server had to pay the difference.

[57] For his part, Mr. Drummond indicated that he was not on site, as he worked as a bailiff; it was therefore important for him to implement a system to protect him from theft. He testified that his instructions were clear: no meal could leave the kitchen without a receipt and no beverage could be poured if it was not entered

in the "Veloce" system. In addition, according to his estimate, 80% of the bills were paid by Visa or by debit card.[6]

[58] The witnesses also indicated that competition was fierce and that to attract patrons the appellant had put on a number of promotions, for example: discounts for persons who worked at ski resorts, "two-for-one" specials for hockey and rugby teams, promotions before and after shows at the Chapiteau Bromont and special activities to attract business. According to those witnesses, the appellant had to be generous with respect to [TRANSLATION] "complimentary items and losses" in order to attract business.

[59] The respondent filed in evidence a report from "Veloce" for the period from October 1, 2006, to September 30, 2007, which indicates what is included in the "Veloce" system:[7]

1.	LIBERALITIES	$12,840.53
2.	FREE ITEMS	$1,709.60
3.	EMPLOYEE DISCOUNTS	$5,515.15
4.	10% DISCOUNT	$534.32
8.	Menhir	$59.10

[60] Following meetings with the appellant, the ARQ allowed an additional 5% for [TRANSLATION] "complimentary items and losses." This 5% was added to what had already been entered in the "Veloce" system. According to Ms. Gendron, the percentage of [TRANSLATION] "complimentary items and losses" and other items in "Veloce" was approximately 3.9%.

[61] At the hearing, the appellant did not indicate why the inventory control sheets for the periods at issue, showing the [TRANSLATION] "complimentary items and losses", were not filed in evidence.

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6 According to Exhibit I-2, on December 4, 2008, 77% of bills were paid by debit card or credit card; on December 5, the percentage was 65%; on December 10, it was 80% at 0:48 and 92% at 3:47; on December 18, it was 45% and on December 19, 47%.

7 See Exhibit I-1.

[62] None of the witnesses was able to indicate what the percentage of [TRANSLATION] "complimentary items and losses" was during the periods at issue, except to say that a number of [TRANSLATION] "complimentary items" were provided to the appellant's patrons.

[63] Therefore, in the absence of any evidence, I cannot increase the percentage of [TRANSLATION] "complimentary items and losses."

[64] Accordingly, in light of the respondent's concession, the appeal is allowed so that the amount of $1,147.17 can be deducted from the amount that the appellant was required to collect as GST for the periods between October 1, 2007, and March 31, 2008. In all other respects, the appeal is dismissed and costs are awarded to the respondent.

Signed at Ottawa, Canada, this 10th day of September 2015.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 27th day of July 2016.

Erich Klein, Revisor

CITATION:	2015 TCC 220
COURT FILE NO.:	2010-699(GST)G
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PLACE OF HEARING:	Granby, Quebec
DATE OF HEARING:	February 12 and 13, 2014, and March 30, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	September 10, 2015

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Counsel for the respondent:	Claudine Alcindor Catherine-A. Boisvert

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