

BETWEEN:

BIJOUTERIE ALMAR INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 14, 15 and 16, 2010, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the appellant: Louis-Frédéric Côté

Counsel for the respondent: Benoît Denis

JUDGMENT

The appeal from the assessment by the Minister of Revenue of Quebec (**the Minister**), made under Part IX of the *Excise Tax Act (ETA)* and dated April 18, 2008, for periods from August 2003 to March 2007 (33 periods) and for the amount of \$3,911,530.61, including penalties and interest, is allowed, and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that the appellant is entitled to input tax credits in the amount of \$2,303,351.63 in respect of supplies of jewellery received from 2867-8555 Québec Inc. (JemGold) and from 4114299 Canada Inc. during the periods at issue.

The penalties and interest assessed under section 280 of the ETA are cancelled accordingly. The penalty assessed under section 285 of the ETA is cancelled.

The appellant is entitled to costs under Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 2nd day of December 2010.

"Lucie Lamarre"

Lamarre J.

Citation: 2010 TCC 618
Date: 20101202
Docket: 2008-3306(GST)G

BETWEEN:

BIJOUTERIE ALMAR INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from an assessment dated April 18, 2008, made in respect of the appellant by the Minister of Revenue of Quebec (**the Minister**) under Part IX of the *Excise Tax Act (ETA)* for periods from August 2003 to March 2007 (33 periods) and for the amount of \$3,911,530.61, including penalties and interest (see Reply to the Notice of Appeal, paragraph 11, and Exhibit A-1).

[2] In that assessment, the Minister disallowed input tax credits (**ITCs**) in the amount of \$2,310,614.18, including an amount of \$2,303,351.63 in respect of supplies of gold jewellery that the appellant had allegedly never acquired. The appellant challenges only that part of the assessment and therefore claims ITCs in the amount of \$2,303,351.63 (see Reply to the Notice of Appeal, paragraph 13, and Notice of Appeal, paragraph 6) and seeks the cancellation of the penalties and interest assessed under section 280 of the ETA, and of the penalty imposed under section 285 of the ETA.

[3] More specifically, the Minister disallowed the ITCs claimed in respect of gold jewellery that the appellant claims to have purchased from two suppliers, as detailed below:

2867-8555 Québec Inc. (JemGold)	\$1,461,022.87
4114299 Canada Inc.	\$842,328.75
Total:	\$2,303,351.63

[4] According to the respondent, the documents submitted by the appellant in support of the disallowed ITCs are false and are accommodation invoices, because, according to the Minister, the appellant had not purchased any gold jewellery from those two suppliers. In the Reply to the Notice of Appeal, the respondent maintains that the two companies mentioned above were owned by Michel Henri and that those companies had neither the staff nor the equipment necessary to manufacture such large amounts of jewellery. Nor did they acquire such an amount of jewellery as would have enabled them to supply the appellant with what it claims to have purchased. The respondent further contends that the invoices submitted do not provide a description sufficient to identify the jewellery that had allegedly been sold by the two suppliers in question and that instead they merely state "assorted gold jewellery" or "assorted gold merchandise". It is my understanding that 2867-8555 Québec Inc. (**JemGold**) ceased to exist once 4114299 Canada Inc. was created. That company took over JemGold's assets (see Audit Report, Exhibit A-8, page 4).

Facts

[5] The appellant called eleven witnesses, and the respondent called five witnesses. The president of the Appellant, Allan Puzantyan, testified first. He and an associate, Berc Pabucyan, who also testified, have been operating the business since 1993.

[6] In the beginning, they manufactured gold and silver jewellery using moulds. The jewellery manufactured was sold to wholesalers and retailers. In 1999, they started to buy jewellery wholesale for resale. Berc Pabucyan continued to be in charge of manufacturing jewellery and Allan Puzantyan took on the purchase and resale part of the business. They had 13 or 14 employees at that time. Over the years, the manufacturing of jewellery slowed down, and, during the years at issue, it represented about 30% of sales. As a result, the number of staff decreased, and the business now has 3 employees.

[7] The company's place of business has always been the same: on Cathcart Street in Phillips Square in Montreal. There is a showroom with counters and four other rooms.

[8] Allan Puzantyan met Michel Henri through his uncle. They started doing business together in August 2003. At first, Michel Henri would go to Allan Puzantyan's place of business to show him the jewellery he had for sale. Later on, it was Allan Puzantyan who went over to Michel Henri's premises. Michel Henri's place of business was also in Phillips Square, a four-minute walk away. Michel Henri's premises contained a showroom with several displays.

[9] Mr. Henri stated in his testimony that part of his jewellery inventory was kept elsewhere, in two different places, one of which was on Bates Street and the other on Mont-Royal Street, both in Montreal.

[10] Mr. Puzantyan explained that he would make an appointment with Mr. Henri before going to meet him at his place of business in Phillips Square. Mr. Henri worked with Jan Cienki, who was his right-hand man. Mr. Henri's brother, Paul Henri, was also occasionally on the premises. Mr. Puzantyan selected his jewellery and negotiated the price with Mr. Henri, which was calculated by weight according to the price of gold at the time, with an additional amount for labour. There were no transportation costs because of the proximity of the two places of business. The jewellery was simply put in a bag, which was transported from one place to the other on foot, without any particular security. It could have been any one of Allan Puzantyan, Allan Puzantyan's father (Levon Puzantyan), who was helping his son, Mr. Cienki or Mr. Henri who transported the jewellery once the transaction was finalized.

[11] Mr. Henri accepted payments spread over a set period of time. Invoices demonstrating the practice were filed in evidence. Thus, for example, in Exhibit A-4, Volume 2, Tab "July", there is invoice number 04371 dated July 2, 2004, which indicates that there was a sale of "assorted gold jewellery" to the appellant by JemGold for an amount of \$200,000 before tax and \$230,050 with tax. According to what is indicated on that invoice, the payment was made by cheque in three instalments, on September 9, 10 and 14, 2004.

[12] Mr. Puzantyan explained that the description "assorted gold jewellery" was in keeping with jewellery industry practice. Jewellery sold is itemized only for the purposes of importation from abroad. Locally sold jewellery is never itemized. This was confirmed by Jan Cienki and Michel Henri, who explained that there would not

be enough space on an invoice to write out every piece of jewellery sold, given the quantity involved. Mr. Cienki explained that 98% of invoicing was done in this way and that such was the procedure followed in the industry.

[13] Mr. Puzantyan explained that payment could be spread over six to nine months, but that it could just as well be made on delivery of the jewellery or over a shorter period, as demonstrated by the example of the invoice referred to above. Mr. Puzantyan also said that he could lose money on some purchases of jewellery. Thus, if he did not resell the items within a certain time, he tried to liquidate them or simply melted them down either to manufacture new jewellery or to make gold ingots, which he resold mainly to a company specializing in that field, Federal Commercial Metals & Company (**Federal Commercial**), for the market price of gold. He stated that, when he melted the jewellery down, he calculated a loss of about 3% on that jewellery (taking into account the price of gold and labour). Overall, he said that he had made profits from the jewellery that he had purchased from Michel Henri and from other suppliers.

[14] The financial statements filed as Exhibit A-5 show gross sales of 11 to 18 million dollars from 2004 to 2007, gross profits ranging from \$700,000 to \$1 million for the same period and an inventory turnover rate of two or three months (as calculated by the appellant by dividing gross income by the value of the inventory at year-end, which is admitted by both parties herein).

[15] Mr. Puzantyan also acknowledged that he had bought merchandise directly from suppliers in Italy, as demonstrated by the invoices filed as Exhibit A-7. However, he said that, although he knew many suppliers there, he did not favour that option since he had to pay the sale price in full before the merchandise would be delivered. The advantage of going through Mr. Henri was that Mr. Henri gave him financing by allowing him to pay in instalments. The evidence discloses that he also bought in Mexico (Exhibit I-1), the United States (Exhibit I-2) and Spain (Exhibit I-3).

[16] In cross-examination, Mr. Puzantyan admitted that sometimes he paid for the jewellery he bought with gold ingots. This was confirmed by his father, Levon Puzantyan. An example was given in Exhibit A-4, Volume 2, Tab "Dec.", where invoice number 06112 dated December 7, 2004, for a total of \$301,377 including tax, was paid in gold. Attached to this invoice are three cheques made by the appellant to Federal Commercial, which were allegedly used to buy the gold in order to pay the invoice.

[17] Levon Puzantyan compiled all the invoices covered by the assessment for which he had (with the exception of one invoice) traced the payment made to the two suppliers, or to others parties acting on their behalf, whether by ordinary cheque or by certified cheques for which he had the receipts from the bank. He also noted every invoice that had been purportedly paid with gold bought from Federal Commercial and the cheques made out to that entity for the purchase of the gold that was allegedly used to pay the suppliers. All the appellant's bank statements are attached, and they demonstrate that all the cheques in question were drawn on the appellant's bank account. This compilation was filed as Exhibit A-4, Volumes 1, 2 and 3.

[18] Arman Puzantyan, Allan's brother and Levon's son, also testified. He worked for the appellant for 12 years. He occasionally selected jewellery with his brother Allan at Michel Henri's place of business. He said that he had gone there ten or so times and had transported jewellery himself twice using a suitcase with casters. He stated that Jan Cienki and Michel Henri's brother, Paul, had also delivered jewellery to the appellant. Arman Puzantyan was a vendor himself in Western Canada and Toronto. He transported jewellery valued up to \$400,000 without any special security measures. He was away once a month on average.

[19] Berc Pabucyan, Allan Puzantyan's associate, confirmed that they bought their jewellery from Michel Henri and that they transported it themselves or that it was personally delivered to the appellant either by Michel Henri or by Jan Cienki. He also confirmed that, if the jewellery did not sell, they melted it down to make gold ingots, which they sold to Federal Commercial.

[20] Denis Filiatreault, a sales representative for the appellant, also testified. He is not related to the appellant's owners. He was an employee assigned to the counter at the place of business on Cathcart Street from 2004 to 2007.

[21] He described the showroom as a large U-shaped counter surrounded by shelves of jewellery on the walls. He together with Arman Puzantyan (when Arman Puzantyan was not selling jewellery in Western Canada) dealt with buyers. He said that there were always people coming in to buy jewellery (the clients were mainly Montreal jewellery stores). Moreover, he saw two or three suppliers per day, including Michel Henri. He never saw Michel Henri with any merchandise, but he did see Jan Cienki and Paul Henri bring merchandise. The jewellery was first weighed in the office for inventory control and then brought into the showroom.

[22] Next Michel Henri testified. He has worked in the jewellery industry since 1989. He started out as a commission salesman and several years later opened his own business specializing in the purchase and resale of jewellery.

[23] He had met Jan Cienki earlier, and they decided to work together, but Michel Henri was the owner and made all the important decisions. He met Allan Puzantyan when he was just starting out. He approached him to sell him jewellery, and they did a great deal of business together. When Michel Henri received merchandise, he called Allan Puzantyan, who came to select the jewellery he wanted. Michel Henri then negotiated the price according to the price of gold at the time, and also taking into account his profit margin. Payment was made either immediately or in instalments. He confirmed that the persons who transported merchandise between his place of business and that of the appellant were those mentioned by the other witnesses.

[24] Mr. Henri had obtained financing from a company called C.A.B.L.E., and sometimes the appellant had to pay C.A.B.L.E. directly. Michel Henri had more than ten other clients in Montreal and clients in Toronto as well. He stated that he had several suppliers and that he also sometimes sold to Federal Commercial when he needed money.

[25] Jan Cienki confirmed that he worked with Michel Henri and that he had sold jewellery to Allan Puzantyan during a four- or five-year period. He also confirmed that Michel Henri had other clients. He said as well that he and everyone who worked with Allan Puzantyan could transport jewellery from one place to the other and that payment was just handed over. He said that Michel Henri kept his jewellery in vaults at the main office in Phillips Square and on Bates Street.

[26] Emmanuel Phaneuf, a trustee in bankruptcy at Raymond Chabot Inc., managed the bankruptcy file of 4114299 Canada Inc., which declared bankruptcy in August 2007. The bankrupt's property was seized by the Minister in June 2007. It included equipment used to melt down gold (including ovens), a scale and cooling pads used in processing gold [TRANSLATION] "at the plant", as well as moulds, welders and other industrial machines (Exhibits A-9, A-10 and A-11). Mr. Phaneuf explained that the seized jewellery inventory that was kept in the vault of the Canadian Imperial Bank of Commerce (CIBC) had been valued for bankruptcy purposes at a total of \$15 million. Each item was listed and labelled. He filed Exhibit A-12 in this regard.

[27] David Malka, who has been a wholesale jeweller for 36 years, also testified. His place of business has been on Cathcart Street, near Phillips Square in Montreal, for the last 22 years. He buys jewellery locally, imports it from abroad and manufactures it on site. He sells only to jewellers. He as well bought from JemGold. When Michel Henri received merchandise, he contacted Mr. Malka, and Mr. Malka bought the jewellery he wanted, quickly settling the bill. He did business with Mr. Henri in that way from August 9, 2001 to October 5, 2004, as shown by the chronological details for his suppliers, which he listed and filed as Exhibit A-13. He also attached thereto a few invoices from JemGold.

[28] Some of them are exactly like those produced by the appellant as Exhibit A-4, the difference being that some of them indicate 14kt – 18kt in addition to the words "assorted gold jewellery". On one invoice there appear two words; one is "chains" and the other I was unable to make out. Mr. Malka explained that, if he paid quickly, he was given a better price for the merchandise, which was delivered by Michel Henri's brother to his place of business, located just a stone's throw away. Mr. Malka then gave him a cheque in payment, which was sometimes postdated. He said that he had seen Allan Puzantyan several times.

[29] Ani Hovanessian, who is likewise a jewellery wholesaler and who has been carrying on that business in Toronto for 15 years, also testified. She is the CEO of Shiny Jewellers, which is owned by her father. She is in charge of all purchases. She imports jewellery from all over the world and resells to retailers in Canada. She said that she had bought Italian gold jewellery from Michel Henri. He, his brother or Jan Cienki generally came to sell his products at her place of business in Toronto, but she has also gone to Michel Henri's place of business in Phillips Square in Montreal two or three times.

[30] The price negotiated was based on the price of gold at the time, to which labour, taxes and a profit margin were added. She took the jewellery back with her. She did not use a courier service. She also filed a few invoices as Exhibit A-14, which are in the very same format as those provided by the appellant (Exhibit A-4). She started buying from Michel Henri in October 2002 and said she stopped in January 2005. She paid right away or in a week's or a month's time.

[31] Kevin Klieman, a Toronto jewellery wholesaler, who operates under the name of Traders, was the last witness for the appellant. He co-owns Traders with a certain Frank Merdocca. They have been manufacturing and importing gold and diamond jewellery, and selling it to retailers, for 13 years. He also bought from Michel Henri from October 2003 to November 2006. He travelled to Montreal in order to buy

jewellery directly at Michel Henri's place of business. The price he was given was based on the price of gold, to which Mr. Henri added a profit margin. Mr. Klieman paid him by means of cheques, usually over a period of six or seven months. He also took the jewellery back with him.

[32] He said that he had seen Allan Puzantyan at Michel Henri's place of business, and that he knew of several other business owners who bought there.

[33] He also produced purchase invoices from Michel Henri, which were in the same format as those submitted by the appellant (Exhibit A-15). The invoices tendered had been paid to C.A.B.L.E., which had seized the accounts receivable of 4114299 Canada Inc.

[34] On a few occasions, the merchandise was delivered to him by JemGold on consignment accompanied by a delivery slip. He could return the merchandise or he could keep it, in which case, he received an invoice.

[35] For the respondent, I first heard the testimony of Nancy Gaudreault, who was the Minister's auditor in the appellant's case. In her audit report filed as Exhibit A-8, she noted that the proportion of purchases made by the appellant from JemGold and 4114299 Canada Inc. (the two suppliers for which she had denied the appellant ITCs) was, in one year, as high as 83% of the appellant's total purchases. From the document filed as Exhibit I-4 it can be seen that the appellant's purchases from those two suppliers as a proportion of its total purchases was 60.5% for the fiscal year ending on March 31, 2004, 83.64% for the year ending on March 31, 2005, and 72.87% for the year ending on March 31, 2006, and then dropped significantly to 0.89% for the year ending on March 31, 2007.

[36] Moreover, the appellant's sales to Federal Commercial that resulted from the melting down of jewellery bought represented 34.8% of its total sales for the 2004 fiscal year, 45.25% for the 2005 fiscal year, 27.64 percent for the 2006 fiscal year and 4.92% for 2007 (Exhibit I-5). These sales of scrap gold were made not only to Federal Commercial but also to other clients. Thus, for the 2006 fiscal year, the total of the appellant's scrapgold sales was 30.89% of its total sales, while the figure was 11.39% for the 2007 fiscal year (Exhibit I-6). During her audit, Ms. Gaudreault had been told by the appellant's agent that there was a loss of about 7 or 8% on scrapgold sales.

[37] Concerning her decision not to accept the purchase invoices for the purpose of granting the appellant ITCs, she said that, following the audits conducted by the

Minister in respect of JemGold and 4114299 Canada Inc., in which she herself was not involved, the Minister had concluded that those two suppliers were not able to have supplied the jewellery. On that basis, she concluded that neither of these suppliers, which were owned by Michel Henri, could have supplied the appellant. She also considered that the invoices filed in evidence were not detailed enough. According to her, the weight and unit price of the jewellery bought should have appeared on the invoices. In cross-examination, she acknowledged that the inventory taken at the appellant's business on April 20, 2006, by the Minister showed that there was on-site inventory worth \$1,652,487 in total and stock that had been sent to Miami, Florida, that was worth \$1,152,584 (Exhibit A-7, document E-2).¹ She also admitted that the absence of transportation costs and the fact that the appellant had purchased directly from suppliers in Italy had influenced her decision, but she had not asked any explanations.

[38] Huu Bang Nguyen, a tax auditor for the Minister, then testified for the respondent. He audited the purchases made by 4114299 Canada Inc. for which it had claimed ITCs from April 2004 to March 2006. He noted that five suppliers of that company had no place of business nor did they carry on any commercial activity.

[39] A list of 4114299 Canada Inc.'s suppliers can be found in Exhibit I-8. The first of the five suppliers in question is A.N.D. jewellery (**A.N.D.**). 4114299 Canada Inc. claimed to have bought \$38 million worth of jewellery from A.N.D. during the period at issue and claimed ITCs in the amount of some \$2.7 million.

[40] Pierre Gariépy, an auditor for the Minister, audited A.N.D. for the period from April 30, 2004, to January 31, 2006. According to Mr. Gariépy, who also testified, that business kept no books or records, but had filed tax returns until it was sold in January 2005. However, it had no documents substantiating its purchases. It had only sales invoices, and its biggest client was 4114299 Canada Inc. (Exhibit I-9). Mr. Gariépy closed A.N.D.'s goods and services tax (**GST**) account on January 31, 2006, since it was not operating any business. In addition, Mr. Nguyen noted that its president reported a very low income and that he was also the president of two companies, which declared bankruptcy in 2004 and 2005. A.N.D. was apparently assessed for \$15.9 million in unpaid GST.

[41] The second of 4114299 Canada Inc.'s suppliers analyzed by Mr. Nguyen was A.S.N. jewellery (**A.S.N.**). That company underwent an audit conducted for the

¹This corresponds to an increase (in a period of three weeks) of about \$500,000 in comparison with the year-end inventory indicated in the financial statements at March 31, 2006, which was worth \$2,261,170 (Exhibit A-5).

Minister by Marina Raposo. She explained in court that A.S.N. had filed tax returns from July 2001 to March 2004. Starting in April 2004, there were no more invoices or accounting documents. She was unable to trace the suppliers in respect of which A.S.N. had claimed ITCs which were disallowed. Exhibit I-8 shows that 4114299 Canada Inc. apparently bought \$35.5 million worth of jewellery from A.S.N. However, Ms. Raposo did not take this into account in her draft assessment for A.S.N. since, when she was working on A.S.N.'s file, the audit of 4114299 Canada Inc. had not yet begun. Following Ms. Raposo's audit, Mr. Nguyen disallowed the ITCs claimed by 4114299 Canada Inc. in the amount of approximately \$2.5 million for purchases from A.S.N., especially since A.S.N. had filed no tax returns since 2004.

[42] The third supplier with respect to which 4114299 Canada Inc. was disallowed ITCs (in the amount of roughly \$2 million) was 9141-2882 Québec Inc., whose president was the same, as A.S.N.'s. Ms. Raposo audited this company, which issued many invoices but filed no tax returns. For his part, Mr. Nguyen noted that that company had no place of business.

[43] The fourth of 4114299 Canada Inc.'s suppliers with respect to which Mr. Nguyen disallowed ITCs (in the amount of \$234,554) was Kristor Inc. That company was audited by Ms. Raposo. It did not file tax returns and did not provide all of its sale invoices to Ms. Raposo. Kristor claimed to have purchased \$52 million worth of jewellery from A.N.D and A.S.N., when those two companies were clearly unable to supply that jewellery.

[44] The fifth of 4114299 Canada Inc.'s suppliers with respect to which Mr. Nguyen disallowed ITCs (in the amount of \$2,084) was Jackin-Or. Mr. Nguyen did not visit that company's place of business, but its president's income was very low, and thus Mr. Nguyen disallowed all the ITCs claimed.

[45] In all, Mr. Nguyen refused 4114299 Canada Inc. a total of \$7,511,868 in ITCs in respect of supplies of gold alone. In cross-examination, he acknowledged that he had not analyzed the sales of 4114299 Canada Inc. to buyers listed in Exhibit I-8, including the appellant.

[46] The respondent also called as a witness Myrlande Rochelin, who audited JemGold for the Minister for the period from September 1, 2000, to February 24, 2004. She checked whether JemGold's seven biggest suppliers were filing tax returns. A list of those suppliers can be found in Exhibit I-10. In all, she disallowed ITCs in the amount of \$7,750,996 claimed by JemGold in respect of

purchases it had allegedly made from those suppliers during the period from September 1, 2000, to February 24, 2004. Those suppliers did not file tax returns and had no places of business. In cross-examination, she said that she had not focused on JemGold's sales, since there were too many problems with its purchases. My understanding is that she felt that JemGold could not have sold what it had not bought.

[47] Ms. Raposo also audited some of JemGold's suppliers. Among these was Serkab jewellery, which pleaded guilty to providing accommodation invoices to JemGold. In addition, she noted that, for 2003, JemGold was disallowed, for the purposes of its ITC claim, 90% of its total purchases according to its financial statements (Exhibit I-10). In cross-examination, Ms. Raposo stated that the appellant did not appear in her audit as a buyer with respect to any of the suppliers she audited.

Arguments of the parties

[48] The appellant argues that, just because the owner of the two jewellery suppliers with respect to which it is claiming the ITCs at issue was accused of fraud, it should not have to suffer the consequences.

[49] The appellant submits that it has been for years a profitable business whose inventory turnover rate is two or three months according to its financial statements, as the Minister was able to verify by looking at the stock in inventory on site. The appellant argues that it negotiated no discounts with the suppliers in question when it bought the jewellery and that proof of payment has indeed been provided in the form of invoices to which cheques or receipts and bank statements are attached. The appellant called several witnesses who confirmed industry practice and corroborated the assertion that the appellant had in fact bought the jewellery for which it is claiming ITCs disallowed by the Minister. The appellant submits that its witness Mr. Phaneuf, the trustee in bankruptcy for 4114299 Canada Inc., confirmed the existence of the business of Michel Henri, who owned the equipment necessary to manufacture jewellery. Mr. Phaneuf also referred to the jewellery inventory of about \$15 million owned by Mr. Henri. Moreover, representatives of competitors of the appellant said in their testimony that they had bought jewellery from Mr. Henri.

[50] According to the appellant, all of the respondent's evidence rests on the fraud purportedly committed by Michel Henri and some of his suppliers. The appellant is not among the businesses targeted because of fraud. The evidence does not show any collusion on its part. The evidence does not show that the appellant is a business that was established for the sole purpose of participating in a fraudulent scheme. The

respondent merely proved the insolvency of the suppliers used by Michel Henri's businesses and did no analysis of the sales made by those businesses. The respondent submitted no evidence that those who bought from Michel Henri — and even less so the appellant — were aware of their suppliers' alleged fraud. The weight of the evidence shows that the appellant did indeed buy the jewellery from Michel Henri and that it did so in accordance with industry practice. It is not the appellant's responsibility to bear the economic burden created by those who are accused of fraud.

[51] The respondent, for her part, says she does not deny the existence, as such, of Michel Henri's businesses. What she denies is the supply of jewellery that the appellant claims to have received. The respondent does not believe that the appellant purchased as great a quantity of jewellery as it claims or that it did so for the prices indicated on the invoices. Moreover, the invoices do not indicate the exact quantity of jewellery bought.

[52] The respondent argues that the fact that Michel Henri's suppliers were not in a position to supply all of the jewellery is important in this case since it shows that Michel Henri did not have sufficient inventory to supply the amount of jewellery that the appellant claims to have purchased. Up to 80% of the jewellery bought by the appellant in one year alone came from Mr. Henri's businesses, and about 70% of those businesses' purchases have been disallowed since there were no actual suppliers. How could Michel Henri have resold so much jewellery to the appellant? In addition, in analyzing the invoices issued to the appellant that were filed as Exhibit A-4, the respondent noted that the numbering of the invoices was inconsistent.

[53] Finally, the sales of scrap gold are too high. Why buy so much jewellery and then resell it at a loss in the form of scrap gold?

[54] The appellant simply emphasized in reply that the fact that some of Michel Henri's suppliers provided false invoices does not mean that Michel Henri had no jewellery to sell.

Analysis

[55] In disallowing the ITCs claimed by the appellant on the purchases of jewellery from JemGold and 4114299 Canada Inc., the Minister based his decision on, among other things, the allegations in paragraph 18, subparagraph (g) et seq. of the Reply to the Notice of Appeal, which read as follows:

[TRANSLATION]

- (g) The appellant did not provide the Minister, when it was required to do so, with sufficient evidence, including prescribed information to establish the amount of \$2,303,351.63 in ITCs, mentioned in the previous subparagraph, which it had claimed in calculating its net tax for the 33 periods in question and which it obtained.
- (h) More specifically, in order to establish the said amount of ITCs, the appellant provided the Minister with supporting documentation that did not meet the requirements of the ETA and the regulations thereunder.
- (i) Basically, the documentation in support of the disallowed ITCs in the amount of \$2,303,351.63 with respect to supplies of gold jewellery it had acquired during the 33 periods in question is false and consists of accommodation invoices issued to enable the appellant to claim ITCs without entitlement in calculating its net tax for the 33 periods in question.
- (j) The purpose of the scheme is to use so-called "accommodation" invoices in order to claim ITCs to which there was no entitlement in view of the ETA requirements.
- (k) In this case, the appellant, who was the "accommodated" party, used the services of third parties operating real or dummy businesses, as the case may be, those third parties being the two (2) suppliers in question which were the "accommodating" parties and which would issue invoices to the appellant for supplies of products that they did not make to the appellant and that the appellant did not acquire from either one of them.
- (l) The appellant did not acquire any of the supplies of gold jewellery at issue from the two (2) suppliers.
- (m) The two (2) suppliers were owned by Michel Henri.
- (n) The two (2) suppliers in question had neither the staff nor the equipment to manufacture so much jewellery nor did they purchase such a quantity of jewellery that they would have been able to make the supplies that they had undertaken to make to the appellant.
- (o) The supporting documentation (invoices) submitted does not contain a description sufficient to identify the supplies made by the two (2) suppliers, which were acquired by the appellant (the quantity and quality of the jewellery supplied, the consideration for each item,

etc.), but indicates only "assorted gold jewellery", "assorted gold merchandise" or some similar phrase, and shows only the total amount to be paid as consideration for the supplies.

- (p) Consequently, the appellant owes the Minister the amount of the adjustments to its net reported tax for the 33 periods in question, plus penalties and interest.

[56] In *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, the Supreme Court of Canada stated that the initial onus is on the taxpayer to demolish the assumptions relied on by the Minister in making an assessment. In *Amiante Spec Inc. v. Canada*, 2009 FCA 139, at paragraph 15, the Federal Court of Appeal established that 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. The Federal Court of Appeal explained the concept of a *prima facie* case as follows at paragraphs 23 and 24:

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 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.*).

[57] If the taxpayer meets the initial burden, the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer, in order to prove his own assumptions.

[58] Thus, the initial burden of proof is on the taxpayer because he knows his business and possesses information that the Minister does not.

[59] In the instant case, the evidence does not disclose that the appellant was aware of the fact that its two suppliers had been disallowed 70% of their purchases by the Minister for the purposes of their ITC claims. That was information that the Minister possessed and over which the appellant had no control. In the circumstances, that fact

should be kept in mind when determining whether the appellant made out a *prima facie* case demolishing the Minister's assumptions.

[60] That being said, is it possible to conclude that the evidence adduced by the appellant creates such a degree of probability in its favour that I must accept it if I believe it? Was that evidence rebutted or the contrary proved?

[61] The Minister's first assumption is that the invoices provided by the appellant are false and constitute accommodation invoices. The Minister based that assumption on the fact that the two suppliers did not have the staff or the equipment to supply so much jewellery, nor did they purchase such a quantity of jewellery that they would have been able to make the supplies that they had undertaken to make to the appellant.

[62] All of the appellant's witnesses described the place of business of the two suppliers in question, which belonged to Michel Henri. Mr. Henri's place of business was in Phillips Square, and the trustee in bankruptcy confirmed that, when 4114299 Canada Inc. declared bankruptcy, there was jewellery inventory worth \$15 million in the vault of CIBC, as well as equipment that was seized at that place of business. Thus, I find that the appellant has *prima facie* demolished the Minister's assumption that the two suppliers were unable to supply the jewellery to the appellant.

[63] To discharge her burden of demonstrating that the invoices provided by the appellant were accommodation invoices, the respondent sought to prove, through her auditors, that several of the suppliers used by JemGold and 4119299 Canada Inc. did not exist or that they carried on no commercial activity. In so doing, the respondent inferred that those suppliers could not have supplied Michel Henri with the quantity that the appellant claims to have purchased. The respondent added that a large percentage of the appellant's purchases were from those two suppliers (JemGold and 4119299 Canada Inc.).

[64] For its part, the appellant established, through objective evidence, that its two suppliers, JemGold and later 4119299 Canada Inc., were indeed carrying on a commercial activity and, moreover, that 4119299 Canada Inc. had a very significant inventory of jewellery at the time of its bankruptcy in 2007.

[65] The respondent also sought to cast doubt on the appellant's credibility by arguing that about 35% of its annual sales came from melting down jewellery it had bought.

[66] In my opinion, the respondent has not proven on the balance of probabilities that the appellant did not purchase the amount of jewellery that it claims to have purchased from the two suppliers in question. The appellant filed in evidence its financial statements as well as all of its bank statements and proofs of payment, and the respondent did not adduce any tangible evidence that would enable me to conclude that the appellant did not in reality disburse the amounts shown in exchange for the jewellery purchased. There is no evidence that the cheques issued went through cheque-cashing centres and that the funds came back to the appellant, as the respondent seems to be claiming. That is very difficult for the respondent to prove and, in this case, I am not able to say that the supplies of jewellery were fictitious and that no payment was made in exchange.

[67] The respondent acknowledges that the suppliers existed and that they carried on commercial activities. She does not, however, acknowledge the quantity of jewellery bought as the two suppliers were allegedly involved in fraudulent schemes with their own suppliers. The respondent did not succeed in demonstrating that there was any kind of collusion on the part of the appellant. The scheme the respondent is referring to was uncovered through an investigation by the Canada Revenue Agency which did not involve the appellant in any way. The evidence did not show that the appellant was aware of the above-stated facts or that it acted in concert with those involved in the scheme. Counsel for the respondent argued that the invoice numbering was inconsistent. However, none of the numerous witnesses were questioned about this and, in the circumstances, I find it impossible to draw from that fact a negative inference in regard to the appellant.

[68] Moreover, the fact that a higher percentage of jewellery was sold at a loss in one year as gold ingots may be attributable to the risk inherent in operating this type of business. I am unable to conclude that this is evidence of participation in a fraudulent scheme. In any case, the respondent was unable to establish a sufficient connection to convince me otherwise.

[69] The other Minister's assumption is that the appellant did not provide supporting documentation that satisfied the requirements of the ETA and the regulations thereunder. Subsection 169(4) of the ETA reads as follows:

- (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; and

(b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax payable in respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

[70] Section 3 of the *Input Tax Credit Information (GST/HST) Regulations* (the Regulations) reads as follows:

3. Prescribed information — 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) where an invoice is issued in respect of the supply or the supplies, the date of the invoice,

(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. [Emphasis added.]

[71] The invoices provided by the appellant establish the name of the recipient and the supplier, the supplier’s registration number, the date, and the total amount paid, and provide the general description "assorted gold jewellery". The Regulations state that the description must be sufficient to identify each supply. The Minister indicated in his assumptions that the description was not sufficient in that it contained neither the quantity or quality of jewellery supplied nor the consideration required for each item.

[72] All three witnesses subpoenaed by the appellant who were completely unrelated to it, namely David Malka, Ani Hovanessian and Kevin Klieman, said they had bought jewellery from Michel Henri, and they provided invoices that were identical or almost identical to those provided by the appellant. The respondent did not question those witnesses about the descriptions on those invoices. Nor did the respondent dispute the testimony of those three witnesses or challenge their credibility.

[73] Furthermore, evidence was led that the invoices issued for the jewellery purchases made abroad are more detailed in that they specify, in some cases, the weight, in other cases, the quantity, and in still others, both, as well as giving a sometimes summary description of the products purchased. Also shown, in some instances, is the price of gold or labour, and in other cases, the unit price (see Exhibits A-7, I-1, I-2 and I-3).

[74] The testimony disclosed that there is a difference between invoicing for imported products and invoicing for jewellery purchased locally. Although there is a paucity of evidence on this point, it is my understanding that providing on each invoice a detailed description of every item of jewellery purchased would be far too tedious.

[75] The Regulations require a description of each supply sufficient to identify it. The respondent argued that to meet this requirement the invoice must show the quantity and quality of the jewellery supplied and the consideration for each item. The respondent did not, however, explain the basis for the requirements so identified by her.

[76] I conclude from the testimony that the supporting documentation produced as evidence is not abnormal in the industry. However, the description of the products purchased is clearly inconsistent with the requirements stated by the respondent in her assumptions of fact. So the question that must be answered is the following: what is the meaning of the requirement in the Regulations that the information in the supporting documentation must include a description of each supply sufficient to identify it? The Regulations make no mention of the requirements that must be met according to the respondent. They speak of a description of each supply sufficient to identify it. What is the meaning of "each supply"? In the present case, can it be said that each item of jewellery is a supply, or is it each lot of jewellery that constitutes a supply? In the former case, the supporting documentation would be insufficient; in the latter, it might be sufficient. The parties did not place any emphasis on this point.

[77] In view of the scanty evidence presented to me in this regard and the rather vague terms used in the Regulations, and given my conclusion that the respondent has not established the existence of accommodation invoices, I consider the invoices submitted to be in conformity with the Regulations. If, in the respondent's view, standard business practice in the industry does not meet the requirements of the Regulations, it is incumbent on the respondent to demonstrate more clearly that the requirements stated by her are those laid down in the Regulations. In the present case,

my opinion is that the appellant has shown on the balance of probabilities that the invoices submitted do meet the requirements of section 3 of the Regulations.

[78] For these reasons, I would allow the appeal and refer the assessment back to the Minister for reconsideration and reassessment on the basis that the appellant is entitled to \$2,303,351.63 in ITCs in respect of supplies of jewellery received from JemGold and 4114299 Canada Inc. during the periods at issue. The penalties and interest assessed under section 280 of the ETA are cancelled accordingly. The penalty assessed under section 285 of the ETA is cancelled.

[79] The appellant is entitled to costs under Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 2nd day of December 2010.

"Lucie Lamarre"

Lamarre J.

CITATION: 2010 TCC 618

COURT FILE NO.: 2008-3306(GST)G

STYLE OF CAUSE: Bijouterie Almar Inc. v. Her Majesty the Queen

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: September 14, 15 and 16, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: December 2, 2010

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