

Docket: 2020-1117(IT)I

BETWEEN:

COCO QI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on February 28 and 29, 2024 and March 28, 2024, at
Toronto, Ontario

Before: The Honourable Justice Ronald MacPhee

Appearances:

For the Appellant: The Appellant Herself

Counsel for the Respondent: Niloofar Sharif
Leonard Elias

JUDGMENT

WHEREAS the Court has on this date published its Reasons for Judgement attached.

NOW THEREFORE THIS COURT ORDERS THAT:

The Appeal from the reassessments made under the *Income Tax Act* concerning the 2015, 2016, and 2017 taxation years is dismissed with costs awarded to the Respondent in accordance with the attached Reasons for Judgement.

Signed at Ottawa, Canada, this 12th day of June 2024.

“R. MacPhee”

MacPhee J.

Docket: 2020-1119(IT)G

BETWEEN:

COCO QI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on February 28 and 29, 2024 and March 28, 2024, at
Toronto, Ontario

Before: The Honourable Justice Ronald MacPhee

Appearances:

For the Appellant: The Appellant Herself

Counsel for the Respondent: Niloofar Sharif
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JUDGMENT

WHEREAS the Court has on this date published its Reasons for Judgement attached.

NOW THEREFORE THIS COURT ORDERS THAT:

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Signed at Ottawa, Canada, this 12th day of June 2024.

“R. MacPhee”

MacPhee J.

Docket: 2020-384(IT)I

BETWEEN:

2467769 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on February 28 and 29, 2024 and March 28, 2024, at
Toronto, Ontario

Before: The Honourable Justice Ronald MacPhee

Appearances:

For the Appellant: The Appellant Herself

Counsel for the Respondent: Niloofar Sharif
Leonard Elias

JUDGMENT

WHEREAS the Court has on this date published its Reasons for Judgement attached.

NOW THEREFORE THIS COURT ORDERS THAT:

The Appeal from the reassessments made under the *Income Tax Act* concerning the reporting periods ending April 30, 2016, April 30, 2017, and April 30, 2018 is dismissed with costs awarded to the Respondent in accordance with the attached Reasons for Judgement.

Signed at Ottawa, Canada, this 12th day of June 2024.

“R. MacPhee”

MacPhee J.

Docket: 2020-385(GST)I

BETWEEN:

2467769 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on February 28 and 29, 2024 and March 28, 2024, at
Toronto, Ontario

Before: The Honourable Justice Ronald MacPhee

Appearances:

For the Appellant: The Appellant Herself

Counsel for the Respondent: Niloofar Sharif
Leonard Elias

JUDGMENT

WHEREAS the Court has on this date published its Reasons for Judgement attached.

NOW THEREFORE THIS COURT ORDERS THAT:

The Appeal from the reassessments made under the *Excise Tax Act* concerning the reporting periods ending April 30, 2016, April 30, 2017, and April 30, 2018 is dismissed with costs awarded to the Respondent in accordance with the attached Reasons for Judgement.

Signed at Ottawa, Canada, this 12th day of June 2024.

“R. MacPhee”

MacPhee J.

Citation: 2024 TCC 86
Date: 20240612
Docket: 2020-1117(IT)I

BETWEEN:

COCO QI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2020-1119(IT)G

AND BETWEEN:

COCO QI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2020-384(IT)I

AND BETWEEN:

2467769 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2020-385(GST)I

AND BETWEEN:

2467769 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

COMMON REASONS FOR JUDGMENT

MacPhee J.

I. INTRODUCTION

[1] These appeals concern, Osaka Sushi (“Osaka”) a sushi restaurant located in North York, Ontario. The corporate Appellant, who operated Osaka, was 2467769 Ontario Inc. The other Appellant in this appeal, Coco Qi (“Ms. Qi”), is the sole shareholder of 2467769 Ontario Inc.

[2] After CRA’s completion of an audit of Osaka, the Minister reassessed 2467769 Ontario Inc. and Ms. Qi’s tax liabilities to include unreported business income or unreported shareholder benefits, as applicable. Unremitted GST/HST was reassessed to 2467769 Ontario Inc. The Minister also imposed penalties pursuant to subsection 163(2) and 163(3) (only for 2467769 Ontario Inc.) of the *Income Tax Act*, RSC 1985 c1 (5th Supp) (“ITA”); and section 285 and 285.01 (2) (only for 2467769 Ontario Inc.) of *Excise Tax Act*, R.S.C., 1985, c. E-15 (“ETA”).

[3] The overall conclusion of the audit was that Osaka did not report a percentage of cash sales for each year. The Minister determined that Osaka employed some sort of device to suppress cash sales in their books and records. The Minister further concluded that these unreported cash sales were obtained by Ms. Qi as a shareholder benefit.

[4] The issues in these appeals are:

A. Whether 2467769 Ontario Inc. failed to report income arising from its operation of Osaka in the amounts of \$221,953.40, \$262,200.83, and \$22,689.91 for the taxation years ending April 30, 2016, April 30, 2017 and April 30, 2018, respectively;

B. Whether Ms. Qi received unreported benefits from 2467769 Ontario Inc. in the amounts of \$167,204.90, \$283,387.08, and \$116,985.38 in her 2015, 2016 and 2017 taxation years, respectively and therefore was properly assessed under ss.15(1) of the Act;

C. Whether 2467769 Ontario Inc. failed to collect and remit Goods and Services Tax and Harmonized Sales Tax due to unreported income in the

amounts of \$28,853.94, \$35,476.11 and \$2,949.69 for the reporting periods ending April 30, 2016, April 30, 2017 and April 30, 2018, respectively;

D. Whether the Minister was entitled to reassess Ms. Qi for the 2015 taxation year beyond the normal reassessment period;

E. Whether Ms. Qi and 2467769 Ontario Inc. are liable for gross negligence penalties under subsection 163(2) of ITA and section 285 (only for 2467769 Ontario Inc.) of the ETA;

F. Whether 2467769 Ontario Inc. is liable for electronic sales suppression penalties for the reporting period ending April 30, 2018 under subsection 163.3(2) of the ITA and subsection 285.01 (2) of the ETA; and,

G. Whether Ms. Qi is entitled to GST/HST credits for the periods at issue, pursuant to Part IX of the ETA. This appeared to have been plead by Ms. Qi in error. No evidence was lead or arguments made on this issue by either party. Therefore this component of the appeal will be denied without further mention; and,

H. Whether this Court has the jurisdiction to determine Ms. Qi's eligibility for the Ontario Trillium Benefit ("OTB"). No evidence was led or arguments made on this issue by either party. The Tax Court does not have jurisdiction on this matter pursuant to subsection 103.2 of the *Ontario Taxation Act, 2007*, S.O. 2007, c.11. Sched. A (the "OTA"). Therefore this component of the appeal will be denied without further mention.

II. FACTS

[5] Despite the reassessments being for the fairly large amounts described in the above paragraphs, 2467769 Ontario Inc., chose to proceed by way of the informal rules.

[6] Ms. Qi represented both herself and the corporation. While Ms. Qi made it clear in her testimony that she believed the various reassessments to be wrong, and stated that Osaka simply was not as successful as the Minister concluded, she failed to adduce any evidence concerning particular issues identified in the pleadings.

[7] Ms. Qi incorporated 2467769 Ontario Inc. on May 25, 2015. 247769 Ontario Inc. purchased Osaka, a Japanese restaurant located in North York, in the summer of 2015.

[8] Osaka was a full-service sushi restaurant and buffet serving alcoholic and non-alcoholic beverages, and offered take-out and delivery through third-party applications such as Uber Eats, Just Eats, and Skip the Dishes.

[9] During 2015, 2016, and 2017, Osaka underwent some changes under the direction of Ms. Qi, who was the new onsite manager. Ms. Qi had previously worked as a waitress and a kitchen helper in a restaurant and was familiar with how restaurants operate.

[10] In 2015, 2016, and 2017, Osaka ran numerous promotions to attract new customers, based on a discount in return for a cash payment.

[11] Ms. Qi's reported personal income for the 2015, 2016 and 2017 taxations years was as follows:

Taxation Year	2015	2016	2017
Ms. Qi Reported	\$10,630	\$9,333	\$29,900

[12] In 2015, 2016 and 2017, Ms. Qi paid for a mortgage, property taxes and various personal expenses.

[13] Three witness testified at trial. Ms Qi testified on behalf of herself and 2467769 Ontario Inc. Two employees from CRA also testified. They were Ms. Melissa Singh ("Ms. Singh"), an Income Tax auditor with CRA and Ms. Laura Craig ("Ms. Craig") a CRA Computer Audit Specialist, both of whom worked on the audit.

[14] Ms. Craig and Ms. Singh walked the Court through the various steps they took in the audit of Osaka and Ms. Qi, the information they obtained, and the conclusions they drew from this information. I found their testimony to be very thorough and informative. They also performed corroborating steps, such as a net worth of Ms. Qi, to support their conclusions.

(1) POS System

[15] Osaka recorded sales electronically using a point of sale system and software called QuickPos (“POS”). The POS tracks and records sales and other various data. The cash registers were closed at the end of each day and daily registry tapes were generated. POS tracked all sales entered in the system on a specific date by creating a unique transaction identification.

[16] There was very little evidence on this point, but it appeared that most staff members had access to the POS system and could operate the POS machines, enter orders, and print bills.

(2) The Audit Process Generally

[17] I can do no better job in describing the audit steps taken than reproducing the description provided in the Respondent’s written submission, which accurately reflected the mostly unchallenged evidence at trial. Many of these same facts are found in the assumption paragraphs in the Respondent’s reply. In my decision I have therefore reproduced much of the description of the audit and the conclusions drawn from the Respondent’s written submissions, as well as from the assumptions made by the Minister. I have made some additions specific to the evidence lead at trial.

[18] Ms. Singh and Ms. Craig (“the Auditors”), visited Osaka on a few occasions both separately and jointly, to obtain copies of the books and records of Osaka and to observe its daily operations.

[19] They received a copies of Osaka’s books and records and its Point of Sale (“POS”) data as presented by Ms. Qi.

[20] During the on-site observation days, the Auditors noted the number of employees who were present at the restaurant.

[21] They also recorded all the transactions made at the restaurant on those days. Ms. Singh calculated the percentage of Osaka’s cash sales during the observation days.

[22] They determined that Osaka’s books and records could not be relied upon to verify its reported income. This determination was reached on the following basis:

- a) The POS data obtained from Osaka had anomalies that suggested that they were using sales suppression software to delete a percentage of cash sales;

- b) The CRA could not reconcile the number of Osaka's employees present at the restaurant with the wages and salaries reported by the restaurant; and
- c) Osaka's accountant did not have access to the source documents. The Appellants created an excel spreadsheet that they shared with their accountant to file their taxes.

[23] As a result, the CRA resorted to the cash tender analysis to determine Osaka's income for each of the years at issue.

[24] A cash tender analysis is an indirect verification method that assumes that the ratio of cash to non-cash sales of a business is constant. As such, if one can determine this ratio and the true amount of non-cash sales, then one can calculate the true amount of cash sales.

[25] After conducting a cash tender analysis on Osaka's revenue, the CRA determined that it had failed to report all of its income in the taxation years at issue. The CRA also concluded that Osaka had conferred this unreported income to its sole shareholder, Ms. Qi.

[26] Put in simplest terms, in their filings with the Minister for April 30, 2016, 2017 and 2018, Osaka recorded 6% of all sales as being cash sales. The Minister determined that the correct figure was 24% of all sales in this time period as being in cash.

(3) Osaka Sushi's Unreliable Books and Records

[27] As previously stated, Osaka recorded its sales electronically using a POS system called QuickPOS. The POS tracked all sales entered in the system on a specific date by creating a unique transaction identification.

[28] The Auditors conducted an unannounced site visit to the restaurant on May 10, 2018.

[29] They chose May 10 as Osaka's taxation year and its GST/HST yearly reporting period ended on April 30. The Auditors wanted to start the audit on a date close in time to 2467769 Ontario Inc.'s corporate year end and the end of its GST/HST reporting period to preserve the POS data from potential manipulation.

[30] During the initial visit, Ms. Craig copied the restaurant's POS system data for transactions from July 1, 2015 to May 9, 2018 from Osaka's server to its computer desktop, and then copied the original POS system data from the restaurant desktop. This is called the "Original POS system data".

[31] On May 17, 2018, Ms. Craig copied the closing reports from POS data to its desktop and then copied the data onto her USB. The closing reports were only available from February 1, 2016 going forward.

[32] On September 7, 2018, Ms. Craig collected Osaka's POS system data for transactions from July 1, 2015 to September 6, 2018. This is called the "Refresh POS system data."

[33] Ms. Craig analyzed the point of sale databases and determined whether the data could be relied upon to determine Osaka's true income.

(4) TXNIDs

[34] The POS typically consists of a number of relationship databases or files that record information relevant to a restaurant's sales. This information can include: 1) the price of a transaction; 2) the payment method; 3) a customer profile; 4) any special orders (such as "no added salt"); 5) any voided transactions; 6) any transactions where a bill is being split; 7) orders that are being combined; and 8) any transactions where the table at which the clients are sitting is changing.

[35] The POS system assigns a unique transaction ID ("TXNID") for each transaction (including open, closed, voided and no sale transactions) in a sequential +1 algorithm (e.g. 1, 2, 3...). Each TXNID is unique and cannot be duplicated.

[36] Ms. Craig analysed the POS System Data obtained from Osaka and determined that 1) Osaka used this data to prepare its returns of income 2) the data could not be relied upon.

[37] Ms. Craig found significant anomalies in the POS sales data and concluded it was likely to have been manipulated. Depending on the type of analysis, an anomaly can be:

- a) A gap in the TXNIDs;
- b) A transaction with a TXNID that is improperly assigned;

- c) Discrepancies between the closing reports and POS data;
- d) A significant increase in cash sales after the audit started while no significant increase was identified in other sales trends; and,
- e) Printing the audit reports in large batches prior to the audit.

(5) Gaps And Misassigned TXNIDs

[38] When the TXNIDs were sorted by date, the TXNIDs in the POS system data were not sequential. For example:

- I. The TXNID “10109” was assigned to November 29, 2015;
- II. The TXNID “10110” was assigned to January 30, 2016;
- III. The TXNID “10814” was assigned to February 11, 2016; and
- IV. The TXNID “101815” was assigned to December 13, 2015.

[39] There were no TXNIDs for the dates from November 30, 2015 to December 12, 2015. Ms. Qi testified that this occurred because her internet was down for this period. Ms. Craig testified that the system does not run on the internet, so Ms. Qi’s internet being down would not have caused this anomaly.

(6) Discrepancies Between the Closing Reports and POS Data

[40] At times in the Original POS system data, the data in the closing report for a particular date did not reconcile with the POS sales data for the same date – specifically, there were more sales on the closing reports than in the POS sales data.

[41] Osaka periodically printed closing reports in batches.

(7) Improper Records of Bank Deposits Were Maintained

[42] Osaka did not maintain proper records of the disposition of the proceeds from its sales.

[43] Osaka's sales were paid by either cash, debit card, or credit card (the debit card and credit card sales are hereinafter collectively referred to as "non-cash sales").

[44] All non-cash sales, as recorded on the POS system, were directly deposited into the Osaka's business bank account.

[45] Cash generated from sales was deposited in their respective tills. At the end of each day, Ms. Qi or one of her employees closed the cash register by counting the amount of cash and putting cash sales in a box located at the restaurant.

[46] Then Ms. Qi counted the amount of cash sales and used the cash to pay daily tips and remuneration to her employees and/or to pay for Osaka's supplies. No records of the cash tips deposited into the box were maintained.

[47] Next the remaining cash and the purchase invoices for expenses paid in cash were deposited in a safe located at the restaurant. On a rare occurrence the amount of cash in the box could exceed \$20,000 or \$30,000 and at such time Ms. Qi would deposit some cash in the bank since she did not feel safe keeping such high amounts of cash at the restaurant.

[48] However, when asked during cross-examination to identify any instances of cash deposits in the bank records of 2467769 Ontario Inc., Ms. Qi was only able to point out one cash deposit made during the years before the court.

[49] As an onsite manager, Ms. Qi had unlimited access to the cash box. The CRA determined that she used that money to pay for her personal expenses.

[50] For the purpose of reporting Osaka's income and her personal income, Ms. Qi provided a manipulated version of Osaka's books and records to Turner Moore LLP, chartered accountants.

[51] As such, the CRA concluded that it was not possible to audit the accuracy of any reported sales using Osaka's books and records.

[52] Based on the observation days and during the observation months, Ms. Craig determined what percentage of sales were cash sales (the "Cash Percentage") for Osaka.

[53] Ms. Craig's calculation of the Cash Percentage was significantly greater than the average derived from Osaka's books and records during the audit period.

[54] Ms. Craig determined that there was a significant increase in cash sales from June 1, 2017 to September 6, 2018 in the POS system data, while there was no significant increase in sales from other means of payment, such as debit or credit.

[55] It is the Minister's theory that the cash sales increased in this period because 2467769 Ontario Inc. did not yet have an opportunity to apply the suppression software to reduce the sales amounts in the books and records.

[56] The auditors observed that before June 1, 2017, the average monthly cash sales were 6% based on the POS system data, while between June 1, 2017 and September 6, 2018, the average monthly cash sales was between 24% to 26% based on the POS system data.

[57] Based upon their analysis of the other sales, and making the assumption that cash sales will remain a consistent percentage of the other sales, the Minister determined that Osaka had cash sales of 24% of overall sales for each of the years in question.

[58] In order to determine the amount of HST/GST that Osaka had failed to report, the amount of unreported income was added to Osaka's sales, as filed on its GST/HST returns as income, in proportion to the percentage of sales in that reporting period.

[59] This was in line with the percentage of cash sales calculated by Ms. Singh during the observation days and her review of tape collections.

[60] Evidence was lead by the CRA to corroborate their findings. These were additional audit steps that did not form part of the reassessment, but instead were done in order to provide some peace of mind that the cash tender analyses reached a reasonable conclusion.

[61] This was mainly by way of a net worth concerning Ms. Qi, which in broad terms, supported the assessment.

III. POSITION OF THE PARTIES

(i) The Appellants

[62] Ms. Qi's evidence was very limited. While she did testify, the focus of her testimony was that the POS was accurate, and to her knowledge, never altered.

Furthermore, when questioned as to whether cash sales were under reported, she testified that this was not the case.

[63] Ms. Qi also provided some testimony that she received loans from her family. She used these funds to pay for her lifestyle despite her lack of income. No particulars or details were provided as to who provided the funds, when they were provided, or in what amounts.

[64] Concerning the missing sales transactions in the November 30 to December 12, 2015 time period, Ms. Qi testified that this occurred because her internet was not working. She provided no corroboration for this.

(ii) Respondent's position on various issues

(a) Unreported Sales

[65] The Respondent's position is that the POS records for Osaka were manipulated to delete cash sales in the years before the court.

[66] The Respondent submits that where the facts suggest a manipulation in POS data, the Minister is entitled to reassess the taxpayer using an arbitrary method under subsection 152(7).

[67] The Respondent submits that reassessing 2467769 Ontario Inc. based on cash tender analysis is the appropriate methodology. The CRA also conducted separate analyses to provide verification that their audit methodology reached a reasonable sales figure.

[68] A byproduct of this underreporting of income is that GST/HST was under remitted in the amounts of \$28,853.94, \$35,476.11 and \$2,949.69 for the reporting periods ending April 30, 2016, April 30, 2017 and April 30, 2018, respectively.

(b) Shareholder Benefits

[69] Ms. Qi was reassessed shareholder benefits on the basis of the 2467769 Ontario Inc. reassessment. The Respondent's position is that, based on the unreported income of Osaka, the lack of cash deposits into the corporate bank by the restaurant, the lack of any explanation as to where these funds went, and the net worth performed on Ms. Qi, it is appropriate to infer that Ms. Qi appropriated the funds from the cash sales.

(c) *Penalties*

[70] The Respondent submits that the manipulation of the POS data was done at the direction of Ms. Qi to delete cash sales. As such, 2467769 Ontario Inc.'s income tax returns filed for 2016, 2017 and 2018 contained false statements under reporting sales. Furthermore, Ms. Qi knowingly underreported her income in her filings for the 2015, 2016 and 2017 taxation years. Penalties pursuant to both the ITA and the ETA for Ms. Qi, and 2467769 Ontario Inc. were therefore correctly assessed.

[71] Furthermore, the Respondent submits that sufficient evidence exists to support the conclusion that electronic sales suppression software was used to delete cash sales from Osaka's records. Therefore additional penalties were properly assessed in this regard.

IV. ANALYSIS

A. Unreported income of 2467769 Ontario Inc. and unremitted GST/HST

[72] Under subsection 152(7) of the ITA, the Minister is not bound by a return or information supplied by a taxpayer and may assess the taxpayer using any method that is appropriate in the circumstances. Subsection 152(8) of the ITA sets out that these assessments are deemed to be valid. The onus is therefore upon the taxpayer to disprove the assumptions of the Minister by making out a *prima facie* case. Once the Minister's assumptions have been "demolished", the onus shifts to the Minister to rebut the *prima facie* case made out by the taxpayer and to prove the assumptions.¹

[73] As was stated by Justice Boccock² of this Court, no better a statement on the issue of burden and onus concerning arbitrary assessments has been made since President Thorson of the Exchequer Court in the case of *Dezura v. Minister of National Revenue* (1947), [1948] Ex. C.R. 10 (Can. Ex. Ct.) stated:

The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. [...] Ordinarily, the taxpayer knows better than anyone else the amount of his taxable income and should be able to

¹ *Guibord v. R.*, 2011 FCA 344.

² *Lin v. The Queen*, 2020 TCC 26 at para 109.

prove it to the satisfaction of the Court. [...] If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands.

[74] In *Bousfield v. The King*,³ the Tax Court of Canada explained in detail how a taxpayer can rebut the Minister's assumption in a case such as this:

“When the Minister determines a taxpayer's income or revenue using an alternative assessment technique, the taxpayer can win:

- a) by showing that the taxpayer's income or revenue can be more accurately calculated using the taxpayer's own books and records;
- b) by accepting that the alternative assessment technique used by the Minister is appropriate by attacking components of the calculation in an effort to reduce the income or revenue;
- c) if the year in question is statute-barred, by showing that the alternative assessment technique used by the Minister is fundamentally flawed;
- d) by presenting a different alternative assessment technique that more accurately calculates the taxpayer's income or revenue; or
- e) by accepting that the alternative assessment technique used by the Minister was appropriate but showing that the income or revenue calculated by the technique was from a non-taxable source.”

[75] As such, Ms. Qi would have been able to undermine the Minister's reassessment by employing any of the options above. While she did provide some financial records she prepared herself, these records had no corroboration. I do not accept them to be an accurate reflection of Osaka's business.

[76] As noted above, the Minister did not simply rely upon the assumptions made. They called two CRA employees with knowledge of the audit and the conclusions made to explain: (i) why Osaka was audited; (ii) the various audit steps, and (iii) the conclusions reached. Based on this uncontradicted evidence, I accept that 2467760 Ontario Inc. used software to suppress cash sales (the reasons for my conclusion regarding the use of suppression software is expanded upon further in the decision) and under report overall income in their corporate tax filings. Cash sales were 24% of all of Osaka's sales, not the 6% reported in tax filings.

³ *Bousfield v. The King*, 2022 TCC 169 at para 21.

[77] I therefore conclude that the ITA assessment concerning 2467769 Ontario Inc. is correct. The assumptions as made stand. I accept that 2467769 Ontario Inc. failed to report income arising from its operation of Osaka in the amounts of \$221,953.40, \$262,200.83, and \$22,689.91 for the taxation years ending April 30, 2016, April 30, 2017 and April 30, 2018, respectively.

[78] Given that I have found that the above income tax reassessments to be correct concerning 2467769 Ontario Inc., I also find that 2467769 Ontario Inc. failed to collect and remit Goods and Services Tax and Harmonized Sales Tax due to unreported sales in the amounts of \$28,853.94, \$35,476.11 and \$2,949.69 for the reporting periods ending April 30, 2016, April 30, 2017 and April 30, 2018. The reporting period covered by the GST/HST audit does match the reporting period covered by ITA audit. All adjustments to the GST/HST filing were consequential to the adjustments on the ITA audit.

B. Statue barred 2015 year for Ms. Qi

[79] Concerning the 2015 taxation year, the year was statue barred at the time of Ms. Qi's reassessment. Ms. Qi was reassessed for receiving shareholder benefits of \$167,204.90 in 2015.

[80] In this instance the Respondent has the burden of proving that Ms. Qi had unreported income or revenue. In doing so, the Minister must establish Ms. Qi made misrepresentations in her filings attributable to neglect, carelessness, or wilful default, justifying reassessments made after the normal reassessment period as set out at s. 152(4)(a)(i) of ITA.

[81] In this particular circumstance, if I were to find that the alternative assessment technique used by the Minister was fundamentally flawed in 2015, then the Respondent would not meet their burden. I have not made such a finding.

[82] In the 2015 taxation year, Ms. Qi reported personal income of \$10,620. She did not present evidence as to how she lived on such minimal income while she paid her mortgage, property tax, and numerous other life expenses. During the course of trial, Ms. Qi did testify that, in 2015, 2016 and 2017 she received loans from family and friends. However, this evidence was vague and totally lacking in detail. This evidence only confirmed for me that Ms. Qi had unreported income in 2015 and did not provide a credible explanation as to its source.

[83] Furthermore the Minister has presented reliable evidence to show that 2467769 Ontario Inc. under reported its income in 2015.

[84] Ms. Qi is the sole shareholder of 2467769 Ontario Inc. The evidence indicated that she provided what I accept was altered sales information to 2467769 Ontario Inc.'s accountant for tax filing purposes in all the years before the Court and that she used the under reported cash sales for her own benefit. She knew in 2015 that she was under reporting her income in her tax filings. I therefore accept that, in filing her 2015 taxation return, Ms. Qi wilfully made misrepresentations in understating her income. I find that the Minister has satisfied his onus in order to reopen the 2015 taxation year to reassess Ms. Qi.⁴

C. Ms. Qi appropriated the Company's unreported revenue and unreported income

[85] The Minister's assumptions include the following:

- (i) The Company conferred benefits on the Appellant in her capacity as a shareholder of the Company in the aggregate amount of no less than the appropriated unreported income and unreported GST/HST collected of the company;
- (ii) The Appellant received benefits of not less than the appropriated unreported income and unreported GST/HST collected of the Company; and
- (iii) The Appellant failed to include the Shareholder Benefits conferred in computing her income for the relevant years.

[86] As noted the Minister also performed a net worth on the Appellant, not as part of a conclusion for the reassessment, but instead as a form of corroboration for the above assumptions.

[87] The overall results of the net worth was consistent with the reassessment. In response, as already referenced, Ms. Qi provided oral evidence that she received money from family and friends in the years under audit. No further details or evidence was provided.

⁴ See *Lacroix v. R*, 2008 FCA 241 at para 30 for similar facts.

[88] The unreported income not finding its way to 2467769 Ontario Inc. implies strongly that the controlling party of 2467769 Ontario Inc., namely Ms. Qi, received it.

[89] The Minister's assumptions were not challenged by Ms. Qi. The Appellants offered no evidence (other than as described in paragraph 75 of this decision) that the assessed unreported income was incorrect or that the cash sales income in issue was not received by her. As such, the Court has no factual basis before it to conclude the Minister's assumptions are incorrect. The shareholder benefits assessment must stand.

[90] Furthermore, even without referring to the assumptions, the Respondent lead compelling evidence for each of the 2015, 2016, and 2017 taxation years that Ms. Qi had unreported income in the amounts assessed. This evidence includes the net worth as well as the evidence that substantial cash sales were unreported, and the cash was never deposited into the corporate bank account. In these circumstances, without any contradictory evidence from M. Qi, it is a reasonable conclusion that she appropriated the cash sales for her own benefit. I therefore must deny Ms. Qi's appeal concerning unreported income for the 2015, 2016 and 2017 taxation years.

D. Penalties

[91] A taxpayer is liable for a penalty under subsection 163(2) of the ITA where the taxpayer has knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to, or acquiesced in, the making of a false statement or omission in an income tax return (the same test applies under 285 of the ETA). The Respondent bears the onus of establishing that the conditions under subsection 163(2) of the ITA and 285 of the ETA are met.

[92] The Respondent relies upon the FCA decision of *Lacroix*⁵, wherein the court sets out the process of considering gross negligence penalties when it comes to alternative assessment techniques:

29. "...In the case at bar, the Minister found undeclared income and asked the taxpayer to justify it. The taxpayer provided an explanation that neither the Minister nor the Tax Court of Canada found to be credible. Accordingly, there is no viable and reasonable hypothesis that could lead the decision-maker to give the taxpayer the benefit of the doubt. The only hypothesis offered was deemed not to be credible.

⁵ *Lacroix v. R.*, 2009 FCA 241 at para 29 and 30.

30. The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanations he gave were found not to be credible. In my view, given such circumstances, one must come to the inevitable conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence. This justifies not only a penalty, but also a reassessment beyond the statutory period."

[93] While this analysis is helpful and applicable, in relying upon *Lacroix* I must also consider the more recent FCA decision in *Deyab*⁶ in which Justice Webb stated at paragraph 65:

65. Simply finding that an unreported amount is taxable does not inevitably lead to a conclusion that a gross negligence penalty is justified. The Tax Court Judge effectively equated the test for determining whether a gross negligence penalty should be assessed with the test for determining whether the amounts were taxable.

...

66. The right to reassess a statute-barred year and the right to assess a gross negligence penalty are both premised on a taxpayer having unreported income for a particular taxation year. Once it has been established that a taxpayer had unreported income, the circumstances related to the failure to report the income must be examined to determine if such failure was attributable to neglect, carelessness, wilful default or fraud (to reassess a statute-barred year) or gross negligence (to justify the assessment of the gross negligence penalty).

...

74. In *Lacroix*, at paragraph 28, this Court quoted the following passage from the decision of Justice Bowman in *Farm Business Consultants Inc. v. R.*, [1994] 2 C.T.C. 2450, 95 D.T.C. 200 (T.C.C.) :

27 A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged.... Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted...

⁶ *Deyab v. Canada* 2020 CarswellNat 5519.

[94] With these cases in mind, as well as the analysis provided in *Wood v. the Queen* (2020) CCI 87, I do find that the gross negligence penalties were properly assessed.

[95] The factors I have considered in upholding the penalty assessments are that Ms. Qi played an active role in understating Osaka's sales. This includes providing 2467769 Ontario Inc.'s accountant with incorrect sales information. I also have concluded that she appropriated the understated cash sales from Osaka, for her own benefit, yet never declared these amounts in her Income Tax filings. On this basis, I find the 163(2) penalty assessment against Ms. Qi is correctly assessed.

[96] I also rely upon the fact that there is evidence of data manipulation, which suppressed the cash sales of Osaka. Ms. Qi, who had full control of the POS system and is certainly the person responsible for this manipulation, did this in her capacity as sole shareholder of 2467769 Ontario Inc. This led to the suppression of income and the filing of understated T2 returns and improper GST/HST remittances by 2467769 Ontario Inc. On this basis I uphold the ss. 163(2) (of the ITA) and s. 285 (of the ETA) penalties assessed to 2467769 Ontario Inc.

E. Zapper penalties

[97] 2467769 Ontario Inc. has been assessed penalties under section 163.2(2) of the ITA and s. 285.01 of the ETA, for the use of electronic suppression of sales device. By assessing penalties under both the ITA and the ETA, this in effect doubles the penalty from \$5000 to \$10,000. Both the ITA and the ETA rely upon basically the same wording:

163.2 Penalty — use

(2) Every person that uses, or that knowingly, or under circumstances attributable to neglect, carelessness or wilful default, participates in, assents to or acquiesces in the use of, an electronic suppression of sales device or a similar device or software in relation to records that are required to be kept by any person under section 230 is liable to a penalty of

(a) unless paragraph (b) applies, \$5,000; or

(b) \$50,000 if the action of the person occurs after the Minister has assessed a penalty payable by the person under this section or section 285.01 of the Excise Tax Act.

[98] The onus is on the Respondent to support this penalty. Once again, a civil standard of proof, the balance of probabilities, applies. Additionally, the due diligence defence is not available to a taxpayer subject to those penalties, as per 285.01(6) of the ETA and 163.3(7) of the ITA.

[99] There is no legal precedent on point.⁷

[100] When asked how they intended to prove that a suppression of sales device was used, the following exchange occurred with the Respondent:

JUSTICE: You did. I'm -- I'm just wondering, does this phantom software or these other methodologies to manipulate data, do they leave a fingerprint of some sort where you can tell it's happened?

A I would say that the anomalies found in this transaction ID analysis are exactly that fingerprint.⁸

[101] The anomalies in the system, for which much evidence was called by the Respondent, were as follows:

- a) Gaps in the TXNIDs; and,
- b) A transaction with a TXNID that is improperly assigned; and,
- c) Discrepancies between the closing reports and POS data; and,
- d) A significant increase in cash sales after the audit started while no significant increase was identified in other sales trends; and,
- e) Printing the audit reports in large batches prior to the audit; and,
- f) No transactions between November 30th and December 12th, 2015.

[102] For me, the most pertinent of these examples are the TXNID being out of sequence, and the missing sales data for transactions between November 30th and

⁷ 9134-2485 *Québec inc. v. R.*, does some helpful analysis

⁸ Transcripts, February 29, 2024 at pp 65-66

December 12th, 2015. The other examples provided by the Respondent also supported their case that suppression software was used.

[103] There was no response from the Appellant to either challenge or explain these anomalies.

[104] I do therefore find that the Respondent has shown, on the balance of probabilities that the corporate Appellant, 2467769 Ontario Inc. has knowingly, or under circumstances attributable to neglect, carelessness or wilful default, participates in, assents to or acquiesces in the use of, an electronic suppression of sales device.

V. CONCLUSION

[105] Based on all the foregoing:

A. 2467769 Ontario Inc.'s appeal of the reassessment that it failed to report income arising from its operation of Osaka in the amounts of \$221,953.40, \$262,200.83, and \$22,689.91 for the taxation years ending April 30, 2016, April 30, 2017 and April 30, 2018, is denied; and,

B. Ms. Qi's appeal of the assessment that she received unreported benefits from 2467769 Ontario Inc. in the amounts of \$167,204.90, \$283,387.08, and \$116,985.38 in her 2015, 2016 and 2017 taxation years, respectively and therefore was properly reassessed under ss.15(1) of the ITA is denied; and,

C. 2467769 Ontario Inc.'s appeal of the reassessment that it failed to collect and remit Goods and Services Tax and Harmonized Sales Tax due to unreported income in the amounts of \$28,853.94, \$35,476.11 and \$2,949.69 for the reporting periods ending April 30, 2016, April 30, 2017 and April 30, 2018, is denied; and,

D. The Minister was entitled to reassess Ms. Qi for the 2015 taxation year beyond the normal reassessment period; and,

E. Ms. Qi and 2467769 Ontario Inc. are liable for gross negligence penalties under subsection 163(2) of the ITA and section 285 (only for 2467769 Ontario Inc.) of the ETA; and,

F. 2467769 Ontario Inc. is liable for electronic sales suppression penalties for the reporting period ending April 30, 2018 under subsection 163.3(2) of the ITA and subsection 285.01 (2) of the ETA; and,

G. Ms. Qi's appeal that she is entitled to GST/HST credits for the periods at issue, pursuant to Part IX of the ETA is denied; and,

H. This Court does not have the jurisdiction to determine Ms. Qi's eligibility for the Ontario Trillium Benefit ("OTB") pursuant to subsection 103.2 of the *Ontario Taxation Act, 2007*, S.O. 2007, c.11. Sched. A (the "OTA"); and,

I. One set of costs is rewarded to the Respondent in respect of the trial and the various disbursements incurred. The parties shall have thirty days to agree upon costs. If such an agreement can not be reached, the Respondent shall have until July 30, 2024 to make submissions on costs. The Appellant may make responding submissions on or before August 30, 2024.

Signed at Ottawa, Canada, this 12th day of June 2024.

"R. MacPhee"

MacPhee J.

CITATION: 2024 TCC 86

COURT FILE NO.: 2020-1117(IT)I, 2020-1119(IT)G, 2020-384(IT)I, 2020-385(GST)I

STYLE OF CAUSE: COCO QI AND HIS MAJESTY THE KING; COCO QI AND HIS MAJESTY THE KING; 2467769 ONTARIO INC. AND HIS MAJESTY THE KING; 2467769 ONTARIO INC. AND HIS MAJESTY THE KING

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 28 and 29, 2024 and March 28, 2024

REASONS FOR JUDGMENT BY: The Honourable Justice Ronald MacPhee

DATE OF JUDGMENT: June 12, 2024

APPEARANCES:

For the Appellant: The Appellant Herself

Counsel for the Respondent: Niloofar Sharif
Leonard Elias

COUNSEL OF RECORD:

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Name:

Firm:

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