

Docket: 2011-1556(GST)G

BETWEEN:

CAITHKIN INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on November 12, 13, 14 and 15, 2013,  
at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant: Arnold Schwisberg  
Counsel for the Respondent: Marilyn Vardy

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**JUDGMENT**

The Appeal from the reassessments is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

- (a) the Appellant's net tax for its reporting period from April 1 to June 30, 2004 be reduced by \$25,563.40; and
- (b) the Appellant be allowed input tax credits of \$77,496.73 in its reporting periods from July 1, 2004 to December 31, 2004 and April 1, 2005 to March 31, 2009.

Costs are awarded to the Respondent.

Signed at Victoria, British Columbia, this 24<sup>th</sup> day of March 2014.

“David E. Graham”

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Graham J.

Citation: 2014 TCC 80  
Date: 20140324  
Docket: 2011-1556(GST)G

BETWEEN:

CAITHKIN INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Graham J.

[1] Caithkin Inc. is involved in the provision of foster care to children in Ontario. It is registered for GST. From April 1, 2004 to December 31, 2004 and April 1, 2005 to March 31, 2009, Caithkin made supplies of various services to various Children's Aid Societies in Ontario. Caithkin did not collect or remit GST on those supplies. Caithkin took the position that the supplies were exempt supplies under Schedule V, Part IV, section 2 of the *Excise Tax Act* (the "Act"). Despite believing that the supplies were exempt supplies, Caithkin nonetheless claimed input tax credits in respect of those supplies.

[2] The Minister of National Revenue (the "Minister") reassessed Caithkin for its reporting periods from April 1, 2004 to December 31, 2004 and April 1, 2005 to March 31, 2009 on the basis that Caithkin's supplies to the Children's Aid Societies were not exempt supplies. Despite believing that the supplies were taxable supplies, the Minister nonetheless denied the input tax credits claimed by Caithkin.

### **CONCESSIONS**

[3] The Respondent concedes that Caithkin's reporting period from April 1 to June 30, 2004 is statute barred and consents to Caithkin's appeal in respect of that period. This concession means that the reporting periods remaining in issue are

July 1, 2004 to December 31, 2004 and April 1, 2005 to March 31, 2009 (the “Reporting Periods”) and that Caithkin’s net tax for its reporting period from April 1 to June 30, 2004 will be reduced by \$25,563.40.

[4] The Respondent also concedes that if the supplies that Caithkin made to the Children’s Aid Societies are taxable, then Caithkin is entitled to an additional \$77,496.73 in input tax credits in respect of the Reporting Periods. Correspondingly, Caithkin concedes that if the supplies are exempt, then Caithkin is not entitled to any input tax credits in respect of the Reporting Periods.

### **WITNESSES**

[5] The Respondent did not call any witnesses. Caithkin called 11 witnesses: the 2 owners of Caithkin; a representative from the Ontario Residential Care Association (an industry organization representing companies like Caithkin); a representative from a Children’s Aid Society; a representative from the Ontario Association of Residences Treating Youth; a representative from the Ontario Ministry of Children and Youth Services; 4 foster parents who work with Caithkin; and a Canada Revenue Agency official.

[6] I found all of the witnesses to be credible. That said, the 2 owners of Caithkin and the 4 foster parents all tended to describe what appear to be rare or infrequent events as if they were the norm. While I accept that the events in question did occur, I am not prepared to accept the implication that they were common. I am also not, in all cases, prepared to accept that they actually took place in the Reporting Periods as cross-examination revealed that not to have been the case. While I have given less weight to this type of evidence from these witnesses, the fact that I have done so has not affected my overall decision on this matter.

### **THE FOSTER CARE SYSTEM IN ONTARIO**

[7] There are 4 key players involved in the foster care system in Ontario: the Ontario Ministry of Children and Youth Services, Children’s Aid Societies, Outside Payment Resources and foster parents.

- (a) Ontario Ministry of Children and Youth Services: The Ministry of Children and Youth Services<sup>1</sup> (the “Provincial Ministry”) is in charge of the foster care system and provides funding to each Children’s Aid Society. The Provincial Ministry also licences Outside Payment Resources.
- (b) Children’s Aid Societies: There are approximately 54 different Children’s Aid Societies in Ontario. The Children’s Aid Societies (the “Societies”) in essence administer the foster care system for the Provincial Ministry. The Societies are the legal guardians of the foster children in their care. Some Societies also act as Outside Payment Resources.
- (c) Outside Payment Resources<sup>2</sup>: Outside Payment Resources are intermediaries who sit between the Societies and the foster parents. Caithkin is an Outside Payment Resource. In very simple terms, Outside Payment Resources find qualified foster parents, train those foster parents, place the foster children that are assigned to the Outside Payment Resource by a Society with those foster parents and supervise those foster parents on an ongoing basis. A given Outside Payment Resource may provide an array of other important services. I will discuss the specific services provided by Caithkin in more detail below. There are approximately 167 Outside Payment Resources in Ontario. Outside Payment Resources are required to be licensed by the Provincial Ministry. In some areas of Ontario there are no Outside

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<sup>1</sup> The Provincial Ministry appears to have changed its name fairly frequently over the years. Various witnesses referred to it by different names. I have taken this name from one of the licences issued to Caithkin during the Reporting Periods.

<sup>2</sup> I have taken the term “Outside Payment Resource” from the evidence of Len Goddard. Mr. Goddard is the executive director of a company that provides the same type of services as Caithkin does. He is also the president of an industry association called the Ontario Residential Care Association, which advocates on behalf of companies such as Caithkin. Mr. Goddard referred to organizations such as his company and Caithkin as “Outside Payment Resources”. The vast majority of the contracts filed in evidence between the Societies and Caithkin refer to Caithkin as the “Resource”. This lends further support to Mr. Goddard’s choice of terms. At trial, Caithkin described itself and other companies that provide similar services as “foster care service providers”. In my view, that term presupposes that Caithkin is providing foster care services (one of the very issues in dispute). Given that the term “Outside Payment Resources” is a neutral term and that it appears to be a term widely accepted in the industry, I have adopted that term for the purposes of my judgment.

Payment Resources. In those cases, the Societies themselves fulfill the role of Outside Payment Resources in which case they are required to have the same license from the Provincial Ministry.

- (d) Foster Parents: The foster parents are the individuals who take foster children into their homes. They are not employees of the Outside Payment Resources. The testimony and legislation regarding whether foster parents require licenses were, at best, confusing and, at worst, conflicting. It is clear that a foster parent does not require a licence to foster fewer than 3 unrelated children. As there is no evidence that any of Caithkin's foster parents exceeded this limit<sup>3</sup>, I will accept for the purposes of the appeal that during the Reporting Periods Caithkin's foster parents did not require licenses.

[8] The Provincial Ministry funds the Societies based on the number of children that a given Society has in its care. Outside Payment Resources negotiate with the Provincial Ministry to determine a per diem amount that they will receive for each foster child staying with the Outside Payment Resources' foster parents. The Outside Payment Resources, in turn, pay a smaller per diem amount to foster parents for each child in the foster parents' care. In determining the per diem amount to pay to the Outside Payment Resources, the Provincial Ministry takes into account the per diem amounts that the Outside Payment Resources will have to pay to the foster parents. The payments giving rise to this appeal are the per diem amounts paid by the Societies to Caithkin.

## **CAITHKIN'S OPERATIONS**

[9] Caithkin is owned and operated by Leslie Listro and Ainslie Tomlinson. Caithkin's staff consists of Ms. Listro, Ms. Tomlinson, a number of resource workers, some office staff and a number of volunteer drivers. Resource workers are employees of Caithkin who are assigned responsibility for a given set of foster homes. Caithkin also retains the services of a number of independent contractors who Caithkin calls "one-to-one workers".

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<sup>3</sup> There is evidence that some of the foster parents had more than 2 children in their care at a given time but no evidence whether those children were related.

[10] Throughout the Reporting Periods, Caithkin had a license from the Provincial Ministry that allowed it to be the Outside Payment Resource for up to 30 foster care homes. Caithkin was required to renew its license annually.

[11] The easiest way to understand what Caithkin does is to look at its interactions with others.

### Provincial Ministry

- (a) The Provincial Ministry issues a licence to Caithkin each year. The licence is subject to various detailed terms and conditions attached thereto. Those terms and conditions include the following:
- requirements that Caithkin have various written policies and procedures regarding such things as access to natural parents, the provision of health care, the foster child's privacy, money earned by the foster child inside or outside of the foster home, acceptable disciplinary actions, acceptance or rejection of potential foster parents, the criteria used for placing foster children with foster parents, emergency relief for foster parents, development of foster parents, closing foster homes and serious occurrences (e.g. serious injury of a foster child);
  - reporting requirements to both the Societies and the Provincial Ministry;
  - record keeping requirements;
  - health and safety requirements for foster homes;
  - the requirement to ensure that foster children have a supply of suitable clothing and that food suitable to their dietary needs is provided;
  - policies regarding changes in placement of a foster child;
  - requirements for selecting foster parents;

- requirements that a formal complaint process be in place for foster parents to use; and
  - requirements to conduct an annual review of each foster parent.
- (b) These terms and conditions appear, in large part, to reflect the requirements set out for licensees in the *Child and Family Services Act Regulations*, R.R.O. 1990, Regulation 70. The requirements of licensees are also described in extensive detail in a manual produced by the Provincial Ministry called “Foster Care Licensing”.

### Societies

- (c) Caithkin signs an annual contract with each Society called a “Resource Service Agreement”<sup>4</sup>.
- (d) When a Society has a foster child that it needs to place, it contacts Caithkin to see if Caithkin is able to accept that child. Caithkin considers the needs of the child and the resources that Caithkin and its foster parents have available and decides whether to accept the child or not.
- (e) In accordance with Provincial Ministry requirements, within 7 days of placing a child with a foster parent, Caithkin meets with a representative of the Society, which has placed the child, and the foster parent to develop a treatment plan for the child. That plan is updated after 30 days of care and is reviewed on an ongoing basis. Caithkin is responsible for ensuring that that plan is implemented. The plan includes such items as schooling, access to the child’s natural parents or siblings, medical issues, psychological issues, access to the child’s friends, legal issues (e.g. probation conditions), family court issues and extra-curricular activities.

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<sup>4</sup> Various amended versions of these contracts were entered by Caithkin as exhibits. The amendments appeared to have been designed to paint the contractual relationship between Caithkin and the Societies in a more favourable light. The amendments were made sometime after the Minister began auditing Caithkin. I have given no weight to these self-serving documents.



- (f) Caithkin files regular reports with the Societies regarding the foster children that its foster parents are looking after.
- (g) Since the Societies are the legal guardians of the foster children, if the guardian's consent is needed for something in a given foster child's life (e.g. for medical care or a school trip), Caithkin looks after obtaining that consent from the Society.
- (h) Each month Caithkin invoices each Society for the foster children that that Society has assigned to Caithkin.

### Foster Parents

- (i) Caithkin finds and recruits suitable foster parents. Initial recruitment involves an information session that describes what will be required of the foster parents and the resources that will be provided by Caithkin. Caithkin then conducts an assessment process that includes a lengthy application, criminal record checks for anyone over 18 years of age living in the potential foster parent's house, medical clearance of all people in the house, personal and professional reference checks and one or more detailed interviews. The review process also includes an audit of the foster parent's house to ensure that it meets all of Caithkin's standards. These standards include items that one would expect from anyone who was providing accommodation such as fire safety, cleanliness and security standards. The standards also include items that most parents would normally attend to but that the Provincial Ministry requires Caithkin to ensure have been looked after such as the vaccination of pets. Finally, the standards include items that parents outside of the foster care system may not necessarily adhere to but which the Provincial Ministry requires of all foster homes such as requirements that all medicine in the house be stored in a locked cabinet.
- (j) If a foster parent is accepted by Caithkin, Caithkin then trains him or her to ensure both that he or she is fully aware of the requirements of the Provincial Ministry, the particular Society that Caithkin is working with and Caithkin itself and that he or she is able to carry out his or her responsibilities. Some training is also provided by the Societies. It was clear from the evidence that Caithkin takes great pride in the quality of

training that it provides to its foster parents and that the foster parents feel that they truly benefit from that training.

- (k) Caithkin has prepared an extremely detailed foster parent policy manual (over 250 pages long) which sets out all of its policies and procedures. For example, the manual sets out Caithkin's policies on disciplining foster children, reporting behavioural issues, dealing with criminal conduct and communicating with the foster child's natural parents. Caithkin ensures that all potential foster parents are completely familiar with its policy manual. The manual was created to meet the Provincial Ministry requirement that Caithkin establish certain policies and guidelines and communicate those policies and guidelines to its foster parents in writing. The manual conforms to the standards set by the Provincial Ministry.
- (l) When a Society approaches Caithkin about accepting a given foster child, Caithkin speaks to one or more of its foster parents to see if they would be prepared to foster that child. The decision of which foster parents to choose rests with Caithkin. The decision whether to accept the child rests with the foster parents.
- (m) If a given foster child has any particular religious, dietary, social, physical or mental needs, Caithkin will require any foster parent who wishes to foster that child to adjust their home and/or routine to accommodate those needs. For example, if a foster child has been sexually abused in his or her own home and the bedroom where the abuse occurred was painted beige, Caithkin may require the foster parents to paint the child's room a distinctly different colour in order to help the child feel safer.
- (n) Once a child is placed with a foster parent, Caithkin conducts annual audits of the foster parent's home to ensure that Caithkin's standards are being maintained. Caithkin prepares annual reports on each foster parent. The reports are shared with the foster parents. They note areas that require improvement and set goals for the coming year. If a foster parent is not meeting expectations and the problem cannot be reasonably addressed, Caithkin removes the foster child from the foster parent's home.

- (o) Caithkin continues to train the foster parents through mandatory group training sessions every second week throughout the year. Among other things, these training sessions help the foster parents to better understand challenges that some foster children may face such as autism or fetal alcohol syndrome. Towards the end of the Reporting Periods, Caithkin began accepting foster children with greater psychological or physical challenges. The training that Caithkin conducted was essential to enabling its foster parents to care for those children. Failure to attend training sessions can result in a foster parent receiving a lower per diem rate.
- (p) The foster parents regard Caithkin as an expert in all matters relating to foster care. They frequently seek Caithkin's input and guidance and defer to its expertise. Caithkin provides that input and guidance through its resource workers. The resource workers provide their assistance either at the foster home or over the phone depending on the circumstances. If issues develop with a foster child, the resource workers will provide support for the foster parents. That support can range from providing strategies to address the problem, to acting as an intermediary to help de-escalate the problem to the point where the foster parent can manage, to stepping in and taking care of the problem in place of the foster parents, to removing the foster child from the home for a few days. When difficult decisions have to be made in the foster home, the decision will often be presented to the foster child as coming from the resource worker. This allows any frustration that the child may have regarding the decision to be directed to the resource worker or Caithkin rather than to his or her foster parents and thus avoids unnecessarily straining the relationship between the child and the foster parents.
- (q) Caithkin's offices are open during regular business hours but it maintains a 24 hour on-call service to assist foster parents with any problems that may arise.
- (r) Caithkin recognizes that, like any parent, foster parents can benefit from a break from the children that they are looking after. Caithkin refers to this type of break as "respite". To facilitate respite, Caithkin arranges, when possible, for foster children from one of its foster parents to be placed with a different foster parent while the first foster parent takes a short break. It is understood that foster parents in the

Caithkin group will be expected to provide respite for each other when their homes are not otherwise full. New foster parents often provide respite services before they receive foster children of their own as a means of testing whether they are ready for the challenges of foster parenting.

- (s) Caithkin and each foster parent sign a contract each year called a Residential Treatment Foster Care Agreement. The contract is mandated by Regulation 120 of the *Child and Family Services Act Regulations*. Among other things, the contract sets out the per diem rate that Caithkin will pay the foster parent for each foster child, the per diem rate for any respite care and the support and training that will be provided by Caithkin.

### Foster Children

- (t) Caithkin's interaction with the foster children primarily occurs through its resource workers and one-to-one workers.
- (u) Resource workers attend medical specialist appointments, court appearances and therapist appointments with the foster child. In the event of a serious incident involving a foster child (e.g. serious injury or absence without leave), the foster parents inform the resource worker who then prepares a serious incident report to give to the Society and conducts any follow up with the child.
- (v) One-to-one workers are independent contractors who work directly with individual foster children. Caithkin had one one-to-one worker from 2004 to 2006, two one-to-one workers in 2007 and three one-to-one workers in 2008 and 2009. Each foster child is assigned a certain number of hours of contact with a one-to-one worker each week. The number of hours varies based on the individual needs of the child. Although some foster children receive as much as 40 hours per week of one-to-one support, the per diem rate that Caithkin charges to the Societies is based on each foster child receiving 17 hours of one-to-one support each month. The work that the one-to-one workers do varies with the needs of each child. With older children, the work is focused on developing the life skills that will be necessary to have when the child leaves the foster care system upon becoming an adult.

The following are examples of the types of work that one-to-one workers do with the foster children:

- take them to a movie;
  - play sports with them;
  - transport them to activities that the foster parents are unable to take them to;
  - help them with their homework;
  - help them to prepare a resume;
  - help them to prepare for a job interview;
  - teach them how to do laundry either in the foster parents' house or at a laundry mat;
  - teach them how to budget;
  - teach them how to shop for clothing and food;
  - teach them how to cook either in the foster parents' house or at the cooking facilities at Caithkin's offices.
- (w) Caithkin maintains a residence file for each foster child made up of his or her medical file, dental file, school file, assessments file (e.g. psychological assessments), correspondence file and serious occurrences file. The foster parents have access to only a portion of this residence file.

## **ISSUES**

[12] There are 3 primary issues on this appeal:

- (a) Was Caithkin carrying on a business during the Reporting Periods?<sup>5</sup>
- (b) If Caithkin was carrying on a business during the Reporting Periods, were the supplies that Caithkin made to the various Societies taxable supplies or exempt supplies under Schedule V, Part IV, section 2 of the *Act*?

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<sup>5</sup> This issue was raised for the first time by Caithkin during the trial. I allowed Caithkin to argue the issue despite the lack of notice to the Respondent because the Respondent was able to enter all the evidence that was necessary in respect of the issue.

- (c) If Caithkin was carrying on a business during the Reporting Periods and its supplies were taxable supplies, did Caithkin exercise due diligence such that a penalty under former paragraph 280(1)(a) of the *Act* should not be applied?

### **CARRYING ON BUSINESS**

[13] The first issue in this Appeal is whether Caithkin was carrying on business. In my view, there is no question that this was the case. Caithkin was clearly engaged in the undertaking of supplying Societies with foster care services. Although the presence of a reasonable expectation of profit is not a requirement under the *Act* for a corporation to be carrying on a business, I note that Caithkin had net income before tax from 2004 to 2008 and that its cumulative net income before tax from 2004 to 2009 exceeded \$225,000. While Caithkin may have reinvested those profits in its operations rather than paying them out to its shareholders as dividends, that does not change the fact that it earned profits. I accept that the work that Caithkin does is very important to society and has immeasurable benefits for the foster children in question, but this does not change the fact that it is carrying on a business.

### **TAXABLE OR EXEMPT SUPPLIES**

[14] Having concluded that Caithkin is carrying on a business, it therefore follows that Caithkin was carrying on a commercial activity and was thus required to charge GST on its supplies unless those supplies were exempt supplies. The second issue in this Appeal is therefore whether Caithkin's supplies to the Societies that it dealt with were exempt supplies.

[15] Schedule V, Part IV, section 2 ("section 2") of the *Act* makes the following supplies exempt:

A supply of a service of providing care, supervision and a place of residence to children, under-privileged individuals or individuals with a disability in an establishment operated by the supplier for the purpose of providing such service.

[16] Section 2 contains a number of components. For Caithkin's supplies to be exempt it has to meet the following 3 tests. First, Caithkin must be supplying a service of providing care, supervision and a place of residence. Second, the care,

supervision and a place of residence must be provided to children. Finally, the service must be being supplied in an establishment that Caithkin operates for the purpose of providing such a service.

[17] The Respondent submits that none of these components was met. Caithkin submits that all of them were.

### Supply of Care, Supervision and a Place of Residence

[18] In order to determine whether Caithkin meets this test, I must first determine what Caithkin is supplying. Both parties agree that Caithkin makes a single supply as opposed to multiple supplies and I agree with them. However, the parties each characterize that single supply differently.

[19] The Respondent takes the position that the foster parents are the ones who supply care, supervision and a place of residence. The Respondent is unable to specifically describe the service that Caithkin provides but she is certain that it is not care, supervision and a place of residence but rather something far more administrative in nature.

[20] Caithkin agrees that the foster parents supply care, supervision and a place of residence but takes the position that it made those supplies too through all of the things that it does above and beyond what the foster parents do and through managing the care, supervision and a place of residence supplied by the foster parents. Caithkin cites the work that the one-to-one workers and resource workers do as examples of the care and supervision that it personally provides. It is not entirely clear to me under this theory on what basis Caithkin believes it is directly supplying places of residence.

[21] In my view, neither parties' characterizations is correct. I conclude that Caithkin is making supplies of care, supervision and a place of residence but not for the reasons advanced by Caithkin. Foster care is the core service that Caithkin is supplying. It is just supplying it in a more organized and professional manner and on a larger scale than would be possible for individual foster parents.

[22] The Resource Service Agreements entered into between Caithkin and the Societies do not make it easy to interpret what services Caithkin is providing. Oddly, while the sample Resource Service Agreements entered into evidence cover such topics as medical care, clothing, court attendances and school, only one of them

actually says anything about who is responsible for feeding and housing the foster children. The remaining agreements speak about the foster children being “placed” but are silent as to whom they are being placed with. They set out that Caithkin will be paid a per diem rate for each day that a child is in “care” but do not specify who is providing the care.

[23] What I am left with is the following clear facts:

- The Societies need someone to provide care, supervision and a place of residence to their foster children.
- The foster parents are able to supply care, supervision and a place of residence but they do not have a contract with the Societies and are not paid by the Societies.
- Caithkin is not, by itself, able to supply care, supervision and a place of residence.
- Yet Caithkin does have a contract with the Societies and is paid by the Societies for each day of care that a foster child receives and that pay explicitly takes into account the per diem rate that will be paid to the foster parents.
- The foster parents do have a contract with Caithkin and are paid a per diem rate by Caithkin for each foster child in their care.
- Caithkin has no need to be supplied with the foster parents’ services unless its intention is to re-supply those services to the Societies.
- There is no evidence whatsoever that would indicate that Caithkin is in any way acting as an agent of the Societies by entering into contracts with the foster parents and paying them on the Societies’ behalf.

[24] Based on the foregoing, the only conclusion that I can reach is that, despite the omission of this term from all but one of the Resource Service Agreements, Caithkin has agreed to re-supply the Societies with the care, supervision and a place of residence services that it acquires from the foster parents. There is no other characterization that can explain why Caithkin has contracted with the foster parents, how the Societies acquire the services that they need and why the money flows from the Societies to Caithkin and then to the foster parents.

[25] The Respondent takes the position that the majority of the activities that Caithkin engages in do not involve the provision of care, supervision and a place of residence. I have already concluded that Caithkin is re-supplying the services of care,



supervision and a place of residence that it receives from the foster parents. However, it is still worthwhile to review the activities that Caithkin engages in above and beyond re-supplying those services.

Recruiting and Screening Foster Parents: Caithkin recruits and screens foster parents in order to ensure both that it has a pool of available foster parents and that those foster parents are suitable for the job. However, this recruitment and screening is not a supply that Caithkin makes to the Societies. It is an activity that Caithkin does itself in order to ensure that it has the resources available to fulfill its obligations to supply care, supervision and a place of residence to the Societies.

Training Foster Parents: Caithkin clearly spends time training its foster parents. However, this is not a supply that it is making to either the Societies or the foster parents. It is something that Caithkin is doing internally in order to ensure that its foster parents have the skills necessary to fulfill Caithkin's obligations to supply care, supervision and a place of residence to the Societies in accordance with the standards set by the Societies. Caithkin receives a higher per diem rate from the Societies because of this training but the higher per diem rate comes not because the Societies are paying Caithkin to train the foster parents but rather because, through the training, Caithkin is able to re-supply the Societies with the services of more qualified foster parents.

Inspecting Foster Care Homes; Caithkin inspects the foster parents' homes both before they are accepted as part of the Caithkin group and on an annual basis thereafter. However, these inspections are not a supply that Caithkin is making to the Societies. They are an activity that Caithkin does itself in order to ensure that the residences that it is supplying to the Societies meet the standards required by the Provincial Ministry for Caithkin to maintain its licence.

Establishing and Enforcing Guidelines: There is no doubt that Caithkin devotes a lot of time and resources to establishing and enforcing operational guidelines for its foster parents. However, the establishment and enforcement of these guidelines is not something that Caithkin is supplying to the Societies but rather something that Caithkin is doing to ensure that the care, supervision and a place of residence that it is supplying meet the standards required by the Societies and that Caithkin meets the standards set by the Provincial Ministry necessary to maintain its license. There is no doubt that the Societies benefit from Caithkin's enforcement of the standards, but the Societies have not

retained Caithkin to enforce standards on foster parents but rather to provide care, supervision and places of residence in accordance with the Provincial Ministry's standards.

Reporting and Attending Meetings: Caithkin provides detailed reports to the Societies about each foster child and about Caithkin's overall activities and attends numerous meetings with the Societies. However, the Societies have not contracted with Caithkin to supply them with reports or attend meetings. The reports and meetings are merely the means by which Caithkin communicates with the Societies its progress on its core supply of care, supervision and a place of residence.

Establishing Treatment Plans: While Caithkin is a key participant in establishing treatment plans, it is not supplying the Societies with the service of preparing those plans. Caithkin is simply sitting down with the foster parents and the Societies to agree on the means by which the supply of care, supervision and a place of residence is to be carried out in respect of a given child.

Providing One-To-One Workers: Caithkin has agreed that, as part of its supply of care, supervision and a place of residence to the Societies, it will make a one-to-one worker available for each child for a certain number of hours per week. These services are an extension of the care and supervision that Caithkin is already providing.

Resource Workers: Caithkin has agreed that, as part of its supply of care, supervision and a place of residence to the Societies, it will have a certain number of resource workers available. The resource workers work with the Societies, the foster children and the foster parents. The work with the Societies is largely related to the reporting and treatment plan functions described above. The work with the foster children relates directly to their care. The work with the foster parents involves supporting the foster parents to allow them to better provide the care and supervision that they are already providing. All of these activities are either part of or ancillary to Caithkin's supply of care and supervision.

Respite: Caithkin negotiates the terms of respite services with its foster parents. It is part of the supplies that the foster parents make to Caithkin. It is a necessary supply for Caithkin to receive in order for Caithkin to ensure that it

can supply care, supervision and a place of residence to the Societies on an ongoing basis.

Summer Camp: Caithkin sends the foster children in its care to summer camps for 2 weeks each year. This is a service that Caithkin is supplying to the Societies and for which it is compensated in its per diem rate. The summer camps supply the service of care, supervision and a place of residence at the summer camp to Caithkin who, in turn, re-supplies it to the Societies.

Social Activities: Caithkin offers a number of social activities for the foster parents, foster children and natural children that are part of the Caithkin group. This is not a supply that Caithkin is making to the Societies but rather something that it is doing internally in order to support and reward the foster parents and promote a sense of unity within the Caithkin group.

[26] Based on all of the above, I am satisfied that the supply that Caithkin is making to the Societies is the service of providing care, supervision and a place of residence.

### To Children

[27] The second test that must be met for section 2 to apply is that Caithkin's supply of care, supervision and a place of residence must be being provided to children. The Respondent submits that section 2 only applies to a supplier who makes a supply directly to children and therefore cannot apply to Caithkin since its services are largely supplied indirectly through the foster parents. Caithkin submits that section 2 applies to both direct and indirect supplies and that Caithkin makes both such supplies. In my view, neither party has correctly interpreted this aspect of section 2. Their interpretations are driven, in large part, by the fact that neither of them characterized Caithkin as re-supplying the care, supervision and a place of residence services of the foster parents<sup>6</sup>.

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<sup>6</sup> In her submissions, the Respondent also focused on the wording of the Explanatory Notes to the Notice of Ways and Means Motion that amended the wording of section 2 in 1993. Those notes suggest that Parliament's intention was that to be exempt, the supply must have been made "directly" to the children. I agree that that is what the amendment was intended to achieve but I disagree that it was intended to do so by reading the word "directly" into the section immediately before the words "to children". In my view, the goal to ensure that the supplies were made directly to the children was intended to be accomplished and was accomplished through the third test of section 2; namely that the supply must be provided in

[28] Section 2 does not require the supply to be made to children, it requires the supply to be a service of providing care, supervision and a place of residence to children. The words “to children” specify to whom the care, supervision and place of residence are provided not to whom the supply is made. In other words, the supply can be made to anyone but the supply that is made must be the provision of care, supervision and a place of residence to children.

[29] If I were to interpret the phrase “to children” in section 2 as modifying the word “supply” then it would therefore not modify the word “providing”. As a result, so long as the supply were made to children, there would be no qualification as to whom the care, supervision and place was provided. That would result in the absurd situation where a child who paid for care, supervision and a place of residence for his father would not be charged GST but a father who paid for care, supervision and a place of residence for his child would be.

[30] My interpretation of section 2 is supported by looking at the context of Part IV of the *Act*. Schedule V, Part IV, section 1 reads as follows:

A supply of child care services, the primary purpose of which is to provide care and supervision to children 14 years of age or under for periods normally less than 24 hours per day, but not including a supply of a service of supervising an unaccompanied child made by a person in connection with a taxable supply by that person of a passenger transportation service.

[31] It is clear from the wording of section 1 that the words “to children” qualify to whom the care and supervision are provided, not to whom the supply is made. To interpret it any other way would require me to interpret the phrase “the primary purpose of which is to provide care and supervision to children 14 years of age or under for periods normally less than 24 hours per day” as if the first part of the phrase (i.e. “the primary purpose of which is to provide care and supervision”) modified the word “services”, the middle of the phrase (i.e. “to children 14 years of age or under”) modified the word “supply” and the end of the phrase (i.e. “for periods normally less than 24 hours per day”) again modified the word “services”. Such an interpretation is illogical. Furthermore it would lead to the absurd situation that care of a 15 year old would be exempt as long as her 13 year old brother paid for the service since the

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an establishment operated by the supplier. That test is discussed in the next section of these Reasons for Judgment.

modifying phrase “to children 14 years of age or under” would modify the word “supply” not the word “service”.

[32] My interpretation of section 2 is also consistent with its overall purpose. The goal of section 2 is presumably to exempt various basic services provided to certain potentially vulnerable individuals (i.e. children, underprivileged individuals or individuals with a disability) from GST. How could that purpose possibly be achieved if section 2 required those same potentially vulnerable individuals to pay for the services in order for the exemption to apply?

[33] In summary, a textual, contextual and purposive interpretation of section 2 indicates that it is the care, supervision and a place of residence that must be provided to children, not the supply itself. There is no question that the supply that Caithkin is making to the Societies is a supply of providing care, supervision and a place of residence to children. Therefore, this second test is met.

#### In a Establishment Operated by Caithkin

[34] The final test under section 2 is that the supply must be being provided in an establishment operated by Caithkin for the purpose of providing care, supervision and a place of residence. The establishments where the care, supervision and a place of residence are provided are the foster parents’ homes<sup>7</sup>. Both parties agree that the foster parents’ homes are operated by the foster parents. Caithkin submits that they are also operated by Caithkin. The Respondent submits that they are not. The key question is what the word “operated” means in section 2.

[35] The *Canadian Oxford Dictionary*, Second Edition, defines “operate” as:

... manage, work, control; put or keep in a functional state ...

[36] *Webster’s New World Dictionary of American English*, Third College Edition, defines “operate” as:

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<sup>7</sup> I acknowledge that Caithkin’s offices have a space where a foster child can stay overnight on a short term basis in the event of an emergency and contain some facilities where the foster children can learn skills such as cooking with their one-to-one workers. However, the care, supervision and place of residence provided or potentially provided to a given foster child in this space is insignificant compared to that provided in their foster parent’s home.

... 2 *a*) to put or keep in action; work (a machine, etc.) *b*) to conduct or direct the affairs of (a business, etc.); manage ...

[37] Even if I were to give the benefit of the doubt to Caithkin and interpret the word “operate” in as broad a way as possible, I cannot find that Caithkin is operating the foster parents’ homes. Section 2 requires the “establishment” to be operated by Caithkin, not the “service”. While I accept that Caithkin could be said to manage the foster care service that is provided in the homes, I cannot accept that it is managing the houses themselves. The houses are the foster parents’ homes. Caithkin neither owns nor leases the homes. The foster parents are the kings and queens of their own castles. First and foremost, their homes are a place of shelter and residence for themselves and their natural children. Caithkin has nothing to do with those aspects of the homes. Furthermore, the foster parents have the right at all times to refuse to care for or to continuing caring for a given foster child in their home. At best, Caithkin can be said to manage some of the activities that occur in the homes but not the homes themselves.

### Summary

[38] Based on the foregoing, I find that Caithkin’s supplies are not exempt under section 2 as they are not provided in an establishment operated by Caithkin.

### **DUE DILIGENCE**

[39] The fact that Caithkin both treated its supplies as being exempt supplies and, at the same time, claimed input tax credits in respect of those supplies makes it impossible for me to find that Caithkin exercised due diligence in determining its GST obligations. In no way could this have-my-cake-and-eat-it-too approach be seen to be duly diligent. Accordingly, the Minister was correct to apply the penalty under former paragraph 280(1)(a) of the *Act*.

### **CONCLUSION**

[40] The Appeal from the reassessments is allowed and the matter is referred back to the Minister for reconsideration and reassessment on the basis that:

- (c) Caithkin’s net tax for its reporting period from April 1 to June 30, 2004 be reduced by \$25,563.40; and

- (d) Caithkin be allowed input tax credits of \$77,496.73 in its reporting periods from July 1, 2004 to December 31, 2004 and April 1, 2005 to March 31, 2009.

Costs are awarded to the Respondent.

Signed at Victoria, British Columbia, this 24<sup>th</sup> day of March 2014.

“David E. Graham”

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Graham J.

CITATION: 2014 TCC 80  
COURT FILE NO.: 2011-1556(GST)G  
STYLE OF CAUSE: CAITHKIN INC. AND HER MAJESTY  
THE QUEEN  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: November 12, 13, 14 and 15, 2013  
REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham  
DATE OF JUDGMENT: March 24, 2014  
APPEARANCES:

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