Docket: 2008-1253(GST)G

|BETWEEN:

9056-2059 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 5, 2009, at Montréal, Quebec.
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant:	Jean-François Poulin Ann-Sophie Verrier
Counsel for the Respondent:	Dany Galarneau

JUDGMENT

The appeal from an assessment of Goods and Services Tax made under Part IX of the *Excise Tax Act*, notice of which is dated November 30, 2006, and bears the number TR0445, for the period from February 1, 2002, to December 31, 2005, is allowed in part, in that the penalty is vacated; as for the other aspects, the assessment shall remain unchanged in accordance with the attached Reasons for Judgment.

Without costs.

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

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of December 2010.

François Brunet, Revisor

Citation: 2010 TCC 358
Date: 20100702
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Appellant,

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from an assessment made under the *Excise Tax Act* (hereinafter the "ETA").

[2] The assessment and inherent penalty are appealed from by means of a Notice of Appeal of which the content is as follows:

[TRANSLATION]

1. The Appellant operates an agri-business and specializes more particularly in apiculture.

2. Indeed, Jean-Pierre Binette, the Appellant's majority shareholder, has been an apiculturist since he was 19 years old.

3. To operate its business, the Appellant uses various methods to stimulate, facilitate and promote the sale of a variety of its products.

4. More specifically, with the purchase of a farm product, the Appellant grants admission to its trails so as to permit outdoor activities.

5. In the winter, the Appellant's customers, who purchase a farm product, can use the farm estate to ice skate on dedicated trails and in the summer, they can use those same trails to hike and walk trails and engage in berry picking.

6. The Appellant's customers cannot access the trails without purchasing of a farm product.

7. The Appellant's trails were originally meant for the shareholders' family members and it was not until later that the family came up with the idea of using the land to promote the sale of farm products.

8. A lengthy approval process by the Commission de la protection du territoire agricole (hereinafter the "Commission") was therefore undertaken to be able to plan the development of trails on the Appellant's land that would attract a regular customer base for the disposition of products from the Appellant's farming business.

9. Following the Appellant's submissions, the Commission authorized the development of trails aimed at attracting customers for farm products, insofar as the use of the Appellant's land did not constitute a commercial use not associated with agriculture.

10. By that decision, the Commission confirmed the development of walking trails was an accessory to the promotion of the Appellant's farm products and the commercial use of that land would thus constitute a statutorily prohibited use as farm land cannot be used for commercial purposes.

11. In 2006, the Appellant objected to an assessment by the respondent.

12. A notice of assessment was issued on November 30, 2006, for the period from February 1, 2002, to December 31, 2005.

13. The respondent argues that the Appellant did not collect and remit the Goods and Services Tax (hereinafter the "GST") on certain reported income.

14. More precisely, the respondent argues that the Appellant provided a right of access to its land and that such supply constitutes a taxable supply.

15. In addition, the respondent disallowed the amount of its input tax credits on the basis that it related to personal expenditures of the shareholders rather than expenses incurred as part of the Appellant's commercial activities.

16. The Appellant filed a notice of objection in due and proper form within the prescribed time period against the notice of assessment issued by the respondent.

17. A decision on the objection was rendered on January 23, 2008, dismissing the notice of objection filed by the Appellant. Hence the present appeal.

[3] To establish and justify the merits of said assessment, the respondent relied on the following assumptions of fact listed in paragraph 18 of the Reply to the Notice of Appeal, which reads as follows:

[TRANSLATION]

(a) The Appellant is a GST registrant and an agent of the Minister for purposes of collecting and remitting GST;

(b) During the period, the Appellant operated an agri-tourism business;

(c) During that period, the Appellant made taxable supplies by allowing access to a labyrinth within a pine forest used as a skating rink during the winter and for in-line skating during the summer;

(d) The supplies made by the Appellant in the operation of this touristic and recreational business did not benefit from any tax exemptions;

(e) During the period, the Appellant failed to collect and remit to the Minister any taxes that were payable;

(f) During the period, the input tax credits (ITCs) were disallowed;

Year ending on December 31	**Taxable supplies**	**Taxable reported income**	**Uncollected and unremitted GST**	**ITCs**
2002	$ 34,896	$ 21,130	$ 1,486.59	($110.25)
2003	$138,697		$ 9,186.48	$1,553.26
2004	$155,349	$ 34,317	$ 8,472.24	$ 514.82
2005	$277,646	$ 50,839	$15,876.47	$ 684.32
TOTAL	$606,588	$106,286	$35,021.78	$2,642.15

(g) The taxable supplies provided by the Appellant, namely admission to the trails (labyrinth) constituted admissions to a "place of amusement;"

(h) Incident to admission fees, farm products were also obtained;

(i) Seeing as what we have here is a multiple supply subject to a single consideration, the supply incidental to the taxable supply, which is admission, also constitutes a taxable supply;

(j) With respect to the ITCs, the so-called "personal" transactions of the Appellant's majority shareholder were disallowed;

(k) In the absence of a clear and detailed accounting, the bank deposits method was used to reconstruct the taxable supplies;

[4] The issues in dispute have been defined by the respondent as follows:

[TRANSLATION]

19. The first issue in dispute is whether the respondent was justified in assessing the Appellant for the uncollected and unreported net GST in the amount of $34,34+.93 as well as for the disallowed ITCs in the amount of $2,642.15 as a result of the tax audit;

20. The second issue is whether the respondent was justified in imposing on the Appellant the penalty in the amount of $4,211.04 provided for in section 280 of the ETA.

[5] First, Madeleine Courchesne provides some background information by detailing how she became a shareholder holding 20% shares in the Appellant, owner of the land. She also described in detail her husband's passion for bees and his highly meritorious investment of time, energy, and money, understandably, but also for developing great expertise in this agri-food sector to the point of becoming an important producer, an exemplary producer even, in the Province of Quebec.

[6] She also mentioned the significant limitations and numerous problems related not only to the production of bees, but also to the business operated by her spouse.

[7] She related the various steps taken by her spouse in the world of apiculture in the early 1970s, when he was in his twenties.

[8] Starting with about thirty hives primarily as a hobby, he gradually increased that number to 300, which still did not lead to financial self-sufficiency. When she met Mr. Binette in 1984, the number of hives was reduced to about twenty.

[9] Very precise and detailed about why and how the business was created and developed, she became very unspecific, and even uninformative, about the facts that led to the assessment under appeal, particularly with respect to how access to the trail was developed and, more specifically, on the mechanism used which consisted in a ticket-based system.

[10] Mrs. Courchesne also provided some background on the trails, whose origin lies in the creation of a rink on a little pond next to a retirement home.

[11] Following an unfortunate accident, Mr. Binette had the idea of having nature trails, which he resurfaced and maintained in the winter using an old zamboni he had modified himself.

[12] In the beginning, it was an activity that very few people were aware of, until a media personality visited and discovered the site in 1993 and called it exceptional. After that, things were never the same and the activity became very popular, highly appreciated and sought after; indeed, it became necessary to fit out a parking lot able to hold several hundreds of cars in order to meet expectations.

[13] Following the large number of readers who read the laudatory newspaper article, the Courchesne-Binette couple said it saw an opportunity to capitalize on the exceptional readership in order to sell farm products, and more specifically, honey.

[14] The evidence also revealed Mr. Binette’s exceptional determination and tenacity.

[15] Having very little education, Mr. Binette has been credited with having learned, understood and developed a difficult business, overcome all sorts of difficulties, specifically the disease that killed a significant portion of the livesock in Quebec and the fierce competition from external, or foreign markets.

[16] The evidence was completed with the testimony of Madeleine Courchesne, Thérèse Deslauriers and Jean Guilbeau.

[17] As for Mrs. Courchesne, she testified on the method used and required to access the trails. She explained the practice of using tickets for admission to the trails. She also explained the price policy on tickets, various products and quantities. She stated that the business had also put in place a special register allowing people or families to become members and benefit from better prices.

[18] As for Mr. Binette, he confirmed the substance of the other witnesses' testimonies. His testimony revealed his tenacity, determination and skill at selling the project that led to the facts that the assessment under appeal was based on.

[19] A number of elements and components of the evidence offered by the Appellant involved subjects or topics not relevant to the sole issue in dispute, namely, whether access to the rink designed in the form of a labyrinth was, for the period covered by the assessment, an exempt supply or rather a taxable supply?

[20] Thus, all things pertaining to public interest in the products from the land, her husband's passion for honey production and his dynamism in promoting it are elements that give colour to the case, and make hearing the case even enjoyable, but that cannot however be taken into consideration in addressing the issue in dispute.

[21] The only relevant facts in the appeal are those pertaining to the mechanism put in place that allowed customers access to the trails during the summer season and to the frozen paths, the so-called "labyrinth."

[22] In the winter, the same paths are maintained and resurfaced using a zamboni, thereby forming a long and very popular skating rink. Furthermore, any publicity generated primarily during the winter season ascribed particular importance to the skating component. The farm products played a more marginal role.

[23] The evidence revealed that traffic volume was considerably higher during the winter period than during the other periods of the year.

[24] In order to access the trails transformed into a skateway and the labyrinth, customers were required to purchase tickets that would grant them not only admission but also access to very small quantities of honey, maple syrup or by-products.

[25] They came in a very small sample size of 50 grams. The small quantity of product was purchased not by money but with the sale of a $12.50 ticket. In other words, any person wishing to benefit from nature and have access to the trails was required to purchase a ticket in consideration for which the purchaser was granted a small quantity of honey and also access to the skateway, as a promotional device.

[26] It was also possible to purchase several tickets and exchange them for products from the land. The evidence did not make it possible to establish whether the only way of purchasing products from the land was by means of tickets. It was however mentioned that several tickets could be used to purchase products from the land.

[27] The real issue is whether the ticket price served as consideration for the purchase of the very small quantity of honey or other product or admission to the trails. In other words, was the price or amount paid to purchase the ticket a scheme to water down, if not conceal, the actual consideration for admission to the trails?

[28] Despite the numerous attempts aimed at providing a detailed clarification of the ticket-based system, things remain relatively unclear. Since access to the trails was defined by the Appellant as being incidental, an incentive or compensation for having purchased the exempted product, it became important to determine and, most of all, to understand whether the price paid was equivalent to the value of the exempt supply purchased with a view to establishing whether access to the trails was a promotional offer to increase the production and sale of honey or a way of commercializing access to the trails.

[29] The evidence offered as to the various advertising and promotional activities used revealed a strong emphasis on the trails versus agri-foods, which played a very small and marginal role in said advertisement.

[30] Mr. Binette's wife testified in a very cautious manner so as not to patently undermine the scenario provided as to the substance of the line of the business: its primary purpose was the production, transformation and marketing of exempted agri-foods.

[31] Since marketing conditions were difficult, the company created a particular way of promoting and also, and above all, of selling its products. Up to that point, its practice was above reproach and commercially entirely sound.

[32] The tax dispute occurred when the Appellant's directors put in place a procedure or system whereby the asking price for the exempt supply was not commensurate, according to the Respondent, with fair value. In other words, the formula used was such that the exempt supply was not the main subject of the subjected transaction but incidental to it, as the main subject was access to the labyrinth's trails, a taxable supply.

[33] A number of documents were offered in support of the testimonies particularly in respect of the difficulties encountered not only with the municipality, but also and primarily with the Commission de la protection des territoires agricoles, which, at first, and on two occasions, concluded that the use of the trails was incompatible with the premises' agricultural purposes, and consequently should be prohibited and sanctions imposed in case of violation.

[34] During the first two attempts, the Commission de la protection des territoires agricoles (CPTAQ) considered such commercial activity as being incompatible with the premises' agricultural purposes.

[35] Following the two unsuccessful attempts, the Appellant submitted a third request, represented by new counsel, maintaining that the use of the trails would serve as a tool for increasing awareness of the premises' agri-food nature and an effective means of developing agri-tourism, as well as an educational and an excellent means of promoting the sale of farm products, particularly honey.

[36] In paragraphs (aa) and (bb), at page 3 of its submissions, the Appellant reproduces an excerpt from the last decision of the Commission de la protection des territoires agricoles:

[TRANSLATION]

> 100- Following an in-depth analysis of all of the decisions previously rendered by the CPTAQ, the following decision was rendered by the Commission:
>
> Considering the forgoing decisions, it is appropriate to examine whether the present request is based on new elements.
>
> Indeed, it is clear that, since then, the applicant has undertaken considerable efforts and that the new project does not include any buildings used for purposes other than agricultural production within the enclosed area provided for the keeping of animals in captivity, the only accommodations required, that is to say, kiosks, access and parking, shall be provided next to the public road over a surface area of approximately 3,200 square feet in addition to the existing residential area.
>
> The applicant wishes to organize, within the trails it installed throughout its pine plantation, activities that meet that requirement and which make it possible to attract a regular customer base for the disposition of farming products, that is, fish, berries, honey and by-products, wild mushrooms and others.
>
> At the end of the day, all the applicant is asking is that existing trails that are also necessary for pick-your-own activities be used on a need-by-need basis for purposes other than agricultural, either during the summer months for educational and

> sightseeing purposes, or during the winter months to allow for ice fishing, as with the use of farm land or back-country trails for the installation of snowmobile trails or cross-country skiing.
>
> However, the Commission could not certainly permit authorize a commercial use not related to agriculture in that area. Nevertheless, taking into account the context of the request and the type of usage sought, it is the Commission's view that the agricultural surroundings will not be detrimentally affected.
>
> [Emphasis added.]

> Furthermore, the Commission cannot ignore the fact that granting the request would promote the sale of part of the applicant's farm production, which would in turn be beneficial to the development of this agricultural sector's farming activities. Considering the foregoing, the Commission considers that the realization of the project would not result in an agricultural loss and will not limit the exercise of the farming activities performed or that could be performed on surrounding parcels.
>
> At the time of the last two decisions, Ms. Courchesne has begun to implement the project. Such requests were perhaps premature.
>
> Thus, considering the alleged facts and the documents produced in support of the request, the Commission considers that it can granting it without causing major prejudice to the area, even more so since it will contribute to the development of agri-tourim in the region.
>
> An authorization by the Commission would meet the objectives of the *Étude sur le tourisme rural au Québec relié au monde agricole* prepared in collaboration with the MAPAQ, Tourisme Québec and the UPA, which reads as follows:

[TRANSLATION]

> "It is essential that we succeed in attracting people beyond the summer peak season."
>
> . . .
>
> FOR THESE REASONS, THE COMMISSION:
>
> AUTHORIZES use for purposes other than agricultural, specifically the use of already existing trails, of part of Lot 41 of the cadastre of the parish of Notre-Dame-Du-Mont-Carmel, of the Land Registry District of Champlain, of an area of 1.5 hectare.

[37] The Appellant continues as follows:
[TRANSLATION]

(iii) Application of the decisions of the CPTAQ to the qualification of the supply made by the Appellant

102- The Appellant respectfully submits that the decisions of the CPTAQ must be considered by the Tax Court of Canada in the light of the following aspects:

a. The Appellant has, in the past, segregated sales for honey and admission to his trails;

b. This was formally prohibited by the CPTAQ on October 26 1994, as it was contrary to *An Act to preserve agricultural land*;

c. In a decision rendered on April 25, 1997, the CPTAQ reiterated that the use of the farm land in question for commercial purposes other than agricultural was prohibited;

d. In fact, following the decisions rendered by the CPTAQ, the Appellant is formally prohibited from selling to its customers admission to its trails as such use of the land would constitute a commercial use not related to agriculture.

[Emphasis added.]

103- The Appellant submits that the supply of apiarian products providing admission to its trails is a single supply and not a multiple supply as argued by Revenu Québec as access to the trails and the sale of apiarian products are interdependent and inextricably linked, each constituting an integral part of whole.

104- The Appellant submits that the supply of apiarian products and access to the trails granted to its customers are two elements of a single and same supply for the following reasons:

e. To understand the Respondent's position that the Appellant's operations consist in multiple supplies, it is necessary to completely exclude the factual context in which the Appellant operates;

f. In fact, in a free market, it is possible to separately obtain apiarian products and have access to centres providing walking trails;

g. However, *O.A. Brown*, a Federal Court of Appeal case, held that the Court must assess the operations in question within the context of their reality and not take into account possible operations made up of similar or identical elements;

h. According to the Federal Court of Appeal, the issue is whether it would be possible to purchase each of the elements separately;

i. With respect to that issue, the Appellant's position is that when supplied together, the supply of apiarian products and the sale of honey are inextricably linked.

j. A customer may choose to obtain a jar of honey without visiting the Appellant's trails, but the converse is not possible;

k. Indeed, owing to the agricultural nature of the land on which the business is operated, the Appellant is formally prohibited from only selling admission to its trails;

l. In that context, the supply that consists in selling admission to the Appellant's trails cannot be made as a single supply to the customer;

m. In its decisions rendered in 1994, 1995 and 1997, the CPTAQ clearly pointed out to the Appellant that the farm land could not be used for commercial use for purposes other than agricultural;

n. The Appellant understands from the decisions rendered by the CPTAQ that it is formally prohibited from selling admission to its trails without selling farm products;

o. In that context, the Respondent's position that what we have here is a multiple supply is unrealistic, as it does not take into account *An Act to preserve agricultural land* or the decisions rendered by the CPTAQ;

p. The Appellant's commercial and legal reality is such that the sale of apiarian products and admission to its trails constitute an integral part of a complete whole and cannot be reasonably considered as being two distinct supplies;

q. The Appellant therefore submits that the Respondent's position that what we have here are multiple supplies is unfounded in fact and law.

105- Similarly, in the light of the administrative position adopted by the CRA, cited earlier,[1] the following facts appear to weigh in favour of the qualification of the supply as constituting a single supply:

r. The supply is made by a sole provider, the Appellant (when a supply is made by more than one provider, it usually constitutes a multiple supply);
s. The supply is acquired by a sole recipient (when a supply is acquired by a sole recipient, it usually constitutes a multiple supply);

t. The Appellant supplied honey for consideration received from its customers;

   i. In fact, the testimonies heard before the Court revealed that the Appellant's directors have always been very passionate about the world of apiculture;

   ii. They have long sought to enter the honey market to no avail;

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[1] Appellant’s book of authorities, Tab 8.

iii. Indeed, the marketing of apiarian products was very difficult;

iv. The testimonies of the Appellant's directors leave no doubt as to the product they sell to their customers, honey;

v. From that observation, there is no doubt that the Appellant's intention is to sell its customers honey and not admission to its trails;

vi. The issue as to what exactly customers acquire when they visit the Appellant's premises is however much more difficult to address;

vii. Each customer can come with completely different intentions, which makes reference to the recipients' needs uncertain;

u. The recipient knows what specific elements are part of the whole (this weighs in favour of categorizing the supply as a multiple supply);

v. The recipient cannot separately acquire the elements or substitute the elements (this weighs in favour of characterizing the supply as a single supply).

(iv) Characterization of the single supply

106- If the Court agrees that the Appellant made a single supply, it is also necessary to determine the dominant or primary element of such supply.

107- The Appellant submits that the dominant element of the supply must be established based on a number of factors, namely the following:

w. The supplier's primary motivations and primary objective from an operational standpoint;

x. The economic reality of the Appellant's operations;

y. The value of the elements constituting the supply.

[38] The Appellant's arguments are quite surprising as they substantiate not its own submissions but, rather than the submissions of the Respondent. Fiscal laws would quickly become inapplicable if it were necessary to take into account the personality or character traits or even the very subjective interpretation of individuals subject to such laws and multiples factors specific to each case when those laws are applied.

[39] The work, tenacity, determination and communication skills of Jean-Pierre Binette, in terms of his passion for the production and sale of honey and its by-

products, enabled him to overcome a number of difficulties and obstacles, not least of which were those under *An Act to preserve agricultural land.*

[40] In fact, after two consecutive failed attempts, the Appellant managed to show that access to the trails was part of the premises' agricultural activities. Building on that success, the Appellant devised a structure and/or a scheme to comply with all the legal provisions affecting the activity concerned, and thus argues that the use is incidental, secondary, and that it is essentially a promotional and development tool for agricultural activity, whose production is an exempt supply.

[41] After being successful before the Commission de la protection des territoires agricoles, the Appellant relies on the decision to argue that its appeal is well-founded. The Commission's decision, of which an excerpt is reproduced in paragraph 35 of this judgment, brings to light the problem that the Appellant faced.

[42] In its Notice of Appeal, the Appellant writes as follows:
[TRANSLATION]

> 9. Following the Appellant's submissions, the Commission authorized the placement of trails aimed at attracting a customer base for farm products, insofar as such use of the Appellant's and did not constitute a commercial use not related to agriculture.
>
> 10. In that decision, the Commission confirms that the placement of walking trails is incidental to the promotion of the Appellant's farm products and, by that very fact, the commercial use of the land would constitute a use prohibited by law as farm land cannot be used for commercial purposes.

[43] Since all commercial activity is prohibited on land defined as farm land, after its two failed attempts the Appellant proposed to otherwise define the nature of the rather straightforward, real and completely autonomous and independent activity.

[44] Selling a farm product is considered to be an acceptable commercial activity under *An Act to preserve agricultural land*. It was an assumption made by the Appellant, which decided to overcome constraints by submitting that access to the trails it installed on its farm, bound under *An Act to preserve agricultural land*, constituted a real activity merged with one or more farm products available and sold on the premises; in other words, according to the Appellant, access to the trails constituted a farm activity by association, and consequently an exempt commercial farming activity.

[45] According to the Appellant, access to the trails was incidental, marginal and secondary, completely integrated not only with the activity but also with the premises' purpose.

[46] The Appellant was obviously able to convince the competent authorities over agricultural land preservation. Such a decision or authorization, to the effect that the activity is consistent with agricultural purpose, is of no effect and not enforceable in matters pertaining to GST matters.

[47] In other words, using trickery and imagination, the Appellant convinced the Commission that it took an essentially commercial activity and made it into a promotional exercise for farm products, thereby establishing an effective development tool for the agri-food sector.

[48] I have absolutely no interest or desire even to intervene in a case over which the Tribunal Administratif du Québec has exclusive jurisdiction; however, conversely, the Commission's decision cannot be used or form the basis for arguments about changing, amending or even defining the nature of a supply under the ETA.

[49] The fact that the Commission accepted to make the use of a part of land acceptable and consistent with agricultural purpose is irrelevant in determining whether or not a supply is exempt.

[50] When two consumer products are subject to a single transaction subject to the exclusive control of the seller or when two supplies are associated, and rendered inseparable by the seller's choice, it becomes necessary to analyze the seller's with a view to determining the true nature of the content or the object of the possible if not actual transaction.

[51] It would have been quite interesting to hear what the users of the trails who were party to the transaction had to say about why they agreed to purchase the ticket. Was it because they wanted to sample the honey, support the Appellant's production of honey or simply benefit from the ingenious set up, from the pure air of the country and make exercising more enjoyable in an exceptional environment?

[52] Allowing or accepting that a supply be included in the exempt category by virtue of its decision or the vendor's use of creativity in associating such a supply to another would exempt thousands of supplies from the application of the ETA.

[53] One could therefore very easily evade the provisions of the ETA by claiming that a supply that is normally subject to the Act is not covered by that legistlation when one associates it with an exempt supply under the guise of promoting it for the sake of increased production.

[54] With very little imagination required, it would be possible to create an infinity of very crazy possibilities that would make it possible to evade the provisions of the ETA. It is therefore essential to conduct a specific analysis when there is a group or association of supplies considered and defined by the registrant as a single supply.

[55] This is even more critical where there are one or more tax consequences under the ETA. Indeed, the Act makes it possible to sell or associate exempt property with a taxable supply, as in the case of the honey; in other words, this is in some way incidental to the primary property taxed as forming part of the exempt supply.

[56] In that respect, counsel for the Respondent provided a very pertinent example of the possible surprise, bonus or small toy included in a cereal box that is not taken into consideration. The cereal box being the exempt supply, the supply associated with it loses its usual taxable quality thereby receiving the same treatment as the primary exempt supply.

[57] It is easy to grasp the logic and reasonableness of that approach as more often than not a taxable supply groups together several components for determining the sale price subject to the GST. Thus, there are the components, but also components related to provision, advertisement, development, etc.

[58] Generally speaking, those inseparable things or components are often intangible. Nevertheless, when dealing with, as in the case bar, individual goods that have absolutely nothing in common, this instantly raises a number of questions for the purposes of identifying what is primary as opposed to incidental.

[59] Although there are a number of decisions in this area, there is no objective formula or magic recipe with various criteria making it possible to obtain a decisive and reliable result.

[60] I am of the view that the process and analysis must be guided by a basic common sense approach within a context of reasonableness. As prescribed by section 138 of the *Excise Tax Act*,

> "For the purposes of this Part, where

(*a*) a particular property or service is supplied together with any other property or service for a single consideration, and

(*b*) it may reasonably be regarded that the provision of the other property or service is incidental to the provision of the particular property or service,

the other property or service shall be deemed to form part of the particular property or service so supplied."

[61] In the case at bar, the Appellant conceals in its analysis the supply presented as incidental and focuses on the exempt supply; on that basis, first it defines itself by stating the company's mission and purpose; then, it ignores the nature of the property it defines as a means or way of promoting the sale, production and marketing of the exempt product, namely, honey and other farm products.

[62] To accept or subscribe to the Appellant's approach would lead to aberrations and/or completely spurious results. Furthermore, it would allow anyone with a fertile imagination, to set up a multitude of scenarios that are entirely inconsistent with the letter and spirit of the law.

[63] In the case at bar, there is no doubt that the so-called promotional part of the supply, that is, access to the trails granted, provided or made available for free, must be specifically analyzed. What is it? Is it something secondary, incidental or marginal? Is it something very minor with respect to the consideration taken into account at the time of purchase of the supply?

[64] It involves a series of trails that form a long path that winds its way through the forest where it is possible to see, hear and appreciate nature and observe deer; the icy runway was regularly maintained with a zamboni. The installation of the trails required a significant injection of funds as well maintenance costs. The huge number of people who flock here to skate are users of the on-site parking area, which accommodates several hundreds of cars.

[65] When two or more goods, or two or more services, are highly interconnected, they can form a single supply and be subject to a single transaction. Generally speaking, the consideration taken into account and which is at the basis of the transaction involves either a specific object or a whole of which the parts or components are inseparable. The analysis must take into account three broad principles:

- Each supply must be considered separate and independent.

- The supply should not be artificially split.
- Where the single supply is made up of several elements or components, the element that raises one or more issues must be used to enhance the supply.

[66] It would appear that the present dispute stems from the application of *An Act to preserve agricultural land*. Under that act, it is prohibited to operate any non-agricultural commercial business on the land defined as the so-called "agricultural zone."

[67] On two occasions, the Commission de protection des territoires agricoles prohibited the conduct of the commercial activity at the centre of this dispute at the place chosen by the Appellant, considering that it was located in a protected area, and therefore in an area reserved exclusively for agricultural activities.

[68] Drawing on that reality and owing to this major and completely unavoidable obstacle, it became imperative to create a project within which the activity related to the use of forest trails (walking and skating) could ultimately be defined as an element or component of an exempt supply; in other words, it was necessary that a whole other definition be established, not on the basis of the nature of the good but on the basis of its use and most of all on the basis of the essentially self-serving and subjective determination.

[69] On the Appellant's third attempt, the matter submitted to the Commission de protection de protection des territoires agricoles was prepared in such a way that the Commission authorized the use. The authorization was granted following the presentation of a definition of the trails not as an economic and independent activity, but as a measure benefiting the production and sale of farm products.

[70] The authorization of the Commission de protection des territoires agricoles or compliance of the activity with the provisions of *An Act to preserve agricultural land* does not modify the nature of a good, an activity and/or a service subject to the ETA.

[71] In other words, a decision of the Commission de protection des territoires agricoles cannot determine or decide whether or not a supply is exempt; that is, an issue that falls within the exclusive scope of the ETA. Although ideally consistency is desirable for the application of statutes, the same set of circumstances may lead to different treatments under relevant statutes.

[72] Thus, the fact that the Commission accepted that the supply in dispute be defined as being part of an activity that is consistent with *An Act to preserve*

agricultural land does not impact or affect the assessment made by the Respondent under the ETA.

[73] That is a unique situation in that the Appellant wished to operate a business by complying with the provisions of legislation governing the preservation of agricultural land which has power over life and death in respect of certain economic activities performed on the agricultural land over which the Commission has jurisdiction.

[74] At page 17 of their written submissions, the Appellant write as follows, and I quote:

> [TRANSLATION]
> Multiple supplies occur when one or more of the elements can sensibly or realistically be broken out.
>
> Conversely, two or more elements are part of a single supply when the elements are integral components; the elements are inextricably bound up with each other; the elements are so intertwined and interdependent that they must be supplied together; or one element of the transaction is so dominated by another element that the first element has lost any identity for fiscal purposes.
>
> When conducting an analysis, it is important that the analysis be confined to the transaction at issue, rather than referring to other possible transactions containing the same or similar elements. This process should not involve artificially splitting something that commercially is a single supply. Moreover, when examining an agreement, it should not be viewed in isolation. Rather, it must be examined in the context of other factors such as the intent of the parties, the circumstances surrounding the transaction, and the supplier's usual business practices.
>
> [Emphasis added.]

[75] It is difficult for me to reconcile the content of that submission with the relief sought by the Appellant. The Appellant sells tickets that can be used for a very small quantity of honey and access to trails.

[76] To argue that such a practice is a single supply that should not be artificially split is an approach which I do not accept. The Appellant makes reference to the parties' intention but the evidence only referred to the Appellant's self-serving intention.

[77] To subscribe to such an interpretation or analysis would allow parties to a transaction to determine the nature of a supply, at arm's length of the Respondent, but also, and above all, the authority to unilaterally decide whether a supply is taxable, not taxable or exempt.

[78] In the case at bar, it would have been interesting to know the percentage of trail users interested exclusively in accessing the trails when referring to the intention of the parties to a transaction in which a supply is traded. That aspect is certainly a pertinent one that, however, requires the contribution of the parties to the transaction in dispute.

[79] Eligibility under the single supply category requires that the elements that are grouped together, associated, linked or fused be, in principle, related. It seems to me somewhat reckless to associate elements with no degree of commonality and of a totally different nature. The property or service supplied may group together various elements which, once provided, become practically inseparable.

[80] In the case at bar, the least that can be said is that the two elements of the supply, referred to as single by the Appellant, are neither related or of the same family; it is obviously easy to isolate or separate them. It is not the process that is artificial but the association, the correlation. At page 18 of their written submissions, the Appellant emphasize the following issue:

> In the context of the particular transaction, does the recipient have the option to acquire the elements separately or to substitute elements?

[81] The issue raises a very important aspect that the Appellant completely concealed in its analysis; in fact, such a possibility requires an ability and freedom to choose. In the case at bar, that choice is simply non-existent. Access to the trails requires an acceptance to pay consideration that has absolutely nothing to do with the supply described as the primary supply. In other words, the supplier requires consideration for a supply they deem as primary or dominant, whereas, for its part, the purchaser essentially accepts to pay the amount required for the element defined as secondary or incidental. As for the method used, that is, the ticket, it was essentially an indirect way of doing something that clearly could not be done directly.

[82] Common sense and reasonability lead to a determination that does not at all correspond with the Appellant's interpretation.

[83] The concept of reasonability can be subjective, arbitrary even, from which it is wise to validate, when the facts permit, a finding as to reasonability. The Respondent's procedure, illustrated in her submissions, was as follows:

[TRANSLATION]

> In order to fully understand the marketing strategy chosen by the Appellant to grant access to the trails, one example is worth a thousand words:
>
> E.g.: family of 4: 2 adults and 2 children
> $12 x 4 admissions = $48 = 4 tickets
>
> - In the light of pages 2, 3 and 4 of Exhibit R-14, the family of 4 would be entitled to
>
> 1. 1 jar of 500 g or;
> 2. 1 jar of 350 g and 1 pot of 55 g (or 50 ml of maple syrup or buckwheat flour) or;
> 3. 4 jars of 55 g (or 50 ml of maple syrup or buckwheat flour)
> - For better value, the jar of 500 g remains the best choice;
> - Thus, according to the Appellant's position, the purpose of that transaction is to sell honey and the result is absurd: the 500 g jar, sold as a bar for close to $8 per jar, costs this family $48.

[84] The Respondent submits that access to the trails is the primary element and the product (honey, maple syrup or other) is incidental; she concludes as follows:

[TRANSLATION]

> 17. Faced with a multiple supply with a single consideration, access to the trails (primary element) and the product (incidental element) constitute a taxable supply in accordance with the ETA.

[85] In paragraphs 18 and 20, she refers to two decisions, *Robertson v. The Queen* (2002 CanLII 46712(TCC)) and *Triple G Corporation Inc. v. The Queen* (2008 TCC 181) to conclude that the multiple supply must be the subject of a single taxable supply.

[86] In my view, the two decisions in question are not as pertinent as suggested; in fact, both decisions involve related elements that merge, and even blend together, even though they could be the subject of an individual supply.

[87] In the case at bar, although no real combination or merging of elements exists, there is an artificial grouping formed by virtue of the constraints and prohibitions provided for by *An Act to preserve agricultural land*. Also, the fact that it is a multiple supply by means of a single consideration is somewhat unsound.

[88] In clear terms, the main intent of the buyers is to access the trails, not to purchase the honey, which, given the quantity, has only symbolic value. I am also convinced that, if given the choice or if the admission price were lowered by the equivalent of the real value of the product supposedly purchased with the ticket, the majority of customers would not buy the exempt supply.

[89] The purpose or goal is to turn a physical activity into an awareness session or a way of connecting with nature. In other words, the Appellant does indirectly what *An Act to preserve agricultural land* prohibits it from doing directly.

[90] On this basis alone, I cannot but conclude that the element of multiple supply other than access to the labyrinth should not be included or form part of the taxable supply which is the value of the admission itself.

[91] As for the question as to whether the Appellant provides apiarian products to its customers, or rather admission to its trails, I believe the answer is simple and clear. The Appellant sells admission to its trails in the hopes of earning a return on the various products sold.

[92] The Appellant concludes at page 65 of its submissions as follows: [TRANSLATION]

> 152. The Appellant respectfully submits that one or the other of the following hypotheses justify the qualification of the supply made by the Appellant as being a zero-rated supply:
>
> a. The sale of honey and admission to the trails both form an integral part of a single supply. The principle set out in *O.A. Brown* is applicable and determinative. The dominant element of the supply is the sale of honey;
>
> b. In the alternative, even if access to the Appellant's trails were to constitute a separate supply, it is incidental to the sale of honey and the two supplies were made for a single consideration. Access to the trails is therefore deemed to form part of the sale of honey under section 138 ETA;

c. Alternatively, the Appellant submits that the Respondent's assessment is ill-founded in fact and in law as the sale of honey is not a supply incidental to admission to the trails, thereby rendering section 138 ETA inapplicable;

d. Finally, the Appellant submits that it was always diligent in the circumstances and that the imposition of a penalty under section 280 ETA is unnecessary.

[93] The evidence strongly suggest that the honey, its by-products, maple syrup and other products, were not the dominant elements; rather, they were secondary, as the dominant, primary and/or determining element was admission to the trails.

[94] There is no doubt that the vast majority of customers visit the premises to use the frozen paths within the infrastructure, the honey and other farm products being the equivalent of the surprises found in cereal boxes.

[95] Although that is a mere interpretation, it is supported and substantiated by a number of elements: the disproportionate gap between the required price of a ticket and the real value of the farm product obtained; the content of the advertisements, in which the emphasis is clearly on the enjoyment derived from the use of its trails and not the honey or other products; parking capacity; and, the large number of visitors depending on the time of the year, with winter being the peak season.

[96] Had it not been for the legislation on the preservation of agricultural land, this matter would have undoubtedly never been at issue; nothing in the evidence makes it possible to conclude that the Appellant was imprudent and did not exercise due diligence.

[97] The Appellant put in place a very popular and ingenious recreational and tourism destination; its initiative was however brought to a halt, and prohibited even by the Commission de la protection du territoire agricole.

[98] Tenacious, determined and astute, the Appellant found a way to obtain the required authorization from the Commission. The initiative was legitimate and is beyond reproach. The decision has no effect on the quality and nature of the supplies under the ETA, except for the fact that it makes it possible to better understand the

situation of the Appellant, who wished to operate a sound, popular and profitable business. That reality and the very unique context are such that, in my view, the penalty is completely inappropriate, which is why it is vacated.

[99] For these reasons, the appeal is allowed in part, in that the penalty is vacated; as for the other aspects, the assessment shall remain unchanged. Without costs.

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

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of December 2010.

François Brunet, Revisor

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