

Dockets: 2008-1600(GST)G
2013-4206(GST)G

BETWEEN:

BRITISH COLUMBIA FERRY SERVICES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 3, 4, 5 and 6, 2014
at Nanaimo, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant: Kimberley L. Cook
Asif Abdulla
Counsel for the Respondent: Ron D.F. Wilhelm
Michael Taylor

JUDGMENT

The appeals from assessments made under Part IX of the *Excise Tax Act*, for the period from April 2, 2003 to June 30, 2005 and the period of March, 2007 are allowed, in part, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment based on the following:

1. British Columbia Ferry Services Inc. (“BCF”) is entitled to claim ITCs in accordance with its chosen “deck by deck” input allocation method, that is, the infrastructure decks, used for steering and propulsion, on those vessels carrying on commercial activities, have

been properly categorized as supporting both taxable and exempt supplies.

2. The provision of stateroom rentals is a taxable supply for which ITCs may be claimed. In addition, because the normal reassessment periods have expired, BCF's claim for ITCs regarding stateroom rentals cannot be offset by the Minister in respect to the GST that BCF failed to collect.
3. BCF is not entitled to claim ITCs in respect to fuel and lubricants.
4. BCF is not entitled to any of the ITCs claimed in respect to the acquisition and importation of the vessel "Northern Adventure".

As success is divided, there shall be no award of costs.

Signed at Ottawa, Canada, this 14th day of October 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 305
Date: 20141014
Dockets: 2008-1600(GST)G
2013-4206(GST)G

BETWEEN:

BRITISH COLUMBIA FERRY SERVICES INC.,

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REASONS FOR JUDGMENT

Campbell J.

Introduction

[1] British Columbia Ferry Services Inc. (“BCF”) operates and administers one of the largest and most complex fleet of ferries in the world, based on the number of passengers transported annually and the supporting transportation infrastructure (Exhibit A-1, Tab 2). On some of its routes along the British Columbia coast, it provides the service of ferry transportation only, which is an exempt supply. On other routes, along with this core ferry service, BCF also provides certain commercial or ancillary services which are taxable supplies.

[2] The ancillary services include the following:

10. ...

- a. Catering (buffet restaurants, snack bars, cafeterias);
- b. Specialty lounges (eg. The Seawest Lounge, and the Raven??? [sic] Lounge on the Northern Routes);
- c. Retail store;
- d. Massage chairs;

- e. Stateroom rentals (northern vessels and spirit class);
- f. Conference room rentals;
- g. Vending machines (throughout the fleet);
- h. Video arcades;
- i. ATM machines, and,
- j. Third party advertising.

(Appellant's Brief, Part 1, paragraph 10)

[3] BCF is entitled to claim input tax credits ("ITCs") but only to the extent they are used in the course of providing those taxable supplies, the ancillary commercial activities. However, the Minister of National Revenue (the "Minister") took issue with how BCF allocated certain inputs between the provision of its exempt and taxable supplies. The monthly Goods and Services Tax ("GST") reporting periods that are in issue are those periods from April 2, 2003 to June 30, 2005 (the "First Period") and the period of March, 2007 (the "Second Period") (collectively the "Periods").

[4] There are several issues which arose in these appeals. The first related to the categorization of the infrastructure decks and staterooms located on some of the ferries. While the Minister categorized these as exempt supplies, BCF treated the propulsion and steering-related decks, as well as those decks containing the overnight staterooms, as providing a common service that would be both taxable and exempt. As well, BCF categorized the stateroom deck on the vessel, the Northern Adventure, as taxable. The ITCs which BCF claimed, in respect of fuel and lubricants, were also an issue. BCF submitted that fuel is a common input, acquired and consumed in the provision of both taxable and exempt supplies. The Minister contended that substantially all of the fuel and lubricants were acquired and consumed to provide ferry transportation, an exempt supply. Finally, BCF claimed ITCs, equal to 100 percent of the GST paid in the acquisition and importation of the Northern Adventure vessel, because it calculated that over 50 percent of the vessel's area was used in making a taxable supply. The Minister submitted that this vessel was acquired primarily to provide exempt ferry transportation and, therefore, BCF is not entitled to any of the ITCs it has claimed.

The Facts

[5] The parties submitted an Agreed Statement of Facts, which I have attached as Schedule “A” to these reasons.

A. BCF

[6] BCF provided core ferry services for vehicles and passengers on 25 routes, along the coast of British Columbia, supported by 37 vessels and 47 terminals.

[7] From 1977 until April 2003, BCF existed as a provincial Crown corporation which was not assessed GST. On April 2, 2003, BCF was incorporated by way of statutory conversion pursuant to the *Coastal Ferry Act*, [SBC 2003] C. 14, (the “*CFA*”). This act redefined the legislative framework for the operation of the Province’s ferry system. When BCF was converted to a company under the *Business Corporations Act (British Columbia)*, it became liable to pay federal taxes, including GST.

B. The British Columbia Ferry Authority

[8] Under the *CFA*, the British Columbia Ferry Authority (the “BCFA”), a no-share capital corporation and not-for-profit entity, was established. The directors of BCFA also served as directors of BCF. Consequently, BCFA owns and controls BCF. Upon dissolution of the BCFA, all of its assets, if any, would vest in the Province. BCFA’s annual reports and general meetings were required to be open to the public.

[9] Under provincial law, the activities of BCF are separated in respect to the core provision of ferry services and the provision of ancillary commercial services on some vessels. The *CFA* defines ferry transportation services as “the transportation of vehicles and passengers on designated ferry routes” but specifically excludes ancillary services from this definition (*CFA*, Part 1 – Interpretation). The regulatory scheme, provided for in the *CFA*, applies only to the core ferry service that BCF provides, but does not apply to the ancillary services provided. This was in keeping with the reasons respecting the transition of BCF from a Crown corporation to a private corporation which required BCF to operate the ferry service system in a commercially viable manner.

C. The Coastal Ferry Service Contract

[10] BCF operates in a highly-regulated environment. When the BCF was incorporated in 2003, it entered into the Coastal Ferry Services Contract (the “Contract”) with the Province. This Contract regulated the operation and the activities of the Province’s ferry system and provided for the payment by the Province of service fees to BCF in exchange for, among other things, the provision of core ferry service levels. Under the *CFA*, BCF was required to operate its ferry services according to commercially viable principles. Consequently, although BCF was to be independent from government, it was required to operate on a commercial basis. (the Contract, page 1). This Contract also contained a number of prohibitions. BCF could not, without the Province’s consent, adjust the ferry schedule, adjust core service levels or assign the Contract. If for any reason the Contract was terminated, any rights granted to BCF under the Contract, or the *CFA*, vested in the Province.

D. The British Columbia Ferries Commissioner

[11] Under the jurisdiction of the *CFA*, the provincial British Columbia Cabinet appointed a Commissioner to regulate BCF’s provision of core ferry services and to establish a price cap on the tariffs that could be charged for such services. The Commissioner, however, had no regulatory powers over the ancillary services provided by BCF, although he possessed extensive powers otherwise to regulate BCF’s ferry transportation services. In summary, the provision of these core ferry services is subject to, not only the Provincial statute, the *CFA*, but also, its provincially owned parent, the BCFA, the terms of the Contract with the Province as well as the regulation of its watchdog, the Commissioner. Although the BCF provides ancillary commercial services onboard some of its vessels, which are meant to subsidize the core ferry transportation services, the Commissioner is specifically prohibited from regulating these ancillary services. Generally, BCF is entitled to claim ITCs for GST paid on its inputs to the extent that those were acquired for consumption, use or supply in the course of its ancillary or commercial activities.

E. BCF’s Allocation Method

[12] To the extent that an input was used directly and exclusively in BCF’s commercial activities, it was entitled to claim a full ITC. Similarly, where an input was used directly and exclusively in BCF’s exempt activities, it was not entitled to claim any ITCs. Where BCF was unable to directly attribute its inputs to taxable

supplies, it was entitled to choose a “fair and reasonable” method to allocate common ITCs between taxable and exempt supplies. Initially, between April 2, 2003 and May 31, 2005, BCF employed the output method to calculate the percentage of its operations that related to taxable supplies in order to determine its ITC entitlement. This method “... prorated the amount of taxable revenue from ancillary services against the exempt Core Ferry Service revenue on each route. These amounts were then prorated in totality to determine an overall percentage which was then applied to inputs associated with general operating expenses (eg. head office, etc.)” (Appellant’s Brief, paragraph 61).

[13] In 2005, and upon the advice of a tax consultant, BCF switched its ITC allocation method to the input method. Where possible, BCF directly attributed what it considered to be single-use inputs to either exempt or taxable supplies. BCF attributed the cost of goods sold in food and retail operations, catering supplies and expenditures related to food and retail services together with paid terminal parking to its taxable activities for which it claimed and was allowed 100 percent of ITCs on which GST had been paid. BCF then calculated a taxable supply percentage for each vessel and each terminal in order to allocate non-single use, or common, inputs between taxable and exempt activities. The various decks on the relevant vessels and the areas at each terminal utilized by BCF were classified into one of three categories: exempt areas, used only in the making of exempt supplies, taxable areas, used only in the making of taxable supplies and common areas, used in the making of both taxable and exempt supplies.

[14] In respect to the terminals, BCF measured the area that was devoted to each of these three categories. Areas with paid parking, retail and restaurants were categorized as taxable while the ramp areas and holding areas for cars and passengers were determined to be exempt. The terminal areas relating to administration and electrical buildings, as well as employee parking areas, were categorized as common. There was no dispute respecting BCF’s entitlement to ITCs using this method of allocation in respect to its terminals.

[15] The percentage of taxable use on ferries was calculated using a “deck by deck” method. Each vessel deck was categorized as belonging to one of the three categories, that is, exempt, taxable or common, and then the entire area of that deck was attributed to that particular category.

[16] The Minister did not dispute the “deck by deck” method as being fair and reasonable. The issue arose over how BCF categorized some of the decks on certain vessels.

[17] There is no dispute respecting BCF's categorization of the car decks as exempt or the passenger decks, where ancillary services occurred, as taxable. However, the dispute arose over the categorization of the infrastructure and stateroom decks.

F. Classification of Infrastructure and Stateroom Decks

[18] BCF categorized those decks containing the infrastructure, that is, the propulsion and steering, as common because they constituted both a direct and indirect input to the provision of ancillary services. The provision of staterooms was treated as part of a taxable supply. The Minister contended that BCF's categorization was neither fair nor reasonable and that all decks in issue provide exempt services related to the core ferry services for which no ITCs can be claimed.

[19] BCF calculated a percentage of each vessel and terminal used in the making of taxable supplies using the following formula:

$$\frac{\text{total taxable area in square metres}}{\text{total area} - \text{total common area}} \times 100$$

(Agreed Statement of Facts, para 71)

[20] Based on this formula, BCF calculated that 13 vessels and 11 terminals had taxable use percentages of less than 10 percent. Therefore, BCF was not entitled to claim any further ITCs beyond those in its direct attribution claims. For the remaining ferries and terminals, BCF claimed ITCs based on the taxable use percentages that it calculated for each according to the formula.

G. Fuel and Lubricants

[21] BCF submitted that fuel consumption serves a dual purpose. In addition to propulsion of the vessels, fuel supports the provision of ancillary services because those commercial activities require additional weight and space onboard the vessels. Therefore, not all fuel is used for propulsion. Consequently, since fuel and lubricants can be viewed as common inputs in the provision of both taxable and exempt supplies, BCF claimed ITCs proportional to the percentage of commercial activity on each vessel.

[22] The Minister's position was that these items constitute a single use input, substantially all of which is consumed in the propulsion of the vessels and, therefore, they relate to the provision of exempt ferry transportation services.

H. The Importation of the Northern Adventure

[23] When the Queen of the North vessel sank in March, 2006, BCF commenced a search for a replacement vessel to service its northern routes. Without another vessel, BCF could not meet its contractual obligations with the Province to provide core ferry service levels. In July, 2006, BCF requested and obtained from the Commissioner a declaration respecting the expenditure of \$233 million for a replacement vessel. In October, 2006, the Northern Adventure vessel was acquired from a company outside of Canada.

[24] The parties agreed that the Northern Adventure was a capital asset that was to be used on the northern routes. When a registrant imports a capital asset, it may claim 100 percent of the related GST as ITCs provided the asset is acquired for use "primarily" in its commercial activities. However, if it is acquired and imported "primarily" for use in exempt activities, then ITCs cannot be claimed.

[25] The Northern Adventure was purchased for \$51 million and imported into Canada in March, 2007. BCF paid approximately \$13.1 million in customs duty and \$3.9 million in GST. BCF applied for and received remission from the Federal Government in respect of the customs duty. BCF claimed ITCs of \$3.9 million because it claimed that the Northern Adventure was imported primarily for use in its commercial activities on the basis that, pursuant to the allocation method calculation, over 50 percent of the vessel's space was used in the making of its taxable supplies. The Minister's position was that this vessel was imported for use primarily in the provision of exempt ferry transportation services and therefore no ITCs could be claimed.

The Evidence

[26] BCF relied on the testimony of James Murray, its Comptroller, and Mark Collins, its Vice-President of Engineering. Both individuals have held these positions since 2004. The Respondent relied on the testimony of Richard Young and Annette Coles, the auditors responsible for the audits of the First Period and Second Period, respectively.

[27] Mr. Murray explained that BCF's conversion from a Crown corporation was meant to address the manner in which BCF undertook capital expenditures in the ferry transportation system. As a Crown corporation, it was not conducive to expanding its capital spending as it was competing for funding with other provincial priorities, such as health care, which were considered more pressing matters for government to address. Throughout the Periods under appeal, revenue had increased, with much of it attributable to the ancillary services. For example, revenue from retail sales in the fiscal year ending March 31, 2006 grew to \$68.8 million from \$63.2 million in 2004 (Exhibit A-1, Tab 4). The significant role that ancillary services played in BCF's operations is reflected in the number of staff dedicated to the provision of these services. "In any given year, approximately one-half of the total number of crew members on the vessels deployed on substantial commercial routes, are engaged directly and exclusively in the provision of commercial services." (Exhibit A-4, Tab 8).

[28] Mr. Murray explained the nexus between propulsion of the vessels and their commercial activities carried out onboard in the following manner:

If the ship does not move customers will not come. We will not sell anything on board our ships or at our terminals.

(Transcript, Volume 1, page 95)

Essentially, the movement of vessels on the routes provides BCF with a high customer turnover, creating a captive market on board the vessels while they are sailing. These factors boost sales of ancillary services that are offered on some vessels. As a consequence of this nexus, BCF's allocation method categorized all infrastructure decks as common, although Mr. Murray acknowledged that no commercial activities actually occurred on those decks (Transcript, Volume 2, page 193).

[29] According to Mr. Murray, this nexus between propulsion of the vessel and commercial activity was also the reason BCF claimed ITCs on fuel and lubricants, BCF's largest input cost for operating its vessels, apart from wages:

Well, we've – we've claimed input tax credits and fuel and lubricants because of the importance of the – of the - the fact that the vessel moves from Point A to Point B. Without that movement no customers. Without that movement we do not sell.

(Transcript, Volume 1, page 92)

[30] On cross-examination, however, Mr. Murray conceded that the primary use of the fuel was to propel the ferries (Transcript, Volume 2, page 201).

[31] In respect to the stateroom rentals, Mr. Murray testified that they were not part of the ferrying services and were not charged to passengers as part of the cost of basic service for ferrying:

... It's an extra charge. Those charges are not regulated by the ferry's commissioner so it's not part of core ferry services, its ancillary service.

... the purchase of a cabin is totally optional.

(Transcript, Volume 1, page 96)

[32] The testimony of Mark Collins was largely technical. He stated that the design and operation of the BCF vessels in issue are inextricably linked to the level of ancillary services on board each vessel. Ancillary services make the design and operation of a vessel exponentially more complex. Invariably, vessels get larger, heavier and their systems more complex in order to accommodate ancillary commercial services. For example, the water and electrical systems on a vessel with significant ancillary services will be much larger and heavier than the same systems on those vessels without commercial activities. Consequently, more fuel will be consumed on vessels with ancillary operations because such activities consume more energy.

[33] However, Mr. Collins acknowledged that individual fuel consumption of a particular component or system within the engine room would be difficult to determine. No breakdown method exists that can be used in the calculation of how much fuel might be consumed by ancillary services.

[34] On cross-examination, Mr. Collins admitted that the primary use of the infrastructure decks was to provide transportation. Nevertheless, his evidence established that, to some extent, those decks do play a role in supporting the ancillary services aboard each vessel.

[35] Richard Young, the auditor for the First Period, testified that the infrastructure decks are properly characterized as exempt because the entire infrastructure would exist regardless of the vessel's commercial activity. Annette Coles was the auditor for the Second Period and specifically in respect to the importation of the Northern Adventure. It was her position that this vessel had been acquired to satisfy the terms of the Contract, that is, the provision of ferry services, even though taxable activities occurred on the vessel.

The Issues

[36] The first issue is whether BCF used a fair and reasonable method to allocate ITCs between its taxable and exempt supplies in respect to its infrastructure decks for the First Period. This issue involves a determination of whether infrastructure decks should be characterized as common in that they provide both taxable and exempt supplies. In addition, it must be determined if rental of the staterooms can be characterized as taxable. If they are taxable, then as a sub issue to the stateroom characterization, the Respondent has taken the position that any claim by BCF for ITCs should be offset by the GST that BCF failed to collect.

[37] The next issue is whether BCF is entitled to ITCs in respect to fuel and lubricants consumed in the operation of the vessels in respect to the First Period. A determination respecting fuel and lubricants is dependant on whether "substantially all" of the fuel and lubricants was acquired and consumed by BCF to provide only an exempt supply or to provide both taxable and exempt supplies.

[38] The final issue is whether BCF is entitled to ITCs in respect to the acquisition and importation of the Northern Adventure vessel. This involves a determination of whether that vessel was imported for use "primarily" for commercial activities, as quantitatively calculated by BCF's "deck by deck" allocation method, or imported for use primarily in providing exempt ferry transportation services.

Analysis

A. Statutory Framework and Caselaw

[39] The issues in these appeals are governed primarily according to the application of the following provisions of the *Excise Tax Act* (the “Act”): subsection 169(1), section 141, section 141.01 and paragraph 199(2)(a). As well, the definitions of “commercial activity”, “exempt supply” and “short term accommodation”, contained in section 123, are also relevant. The Appellant also relied on Schedule V, Part VIII, paragraph 1 in respect to its position on the acquisition of the Northern Adventure vessel.

[40] There are a number of provisions contained in the *CFA* that are also applicable to the issues.

[41] The GST is considered to be a consumption tax which is meant to be paid by the end consumer of the goods and services. Subsection 165(1) is the key liability provision in this regard. In *CIBC World Markets Inc. v The Queen*, 2011 FCA 270, [2011] FCJ No. 1378, at paragraphs 7 to 15, the Court provided a review of the general scheme and purpose of the GST provision contained in the *Act*:

(2) The key liability provision: subsection 165(1) of the Act

[7] Subsection 165(1) of the Act sets out a general rule: those who receive services or property, such as goods, in the course of a commercial activity (known under the Act as a “taxable supply”) are liable to pay GST.

(3) Who is subject to GST

[8] The general rule in subsection 165(1) of the Act applies to all, even those who are not final consumers.

[9] In particular, each recipient of taxable goods and services is potentially liable to pay GST, even if it, as an intermediary, ultimately delivers those goods and services to others. For example, a wholesaler may supply goods to a retailer who supplies them to a consumer. The retailer is liable to pay GST under the general rule in subsection 165(1).

[10] Were the matter left there, the GST would lose its character as a consumption tax imposed on the final consumers of goods and services. It would attach, full force, to each party in a chain of transactions culminating in the final receipt by consumers.

(4) Input tax credits: the general concept

[11] One way in which the Act prevents this consequence is by giving parties credits for “inputs” that they receive.

[12] For example, for the purpose of the selling of goods to consumers, a retailer might receive “inputs,” such as inventory. That “input” to the retailer is necessary in order for it to make a supply of the goods to the consumer. Depending on the particular business, there may be all sorts of necessary “inputs.”

[13] Obviously, if, in the example above, the retailer were not given credit for the GST paid on inputs needed for the making of a taxable supply of goods to a consumer, the GST would be imposed full force on it and, for that matter, on every intermediary in the chain of distribution. If that happened, the GST would lose its character as a consumption tax imposed on the final consumer of goods and services.

[14] To achieve the purpose of taxing the final consumers of goods and services, the Act allows tax credits for inputs received by parties to make an onward taxable supply. These credits are called input tax credits.

[15] The input tax credits, as explained above, ensure that the fundamental character of the GST as a consumption tax on final consumers is maintained. In the words of the Minister: (Canada Revenue Agency, GST Memorandum 8.1 - General Eligibility Rules (May 2005) at paragraph 1)

A fundamental principle underlying the GST/HST is that no tax should be included in the cost of property and services acquired, imported or brought into a participating province by a registrant to make taxable supplies ... in the course of the commercial activities of the registrant. To ensure that a property or service consumed, used or supplied in the course of commercial activities effectively bears no GST/HST, registrants are generally eligible to claim an input tax credit (ITC) for the GST/HST paid or payable on such property or service. Consequently, the ITC enables each registrant to recover the tax incurred in that registrant’s stage of the production and distribution process.

[42] The general rule contained in subsection 165(1) applies to all registrants, even to intermediaries who are not the final consumers. For example, a wholesaler may supply goods to a retailer, who is liable to pay GST, but who in turn will be supplying those goods to a consumer. To retain the character of the GST as a consumption tax in respect to the final consumer of the product or service, the *Act* allows tax credits for “inputs” received by parties in order to make an onward supply. The general rule for calculation of ITCs is contained in subsection 169(1) of the *Act*. Essentially, if a registrant supplies only taxable services, that registrant will be entitled to 100 percent of ITCs used or consumed in the provision of that supply. If only exempt supplies are made, ITCs cannot be claimed.

[43] The additional scenario that may arise is the case of a registrant that makes both a taxable and exempt supply. Since a claim may still be made for ITCs in respect to those goods and services required and used for making the taxable supply portion, the *Act* allows a registrant to adopt an apportionment or allocation method. This means that any part of a business that consists of making exempt supplies must be “notionally severed” for GST purposes. Subsection 141.01(5) allows registrants to freely adopt a method provided it is “fair and reasonable” and “used consistently by the person throughout the year.” Although the *Act* does not offer any guidelines in respect to choosing an allocation method, it is clear that not all methods will be acceptable depending on the circumstances, including the intent and purpose for which the input was acquired. This clearly comes down to a question of fact.

[44] There are also two deeming provisions in respect to claims for ITCs that are relevant. First, pursuant to section 141, if substantially all of the consumption of property or a service is used or intended to be used in a particular activity, taxable or exempt, then the *Act* deems all of the property to be in the course of those activities. The view of the Canada Revenue Agency (“CRA”) is that the term “substantially all” means 90 percent or more. Generally, if 90 percent is used or intended to be used in either taxable or exempt activities, then it will be deemed to be used in 100 percent of that activity. Second, subsection 199(2) overrides subsection 169(1) in respect of ITCs claimed for the acquisition or importation of capital property. If such property is acquired or imported “primarily” for use in commercial activity, the registrant is entitled to claim all of the ITCs. If not, the registrant will be entitled to none. “Primarily” has been interpreted to mean either “more than 50 percent” or “first in importance.”

[45] In *Magog (City of) v The Queen*, 2001 FCA 210, [2001] FCJ No. 1259, Noël J. held that, although the *Act* does not specify a specific allocation method in respect to subsection 141.01(5), a registrant will be permitted to select a method to allocate ITCs provided it is fair and reasonable. At paragraph 17, the following comments were made:

[17] It is important in this regard to note that the *Act* does not require the appellant to establish the type of accounting systems that would enable it to separate out each property or service that is consumed or used in the context of its mixed activities. Parliament was aware that such a requirement could result in compliance expenses that would exceed the tax yielded. So it left it to the taxpayer to select an appropriate method, while requiring that the method chosen be “fair and reasonable”.

[46] The only prerequisite is that the chosen method be fair and reasonable having regard to all of the circumstances. However, there is no requirement that a registrant pick the “best” available allocation method. These principles were discussed in detail in *Bay Ferries Limited v The Queen*, 2004 TCC 663, [2004] TCJ No. 507. In that case, the appellant maintained a ferry operation similar, but not identical, to the vessels in the present appeals. The Court in *Bay Ferries* made the following comments, at paragraphs 39 to 41:

[39] The Minister cannot substitute its own allocation method, simply because it appears to be more representative of the situation or the better method. This reasoning establishes a degree of deference to be given a taxpayer in choosing a method that is fair and reasonable.

[40] Of course I believe that a taxpayer must always be able to satisfactorily substantiate that the chosen method is, in fact, fair and reasonable and consistent. But if he is able to do so, subsection 141.01(5) allows a registrant a broad latitude of flexibility in choosing a method, provided it can be shown to be fair and reasonable. This implies that the chosen method will reasonably reflect the actual use of the property and services and the manner in which it conducts its business generally.

[41] There are no methods specified in the *Act* which are to be used as guidelines. Again, it comes down to a review of the facts in each case. It is generally accepted that the preferred method is direct allocation, where the property or service can be directly allocated to the activities. The direct method will produce the most accurate results. In some circumstances this method cannot be applied. It was not practical for the Appellant in this case to utilize the direct application method because of shared overhead.

[47] In concluding in *Bay Ferries* that the appellant’s method of allocating between taxable and exempt activities was fair and reasonable, four guiding principles for such a determination were established. First, whether a particular allocation method chosen by a registrant will be fair and reasonable is a question of fact (paragraph 6). Second, and relying on the *Magog* decision, the Court does not have to decide whether the best or most appropriate method has been chosen by the Minister or the taxpayer, but simply whether the method chosen by the taxpayer is fair and reasonable (paragraph 37). Third, a degree of deference is to be accorded to the taxpayer in choosing a method that is fair and reasonable as well as consistent (paragraph 39). Fourth, regardless of such deference, a registrant must always be able to satisfactorily substantiate that the chosen method is, in fact, fair, reasonable and consistent. The chosen method must reasonably reflect the actual use of the property and services and the manner in which it conducts its business activities generally (paragraph 40).

[48] The Court, in *Îles-de-la-Madeleine (Municipalité régionale de comté) v The Queen*, 2006 TCC 235, [2006] TCJ No. 166, relied on the reasoning in *Magog and Bay Ferries* in concluding that a chosen method need not be a perfect one and that it cannot be rejected solely on the ground that it is not the ideal method. The Court also noted that the assessment of the fairness and reasonableness of a method involves a “subjective dimension” (paragraph 78).

B. Infrastructure Decks

[49] In respect to the appeals before me, the question is whether BCF’s categorization of the infrastructure decks is fair and reasonable. A fair and reasonable allocation method should realistically reflect the actual use of the property and services and the manner in which BCF conducts its business generally. Both the Appellant and Respondent agreed that the “deck by deck” method chosen by BCF is fair and reasonable. However, the parties disagreed on the classification of some of the decks, that is, whether it is fair and reasonable to consider the infrastructure decks, used for propulsion and steering, on those vessels providing commercial activities, as inputs in the provision of both taxable supplies and exempt supplies.

[50] BCF characterized the infrastructure decks as common and argued that there is a direct nexus between the propulsion activity and the commercial operations on each vessel. BCF’s view is that its operations are fully integrated but that the method it employed to apportion the supplies and claim ITCs resulted in a notional severance of the exempt portions that is both fair and reasonable in the resulting allocation. The propulsion of these vessels, therefore, does not occur in isolation from the commercial activities in which it engages.

[51] BCF conceded that it will not be entitled to ITCs on vessels where propulsion occurs in isolation from commercial activities. However, with respect to the vessels at issue, there exists this direct nexus between the ferrying transportation services and its taxable supplies.

[52] The Respondent submitted that BCF’s allocation method does not reasonably reflect the actual use of these infrastructure decks. Therefore, claims for ITCs in respect to these decks do not reasonably reflect their actual use or the manner in which BCF conducted its business operations. Mr. Murray agreed, on cross-examination, that no commercial activities were actually taking place on those particular infrastructure decks. Consequently, the Respondent submitted that

they do not contribute to those activities and that their inclusion distorts the financial reality of those activities.

[53] BCF, on the other hand, relied on the evidence of Mr. Murray, who testified that the propulsion and steering support the onboard commercial activities by creating a high volume of customer turnover and a captive market. On that basis, BCF categorized all infrastructure decks on those vessels as common to both taxable and exempt activities because they are essential to move the commercial areas onboard.

[54] Subsection 141.01(5) addresses the allocation between taxable and exempt supplies for a registrant who engages in both activities. It is connected to subsection 169(1), which allows ITCs only to the extent that they were acquired for the consumption or use in the course of commercial activity. A method must be chosen that fairly, reasonably and consistently restricts the ITCs that are claimed to reflect those goods and services acquired for or used in the making of taxable supplies. That method must reasonably reflect the actual use of the property and services and the manner in which the business is conducted. In addition, it should not distort the financial reality of the commercial activity (*Bay Ferries*, at paragraph 40).

[55] An input, therefore, must contribute to the ultimate production of the taxable supply. The decision in *Midland Hutterian Brethren v The Queen*, [2000] FCJ No. 2098, dealt with the threshold level of contribution. The issue was whether a religious colony could claim an ITC for 50 percent of the GST incurred on cloth that was allocated to its members in order to make both church clothing and work clothing used in the colony's commercial farming activities. The Federal Court of Appeal, in allowing the colony to claim an ITC for the work cloth, framed the issue, at paragraph 2, as follows:

... There is no dispute that the applicant carries on a commercial activity, that is farming, and produces non-exempt supplies. The disagreement is about whether the cloth was used in the course of commercial activities. The issue is one of remoteness. How closely tied to an output does an expense have to be before it qualifies for an ITC? (Emphasis added)

[56] Once it is determined that an item is acquired and used in connection with a commercial activity of a GST registrant and that item directly or indirectly contributes to the production of articles or the provision of services that are taxable

supplies, then an ITC will be available using a formula in accordance with subsection 141.01(5) of the *Act*.

[57] While I agree with the Respondent that the primary use of those decks is for the propulsion of the vessels and that they support and are connected, therefore, to exempt services, the evidence was clear and uncontradicted that some portion of those decks is indirectly connected and necessary to BCF's commercial activities conducted onboard the vessels. The evidence supports a conclusion that there is a nexus between the propulsion, steering and infrastructure decks and BCF's commercial activities. The ancillary services onboard could not occur without the support of the equipment and systems located on the infrastructure decks. The uncontradicted evidence, of both Mr. Murray and Mr. Collins, established that the decks in issue support the entire vessel and not just the act of propulsion. Most of the decks in issue are located below the passenger decks on each vessel. While these decks on all vessels will contain water, sewer and heating systems, the evidence supports that, on those vessels where commercial activities occur, those systems are specially designed and scaled in size and weight to support the additional requirements of those operations. Such vessels are either specifically built or purchased with these particular structural designations in place so that the commercial activities can be properly supported. The greater the scale of commercial activities on a vessel, the greater the requirement will be for items such as electricity, heating, air conditioning, water, sewerage, deck area and overall vessel stability. For example, larger water tanks will be required if restaurants are located onboard and these tanks will be required to be maintained separately from water tanks used elsewhere on the vessel because of different intended uses. By contrast, a vessel, without commercial activities onboard, will require smaller water tanks, that are fewer in number and with less water pumping capacity, as those water systems will likely be supplying water to a few washrooms only. Mr. Collins also explained how voids or open spaces in the hull of a vessel must be larger in volume to support commercial activities because they add weight to a vessel. These open spaces are essential for buoyancy and consequently are tied to the weight of the vessel.

[58] The jurisprudence in this area supports a standard of review that is deferential to registrants. The method does not have to be the best available method and its application does not have to be infallible. Nor can the Minister substitute a method of its own choosing simply because it feels that another method more accurately reflects the actual use of an input. The test is whether the allocation method is fair and reasonable and not whether it is the best of all possible methods.

[59] According to the evidence, a central focus of BCF's business plan is the ancillary activities. Significant capital investments have been made in the provision of these services. On many routes, almost half of the crew is employed in providing those services. In recent years, there has been some increase in the average spending per passenger. Other than the northern route vessels, the taxable use calculated pursuant to BCF's chosen method ranges between 18 percent and 30 percent. With uncontradicted evidence before me respecting the pivotal role that ancillary activities have onboard these vessels, based on the facts, those percentages reflect a fair and reasonable allocation method employed in a large and complex business operation that provides both taxable and exempt supplies integrated within each vessel's systems. It is certainly not unreasonable to conclude that these decks support not only the transportation systems but also the ancillary activities, nor does the application of the method result in either unfair or unreasonable claims for ITCs.

[60] There may well be a more reliable method of allocation in these circumstances but the test is not to find the best method or to substitute my opinion or the Minister's for that of the registrant. As long as the method satisfies the test of being both fair and reasonable in the circumstances, does not distort the financial reality of BCF's activities and reasonably reflects the actual use of the vessels, the categorization of the infrastructure decks as a common input, directly and indirectly connected to the commercial activities onboard, will be permitted.

C. Staterooms

[61] The Respondent submitted that the rental of staterooms is an exempt supply because it is part of the single supply of ferrying transportation services. BCF contended that they are a separate and taxable supply because, as an optional supply, they are not integral to the core ferrying services provided.

[62] The test to be applied in order to determine whether a supplier has made a single supply or multiple supplies was discussed in detail by Rip A.C.J. (as he was then) in *O.A. Brown Ltd. v Canada*, [1995] TCJ No. 678 and that test was also recently affirmed by the Supreme Court of Canada in *Calgary (City) v The Queen*, 2012 SCC 20, [2012] 1 SCR 689. The test adopted in *O.A. Brown* was whether, in substance and reality, an alleged separate supply is an integral component of the overall supply. Citing *O.A. Brown*, the Supreme Court in *Calgary (City)*, at paragraphs 36 to 38, stated:

[36] When reaching his decision, Justice Rip made the following observation:

... one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. [p. 40-6]

(Citing *Mercantile Contracts Ltd. v. Customs & Excise Commissioners*, File No. LON/88/786, U.K. (unreported).)

[37] Justice Rip also noted the importance of common sense when the determination is made. McArthur T.C.J. made a similar observation in *Gin Max Enterprises Inc. v. R.*, 2007 TCC 223, [2007] G.S.T.C. 56, at para. 18:

From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense.

[38] Applying the test, Justice Rip found that the disbursements and commission were not charged for services that were “distinct supplies, independent of the whole activity” (p. 40-8). Only if taken together did the activities of buying, branding, inoculation, and other disbursements form a useful service. He concluded:

In substance and reality, the alleged separate supply, that of a buying service, is an integral part of the overall supply, being the supply of livestock. The alleged separate supplies cannot be realistically omitted from the overall supply and in fact are the essence of the overall supply. The alleged separate supplies are interconnected with the supply of livestock to such a degree that the extent of their interdependence is an integral part of the composite whole. . . . The appellant is making a single supply of livestock and the commission and disbursements charged are part and parcel of the consideration for that supply. They do not amount to separate supplies. [pp. 40-8 to 40-9]

[63] Conversely, a factor indicative of multiple supplies is whether each alleged separate supply could be purchased individually and still be useful or, as Rip A.C.J. stated in *O.A. Brown*, at paragraphs 22 and 23:

[22] One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply. This is not conclusive...

[23] ... In each case it is useful to consider whether it would be possible to purchase each of the various elements separately and still end up with a useful

article or service. For if it is not possible then it is a necessary conclusion that the supply is a compound supply which cannot be split up for tax purposes.

[64] Applying the test enunciated in *O.A. Brown* and adopted by the Supreme Court of Canada in *Calgary (City)* to the facts before me, the question is whether the alleged separate supply of the rental of staterooms is, in substance and reality, an integral part or component of the overall supply of the ferrying transportation services.

[65] I am of the view that the provision of stateroom rentals is a separate supply. Common sense dictates that the provision of ferrying services remains a useful and valuable supply minus the rental of staterooms. Staterooms are not an essential component to the overall supply of transportation services. In fact, there are insufficient numbers of staterooms to accommodate every passenger, even if all of the passengers on any route wished to purchase a stateroom. The provision of staterooms can be, and frequently is, omitted from the supply of ferry services. It is only logical to conclude that it must be a separate supply. It can be purchased separately and still result in a useful service for a particular passenger. It is a “stand alone” product independent of the ferrying service. There is such a lack of interconnectedness that it is very easy to identify these stateroom supplies as distinct components from the supply of transportation services that get a passenger from Point A to Point B. The rental of staterooms falls within the *Act’s* definition of short-term accommodations and, in any event, can easily be separated from the overall supply, leaving a useful product or service intact.

[66] Given the conclusion that the stateroom rentals are a separate supply from ferry services, are they taxable or exempt? The evidence of Mr. Collins established that many ferry operations exist elsewhere which have itineraries similar in duration to those offered by BCF but that do not offer stateroom rentals. In addition, the provisions of the *CFA* support the conclusion that the rentals are a taxable supply. The *CFA* considers the stateroom rentals to be an ancillary service, not directly related to the transportation of passengers and vehicles. Unlike the basic ferry fees, the cost of stateroom rentals is not regulated by the Commissioner. The Appellant placed considerable weight on this provincial legislation. Justice Jorré, in *Angels of Flight Canada Inc. v The Queen*, 2009 TCC 279, [2009] TCJ No. 192, concluded that weight should be accorded provincial law when interpreting provisions of the *Act*. In these appeals, the *CFA* defines “ancillary services” as “any services that are not directly related to the transportation of vehicles and passengers ...” (*CFA*, Part 1 - Interpretation). Access to a stateroom is an upgrade that is purchased separately from the basic ferry ticket, which moves

passengers between two destinations. The staterooms exist to provide upgraded amenities, while being transported onboard a vessel, to those passengers who choose such an upgrade beyond the basic ticket purchase relating to the provision of core services.

[67] The wording contained in the provincial legislation, the fact that the staterooms are paid for separately and that they are an optional purchase, support my conclusion that such rentals retain a separate and distinct identity from the supply of the ferrying services and, as such, are taxable supplies for which ITCs may be claimed.

[68] The Respondent argued that, if the stateroom rentals were held to be taxable supplies, then BCF's entitlement to ITCs should be offset by the GST that BCF should have, but did not, collect on those rentals during this period. BCF claimed that the Respondent's contention amounts to an assessment for failure to collect GST, which would fall outside the normal reassessment period. I agree with the Appellant in this regard. Subsection 298(4) permits the Minister to assess "at any time" provided the Minister can show that there has been a misrepresentation attributable to carelessness, neglect or willful default or committed fraud. In these appeals, the Minister has neither included any argument in this regard in its pleadings nor raised an argument in submissions or otherwise that addresses the two elements that would permit the Minister to assess BCF for uncollected GST for this period. I agree with the Appellant's submission that the Minister's inability to recover the GST that BCF should have charged on the stateroom rentals, such that the ITC refund can be offset, is "simply the risk associated with having taken a position that was wrong in law" (Appellant's Brief, paragraph 250).

D. Fuel and Lubricants

[69] BCF submitted that it is entitled to claim ITCs for fuel and lubricants which directly and indirectly contribute to the provision of taxable supplies, the ancillary services, by providing the electricity, heat, hot water, lighting and other infrastructure inputs. Mr. Collins explained that, because all such commercial services consume more energy than a vessel without those services onboard, there is an interconnectedness between fuel consumption and the ancillary activities. According to Mr. Collins, the fuel system is common to all energy consumption. Mr. Murray testified that fuel contributes to the propulsion of the vessel which is essential in creating a captive market and high volume turnover of customers who will utilize the ancillary services. Without movement of the vessel, there would be no customers and no sales.

[70] These facts appear to support a conclusion that BCF should be entitled to a proportion of ITCs in respect of the fuel and lubricants. However, the Respondent relied on the following key assumptions respecting ITCs relating to fuel and lubricants in the Reply to the Amended Notice of Appeal:

11. [...]

- ss) less than 10% of the Appellant's consumption and use of fuel and engine lubricants was attributable to the provision of taxable services;
- tt) substantially all of the Appellant's consumption and use of fuel and engine lubricants was attributable to the provision of exempt services;

[...]

[71] The Minister has assumed that less than 10 percent of fuel and lubricants were consumed in commercial activities and, consequently, "substantially all" of the consumption would be attributable to the supply of exempt services. Subsection 141(3) of the *Act* states:

141. (3) Use in other activities – For the purposes of this Part, where substantially all of the consumption or use of property or a service by a person, other than a financial institution, is in the course of particular activities of the person that are not commercial activities, all of the consumption or use of the property or service by the person shall be deemed to be in the course of those particular activities.

Therefore, subsection 141(3) would apply to deem that all of the fuel and lubricants were used in the provision of the exempt activity. The Respondent argued that BCF is unable to prove, on a balance of probabilities, that more than 10 percent of the fuel and lubricants was used directly to support the ancillary activities. Therefore, these items must be a direct and exempt input as substantially all of the fuel was consumed in propulsion.

[72] I agree with the Respondent's argument. BCF has simply failed to produce evidence that could demolish the Minister's assumptions in this regard. At paragraph 80 of the Agreed Statement of Facts, BCF admitted that substantially all of the fuel that was consumed was for propulsion. BCF also admitted that it was unable to prove, on a balance of probabilities, that over 10 percent of the fuel was consumed directly in the provision of the vessel's commercial activities. Surprisingly, BCF went on to concede that it would not challenge that assumption.

[73] During the hearing, Mr. Murray made essentially the same concession:

Q. And BC Ferries agrees that substantially all the fuel was used for propulsion?

A. That is something that is a matter of – we weren't able to absolutely prove that 10 per cent or more was used on any of the vessels, at this point.

(Transcript, Volume 2, page 175)

[74] Mr. Collins explained the practicalities of why BCF made the concessions it did and why it was unable to challenge the Minister's assumptions:

Q. So the engines are drawing from the same place as the generators?

A. Correct.

Q. Do you have a measurement system in place to determine how much fuel is coming for the generators versus the engines?

A. Not really. It's very difficult to determine the individual fuel consumption of a particular component within the engine room. We can tell you how much the ship as a whole, as an integrated unit consumes, but it's very difficult to break it up in between. There is just not the kind of measuring equipment installed on the ships which gives you back (*sic*) kind of breakdown.

(Transcript, Volume 2, page 272)

BCF will therefore not be permitted to claim any ITCs in respect of the fuel and lubricants. Although, in recent decisions, I have criticized the Crown's problematic pleadings, these assumptions are an example of proper drafting of pleadings, the result, I assume, of care and attention to detail by the Counsel involved. The result is that the Appellant is unable to meet the onus of overcoming those assumptions in respect to this issue.

E. The Importation of the Northern Adventure

[75] The issue of the ITC entitlement in respect to the acquisition and importation of this vessel arises out of the special rules for capital property contained in paragraph 199(2)(a) of the *Act*. That provision states:

199. (2) Acquisition of capital personal property – Where a registrant acquires or imports personal property or brings it into a participating province for use as a capital property,

(a) the tax payable by the registrant in respect of the acquisition, importation or bringing in of the property shall not be included in determining an input tax credit of the registrant for any reporting period unless the property was acquired, imported or brought in, as the case may be, for use primarily in commercial activities of the registrant;

If BCF imported this vessel for use “primarily” in its commercial activities, it will be deemed to have imported it for use exclusively in its commercial activities. Consequently, BCF would then be entitled to 100 percent of the ITCs claimed. On the other hand, if the vessel was imported for use “primarily” in its exempt activities, then BCF will be deemed to have imported it for use exclusively in its exempt activities and it will not be entitled to any claim for ITCs.

[76] The Respondent contended that BCF’s intention and purpose in acquiring and importing the Northern Adventure was for use primarily in its exempt ferry transportation services. In fact, it acquired this vessel to replace the Queen of the North and, therefore, to be able to resume its transportation services on those northern routes. BCF submitted that the primary use of the capital property is inextricably bound to the method it has chosen to allocate ITCs pursuant to section 141.02. BCF relied on the decision of *Îles-de-la-Madeleine* in order to claim that its entitlement to ITCs should be based on a percentage of use attributed to its commercial activities. Based on this method, where more than 50 percent of the capital property is used in its commercial activities, then it must be considered to be used “primarily” in its commercial activities for the purposes of paragraph 199(2)(a). BCF’s method allocates 56.6 percent of the vessel as being used for commercial activities. BCF’s position, therefore, is that it should be entitled to all of the claimed ITCs.

[77] This issue requires a determination respecting the application of the term “primarily” to the facts in these appeals. The term was defined “qualitatively” in the decision of *Mid-West Feed Limited et al v Minister of National Revenue*, 87 DTC 394, as “of first important, principle or chief”. However, the decision in *City of Calgary v The Queen*, 2009 TCC 272, [2009] TCJ No. 195, considered that the term “primarily” could also be interpreted “quantitatively” to mean more than 50 percent of the use.

[78] Angers J.A., in *Foote v The Queen*, 2007 TCC 46, [2007] TCJ No. 17, provided a detailed review of the jurisprudence respecting the interpretation of the term “primarily” at paragraphs 11 to 12:

[11] The question of the meaning of "primarily" has been addressed by the courts in previous decisions. In *Mid-West Feed Ltd. v. M.N.R.*, 87 DTC 394, Chief Judge Couture (as he then was) of the Tax Court of Canada held that the word "primarily" means in excess of 50% of the total use of the asset. Mr. Justice Pratte of the Federal Court of Appeal wrote in *Mother's Pizza Parlour (London) Ltd. v. The Queen*, 88 DTC 6397, that when different parts of the same building are permanently used for what are considered to be two different purposes, the most important factor in determining the purpose for which the building is primarily used is the amount of space in the building that is used for each one of those two purposes.

[12] In the present case, two units of the three-storey complex are used for the purpose of earning rental income. As much as I can appreciate the fact that, for the appellant, the object of the project was to build herself a residence, I cannot ignore the other use of the complex. A qualitative assessment may nevertheless be relevant. The Federal Court of Appeal in *Burger King Restaurants of Canada Inc. v. The Queen*, 2000 DTC 6061, said that the qualitative evidence must be sufficiently persuasive and must be capable of being analysed in such a way as to cause the court to displace the result of the quantitative space test. Although, the appellant may have invested more money in her own unit, the evidence is insufficient to allow this court to analyse such a possibility and conclude that the qualitative evidence displaces the result of the quantitative space test. ...

[79] Based on the reasoning in *Foote*, it is preferable to employ the application of a quantitative space test unless qualitative evidence is sufficiently persuasive to displace it. If the quantitative approach is applied in the interpretation of “primarily”, BCF would be allowed to claim 100 percent of the ITCs it is claiming because BCF’s chosen method allocates more than 50 percent of the Northern Adventure for use in its commercial activities.

[80] The Respondent submitted that subsection 199(2) requires that this Court consider BCF’s intention at the time of its purchase. The Respondent’s position is, in fact, supported by the decision of Chief Justice Bowman, as he was then, in *Coburn Realty Ltd. v The Queen*, 2006 TCC 245, [2006] TCJ No. 184. At paragraphs 9 to 12, he held the following:

[9] The words in subsection 199(2) "... for use primarily in commercial activities..." imply purpose or intent. The French version of the provision is consistent with this interpretation:

"... en vue d'être utilisé principalement dans le cadre de ses activités commerciales."

[10] Statements by a taxpayer of his or her subjective purpose and intent are not necessarily and in every case the most reliable basis upon which such a question can be determined. The actual use is frequently the best evidence of the purpose of the acquisition. In *510628 Ontario Limited v. The Queen*, 2000 GTC 877, the following was said:

[11] It should be noted that the expression "for use primarily ..." (en vue d'être utilisé) requires the determination of the purpose of the acquisition, not the actual use. Nonetheless, I should think that as a practical matter if property is in fact used primarily for commercial purposes it is a reasonable inference that it was acquired for that purpose.

[11] I shall turn then to the actual use that was made of the boat. Mr. Coburn testified that the boat was used for entertaining clients and for rewarding his sales staff. He stated that the appellant was seeking to expand its business to cottage country. I accept that he wished to expand the appellant's business but I am not persuaded that the boat was used or was intended to be used primarily for business purposes. Although I think there was probably an element of business in some of its use, the evidence of its actual use does not support the conclusion that the primary purpose of its acquisition was for use in the appellant's business.

[12] The word "primarily" is generally taken to mean over 50%. The problem is, however, to determine what one should apply the 51% to: time, number of trips, distance travelled, number of passengers, length of voyage, the amount of business generated, the number of potential sales locations visited? All of these factors may have a bearing but they illustrate the difficulty in applying a mechanical sort of test. Ultimately, it boils down to a question of judgement and common sense.

(Emphasis added)

[81] Considering the comments in *Coburn Realty*, with which I am in agreement, I conclude that the Northern Adventure was imported primarily for use in the provision of its exempt ferrying services. BCF's core business is providing ferry transportation of passengers and vehicles. The ancillary services are just that – ancillary, that is, subordinate to its core business activities. With the sinking of the Queen of the North vessel, BCF was required to locate a replacement to provide ferry services on its northern routes. Otherwise, it risked being in breach of its Contract with the Province to provide ferry services on all designated routes as well as exposing itself to the potential implications that a contractual breach would bring.

[82] My conclusion, that the main reason that BCF acquired the Northern Adventure was to be able to use it for its transportation services on the routes originally serviced by the Queen of the North, is also supported by correspondence sent by David L. Hahn, the President and CEO of BCF, to The Honourable Jim Flaherty, then Minister of Finance, in support of its remission application of December 12, 2006 (Exhibit R-1, Tab 65). Specifically, Mr. Hahn states in his letter:

On behalf of British Columbia Ferry Services Inc. (BC Ferries), I am writing to inform you that we are submitting the attached request to Finance Canada for duty relief on the purchase of the used vessel *MV Sonia* which is required to provide safe, reliable and essential marine transportation services along the North Coast of British Columbia. (Emphasis added)

[...]

In the Executive Summary, attached to Mr. Hahn's correspondence, it states:

[...]

In order to continue to provide safe, efficient, and reliable ferry service, and return service to a reasonable level to meet the economic and social needs of the communities of the north coast of BC, it was critical for BC Ferries to find a replacement vessel as quickly as possible. ...

[...]

[83] In addition, I have before me the admission of Mr. Murray that the Northern Adventure was imported primarily for use in its ferrying of passengers and vehicles. During discovery, he made the following statement:

Question 1061: So the "Northern Adventure" was acquired and imported primarily for use in ferrying passengers?

Answer: Yes, passengers and vehicles.

(Transcript, Volume 2, page 240)

During the hearing, Mr. Murray testified to the truth of that statement. These facts provide sufficiently persuasive evidence to, not only displace BCF's stated intention, that the vessel was imported primarily for use in its commercial activities, but also to replace the use of the quantitative approach, advocated to determine the primary function of a particular space, with the qualitative approach.

[84] As a result, BCF will not be entitled to claim ITCs in respect to the importation of the Northern Adventure.

Conclusion

[85] The appeals will be allowed in part. I am making no order as to costs because each party has achieved partial success. The allocation method that BCF chose to categorize the infrastructure decks as common to both taxable and exempt supplies is both fair and reasonable in the circumstances and in accordance with the facts that were before me. The evidence, of both Mr. Murray and Mr. Collins, was uncontradicted and it supported my conclusion that these decks are directly and indirectly connected to the commercial activities conducted onboard certain vessels. The Minister does not dispute the “deck by deck” input allocation method which BCF utilized as being fair and reasonable. The Minister did, however, dispute how those decks were categorized in order to calculate the areas that were used in relation to the making of taxable supplies as opposed to exempt supplies. Based on the facts, BCF’s categorization of the infrastructure decks as common cannot be considered unfair or unreasonable. BCF will therefore be entitled to claim ITCs in accordance with its chosen method.

[86] I also accept BCF’s categorization of staterooms as separate taxable supplies. The facts support that they were not an integral component of the overall supply of ferrying services provided by BCF. My conclusion that the provision of stateroom rentals is a taxable supply is not only grounded in common sense but is also supported by both the evidence of Mr. Murray and Mr. Collins and the provisions of the *CFA*. BCF cannot be assessed in respect to the net tax that should have been charged on the stateroom rentals in order to offset its claim for ITCs because the normal reassessment periods have expired and the Minister in any event made no reference to this in its pleadings.

[87] BCF will not be entitled to claim ITCs in respect to fuel and lubricants. The Minister’s assumptions in this regard have not been demolished and BCF has therefore failed to discharge the onus which is upon it in these appeals. BCF has failed to prove, on a balance of probabilities, that over 10 percent of the fuel was directly consumed in its provision of commercial activities. Consequently, substantially all of the fuel and lubricants consumed onboard was, as the Respondent contended, for propulsion.

[88] Finally, the Northern Adventure vessel was acquired and imported by BCF primarily for use in its exempt transportation services and not, as BCF contended,

for use primarily in its commercial activities based on its chosen allocation method. Therefore, BCF will not be entitled to any of the ITCs claimed in respect to the importation of the Northern Adventure.

[89] In conclusion, I wish to commend Counsel on both sides for working together in providing an Agreed Statement of Facts, for providing concise and well-drafted written argument and in presenting straightforward oral submissions.

Signed at Ottawa, Canada, this 14th day of October 2014.

“Diane Campbell”

Campbell J.

SCHEDULE A

2008-1600(GST)G
2013-4206(IT)G

TAX COURT OF CANADA

BETWEEN:

BRITISH COLUMBIA FERRY SERVICES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AGREED STATEMENT OF FACTS

The parties agree that for the purposes of these appeals and any related appeal the facts set out in this Agreed Statement of Facts are true. Either party may adduce other evidence or documents not inconsistent with this Statement.

1. The monthly Goods and Services Tax (GST) reporting periods in issue in these appeals are the periods running from April 2, 2003 to June 30, 2005, and the period of March of 2007 (collectively, the Periods).
2. During the Periods, BCF provided core ferry services on 25 routes supported by 37 vessels and 47 terminals.
3. For GST purposes, BCF engaged in the making of both exempt and taxable supplies.

4. The core ferry service of transporting passengers and vehicles was an exempt supply.
5. The sales in restaurants and gift shops among other things constituted taxable supplies.
6. These appeals focus on the amount of input tax credits (ITCs) that British Columbia Ferry Services Inc. (BCF) can claim respecting the Periods.
7. The *Excise Tax Act* (the Act) requires BCF to use a fair and reasonable method to determine the allocation of ITCs between taxable and exempt activities.
8. BCF claimed ITCs based in part on a method meant to allocate common inputs related to its ferries between taxable and exempt activities. The allocation percentages for common inputs respecting the following ferries (collectively, the Ferries) are in issue:
 - a) The Spirit of Vancouver Island;
 - b) The Spirit of British Columbia;
 - c) The Queen of Burnaby;
 - d) The Queen of Coquitlam;
 - e) The Queen of Cowichan;
 - f) The Queen of Esquimalt;
 - g) The Queen of Oak Bay;
 - h) The Queen of Surrey;
 - i) The Queen of Vancouver;
 - j) The Queen of Nanaimo;

- k) The Queen of New Westminster;
- l) The Queen of Saanich;
- m) The Queen of Tsawwassen;
- n) The Queen of Alberni;
- o) The Queen of Chilliwack
- p) The Queen of the North;
- q) The Queen of Prince Rupert; and
- r) The Northern Adventure.

9. BCF applied a method that calculated ferry input allocation percentages based on a categorization of each deck as providing taxable, exempt or common services. The respondent accepts BCF's categorization of most decks, but some decks remain in issue.

10. The following decks are in issue on the following Ferries:

- a) the Spirits of British Columbia and Vancouver Island:
 - i) the Grating Level, Machinery Flat and Bridge Deck;
- b) the Queens of Burnaby, Coquitlam, Cowichan, Esquimalt, Oak Bay, Surrey and Vancouver:
 - i) the Hold Deck;
- c) the Queens of Nanaimo, New Westminster, Saanich and Tsawwassen:
 - i) the Below Main Deck;

- d) the Queens of Alberni and Chilliwack:
 - i) the Lower Hull and Bridge Deck;
 - e) the Queens of the North and Prince Rupert:
 - i) the Tank Top, Tween Deck, Boat Deck and Top Deck; and
 - f) the Northern Adventure:
 - i) the Tank Top, Tween Deck, Promenade Deck (exterior), Boat Deck, Cabin Deck and Top Deck.
11. The respondent categorizes all the decks in issue as providing exempt services while BCF categorizes all but one of the decks in issue as providing common services. The exception is with respect to the Cabin Deck on the Northern Adventure, which BCF categorizes as providing taxable services.
12. Attached as Appendix A to this Statement of Agreed Facts and Issues is a comparative summary of each Ferries' deck categorizations and allocation calculations by the parties, excluding those for the Northern Adventure.
13. Attached as Appendix B to this Statement of Agreed Facts and Issues is a comparative summary of the Northern Adventure deck categorizations and allocation calculations by the parties. Note, however, that the chart in the summary erroneously refers to the CRA's treatment of the Cabin Deck as taxable, when in fact the CRA treated it as exempt. BCF calculated that vessel's taxable use at 56.8% while the respondent calculated it as 14.1%.

Potential stateroom GST

14. If the Court concludes that the stateroom decks should be treated as providing common services, on the basis that BCF's provision of staterooms is part of a taxable activity, then the respondent asserts that an issue arises as to whether the

GST that BCF should have collected and remitted respecting them offsets any additional ITCs that the Court allows.

The acquisition and importation of the Northern Adventure

15. Where a GST registrant acquires a capital asset, the entitlement to the ITC is based on the primary use of the asset. Where the primary use is in commercial activities, the registrant is entitled to claim an ITC for 100% of GST paid on the acquisition of the asset. Conversely, where the primary use is for exempt activities, the registrant is not entitled to claim any ITC.
16. BCF says that BCF had acquired and imported the Northern Adventure for use primarily in commercial activities because it claims that over 50% of the area of the Northern Adventure was used by BCF in relation to the making of taxable supplies. As such, BCF claims it is entitled to ITCs equal to 100% of the GST paid in acquiring and importing the Northern Adventure.
17. The respondent says that BCF acquired and imported the Northern Adventure primarily for use in the exempt activity of ferry transportation, and therefore BCF is not entitled to any related ITCs.

The Respondent's concession

18. In its GST return for the June of 2005 reporting period, BCF claimed additional ITCs respecting its prior reporting periods even though it had already claimed ITCs in its prior returns for those periods. The respondent has pled that as a matter of law BCF could not claim those additional ITCs in its June of 2005 reporting period return.
19. The respondent now concedes that as a matter of law BCF can claim additional ITCs in its June of 2005 reporting period relating to the prior periods, under subsections 169(1) and 225(1) of the *Excise Tax Act* (the Act), in accordance with the Federal Court of Appeal's decision in *CIBC World Markets Inc. v. Canada*, 2011 FCA 270, [2011] FCJ No. 1378 (CA) (QL).

20. As set out above, there still exists a live issue between the parties as to the amount of additional ITCs, if any, that BCF is entitled to claim respecting the periods prior to June of 2005.

British Columbia Ferry Services Inc.

21. The British Columbia Ferry Corporation was a crown corporation formed on January 1, 1977 to operate a coastal marine vehicle and passenger ferry service that was initiated by the Province of British Columbia in 1960.
22. On March 27, 2003, the provincial *Coastal Ferry Act* (the CFA) was enacted to redefine the statutory and regulatory framework for the B.C. ferry system.
23. On April 2, 2003, the British Columbia Ferry Corporation was converted into a company, as defined by the *Business Corporations Act* (British Columbia), under the authority of ss.19(1) of the CFA and renamed British Columbia Ferry Services Inc.
24. Upon conversion, BCF ceased to be a crown corporation and became liable to pay federal taxes, including GST.
25. 100% of BCF's voting shares were owned by the British Columbia Ferry Authority (BCFA).
26. The BCFA appoints BCF's board of directors.
27. BCF had 9 directors from April 1, 2004 to March 31, 2005, after which it had 12 directors.
28. In 2004 and 2005, the Province owned 75,477 non-voting preferred shares in BCF.
29. The public could not be invited to subscribe for any of BCF's shares.

British Columbia Ferry Authority

30. The BCFA is a no-share capital corporation, and a not-for-profit entity.¹
31. Upon dissolution of the BCFA, all its remaining assets, if any, vest in the Province.²
32. Until March 31, 2004, the BCFA's board of directors was the same as the board for the British Columbia Ferry Corporation immediately before April 1, 2004.³
33. After that date, the CFA required the BCFA to have nine directors from the following sources:⁴
 - a) four directors from the 13 coastal regional districts serviced by BCF, grouped into four appointment areas;
 - b) one director from the union representing BCF's employees;
 - c) two directors appointed by the Province ; and
 - d) two other qualified directors.
34. The BCFA's directors were also BCF's directors.
35. The BCFA must;
 - a) make public an annual report including audited financial statements;⁵ and
 - b) hold an annual general meeting in one of the appointment areas that is open to the public.⁶

¹ CFA, ss. 2(4) and 3(2).

² CFA, ss. 3(4).

³ CFA, ss. 4(1).

⁴ CFA, ss. 5(3).

⁵ CFA, ss. 18(4), (5) and (7).

⁶ CFA, ss. 18(1), (2), (3) and (6).

The Coastal Ferry Services Contract

36. On April 1, 2003, the Province of British Columbia and BCF entered into the Contract which set forth, among other things, a contractual framework for the operation of the B.C. ferry system including service levels and operational standards.
37. Under the Contract, BCF received service fees from the Province in exchange for:
 - a) providing core ferry service levels on specified routes;
 - b) administering certain social policy initiatives on behalf of the Province, and transporting students, the disabled, the elderly and medical patients within identified provincial social policy programs; and
 - c) administering the contracts and paying for ferry services provided by independent contractors on unregulated routes.
38. The core service levels were designed to ensure that basic ferry service was, at a minimum, maintained while recognising the need for some operational flexibility.
39. The specified routes in the Contract were the routes undertaken by the Ferries.
40. BCF had to operate the ferry system in manner that complied with, or exceeded, the core service levels in relation to these routes.
41. Under an agreement reached in March of 2007, the Province made a one-time payment to BCF in respect of additional service fees to account for continuing high fuel costs.
42. In addition to the above, the Contract required BCF to:
 - a) publish two-year ferry schedules for each designated route each year;
 - b) engage an independent consultant to do yearly customer satisfaction surveys respecting the designated routes;

- c) prepare yearly customer satisfaction survey reports, and provide them to the Province, the Commissioner and online to the public;
- d) comply with all requirements and orders of the Commissioner;
- e) allow the Province to inspect, copy or audit its books and records relating to the service fees
- f) deliver a quarterly report to the Province covering ridership, traffic patterns, frequency of ferry service and vessel capacity information;
- g) deliver yearly audited financial statements to the Province;
- h) meet with the Province to determine performance measures relating to the quality of its services;
- i) hold yearly public meetings relating to the management and operation of its business, and publish notices of those meetings, where BCF must:
 - i) afford a reasonable opportunity for the public to ask questions and express their views; and
 - ii) distribute copies of its audited financial statements, annual reports filed with the Commissioner and yearly business plans;
- j) grant the Province the first right and option to purchase the Ferries used on the designated routes if an event of default arose;
- k) grant the Province the right to purchase any vessel if BCF decided to dispose of it;
- l) provide emergency response services and vessels if the Province declared a state of emergency;
- m) administer the contracts for ferry services provided by independent contractors on unregulated routes;

- n) give the Province six months notice of an unregulated route contract expiring and ensure a new contract for those services, while notifying the Province when that has occurred; and
 - o) for the first five years, not permit the level of service on unregulated routes to be reduced below the level provided immediately before the Contract.
43. Under the Contract, BCF could not:
- a) adjust a ferry schedule during the first two years of the contract, unless required by normal maintenance or extraordinary circumstances;
 - b) discontinue transportation services on a designated ferry route without an order of the Commissioner;
 - c) apply to discontinue transportation services on a designated ferry route during the first three years;
 - d) during the first five years, adjust the core service levels without the Province's agreement;
 - e) after the first five years, apply to discontinue transportation services on a designated ferry route during the period of twelve months to six months before the start of a new four year performance term;
 - f) dispose of any of the Ferries on a designated route unless the Province was notified and given the chance to exercise its option to purchase it;
 - g) adjust the Northern Route Group's core service level arising from community and stakeholder consultations without the Province's concurrence;
 - h) adjust Route 30's Saturday service level arising from consultations with the trucking industry without the Province's concurrence;

- i) adjust Routes 17 and 18's core service levels arising from community consultations without the Province's concurrence; and
 - j) assign or transfer the Contract without the Province's consent.
44. BCF would commit an event of default under the Contract if:
- a) it failed to comply with any material provision in the Contract, including maintaining the core service levels set out in it;
 - b) any information, statement, document or report that it must submit to the Province was materially incorrect;
 - c) it became insolvent or was wound up;
 - d) it ceased to carry on business; or
 - e) it failed to comply with an order of the Commissioner.
45. If an event of default occurred, under the Contract the Province could:
- a) suspend or adjust the service fees;
 - b) exercise the option to purchase the Ferries;
 - c) notify the Commissioner and ask him to issue an order requiring BCF to remedy the situation; and
 - d) bring an action for specific performance or an injunction.
46. If the Contract was terminated then the CFA vested in the Province all interests and rights granted to the BCF under it, a lease and the CFA.

The British Columbia Ferries Commissioner

47. The CFA provides for the appointment of a Commissioner to regulate each ferry operator, including BCF, in relation to the provision of core ferry services and a price cap on the tariffs that can be charged for those services.⁷
48. The Provincial cabinet appoints the Commissioner.⁸
49. BCF is required to pay the expenses of the Commissioner.⁹
50. The CFA distinguishes between core ferry transportation services and ancillary services, the latter being those which are not directly related to the provision of transportation of vehicles and passengers which include parking, catering and retail concessions, reservations, vessel maintenance, terminal maintenance and other services not directly related to the provision of core ferry services.
51. Core ferry services under the CFA are the ferry transportation services involving the transportation of vehicles and passengers that BCF is required to provide under BCF's Coastal Ferry Services Contract (the Contract) with the Province.
52. BCF cannot reduce services below the core service level or discontinue service on a route unless the Commissioner authorizes it.¹⁰
53. The price caps involve the Commissioner computing a maximum permitted level of average ferry fares for each group of routes.¹¹
54. During the Periods, the CFA fixed the initial price caps during the Period as the average of tariffs paid on its routes as at April 1, 2003, along with a yearly statutory increase.¹²

⁷ CFA, ss. 35, and 38(1) and (2).

⁸ CFA, ss. 35(1) and 64.

⁹ CFA, s. 57.

¹⁰ CFA, ss. 43 and 44.

¹¹ CFA, s. 41.

¹² CFA, ss. 39 and 1, "first performance term".

55. Under the CFA, the Commissioner is required to regulate BCF in relation to the core ferry services in accordance with 6 specific principles including the principle that BCF is encouraged to adopt a commercial approach to ferry service delivery¹³.
56. Under the CFA the Commissioner must not regulate ancillary services.¹⁴
57. The Commissioner can:¹⁵
- a) appoint inspectors to inspect BCF's operations and look at its books;
 - b) order BCF to comply with the CFA, provide core ferry services where it fails to do so and reduce its average tariffs to comply with a price cap on a route group; and
 - c) reduce a price cap for a route group if BCF fails to comply with an order.
58. The Commissioner must publish every decision, determination and order to the public, and make annual reports to the provincial cabinet and legislature.¹⁶
59. BCF has to provide the Commissioner with:
- a) copies of its Coastal Ferry Services Contracts;¹⁷
 - b) annual reports respecting its service and operations;¹⁸
 - c) quarterly reports on the actual average level of fares paid for each of the seven route groups, traffic patterns, frequency of ferry service, vessel capacities and any other information relating to core ferry services;¹⁹ and
 - d) all information reasonably required or asked for by the Commissioner.²⁰

¹³ CFA ss. 38

¹⁴ CFA ss. 38.

¹⁵ CFA, ss. 46 and 48.

¹⁶ CFA, ss. 52 and 53.

¹⁷ CFA, s. 28.

¹⁸ CFA, ss. 38(2) and 66.

¹⁹ CFA, ss. 38(2) and 65.

60. BCF must make its quarterly and annual reports to the Commissioner available to the public.²¹
61. The Commissioner monitors BCF's provision of information to the public relating to its operations and performance.²²
62. It is an offence punishable by a fine of up to \$500,000 to not comply with the Commissioner's orders, provide false information to the Commissioner and obstruct the Commissioner or an inspector.²³

BCF's ITC claims

63. Generally speaking, BCF can claim ITCs for GST paid on its inputs to the extent that the inputs were acquired for consumption, use or supply in the course of its commercial activities.
64. Between April 2, 2003 and May 31, 2005 BCF used an "output" method, based on revenues, to calculate what percentage of its operations related to taxable supplies.
65. In 2005, BCF changed its ITC allocation method to an "input" method.
66. BCF claimed ITCs under its input method in the following manner.
67. First, it directly attributed what it considered to be single use inputs to either exempt or taxable activities wherever possible.
68. BCF attributed the following items directly to taxable activities, for which it claimed and was allowed 100% ITCs for the GST it paid on them:
 - a) the cost of goods sold in its food and retail operations;

²⁰ CFA, s. 67.

²¹ CFA, ss. 68(3).

²² CFA, ss. 38(2).

²³ CFA, ss. 70(1) and (3).

- b) catering china, paper and plastic supplies, catering equipment and other expenditures related to food services and retail sales;
 - c) retail facility development; and
 - d) terminal parking which had pay parking spaces.
69. Then, BCF used a method to arrive at a taxable use percentage for each vessel and terminal in order to allocate non-single use, or common, inputs between exempt and taxable uses.
70. BCF used an input method under which it classified the various decks on each of the vessels and the areas of each of the terminals used in the B.C. ferry system into one of three categories:
- a) Exempt: the deck/area was used in the making of exempt supplies;
 - b) Taxable: the deck/area was used in the making of taxable supplies; and
 - c) Common: the deck/area was used in the making of both taxable and exempt supplies.
71. BCF calculated a percentage of each vessel and terminal used in the making of taxable supplies by using the following formula:
- $$\frac{\text{total taxable area in square metres}}{\text{total area} - \text{total common area}} \times 100$$
72. Using the formula, BCF concluded that 13 vessels and 11 terminals had taxable use percentages of less than 10%, and that BCF was not entitled to claim any further ITCs beyond those in its direct attribution claims respecting these exempt vessels and terminals.
73. BCF then claimed ITCs respecting each of the Ferries and remaining terminals based on the taxable use percentages that it calculated for each Ferry and remaining terminal.

74. BCF's claimed ITCs included allocations respecting many of its operational costs including ferry fuel, lubricants, and miscellaneous supplies and materials.
75. BCF also determined a taxable use for its general overhead operations including its head office, information systems, the Nanaimo Maintenance Yard, the Deas Dock and the Sydney Maintenance Yard.
76. The taxable use percentages calculated by BCF for its vessels and terminals factored into its determinations of the general overhead taxable use figures.

The ferry fuel

77. The respondent's position is that the fuel and lubricants constitute single-use inputs, because substantially all of those inputs are consumed or used for the propulsion of the vessels and relate to the provision of BCF's exempt ferry transportation services.
78. The propulsion of a vessel involves moving the entire vessel from one point to another, including those areas of the vessel where taxable activity takes place and those areas where exempt activity takes place.
79. BCF had to use its fuel and lubricants to discharge its obligations under the Contract.
80. BCF admits for the purpose of these proceedings that for the Ferries during the Periods:
 - a) substantially all of the fuel that was consumed on them was for propulsion;
 - b) BCF is not able to prove on a balance of probabilities that over 10% of the fuel that was consumed on them was consumed directly in the provision of commercial activities; and

- c) BCF will not challenge the Minister's assumption that less than 10% of the fuel on any of them was consumed directly in the provision of commercial activities on the vessel.

The potential GST on the staterooms

- 81. During the Periods, excluding March of 2007, BCF's staterooms generated \$2,136,318 of revenue.
- 82. If GST had been charged and collected on that revenue it would have totalled \$149,542.26.
- 83. BCF generated additional revenues on its staterooms during the March of 2007 reporting period.

The Northern Adventure

- 84. The Queen of the North sank on March 22, 2006.
- 85. It ran on the northern routes, and typically on Route 10.
- 86. Without another vessel, BCF could not meet the core service levels set out under the Contract.
- 87. On April 10, 2006, BCF asked the Commissioner to approve a reduction of service until April 19, 2006 respecting the sinking of the Queen of the North.
- 88. On April 24, 2006, the Commissioner approved that requested reduction in writing.
- 89. On May 10, 2006, BCF asked the Commissioner to approve a further reduction of service from May 18 to September 30, 2006 respecting the sinking of the Queen of the North.

90. On May 17, 2006, the Commissioner authorized a temporary reduction while BCF searched for a replacement vessel.
91. BCF entered into discussions with the provincial Ministry of Transport concerning a replacement vessel.
92. Both the Commissioner and the Ministry each underwent a process of hiring naval architects to review various vessel options.
93. On July 14, 2006, BCF asked the Commissioner to issue a declaration respecting an expenditure of up to \$233 million for a replacement vessel and associated terminal changes.
94. On August 14, 2006, the Commissioner issued that declaration.
95. In October of 2006, BCF acquired the Northern Adventure from a company outside of Canada.
96. The Northern Adventure was a capital asset acquired for use on the northern ferry routes
97. When a registrant acquires or imports a capital asset, it may claim 100% of the related GST as ITCs if it was acquired or imported for use primarily in commercial activities, and cannot if it was acquired or imported for use primarily in exempt activities.
98. The purchase price for the Northern Adventure was approximately \$51 million.
99. In March of 2007, BCF imported the Northern Adventure into Canada and paid approximately \$13.1 million in customs duty and \$3.9 million in GST upon importation.
100. BCF applied to the federal government for the remission of the customs duty, and in June of 2007 the federal government granted remission.
101. BCF claimed ITCs of approximately \$3.9 million in relation to its importation.

102. BCF claimed these ITCs on the basis that it had acquired the Northern Adventure for use primarily in commercial activities because it calculated that over 50% of the area of the vessel was used in relation to the making of taxable supplies.
103. BCF utilized its deck-by-deck input allocation method to calculate what portion of the area of the Northern Adventure was used in relation to the making of taxable supplies.
104. BCF renegotiated the service fee with the Province in the context of the purchase of the Northern Adventure.
105. The Province ultimately increased the service fees by \$11 million annually, beginning on April 1, 2007.
106. That amount was calculated with reference to the Northern Adventure's capital cost, which was offset by the remissions of the importation duty and related GST, with an annual amortization amount plus financing costs.

The parties' books of documents

107. The parties will each enter a Book of Documents comprised of documents exchanged during the discovery process, and agree that the documents within them are true copies of the documents they represent, were signed by the persons who purported to have signed them, and were signed on the dates they were purportedly signed.

Dated at the city of Vancouver, in the Province of British Columbia, this 22nd day of May, 2014.



Ron D.F. Wilhelm
Counsel for the Respondent

Dated at the City of Nanaimo, in the Province of British Columbia, this 22nd day of May, 2014.

A handwritten signature in black ink, appearing to read 'KLC', written above a horizontal line.

Kimberley L.D. Cook
Counsel for the Appellant

SCHEDULE A

Client: BRITISH COLUMBIA FERRY SERVICES INC.

Auditor: Richard Young

Account #: 804623208
Year End: March 31, 2005

Date: November 9, 2005

Subject: Vessel apportionment calculations

BCF has treated the bridge and engine decks as common use area. CRA feels this is not fair and reasonable as the principle purpose of these areas is propulsion and steering of vessel used in ferrying which is an exempt activity (See Proposal Letter WP 120.3). Accordingly we have calculated taxable use on this basis.

1001 Queen of Alberni

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRAs	
1	Lower Hull: Engine Room, Electric generators, Fuel & Oil Tanks, Sewage Tanks...	Common	Exempt	2041.00
2	Main Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	3044.00
3	Upper Car Deck: Car Lanes, Stair Wells, Elevators	Exempt	Exempt	2919.00
4	Passenger Deck: Cafeteria, News Stand, Pay Phones, Arcade, Snack Bar, Galley...	Taxable	Taxable	1875.00
5	Sun Deck: Liferafts, Fan Room, Refrigeration Machinery, Employee Rooms...	Common	Common	1797.00
6	Bridge Deck: Fido Deck, Wheel House, AC...	Common	Exempt	608.00

Consultants Calculation
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)

CRAs Calculation
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)

Taxable Use % = 21.46%
Consultant Used 20%

Taxable Use % = 15.26%

1002 Queen of Coquitlam

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRAs	
1	Hold Deck: Engine Room, Fuel, Water & Oil Tanks, Control Room, Electric Generators...	Common	Exempt	2125.00
2	Main Car Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2058.00
3	Galley Deck: Car Lanes	Exempt	Exempt	1537.00
4	Upper Car Deck: Car Lanes, Stair Wells, Elevators	Exempt	Exempt	2966.00
5	Passenger Deck: Cafeteria, News Stand, Pay Phones, Snack Bar, Galley...	Taxable	Taxable	2371.00
6	Sun Deck: Outside Seating, Refrigeration Machinery, Employee Rooms, Wheelhouse...	Common	Common	2315.00

Consultants Calculation
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)

CRAs Calculation
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)

Taxable Use % = 26.49%
Consultant Used 25%

Taxable Use % = 21.40%

1003 Queen of Cowichan

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRAs	
1	Hold Deck: Engine Room, Fuel, Water & Oil Tanks, Control Room, Electric Generators...	Common	Exempt	2126.00
2	Main Car Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2058.00
4	Galley Deck: Car Lanes	Exempt	Exempt	1537.00
3	Upper Car Deck: Car Lanes, Stair Wells, Elevators	Exempt	Exempt	2966.00
4	Passenger Deck: Cafeteria, News Stand, Pay Phones, Snack Bar, Galley...	Taxable	Taxable	2371.00
5	Sun Deck: Outside Seating, Refrigeration Machinery, Employee Rooms, Wheelhouse...	Common	Common	2316.00

Consultants Calculation
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)

CRAs Calculation
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)

Taxable Use % = 26.49%
Consultant Used 25%

Taxable Use % = 21.40%

Deck information obtained from WP 9000

1004 Queen of Surrey

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRA's Taxable Use	
1	Hold Deck : Engine Room, Fuel, Water & Oil Tanks, Control Room, Electric Generators...	Common	Exempt	1810.00
2	Main Car Deck : Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	3187.00
3	Galley Deck : Car Lanes	Exempt	Exempt	1600.00
4	Upper Car Deck : Car Lanes, Stair Wells, Elevators	Exempt	Exempt	3002.00
5	Passenger Deck : Cafeteria, Gift Shop, Pay Phones, Snack Bar, Galley...	Taxable	Taxable	2686.00
6	Sun Deck : Outside Seating, Fan Rooms, Employee Rooms, Solariums...	Common	Common	3232.00
7	Bridge Deck : Wheel House	Exempt	Exempt	140.00

Consultants Calculation		CRA's Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % = 25.11%		Taxable Use % = 21.48%	
Consultant used 25%			

1005 Queen of Oak Bay

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRA's Taxable Use	
1	Hold Deck : Engine Room, Fuel, Water & Oil Tanks, Control Room, Electric Generators...	Common	Exempt	1810.00
2	Main Car Deck : Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	3187.00
3	Galley Deck : Car Lanes	Exempt	Exempt	1600.00
4	Upper Car Deck : Car Lanes, Stair Wells, Elevators	Exempt	Exempt	3002.00
5	Passenger Deck : Cafeteria, Gift Shop, Pay Phones, Snack Bar, Galley...	Taxable	Taxable	2686.00
6	Sun Deck : Outside Seating, Fan Rooms, Employee Rooms, Solariums...	Common	Common	3232.00
7	Bridge Deck : Wheel House	Exempt	Exempt	140.00

Consultants Calculation		CRA's Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % = 25.11%		Taxable Use % = 21.48%	
Consultant used 25%			

1011 Spirit Of British Columbia

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRA's Taxable Use	
1	Grating Level : Ballast Tank, Machinery Spaces, Water Purifier Room, Water Tanks...	Common	Exempt	2438.00
2	Machinery Flat : Ballast Tank, Machinery Spaces, Pump Room, Water Tanks...	Common	Exempt	3057.00
3	Main Deck : Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	3600.00
4	Platform Deck : Car Lanes	Exempt	Exempt	1102.00
5	Upper Car Deck : Car Lanes, Stair Wells, Elevators	Exempt	Exempt	3683.00
6	Promenade Deck : Pacific Buffet, Cafeteria, Gift Shop, Arcades, Galley...	Taxable	Taxable	3178.00
7	Sun Deck Interior : Lounge, Cafe, Conference and Stale Rooms, Employee Rooms...	Common	Common	3154.00
8	Bridge Deck : Air Handling Compartments, Machinery Space, Wheel House	Common	Exempt	1374.00

Consultants Calculation		CRA's Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % = 26.88%		Taxable Use % = 17.00%	
Consultant used 27%			

1012 Spirit of Vancouver Island

Deck	Deck Description	Consultants Taxable Use	CRAs Taxable Use	Area m2
1	Grating Deck: Ballast Tank, Machinery Spaces, Water Purifier Room, Water Tanks...	Common	Exempt	2444.00
2	Machinery Flat: Ballast Tank, Machinery Spaces, Pump Room, Water Tanks...	Common	Exempt	3054.00
3	Main Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	3808.00
4	Platform Deck: Car Lanes	Exempt	Exempt	1183.00
5	Upper Car Deck: Car Lanes, Stair Wells, Elevators	Exempt	Exempt	3718.00
6	Promenade Deck: Pacific Buffet, Cafeteria, Gift Shop, Arcades, Galley...	Taxable	Taxable	3360.00
7	Sun Deck Interior: Lounge, Café, Conference and Stale Rooms, Employee Rooms...	Common	Common	3311.00
8	Bridge Deck: Air Handling Compartments, Machinery Space, Wheel House	Common	Exempt	1382.00

22245.00

Consultants Calculation		CRAs Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % =	27.95%	Taxable Use % =	17.79%
	Consultant used 27%		

1021 Queen of Burnaby

Deck	Deck Description	Consultants Taxable Use	CRAs Taxable Use	Area m2
1	Hold Deck: Engine Room, Fuel, Water & Oil Tanks, Electric Generators...	Common	Exempt	1977.00
2	Main Car Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2574.00
3	Platform Deck: Car Lanes	Exempt	Exempt	774.00
4	Promenade Deck: Cafeteria, Cafe, Galley, Arcade, Gift Shop, News Stand...	Taxable	Taxable	1537.00
5	Sun Deck: Lounge, Wheel House, Storage Rooms...	Common	Common	2082.00

8944.00

Consultants Calculation		CRAs Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % =	31.46%	Taxable Use % =	22.40%
	Consultant used 30%		

1022 Queen of Esquimalt

Deck	Deck Description	Consultants Taxable Use	CRAs Taxable Use	Area m2
1	Hold Deck: Engine Room, Fuel & Oil Tanks, Control Room...	Common	Exempt	1948.00
2	Main Car Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2494.00
3	Platform Deck: Car Lanes	Exempt	Exempt	1658.00
4	Upper Car Deck: Car Lanes, Stair Wells, Elevators	Exempt	Exempt	2402.00
5	Promenade Deck: Cafeteria, Snack Bar, Galley, Arcade, Gift Shop...	Taxable	Taxable	1515.00
6	Sun Deck: Dining Lounge, Galley, Lounge, Employee Rooms, Wheel House...	Common	Common	2017.00

12234.00

Consultants Calculation		CRAs Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % =	18.32%	Taxable Use % =	14.83%
	Consultant used 18%		

Calculations

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WP/FT # 6955

Vessel Taxable Use Calculations

69553

1023 Queen of Naniamo

Deck	Deck Description	Consultants Taxable Use	CRAs Taxable Use	Area m2
1	Below Main Deck : Engine Room, Fuel & Oil Tanks, Control Room...	Common	Exempt	1738.00
2	Main Car Deck : Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2582.00
3	Platform Deck : Car Lanes	Exempt	Exempt	876.00
4	Promenade Deck : Cafeteria, Snack Bar, Galley, Arcade, Gift Shop...	Taxable	Taxable	1002.00
5	Sun Deck : Lounge, Life Boats, Wheel House, Employee Rooms...	Common	Common	1148.00

Consultants Calculation		CRAs Calculation	
$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$		$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$	
$Taxable\ Use\ \% =$	22.49%	$Taxable\ Use\ \% =$	22.49%
	Consultant used 30%		

1024 Queen of New Westminster

Deck	Deck Description	Consultants Taxable Use	CRAs Taxable Use	Area m2
1	Below Main Deck : Engine Room, Fuel & Oil Tanks, Control Room...	Common	Exempt	1748.00
2	Main Car Deck : Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2434.00
3	Upper Car Deck : Car Lanes, Stair Wells, Elevators	Exempt	Exempt	2434.00
4	Promenade Deck : Cafeteria, Snack Bar, Galley, Arcade, Gift Shop, News Stand...	Taxable	Taxable	1572.00
5	Sun Deck : Life Boats, Employee Rooms, Wheel House, Lounges...	Common	Common	2224.00

Consultants Calculation		CRAs Calculation	
$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$		$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$	
$Taxable\ Use\ \% =$	24.41%	$Taxable\ Use\ \% =$	19.20%
	Consultant used 24%		

1025 Queen of Saanich

Deck	Deck Description	Consultants Taxable Use	CRAs Taxable Use	Area m2
1	Below Main Deck : Engine Room, Fuel & Oil Tanks, Control Room...	Common	Exempt	1842.00
2	Main Car Deck : Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2533.00
3	Platform Deck : Car Lanes	Exempt	Exempt	921.00
4	Upper Car Deck : Car Lanes, Stair Wells, Elevators	Exempt	Exempt	2367.00
5	Promenade Deck : Cafeteria, Snack Bar, Galley, Arcade, Gift Shop...	Taxable	Taxable	1510.00
6	Sun Deck : Dining Lounge, Arcade, Galley, Employee Rooms, Wheel House...	Common	Common	2011.00

Consultants Calculation		CRAs Calculation	
$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$		$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$	
$Taxable\ Use\ \% =$	20.80%	$Taxable\ Use\ \% =$	16.46%
	Consultant used 20%		

1026 Queen of Vancouver

Deck	Deck Description	Consultants Taxable Use	CRAs Taxable Use	Area m2
1	Hold Deck : Engine Room, Fuel & Oil Tanks, Control Room...	Common	Exempt	1948.00
2	Main Car Deck : Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	2580.00
3	Platform Deck : Car Lanes	Exempt	Exempt	920.00
4	Upper Car Deck : Car Lanes, Stair Wells, Elevators	Exempt	Exempt	2390.00
5	Promenade Deck : Cafeteria, Snack Bar, Galley, Arcade, Gift Shop...	Taxable	Taxable	1553.00
6	Sun Deck : Dining Lounge, Galley, Employee Rooms, Life Boats, Wheel House...	Common	Common	2022.00

Consultants Calculation		CRAs Calculation	
$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$		$Taxable\ Use\ \% = (Total\ Taxable\ area) / (Total\ Area - Common\ Area)$	
$Taxable\ Use\ \% =$	20.81%	$Taxable\ Use\ \% =$	16.50%
	Consultant used 20%		

1041 Queen of Prince Rupert

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRAs	
1	Tank Top: Fuel & Oil Tanks, Engine & Generator Compartments	Common	Exempt	601.00
2	Tween Deck: Employee Cabins, Washrooms, Engine Room, Stores...	Common	Exempt	1061.00
3	Main Car Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	1376.00
4	Platform Deck: Car Lanes	Exempt	Exempt	664.00
5	Lounge Deck Interior: Passenger Cabins, Bar, Arcade, Licensed Lounge...	Taxable	Taxable	1212.00
6	Saloon Deck Interior: Two Cafeterias, Bar, Galley...	Taxable	Taxable	820.00
7	Boat Deck Interior: Passenger Cabins, Employee Cabins...	Common	Exempt	369.00
8	Top Deck: Wheel House, Air cond Plant, Employee Cabins, Sun Deck, Generator...	Common	Exempt	346.00

6429.00

Consultants Calculation		CRAs Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % =	50.90%	Taxable Use % =	31.61%
	Consultant used 51%		

1044 Queen of the North

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRAs	
1	Tank Top: Fuel & Oil Tanks	Common	Exempt	807.00
2	Tween Deck: Employee Cabins, Passenger Cabins, Washrooms, Engine Room...	Common	Exempt	1096.00
3	Main Car Deck: Car and Truck Lanes, Stair Wells, Elevators	Exempt	Exempt	1779.00
4	Platform Deck: Car Lanes	Exempt	Exempt	832.00
5	Saloon Deck: Evergreen Buffet, Dogwood Bar, Lighthouse Café, Galley, Gift Shop...	Taxable	Taxable	1509.00
6	Promenade Deck: Passenger Cabins, Snack Bar, Arcade, Reserved Seating Lounge...	Taxable	Taxable	1306.00
7	Boat Deck: Passenger Cabins, Employee Cabins, Officers Mess, Wheel House...	Common	Exempt	609.00
8	Top Deck: Ventilation Room, Life Boats, outside seating...	Common	Exempt	346.00

8388.00

Consultants Calculation		CRAs Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % =	51.83%	Taxable Use % =	33.57%
	Consultant used 51%		

1045 Queen of Tsawwassen

Deck	Deck Description	Consultants		Area m2
		Taxable Use	CRAs	
1	Below Main Deck: Engine Room, Fuel & Oil Tanks, Control Room, Generators...	Common	Exempt	1534.00
2	Main Car Deck: Car and Truck Lanes, Stair Wells	Exempt	Exempt	1845.00
3	Upper Car Deck: Car Lanes, Stair Wells	Exempt	Exempt	456.00
4	Promenade Deck Interior: Cafeteria, Galley, Arcade, Vending Machines...	Taxable	Taxable	909.00
5	Sun Deck: Life Boats, Employee Rooms, Wheel House, Lounges, Galley Stores...	Common	Common	1021.00

5764.00

Consultants Calculation		CRAs Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % =	28.33%	Taxable Use % =	19.17%
	Consultant used 29%		

1046 Queen of Chilliwack

Deck	Deck Description	Consultants		CRAs		Area m2
		Taxable Use	Exempt	Taxable Use	Exempt	
1	Lower Hull: Fuel & Oil Tanks, Water Tank, Generators...	Common	Exempt			716.00
2	Main Car Deck: Car and Truck Lanes, Star Wells, Elevators	Exempt	Exempt			1343.00
3	Platform Deck: Car Lanes	Exempt	Exempt			375.00
4	Promenade Deck Interior: Bar Lounges, Cafeteria, Galley, Arcade, Gift Shop...	Taxable	Taxable			862.00
5	Sun Deck Interior: Employee Cabins, Ventilation Rooms ...	Common	Common			699.00
6	Bridge Deck: Seating, Wheel House	Common	Exempt			348.00

Consultants Calculation		CRAs Calculation	
Taxable Use % = (Total Taxable area) / (Total Area - Common Area)		Taxable Use % = (Total Taxable area) / (Total Area - Common Area)	
Taxable Use % =	33.41%	Taxable Use % =	23.87%
	Consultant used 30%		

Conclusion: Use CRAs taxable % in ITC apportionments calculation for June 2005.

01-01

SCHEDULE B

1043 Northern Adventure

TAXABLE USE CALCULATION

Route: Inside Passage

Deck	Deck Description	Per CRA		Per BCF		BCF's Taxable Use	Area m2	Deck Primary Inputs Supplies
		Taxable	Exempt	CRA Taxable use	Exempt			
1	Deck 1: Fuel & Oil Tanks							
2	Deck 2: Cargo Hold, Engine Room, Machinery Space							
3	Deck 3: Car and Truck Lanes, Staff Walks, Elevators							
4	Deck 4: Car Lanes							
5	Deck 5: Passenger Cabins, Reception Area							
6	Deck 6: Cafeteria, Store, Heads, Seating Lounge...							
7	Deck 7: Passenger Cabins, Employee Cabins, Officers Mess, Crew Mess							
8	Deck 8: Exterior Deck, Outside Seating							
9	Deck 9: Ventilation Room, Life Boats, outside seating, wheelhouse							
		1,320	7,408					8,992.00

Taxable Use = (Total Taxable area) / Total Area - Common Area

BCF's Taxable Use =

CRA Taxable Use =

CRA Taxable Use =

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1043 NA

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CITATION: 2014 TCC 305

COURT FILE NOS.: 2008-1600(GST)G
2013-4206(GST)G

STYLE OF CAUSE: BRITISH COLUMBIA FERRY
SERVICES INC. and HER MAJESTY THE
QUEEN

PLACE OF HEARING: Nanaimo, British Columbia

DATES OF HEARING: June 3, 4, 5 and 6, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Diane Campbell

DATE OF JUDGMENT: October 14, 2014

APPEARANCES:

 Counsel for the Appellant: Kimberley L. Cook
 Asif Abdulla

 Counsel for the Respondent: Ron D.F. Wilhelm
 Michael Taylor

COUNSEL OF RECORD:

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