Docket: 2013-3740(GST)G

BETWEEN:

UNIVERSITY OF ALBERTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on October 29 and 30, 2014, at Calgary, Alberta.
Submissions received from the Respondent on April 2, 2015 and from the Appellant on April 6, 2015.

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Justin Kutyan
	Carla Hanneman
Counsel for the Respondent:	Ronald MacPhee
	Jack Warren

JUDGMENT

The appeals from the reassessments made under the *Excise Tax Act* and dated July 25, 2011 and November 8, 2011 are allowed with costs. The reassessments are referred back to the Minister for reconsideration and reassessment on the basis that, during the relevant periods, the Appellant used the property identified as Plan 221 ET Block 1 and Block 2 to the extent of 25.36% in its commercial activities.

The parties have thirty days from the date of this judgment to make representations with respect to the amount of costs that the Court should award to

the Appellant. If no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

Signed at Ontario, Canada, this 21st day of December 2015.

"S. D'Arcy"

D'Arcy J.

Citation:2015 TCC 336
Date: 2015 12 21
Docket: 2013-3740(GST)G

BETWEEN:

UNIVERSITY OF ALBERTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

I. **Issue**

[1] The issue in these appeals is the extent to which the Appellant acquired and subsequently used certain of its land in its GST commercial activities.[1] This issue requires the Court to address the application of the general input tax credit rule in subsection 169(1), the "fair and reasonable" rule in subsection 141.01(5), and the input tax credit apportionment rules in subsections 141.01(2) and (3) of the GST Act.

II. **Interrelationship with the University of Calgary Appeals**

[2] These appeals and appeals by the University of Calgary[2] were scheduled to be heard over the same three-day period. The appeals of both Appellants raise the same issue.

[3] Counsel for the Appellant suggested, at the commencement of the hearing of the appeals, that the Court hear the appeals of the University of Calgary on common evidence with the appeals of the University of Alberta. However, he asked that the Court issue two separate judgments.

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1 As that term is defined in subsection 123(1) of Part IX of the *Excise Tax Act* (the "GST Act" or the "Act"). Unless otherwise stated, all statutory references are to the provisions of the GST Act.

2 *University of Calgary v. Her Majesty the Queen,* 2013-3473 (GST)G.

[4] Counsel for the Respondent was willing, for efficiency purposes, to proceed in such a manner but had some concerns since each Appellant would be presenting different facts to support its claim for input tax credits.

[5] I was not willing to follow counsel for the Appellant's suggestion for the simple reason that the evidence was not common to both parties. Although the Appellants carried on very similar, if not identical businesses, they engaged in different activities in the course of their respective businesses. These activities determine their entitlement to input tax credits.

[6] However, I did recognize that the two Appellants used very similar methodologies to determine their entitlement to input tax credits. In addition, counsel for the Appellant informed the Court that while there was no evidence that was common to both appellants, there was "quite a bit of parallel in the evidence".

[7] As a result, the appeals of the two Appellants proceeded as follows:

- The Court called the University of Calgary appeals and both parties presented their evidence.
- The Court adjourned those appeals.
- The Court called the University of Alberta appeals and both parties presented their evidence.
- The Court called the appeals of both Appellants, allowing the parties to present a single argument for the appeals of both Appellants.

III. **Summary of Facts**

[8] I heard from two witnesses. Mr. Martin Ronald Coutts testified on behalf of the Appellant and Mr. Robert Degagne testified on behalf of the Respondent.

[9] Mr. Coutts, a chartered accountant, is the Associate Vice-President, Finance and Supply Management of the Appellant. Mr. Degagne graduated from the Appellant with a Bachelor of Commerce degree. He has been a CRA auditor for a little over 20 years.

[10] I found both witnesses to be credible. However, as I will discuss, I do not accept Mr. Degagne's application of subsections 141.01(2) and (3).

[11] The University of Alberta is a public research university located in Edmonton, Alberta, with approximately 38,000 students and 7,000 faculty and staff. Founded in 1908, the university has 18 faculties and offers approximately 200 undergraduate and 170 graduate programs.[3]

[12] The Appellant owns several parcels of real property in Edmonton, which collectively constitute its land and premises.[4]

[13] Notwithstanding that the Appellant uses its lands and premises predominantly for educational purposes, it also provides various commercial and non-educational services to students, staff, and the public.[5]

[14] The parties note the following in the PASF I at paragraph 2: "At all relevant times, the University of Alberta was a "registrant", a "public service body" and a "public institution", as defined in subsection 123(1) of the *Excise Tax Act* (the "**Act**"**)**. For the purposes of the Act, the University of Alberta makes both taxable and exempt supplies in the course of conducting its activities."

[15] The fact that the Appellant is a public service body means that it is also a public sector body,[6] which is relevant for the purposes of the section 206 change-in-use rules.

[16] These appeals involve one of the parcels of land owned by the Appellant. The legal description of this parcel of land is Plan 221 ET Block 1 and Block 2. I will refer to this parcel of land and the buildings located on the land as the "**Campus**".

[17] The Appellant made an election, effective February 1, 2006, under section 211 of the Act in respect of the Campus.[7] I will discuss the effect of the election shortly. The main consequence of the election, for the purposes of these appeals, is that the Appellant was deemed to have received on February 1, 2006 a taxable supply of the Campus by way of sale and to have paid on that day tax in respect of the deemed supply.[8]

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3 Statement of Partially Agreed Facts (Background Information) ("PASF I"), paragraph 1; Transcript, October 29, 2014, page 9, testimony of Mr. Coutts.

4 PASF I, paragraph 3.

5 PASF I, paragraph 3.

6 Subsection 123(1), definition of public sector body.

7 PASF I, paragraph 4.

8 Paragraphs 5 and 6 of the PASF I attempt to describe the consequences to the Appellant, under the provisions of the Act, of making the election. This is not the purpose of an agreed statement of facts. An agreed statement of facts should deal

[18] Subsequent to February 1, 2006, the Appellant made improvements to the Campus. The tax in respect of the improvements to the Campus appears to have been paid or to have become payable between February 1, 2006 and the end of June 2011.[9]

[19] As a result of the deemed acquisition of the Campus and the subsequent improvements to the Campus, the Appellant is required to determine, for input tax credit purposes, the extent to which it acquired the Campus, additions to the Campus or improvements to the Campus for use in its GST commercial activities.

[20] The Appellant developed a methodology to determine the extent to which it used the Campus in its commercial activities (the "**Appellant's Original Methodology**"). The parties provided the following general description of the Appellant's Original Methodology in the PASF I (paragraphs 8 and 10):

> The University of Alberta took into account all of the structures on the U of A Property [the Campus]. It identified within a particular structure the space (measured by square meters) that was directly used in making taxable supplies for consideration, exempt supplies, and a mix of the two activities.
>
> . . .
>
> The University of Alberta then aggregated all of the activities from all the structures on the property to determine a ratio (expressed as a percentage) to be applied to the remaining space on the property (*i.e.*, the common areas).

[21] The Appellant, using this methodology, filed numerous GST returns in which it claimed input tax credits in respect of the Campus on the basis that, during the relevant periods, 28.67% represented the extent to which it acquired the Campus for use, or used the Campus, in the course of its commercial activities.

[22] The Minister reassessed on the basis that four adjustments are required to the Appellant's Original Methodology in order for the methodology to comply with the provisions of the GST Act, particularly section 141.01.

[23] First, the Minister disagrees with the Appellant's determination of the amount of space in specific buildings that the Appellant used directly in the making of taxable supplies for consideration, directly in the making of exempt

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only with facts, not the law. It is for the Court, not the parties, to determine the law and how it applies to the fact situation before the Court.

9 PASF I, Exhibit A; Transcript, page 87, testimony of Mr. Degagne.

supplies, and indirectly to make both taxable and exempt supplies. Second, she believes that the determination of the extent to which the common areas within buildings (the "**Internal Common Areas**") were used in commercial activities should be made on a building-by-building basis. Third, she disagrees with the Appellant's treatment of the external common areas on the Campus (the "**External Common Areas**"). Fourth, she believes that the Appellant's Original Methodology should be amended to add a weighting or index factor.

[24] The Appellant accepts the changes proposed by the Minister with respect to the allocation of space within specific buildings and the determination of the use of the Internal Common Areas. The PASF I states the following:

> Subsequent to issuance of the Reassessments under appeal, the Appellant agreed to some of the adjustments proposed by the Minister (in applying the Appellant's methodology). As a result the Appellant now claims the extent to which the U of A Property [the Campus] was being used in commercial activities is 25.36%.[10]

[25] I will refer to the 25.36% as the "**Appellant's Final Percentage**" and to the methodology used by the Appellant to determine the percentage as the "**Appellant's Final Methodology**".

[26] The Appellant does not accept the Minister's treatment of the External Common Areas or the addition of an indexing factor.

[27] The parties provided in the PASF I the following general description of the methodology developed by the Respondent (the "**Respondent's Methodology**"):

> The Minister takes the position that the entirety of the U of A Property must be considered in calculating the extent of use in commercial activity. The Minister takes the position that the outdoors areas (other than parking areas) such as green space, roadways, walkways, forest reserve and landscaped areas were not for use in making taxable supplies for consideration. Based on this view, the Minister takes the position that the U of A Method must be applied in a manner that includes these outdoor areas when calculating the extent of use in commercial activity of the appellant.
>
> The Minister takes the position that a weighting or index system is required to take into account the different types of space on the U of A Property. The Minister has identified the relative replacement costs of the various structures

[10] PASF I, paragraph 19.

> on the U of A Property and uses that information to apply an indexing factor to the U of A Property.[11]

[28] The Minister, using the Respondent's Methodology and after making adjustments to the Appellant's initial calculation of the direct use of space within specific buildings and the Appellant's initial determination of the use of the Internal Common Areas, determined that the Campus was used to the extent of 14.12% in commercial activities (the "**Respondent's Percentage**").

[29] This resulted in the Minister assessing the Appellant to increase its net tax by approximately $1.7 million for the relevant periods.[12]

[30] Although they disagree on the treatment of the External Common Areas and the addition of a weighting or index factor to the Appellant's Final Methodology, the parties do agree on the actual use of the space within each building situated on the Campus. Specifically, the Appellant and the Respondent used the same calculation of the extent (measured in square meters) to which **each building** was used directly in the making of taxable supplies for consideration, directly in the making of exempt supplies and indirectly in making both taxable and exempt supplies to determine their percentages (25.36% and 14.12%, respectively).[13]

IV. **The Appellant's Methodology**

[31] Mr. Coutts explained the Appellant's Original Methodology to the Court. He and Mr. Degagne explained the adjustments that the parties made to the Appellant's Original Methodology to arrive at the Appellant's Final Methodology.

[32] As noted in the PASF I, the Appellant identified within a particular structure situated on the Campus all of the space (measured in square meters) that was used directly in the making of taxable supplies for consideration, directly in the making of exempt supplies and indirectly in making both taxable and exempt supplies (i.e., the Internal Common Areas).[14]

[33] Mr. Coutts explained the process used by the Appellant, under the Appellant's Original Methodology, to determine the extent to which the Campus was used in commercial activities.[15] He testified that the Appellant maintained an

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11 PASF I, paragraphs 13, 14.
12 See PASF I, Exhibit D.
13 PASF I, paragraphs 8 and 9.
14 PASF, paragraph 8.
15 Transcript, October 29, 2014, pages 25-26, testimony of Mr. Coutts.

internal space inventory that it used for various internal and external purposes, such as reports to the Alberta Government.

[34] The Appellant used this internal space inventory to determine the activities that took place in each square meter in each of the sixty-seven structures on the Campus. Using this information, the Appellant determined, for each structure, which square meters it used directly in the making of taxable supplies for consideration, directly in the making of exempt supplies and indirectly in the making of both taxable and exempt supplies.

[35] The Appellant then calculated the total square meters in all of the structures that it used directly in the making of taxable supplies, the total square meters in all of the structures that it used directly in the making of exempt supplies, and the total square meters that comprised the Internal Common Areas.[16] Using only the square meters used directly in the making of supplies, it calculated a percentage by dividing the space used **directly** to make taxable supplies by the sum of the space used **directly** to make taxable supplies and the space used **directly** to make exempt supplies.[17] This is the 28.67% percentage that the Appellant originally claimed was the extent to which it used the Campus in commercial activities.

[36] At some point in time, the Appellant reviewed these calculations with the CRA and made two adjustments.

[37] First, the Appellant accepted certain adjustments that the CRA determined were required to the Appellant's calculation of the use of the space within the structures.[18]

[38] Second, the Appellant accepted the CRA's apportionment method for the Internal Common Areas. The CRA apportioned the Internal Common Area for **each** structure between the making of taxable supplies and the making of exempt supplies according to the identified use of the space within the specific structure. Specifically, it apportioned the common area for a specific structure according to the identified direct use of the space **within the specific structure** for the purpose of making taxable supplies for consideration and the identified direct use of the space **within the specific structure** for the purpose of making exempt supplies.[19]

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16 Exhibit A3.

17 Transcript, October 29, 2014, page 37, testimony of Mr. Coutts.

18 Transcript, October 30, 2014, page 56, testimony of Mr. Degagne.

19 The actual calculation is explained in detail at pages 49-59 of the Transcript, October 30, 2014, testimony of Mr. Degagne, and in Exhibit R1, pages 529-530. Certain common areas supported activities across the Campus. A general factor (11%) was used to apportion this space, see Transcript, October 30, 2014, pages 53-56.

Under the Appellant's Original Methodology, a similar calculation is performed. However, the Appellant apportioned all of the Internal Common Areas according to the identified cumulative direct use of the space **within all of the structures on the Campus**. It did not perform a structure-by-structure calculation.

[39] Exhibit B to the PASF I contains the parties' agreed allocation of space in each of the structures on the Campus.[20] It is based upon the Appellant's original calculations and the two CRA adjustments.

[40] The exhibit identifies sixty-seven structures on the Campus. Exhibit B to the PASF I shows the total of the room-by-room calculations for each structure on the Campus broken down by the square meters used in the making of taxable supplies for consideration and the square meters used in the making of exempt supplies.

[41] The square meters for the sixty-seven structures are then totalled with the following result:

- The Appellant used 167,221.83 square meters in the making of taxable supplies for consideration.
- The Appellant used 492,049.63 square meters in the making of exempt supplies.

[42] It is the Appellant's position that the extent to which it used the Campus in commercial activities is determined by taking the total square meters of all of the structures on the Campus that were used in the making of taxable supplies for consideration and dividing it by the total of the square meters used in the making of taxable supplies for consideration and the square meters used in the making of exempt supplies. Using the numbers in Exhibit B to the PASF I, one arrives at the Appellant's Final Percentage, 25.36%,[21] which, the Appellant argues, represents the extent to which the Campus was used in commercial activities.

[43] It is the Appellant's position that it is entitled to the input tax credits resulting from the application of the 25.36% to the GST paid or deemed to have been paid in the relevant periods, as set out in Exhibit A to the PASF I.

[44] For example, Exhibit A shows that the parties have agreed that the GST in respect of which the Appellant was entitled to claim input tax credits as of April

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[20] See also Transcript, October 30, 2014, pages 64-65, testimony of Mr. Degagne, and Exhibit R1, pages 524 to 527.

[21] 167,221.83/ (167,221.83+492,049.63).

30, 2006 is $4,459,253.02. It is the Appellant's position that it was entitled to claim an input tax credit equal to 25.36% of this amount.

[45] The Appellant's Final Methodology assumes that the Appellant acquired all areas of the land on the Campus for the purpose of making either taxable or exempt supplies.

V. **The Respondent's Methodology**

[46] The Respondent does not accept the Appellant's methodology. She does not believe it complies with section 141.01 of the Act. She proposes a methodology developed by the CRA that starts with the use of the space within the structures determined under the Appellant's Final Methodology and makes two substantial adjustments. First, it treats the External Common Areas as space that was "not for use in making taxable supplies for consideration".[22] Second, it applies a weighting or index factor based upon the replacement cost of the various structures on the Campus.

[47] Mr. Degagne explained the Respondent's Methodology.

[48] The CRA started with the numbers contained in Exhibit B of the PASF I for each structure on the Campus. These are the numbers used in the Appellant's Final Methodology to determine the extent to which it used the Campus in commercial activities. The numbers represent the square meters in each structure used in the making of taxable supplies for consideration and the square meters used in the making of exempt supplies.[23]

[49] The CRA then adjusted the numbers in Exhibit B of the PASF I on the assumption that the Appellant did not use the External Common Areas indirectly to make taxable and exempt supplies.[24] As noted in Exhibit B of the PASF I, the External Common Areas comprised 338,945 square meters.[25]

[50] Mr. Degagne testified that the Appellant used the External Common Areas in "exempt" activities.[26]

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22 PASF I, paragraph 13.

23 Exhibit R1, pages 524-527; Transcript, October 30, 2014, pages 48-49, testimony of Mr. Degagne.

24 Exhibit R1, page 526.

25 The CRA subdivided the External Common Areas into a Forest Reserve of 77,900 square meters and the remaining space of 261,045 square meters. See Exhibit R1, page 526.

26 Transcript, October 30, 2014, pages 67 and 68, testimony of Mr. Degagne.

[51] Mr. Degagne took me to Exhibit R1, which shows the adjustments the CRA made to the Appellant's Final Methodology. Exhibit R1 shows that the CRA did not change the Appellant's calculation of the square meters of space within the structures that the Appellant used in the making of taxable supplies for consideration.[27] However, the CRA did increase the number of square meters the Appellant used in the making of exempt supplies by the 338,945 square meters of External Common Areas, resulting in an increase from 492,049.63 square meters to 830,994.74 square meters.[28]

[52] After making the adjustment for the External Common Areas, the CRA then applied what it refers to as a "weighting index" to its square meter calculations.

[53] A CRA valuator, Rick Sliwkanich, estimated the replacement costs for the buildings, parking lots, and landscaped areas located on the Campus (referred to as the improvements).[29] Mr. Sliwkanich calculated the replacement cost of each of the improvements as of January 21, 2009 and then calculated a relative replacement cost per square foot.[30]

[54] The CRA auditor used the relative replacement cost per square foot as a weighting index and applied it to the square meter breakdown agreed to by the parties for the Campus. Pages 529 to 670 of Exhibit R1 show the application of the CRA's indexing factor to the Campus.

[55] For example, for the Engineering Teaching and Learning Complex ("ETLC"), the parties agreed that the Appellant used 1,828.16 square meters of the complex in the making of taxable supplies for consideration and 12,834.74 square meters in the making of exempt supplies.[31] Mr. Sliwkanich determined the relative cost per square foot for the ETLC to be 230.43.[32] The CRA applied its weighting factor as follows:

- It first calculated a weighted commercial area for the ETLC equal to the space used in the making of taxable supplies for consideration times the

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27 See Exhibit R1, page 526, "Total Parcel use".
28 *Ibid*.
29 Statement of Partially Agreed Facts (Valuator's Evidence) ("PASF II"), paragraph 1; Transcript, October 30, 2014, page 71, testimony of Mr. Degagne.
30 PASF II, paragraph 2 and 3.
31 PASF I, Exhibit B.
32 PASF II, page 4.

weighted index (the relative cost per square foot for the ETLC), i.e., 1,828.16 x 230.43 = 421,262.[33]

- It then calculated a weighted exempt area for the ETLC equal to the space used directly in the making of exempt supplies times the weighted index (the relative cost per square foot for the ETLC), i.e.,12,834.74 x 230.43 = 2,957,510.[34]
- The CRA then totalled these amounts to arrive at a weighted total area for the ETLC of 3,378,772 (421,262+ 2,957,510).[35]

[56] The CRA completed the same calculation for each of the other sixty six structures on the Campus.

[57] A calculation was also done for the External Common Areas. Specifically, the CRA auditor began by splitting the agreed size of the External Common Area between a 77,900 square-meter forest reserve and the remaining 261,045.07 square meters. Since Mr. Degagne assumed all of this area was "exempt", he calculated a **weighted exempt area** for each of the two spaces equal to the size of the area times the relevant indexing factor. For the forest reserve, this equalled 77,900 x 1.00 = 77,900 and for the remaining External Common Areas it equalled 261,045 x 2.55 = 665,665. [36]

[58] The CRA then totalled the calculated weighted commercial area, the weighted exempt area, and the weighted total area for the Campus, with the following result:

- Weighted square meters used in commercial activities - 18,265,124.16
- Weighted square meters used in exempt activities – 110,432,751.91[37]
- Weighted total area – 128,697,876.07.[38]

[59] The CRA then determined the extent to which the Appellant used the Campus in commercial activities by taking the amount it calculated as the total weighted square meters used in making taxable supplies for consideration and dividing it by the weighted total area for the Campus. This resulted in the Respondent's Percentage, 14.19%.

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33 Exhibit R1, page 525, "CRA Revised Indexed, Taxable". See also pages 598-599.
34 Exhibit R1, page 525, "CRA Revised Indexed, Exempt". See also pages 598-599.
35 Exhibit R1, page 525, "CRA Revised Indexed, Total Gross m2". See also pages 598-599.
36 Exhibit R1, page 526; PASF II, page5; Exhibit R1, pages 668 and 669.
37 This includes 743,565 (77,900 + 665,665) for the External Common Areas.
38 Exhibit R1, page 526.

[60] It is the Respondent's position that the Appellant is entitled to input tax credits resulting from the application of the Respondent's Percentage to the GST paid or deemed to have been paid with respect to the Campus, as set out in Exhibit A of the PASF I. For example, Exhibit A of the PASF I shows that the eligible amount of GST for the Appellant's reporting period ending April 30, 2006 for the Campus was $4,459,253.[39] It is the Respondent's position that the Appellant was entitled to claim an input tax credit equal to 14.19% of this amount.

[39] PASF I, Exhibit A.

The Law

[61] Subsection 169(1) of the *Act* contains the general rules for the claiming of input tax credits. The applicable portions of subsection 169(1) read as follows:

> Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period
>
> A × B
>
> where
>
> A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and
>
> B is
>
> . . .
>
> (*b*) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and
>
> (*c*) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

[62] These appeals relate to the Appellant's ability to claim input tax credits with respect to the acquisition of capital real property and subsequent improvements to the real property. Under paragraph (*c*) of the definition of B in subsection 169(1), a GST registrant is entitled to claim an input tax credit for GST paid on the acquisition of capital real property according to the extent to which the property is acquired for consumption, use or supply in the course of the registrant's commercial activities. With respect to improvements to the capital real property,

paragraph (*b*) of the definition of B in subsection 169(1) allows a person who is a registrant to claim an input tax credit based upon the extent to which the person was using the capital real property in the course of the person's commercial activities immediately after the capital real property was last acquired by the person.

[63] Subsection 209(1) provides that subsections 199(2) to (4) and 200(2) and (3) apply, with any modifications the circumstances require, to certain real property acquired by a registrant that is a public service body as if the real property were personal property. Those subsections apply to real property acquired by the public service body for use as capital property or, in the case of subsection 199(4), to improvements to capital real property of the public service body.

[64] The Appellant is a public service body. Therefore, in the first instance, subsection 209(1) would apply to any acquisition of the Campus and to improvements to the Campus.

[65] Subsections 199(2) to (4) contain rules that are generally referred to as the primary use test. The combined effect of those provisions and subsection 209(1) is that tax payable by a registered public service body in respect of the acquisition of capital real property is not included in determining the input tax credit of the public service body unless the real property was acquired for use primarily in commercial activities of that body.[40] A similar rule applies for improvements to such real property. Any tax payable in respect of improvements is not included in determining the input tax credit of the public service body unless, at the time that such tax is paid or becomes payable, the capital real property is used primarily in commercial activities of the public service body.[41]

[66] It is my understanding that the Appellant, prior to making the section 211 election on February 1, 2006, was not entitled to claim input tax credits in respect of the Campus since it was not using the property primarily in commercial activities.

[67] Section 211 provides a mechanism whereby certain public service bodies may claim input tax credits in respect of real property that they do not use primarily in commercial activities. In addition, the election results in certain exempt supplies of the real property becoming taxable supplies.

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[40] Subsections 209(1) and 199(2).

[41] Subsections 209(1) and 199(4).

[68] Subsection 211(1) provides in part that, where a public service body files an election with respect to real property that is capital property of the body, section 209 does not apply to the property. As a result, the public service body is entitled to claim input tax credits in respect of such real property even if the real property is used primarily in non-commercial activities.

[69] In addition, supplies of the real property that would otherwise be exempt because of the application of section 1 of Part V.1 of Schedule V[42] or the application of paragraph 25 of Part VI of Schedule V[43] are excluded from exemption under these sections.

[70] The evidence before me is that, prior to February 1, 2006, the Appellant made significant exempt supplies of real property by way of lease. As a result of the election under section 211, these supplies became taxable supplies.

[71] Once a public service body makes an election under subsection 211(1), it is deemed under paragraph 211(2)(*a*) to have made, immediately before the effective date of the election, a supply of the real property by way of sale and to have collected, on the particular day, tax in respect of the supply equal to the basic tax content of the property on the particular day.[44]

[72] Paragraph 211(2)(*b*) deems the public service body to have received, on the effective date of the election, a taxable supply of the real property by way of sale and to have paid, on the particular day, tax in respect of the supply equal to the basic tax content of the property on the particular day.

[73] Effective February 1, 2006, the Appellant made an election under section 211 in respect of the Campus. As a result, it was deemed to have made a supply of the Campus immediately before February 1, 2006 and to have acquired that property on February 1, 2006.

[74] There is no dispute before the Court with respect to either the deemed supply of the property under paragraph 211(1)(*a*) or the Appellant's ability to claim an offsetting input tax credit for the tax it was deemed to have collected.[45]

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42 Section 1 of Part V.1 of Schedule V exempts certain supplies made by charities.

43 Section 25 of Part VI of Schedule V exempts certain supplies of real property made by a public service body.

44 Basic tax content is defined in subsection 123(1).

45 I assume the offsetting input tax credit was claimed under section 193.

[75] The issue before the Court is the Appellant's ability to claim input tax credits for the tax it was deemed to have paid on the exercise of the election and for the GST it subsequently paid in respect of improvements to the Campus.

[76] A significant amount of the input tax credits at issue relates to the GST the Appellant was deemed under paragraph 211(2)(*b*) to have paid on the deemed acquisition of the Campus. Under subsection 169(1), the Appellant is entitled to claim a credit for such tax based on the extent (expressed as a percentage) to which it acquired the real property for use in the course of its commercial activities.

[77] The parties also disagree on the amount of input tax credits the Appellant is entitled to claim in respect of tax paid or payable, after the deemed acquisition, on improvements to the property. Since the Campus is capital real property of the Appellant and the Appellant has made an election under subsection 211(1), paragraph 169(1)(*b*) and the change-in-use rules in section 206 apply when determining the Appellant's entitlement to input tax credits for tax paid in respect of improvements to the property. These provisions look at the Appellant's actual use of the property.

[78] Regardless of which provisions apply, the Appellant's ability to claim input tax credits is dependent on its intended or actual use of the property in commercial activities. Commercial activity is defined in subsection 123(1). The relevant portions of the definition for the purposes of these appeals are as follows:

> "commercial activity" of a person means
>
> (*a*) a business carried on by the person . . . except to the extent to which the business involves the making of exempt supplies by the person,
>
> . . . and
>
> (*c*) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply.

Business is defined in subsection 123(1) as follows:

> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment.

[79] Under the GST Act, a person's business is broader than the person's commercial activity. A business includes all of the activities of a person regardless of whether the activities involve the making of taxable supplies or of exempt supplies. This is an important distinction for the purposes of various provisions of the Act, including the input tax credit apportionment rules contained in section 141.01.

[80] On the evidence before me, I have concluded that the Appellant carried on a single business, namely, the operation of a university, and that it carried on all of its activities in the course of this business. All of the business constituted a commercial activity of the Appellant, except to the extent to which the business involved the making of exempt supplies.

[81] The application of subsection 169(1) to tax paid on property or services acquired by a registrant in the course of its business for consumption or use **directly** in the making of a specific supply is relatively straightforward. For example, if the registrant acquires the property or service only for consumption or use directly in the making of a taxable supply, then the property is consumed or used in the course of the registrant's commercial activity and the registrant is entitled to claim a full input tax credit for the tax paid on the acquisition of the property or service. Alternatively, no input tax credit is available if the registrant acquires the property or service solely for consumption or use directly in the making of exempt supplies.

[82] The application of subsection 169(1) to "indirect costs", that is, those for property and services that are not used directly in the making of a taxable or an exempt supply, is not as straightforward. When making a determination in this regard, one must consider the section 141.01 input tax credit apportionment rules.

[83] Indirect costs include such things as administrative costs, overhead costs, and costs incurred in respect of common areas in or around a building. For example, in most instances, the payroll department of a corporation that makes both taxable and exempt supplies will not be involved directly in the making of any supplies by the corporation.

[84] The expenses of the payroll department are incurred in the course of the registrant's business. All of the registrant's business constitutes its commercial activity, except to the extent to which the business involves the making of exempt supplies. It can be argued that, since the payroll department is not involved directly in the making of exempt supplies, it is not involved in the portion of the

registrant's business that makes the exempt supplies. If this argument were accepted, then all of the payroll department's activities would be considered to have occurred in the course of the registrant's commercial activity. Such an interpretation would allow a registrant who makes both taxable and exempt supplies to claim full input tax credits for indirect costs such as costs incurred by its payroll department.

[85] Parliament addressed this issue when it added section 141.01 in 1994, retroactive to the introduction of the GST. Subsections 141.01(2) and 141.01(3) clarify that, when determining input tax credits for a registrant involved in making both taxable and exempt supplies, one must attribute all costs of the registrant to the making of supplies.

[86] Subsection 141.01(2) sets out a deeming rule that applies on the acquisition of property or a service.[46] The subsection reads as follows:

> Where a person acquires or imports property or a service or brings it into a participating province for consumption or use in the course of an endeavour of the person, the person shall, for the purposes of this Part, be deemed to have acquired or imported the property or service or brought it into the province, as the case may be,
>
> (*a*) for consumption or use in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person for the purpose of making taxable supplies for consideration in the course of that endeavour; and
>
> (*b*) for consumption or use otherwise than in the course of commercial activities of the person, to the extent that the property or service is acquired, imported or brought into the province by the person
>
> (i) for the purpose of making supplies in the course of that endeavour that are not taxable supplies made for consideration, or
>
> (ii) for a purpose other than the making of supplies in the course of that endeavour.

[87] Endeavour of a person is defined in subsection 141.01(1) as meaning a business of the person, an adventure or concern in the nature of trade of the person, or the making of a supply of real property of the person.

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[46] It also applies on the importation of property or a service.

[88] For example, the endeavour of a person carrying on a single business is all of the activities of the business, including the making of taxable supplies and the making of exempt supplies.

[89] Subsection 141.01(2) applies to property or a service acquired[47] by the person for consumption or use in the course of the business. Pursuant to paragraph 141.01(2)(*a*), the person is deemed, for the purposes of the Act, to have acquired the property or service for consumption or use in the course of commercial activities of the person to the extent that the property or service is acquired by the person for the purpose of making taxable supplies for consideration in the course of the business.

[90] Alternatively, under subparagraph 141.01(2)(*b*)(i), the person is deemed to have acquired the property or service for consumption or use otherwise than in the course of commercial activities of the person to the extent that the property or service is acquired by the person for the purpose of making supplies in the course of the business that are not taxable supplies made for consideration. Normally, this would be exempt supplies and taxable supplies made for no consideration or nominal consideration.[48]

[91] In addition, under subparagraph 141.01(2)(*b*)(ii), the person is deemed to have acquired the property or service for consumption or use otherwise than in the course of commercial activities of the person to the extent that the property or service is acquired by the person for a purpose other than the making of supplies in the course of the business. This provision applies where a person incurs expenses that do not relate to the person's business. Normally, such expenses are personal expenses of the owner of the business or a person related to the owner.

[92] Subsection 141.01(2) looks at the person's purpose when acquiring the property or service, in other words, the person's intended use of the property or service. In particular, it looks to see if the intention was to consume or use the property or service in the making of taxable supplies for consideration, the making of exempt supplies or the making of a combination of these supplies.[49] The person is only entitled to claim an input tax credit for tax paid on the property or service to

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47 The subsection also applies to property or services imported into Canada and property or services brought into a participating province.

48 Under subsection 141.01(4) property or services acquired for the purpose of making a taxable supply for no consideration or nominal consideration may be deemed to have been acquired for the purpose of making a taxable supply for consideration.

49 In addition to taxable supplies for consideration and exempt supplies, the person may make taxable supplies for no consideration or nominal consideration. Generally speaking, under subsection 141.01(4), such supplies are recharacterized as either taxable supplies made for consideration or exempt supplies.

the extent that the person's intention was to consume or use the property or service in the making of taxable supplies for consideration.

[93] In my view, if a corporation incurs an expense in the course of its business (endeavour), then the expense will always be incurred for the purpose of making one or more supplies. The purpose of the business is to earn revenue, i.e. to make supplies. Therefore, the result of subsection 141.01(2) is that all costs incurred by a person in the course of the person's business must be traced to a specific supply or multiple supplies in respect of which the costs were incurred.

[94] This is a relatively easy exercise for property or services that can be traced directly to the making of a taxable or an exempt supply. The challenge is to trace indirect costs to the various related supplies.

[95] My view is consistent with the Department of Finance's February 1994 technical notes, which explain the purpose of section 141.01 with respect to indirect costs as follows:

> Many types of properties and services used in the operation of a business are not directly used in the making of supplies. These may be referred to as "indirect inputs". Examples include items of overhead and inputs used in the operation of "support" functions of a business such as a personnel department or an internal audit department. The personnel, management, administrative and other support functions of a business **are part of what is involved in the making of supplies since these functions are undertaken in order for the business to achieve the ultimate end or purpose of making supplies. . . .**
>
> New section 141.01 is added only to reinforce this concept that the ultimate purpose of making supplies of some kind involves all aspects of the business. **The section, in effect requires an attribution of all costs to the making of supplies. . . .**
>
> [Emphasis added]

[96] Subsection 141.01(3) contains identical rules, except the rules in subsection 141.01(3) apply to the actual consumption or use of the property or service rather than the intended consumption or use of the property or service on its acquisition. This subsection is relevant when applying provisions of the GST Act that look at the actual use or consumption of property or a service in a specific period, such as the section 206 change-in-use rules.

[97] The second input tax credit rule that is relevant for the purposes of these appeals is subsection 141.01(5). Paragraph 141.01(5)(*a*) provides, in part, that the method used by a person in a fiscal year to determine the extent to which property or services are acquired by the person for the purpose of making taxable supplies for consideration or for other purposes must be fair and reasonable and is to be used consistently by the person throughout the year.

[98] Paragraph 141.01(5)(*b*) provides an identical rule for actual consumption or use of the property or service. It provides, in part, that the method used by a person to determine the extent to which the consumption or use of property or services is for the purpose of making taxable supplies for consideration or for other purposes must be fair and reasonable and is to be used consistently by the person throughout the year.

[99] The issue of what is fair and reasonable was recently addressed by my colleague Justice Owen in *Sun Life Assurance Company of Canada v. The Queen*.[50] He stated the following with respect to the method proposed by the Appellant, the Sun Life Assurance Company:

> [36] One definition of the word "fair" in the *Oxford English Dictionary* (Second Edition) suggests that the approach taken by Sun Life must be equitable, honest and impartial (see "fair", adverb, (definition) 4.), which in my view is an appropriate interpretation of the word as used in subsection 141.01(5). The use of the word "justes" in the French version of the provision supports this interpretation.
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> [37] The definition of the word "reasonable" in the *Oxford English Dictionary* (Second Edition) that is in my view most appropriate is A.2.a: "Having sound judgement, sensible, sane . . . Also, not asking for too much". The use of the word "raisonnables" in the French version of the provision supports this interpretation.
>
> [38] The use of a reasonableness requirement in tax legislation has been considered in other contexts. In *Bailey v. M.N.R.*, [1989] T.C.J. No. 602 (QL), 89 DTC 416, the Court stated (at page 420):
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> What is "reasonable" is not the subjective view of either the respondent or appellant but the view of an objective observer with a knowledge of all the pertinent facts: *Canadian Propane Gas & Oil Limited v. M.N.R.*, 73 DTC 5019 per Cattanach J. at 5028.

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[50] 2015 TCC 37. Justice Owen issued his decision after the conclusion of the hearing in these appeals. The Court offered the parties the opportunity to make written submissions with respect to Justice Owen's decision and the decision of my colleague Madam Justice Campbell in *British Columbia Ferry Services Inc. v. The Queen*, 2014 TCC 305. The Court received submissions from the Respondent on April 2, 2015 and from the Appellant on April 6, 2015.

> [39] In *Maege v. The Queen*, 2006 TCC 117, the Court adopted the general approach to determining reasonableness set out in *Tsiantoulas v. Canada*, [1994] T.C.J. No. 984 (QL), where the Court stated at paragraph 11:
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> Reasonableness is a question of fact and requires the application of a measure of judgement and common sense.
>
> [40] I can see no reason why the general approach to determining reasonableness in these cases would not also apply to determining whether a particular method is "fair and reasonable". That is to say, what is "fair and reasonable" is a question of fact and requires the application of a measure of judgment and common sense. The determination is not based on the subjective view of either the Appellant or the Respondent but is based on the view of an objective observer with knowledge of all the pertinent facts. It is also important to recognize that the tax authorities cannot simply substitute their approach for that of Sun Life and that there may be more than one method that is fair and reasonable in the circumstances (see *Ville de Magog v. The Queen, supra*).

[100] In my view, this is an accurate statement of the law with respect to the application of the subsection 141.01(5) fair and reasonable test.

VI. **Application of the Law to the Facts**

A. Tax Paid or Payable

[101] Under subsection 169(1), the amount of the Appellant's input tax credits in the relevant reporting periods is dependent in the first instance on the amount of tax that became payable by the Appellant during the relevant reporting periods or that was paid during the periods without having become payable.

[102] The parties agree on the amount of tax the Appellant was deemed to have paid on February 1, 2006 in respect of its deemed acquisition of the Campus and on the amount of tax paid in subsequent reporting periods in respect of improvements to the Campus.

[103] The tax paid on the deemed acquisition is equal to the basic tax content of the property on that date. Basic tax content is defined, as stated earlier, in subsection 123(1). The definition is extremely long.

[104] Generally, the basic tax content of the Campus on February 1, 2006, was the tax the Appellant had paid in the past on the acquisition of the property and on any

improvements to the property, provided such tax was not recoverable by way of rebate, refund or remission (the "non-rebated GST"). It includes any tax paid by the Appellant in respect of which it was entitled to claim or did claim an input tax credit.

[105] Paragraph 6 of the PASF I states the following: "A detailed description of the BTC [basic tax content] for the U of A Property [the Campus] during the relevant reporting periods is provided in Exhibit "A" [to the PASF I]".

[106] Mr. Degagne clarified during his testimony that Exhibit A to the PASF I is actually referring to incremental non-rebated GST for the relevant reporting periods noted in Exhibit A.[51]

[107] For example, the first line in Exhibit A to the PASF I shows basic tax content of $4,459,253.02 for the Campus during the Appellant's April 2006 reporting period. Mr. Degagne explained that this was the basic tax content (as defined in subsection 123(1)) for the property as of the time of the deemed acquisition of the Campus.[52] In other words, it is the non-rebated GST paid prior to the February 1, 2006 deemed disposition. The second line in Exhibit A of the PASF I shows what is referred to as basic tax content of $320,332.77 for the Campus during the Appellant's October 2007 reporting period. Mr. Degagne explained that this represents the non-rebated GST the Appellant paid between May 2006 and October 2007 in respect of improvements to the property.[53]

[108] I am disappointed that counsel submitted a partial agreed statement of facts that required "clarification" by a witness. Regardless, the parties have agreed on the amount of tax the Appellant was deemed to have paid on the deemed disposition and that it did pay on subsequent improvements.

B. The extent to which the Campus was acquired for use or was used in commercial activities

[109] Having determined the amount of tax paid or payable in the relevant periods, the Appellant must then determine the extent to which it used the Campus in its commercial activities. I will first consider the deemed acquisition of the Campus on February 1, 2006.

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51 Transcript, October 30, 2014, pages 86-87, testimony of Mr. Degagne.
52 Transcript, October 30, 2014, page 85, testimony of Mr. Degagne.
53 Transcript, October 30, 2014, page 87, Testimony of Mr. Degagne.

[110] The Appellant carries on a single business that makes both taxable and exempt supplies. It acquired the Campus in the course of carrying on this business. In such a situation, the Appellant must determine the extent to which it acquired the property for use in the course of the portion of the business that constitutes commercial activities and the extent to which it acquired such property for use in the course of the portion of the business that involved the making of exempt supplies.[54]

[111] For an entity such as the Appellant that carries on a large and complex business, the determination of the extent to which it acquires real property for use in the course of its commercial activities will never be exact. It will always be an estimate. The question is not whether the Appellant's Final Methodology determines the exact extent to which the Appellant acquired property for use in the course of its commercial activities or whether the Respondent's Methodology is better that the Appellant's Final Methodology.

[112] The question is whether the Appellant's Final Methodology provides a fair and reasonable estimate of the extent to which the Appellant acquired the property for use in the course of its commercial activities.[55] In most instances, there will be more than one method that is fair and reasonable.

[113] The Appellant's Final Methodology assumes that the Appellant acquired all areas of the land that comprises the Campus in the course of its business for the purpose of making either taxable or exempt supplies. Specifically, the Appellant assumes that it acquired all of the lands that make up the Campus for use directly in the making of taxable supplies for consideration, for use directly in making exempt supplies or for use indirectly in making both taxable and exempt supplies.

[114] This assumption is consistent with the evidence before me. The Appellant's evidence clearly shows that the Appellant acquired the Campus for use in the course of its business of operating a university. The Respondent does not challenge this evidence. In fact, the methodology used by the Respondent, the Respondent's Methodology, is based on the same assumption.

[115] The result of the application of the Appellant's Final Methodology is that the extent to which the Appellant used the Campus in its commercial activities is based upon the amount of space on the Campus, that was used directly in the making of

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54 Subsection 169(1).

55 As a result of the application of section 141.01, this involves a determination of the extent to which the property was acquired for the purpose of making taxable supplies for consideration in the course of the Appellant's business.

taxable supplies for consideration and the amount of such space that was used directly in the making of exempt supplies.

[116] In using this methodology to arrive at its percentages, the Appellant looked at the physical space on the Campus and determined whether it used the space directly in the making of taxable supplies, directly in the making of exempt supplies or indirectly in the making of supplies. With respect to the space used directly in the making of supplies, Exhibit A3 evidences the fact that the Appellant examined thousands of rooms contained in the sixty-seven structures on the Campus.

[117] The Appellant has assumed that the percentage that results from comparing the space used **directly** in the making of taxable supplies for consideration with the total space used **directly** in making taxable supplies for consideration and exempt supplies reasonably reflects the extent to which all of the land was acquired for use in the course of the Appellant's commercial activities.

[118] In most instances, the Appellant determined the extent to which an Internal Common Area within a specific structure was used in a commercial activity according to the direct use of space in the specific building for the purpose of making taxable supplies for consideration.[56] This correctly assumes that the Appellant used the Internal Common Area within a specific building to facilitate and support the supplies it made within the building.

[119] The Appellant determined the extent to which the External Common Areas were used in commercial activity by basing its determination upon the extent to which the spaces within all of the structures on the Campus[57] were used to make taxable supplies for consideration. As I will discuss, this correctly assumes that the Appellant used the External Common Areas to facilitate and support the supplies it made within the various structures and parking lots located across the Campus.

[120] In my view, a methodology based on the actual use of space that involves a detailed review of the use of thousands of rooms comprising approximately 659,000 square meters of space is a fair and reasonable method to determine the extent to which the Appellant acquired the Campus for use in its commercial activities.

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[56] For at least two structures, it determined that the space was used to support activities across the Campus and used a Campus-wide allocation percentage of 11%. See Transcript, October 30, 2014, pages 53-54, testimony of Mr. Degagne.

[57] Including the parking lots.

[121] While the Respondent accepts that the methodology should be based upon the use of space directly in the making of taxable supplies and directly in the making of exempt supplies, she argues that the Appellant's Final Methodology results in an unfair and unreasonable allocation unless two adjustments are made to the calculation.

[122] The first adjustment is to treat the External Common Areas as being used only in exempt activities. Specifically, the Respondent's Methodology assumes that subsection 141.01(3) applies to the External Common Areas so as to deem the use of such space to be otherwise than in the course of commercial activities of the Appellant.[58] As a result, the Respondent's Methodology assumes that all of the External Common Areas were used directly in "exempt" activities.[59]

[123] The second proposed adjustment is an attempt to recognize the amount of GST paid on specific pieces of the Campus. The Respondent's Methodology attempts to accomplish this by applying the indexing factor to the Appellant's Percentage.

[124] I will first consider the parties' treatment of the External Common Areas.

C. External Common Areas

[125] Although the parties do not agree on the Appellant's use of the External Common Areas for the purpose of making supplies, they do agree on the size of the External Common Areas[60] and on the fact that they are comprised of sidewalks, green space, roadways, walkways, bicycle paths, covered elevated walkways between various buildings and landscaped areas.

[126] The Appellant's Final Methodology assumes that the Appellant used both the Internal Common Areas and the External Common Areas indirectly to make both taxable and exempt supplies.

[127] During his testimony, Mr. Coutts, using maps, explained to the Court the various uses of the External Common Areas. He explained that the primary

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58 See paragraph 47 of the Respondent's Written Representations under the heading "Property used for calculation".

59 Transcript, October 30, 2014, pages 67-68, testimony of Mr. Degagne; Exhibit A4, Discovery Read-ins, page 54, examination of Mr. Degagne.

60 PASF I, Exhibit B.

purpose of the External Common Areas is to support the activities that occur within the structures located on the Campus.[61]

[128] He explained that people use the walkways and roadways for access to the Campus and to move throughout the Campus. The walkways are used for access to all of the buildings on the Campus and to various outdoor spaces, such as green space, playing fields, and parking lots. Commercial vehicles, bicycles, and cars use the roadways. The commercial vehicles deliver items to the various buildings on Campus.

[129] Mr. Coutts explained how the External Common Areas contain underground utility corridors that are used to provide heating and cooling to the buildings on the Campus. In addition, the External Common Areas contain elevated walkways that allow people to move from building to building without going outside. Their use increases in the winter months.

[130] He explained how landscaped areas in the External Common Areas were used to host special events (such as activities during the Week of Welcome and Engineering Week), and were used by people on the campus as a place to relax or as a meeting place.

[131] The Appellant argues that this evidence clearly shows that the External Common Areas supported all of the activities that occurred on the Campus. I agree with the Appellant.

[132] The Respondent did not present any evidence to contradict Mr. Coutts' testimony. In fact, there is no evidence before me that the Appellant acquired the portion of the Campus that comprises the External Common Areas for use outside of its business. The evidence before me is that the External Common Areas were an essential part of the Campus in that they facilitated the making of supplies on the Campus.

[133] This includes the area referred to as the Forest Reserve. It comprises approximately 22% of the External Common Areas. It is located at the north end of the Campus and is divided from the rest of the Campus by a major road. Mr. Coutts testified that the Forest Reserve includes a bicycle and walking path, park benches, a cooling plant[62] and a substantial amount of forested area.[63] Mr. Coutts

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61 Transcript, October 29, 2014, pages 17-24, testimony of Mr. Coutts.

62 A portion of the cooling plant is located on the Forest Reserve.

63 Transcript, October 29, 2014, page 17, testimony of Mr. Coutts.

testified that the Forest Reserve is for the use and enjoyment of staff, students, and third parties. For example, he testified that people may pay a rental fee and use the space to take wedding photos, and that students and staff can use the space to eat lunch on a park bench, or use the walking path for exercise.

[134] I accept Mr. Coutts' testimony. In addition, Mr. Degagne testified that, when conducting his review of the tax paid by the Appellant, he did not see any tax paid in respect of the Forest Reserve.[64] I assume he meant the area outside of the cooling plant. The fact that the Appellant paid no GST in respect of improvements to the Forest Reserve is consistent with the evidence before me that the area outside of the cooling plant was comprised mainly of forest. As a result, it is irrelevant for the purposes of determining the input tax credit entitlement of the Appellant.

[135] In summary, I have found, on the evidence before me, that the ultimate purpose of the various activities that occurred on the External Common Areas was to generate revenue from the Appellant's business. In other words, the Appellant's purpose when acquiring the External Common Areas on February 1, 2006 was no different than its purpose when acquiring, at the same time, the remaining portions of the Campus: to use them for the purpose of making both taxable and exempt supplies.

[136] It is not possible or practical to determine the extent to which the Appellant used a specific portion of the Internal Common Areas or the External Common Areas directly in the making of taxable or exempt supplies.

[137] The Appellant's witness referred to the Internal Common Areas as common or non-attributable areas. These areas were comprised of stairwells, corridors, washrooms, storage areas, heating conduits, foyers, or any other area that could not be directly attributed to the making of either taxable or exempt supplies.

[138] The only way the Appellant could determine whether a person who entered a building for the purpose of receiving a taxable supply used a specific portion of the Internal Common Areas would be to physically monitor the activities of the person. For example, someone would have to stand at the door of each washroom and identify each person who entered the washroom. It was clearly not practical for the Appellant to take such action.

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64 Transcript, October 30, 2014, page 98, testimony of Mr. Degagne.

[139] The Appellant faced the same issue with the External Common Areas. The only way one could determine if a person walking on an outdoor walkway or an enclosed elevated walkway was receiving a taxable supply for consideration or an exempt supply would be to stop the person and to ask where the person was going on the Campus.

[140] As a result, the Appellant was required to develop a methodology to apportion the use of the various components of the Internal Common Areas and External Common Areas between their use in the making of taxable supplies and their use in the making of exempt supplies.

[141] Mr. Coutts' testimony shows that, at the time of the deemed acquisition of the Campus, the Appellant intended to use the External Common Areas and the Internal Common areas in the same manner.[65] I agree with the Appellant that any methodology chosen must consider this fact.

[142] Since the Appellant acquired the Campus for use in the course of its business, it was deemed under paragraph 141.01(2)(*a*) to have acquired the property for use in the course of its commercial activities to the extent that the property was acquired for the purpose of making taxable supplies for consideration in the course of its business.

[143] On the other hand, the Appellant was deemed under subparagraph 141.01(2)(*b*)(i) to have acquired the Campus for use otherwise than in the course of its commercial activities to the extent that it acquired the property for the purpose of making supplies in the course of its business that were not taxable supplies made for consideration. There is no evidence before me that the Appellant made supplies for no consideration or nominal consideration. As a result, any supplies that it made that were not taxable supplies made for consideration were exempt supplies made for consideration.

[144] Subparagraph 141.01(2)(*b*)(ii) does not apply to the fact situation before me. Specifically, there was no evidence before me that the Appellant acquired the Campus for use outside of its business.

[145] In summary, subsection 141.01(2) required the Appellant to determine the extent to which it acquired the Campus, including the External Common Areas, for

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[65] See for example, Transcript, October 29, 2014, pages 38-39, testimony of Mr. Coutts.

the purpose of making taxable supplies for consideration and the extent to which it acquired the Campus for the purpose of making exempt supplies.

[146] This is exactly what the Appellant's Final Methodology attempts to accomplish.

[147] The Appellant was able to determine the certain portions of the Campus that it acquired for direct use in making taxable supplies and the certain portions that it acquired for direct use in making exempt supplies.

[148] However, it did not use certain portions of the Campus, i.e., the Internal Common Areas and the External Common Areas, directly in making either taxable or exempt supplies. The Appellant used these portions of the Campus in the course of making both taxable and exempt supplies. In other words, the Appellant acquired these portions of the Campus for the purpose of making both taxable and exempt supplies. As a result, it was required to develop a methodology that apportioned the use thereof between the making of taxable supplies and the making of exempt supplies.

[149] As discussed previously, the Appellant's Final Methodology assumes that the Appellant used the Internal Common Areas and the External Common Areas for both taxable and exempt activities in the same relative proportion as it used the space within the structures directly in the making of taxable supplies for consideration and directly in the making of exempt supplies.[66] Using this assumption, the Appellant developed a methodology that resulted in the Appellant's Final Percentage, which is derived from the amount of space used directly in the making of taxable supplies for consideration and the amount of space used directly in the making of exempt supplies. The Appellant applied the Appellant's Final Percentage to all GST paid during the relevant period in respect of the Campus. This includes the GST paid in respect of the Internal Common Areas and the External Common Areas.

[150] This ratio, derived using the Appellant's Final Methodology, satisfies the requirements of the provisions of subsection 141.01(2). It is based upon the use of the space in making both taxable and exempt supplies. Further, the Appellant consistently applied the Appellant's Final Methodology to the portions of the Campus that it used in the same manner, such as the Internal Common Areas and

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[66] It assumes that the Internal Common Areas within a specific structure were used in a proportion that reflected direct supplies within the structure and that the External Common Areas were used in a proportion that reflected direct supplies in all structures.

the External Common Areas. In my view, a methodology that treats differently two areas that a registrant uses in the same manner (i.e., the External Common Areas and the Internal Common Areas) does not satisfy the subsection 141.01(5) fair and reasonable test.

[151] While the Respondent's Methodology assumes that the Appellant acquired the Internal Common Areas for use in making both taxable and exempt supplies, it also assumes that the Appellant did not acquire the External Common Areas for use in making taxable supplies for consideration.[67] I have a difficult time understanding the factual and/or statutory basis for this position.

[152] The evidence before me is that the Appellant acquired all of the Campus for use in its business, the purpose of which is to make supplies. Further, these supplies include both taxable and exempt supplies. There is no evidence before me that the Appellant only used the External Common Areas to make exempt supplies. Since the External Common Areas supported all activities on the Campus, those areas must, as a question of fact, have been used by persons who were receiving both taxable and exempt supplies.

[153] Mr. Degagne, the CRA auditor, during his examination for discovery, provided the following explanation for why the Respondent's Methodology treated the External Common Areas as being used in what he called "exempt" activities:

> Q MR. KUTYAN: And the basis, again, sir, is because there was **no direct linkage to commercial activity;** is that why?
>
> A Yes. Well, the basis for – for that was Doward's interpretation letter where he talked about the need to have a direct link to commercial activity for common space such as driveways, sidewalks, and those; unless there is a **direct link to the commercial activity,** that we should be treating it as not for use in commercial activity. [Emphasis added].[68]

[154] It is my understanding that the CRA based its treatment of the External Common Areas on the assumption that, since the Appellant did not use the

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[67] PASF I, paragraph 13.

[68] Exhibit A4, Discovery Read-ins, page 54, testimony of Mr. Degagne.

External Common Areas directly to make taxable supplies for consideration, subsection 141.01(2)[69] deemed the areas to be used in "exempt" activities.

[155] The provisions of subsection 141.01(2) do not support such an administrative position.

[156] The test is not whether the Appellant made taxable supplies on a specific piece of the Campus. The test is the extent to which the specific piece of land was acquired or used for the purpose of making taxable supplies for consideration. Subsection 141.01(2) recognizes that property or services may be used indirectly, rather than directly, in the making of supplies. For property used indirectly in the making of supplies, the subsection requires one to determine how the use of the property relates to the aim or objective of making taxable supplies.[70]

[157] A test based only on direct use of property or services would lead to absurd results. For example, under such a test, the Appellant would not be entitled to claim input tax credits for GST paid in respect of the External Common Areas even if it only made taxable supplies. Clearly, this is not consistent with the object and spirit of the GST Act. Under the GST Act, a registrant who only makes taxable supplies is entitled to claim full input tax credits for GST paid on property or services acquired for consumption or use in its business.

[158] As I have stated previously, the evidence before me is that the Appellant acquired the Campus for the purpose of making supplies in the course of its business. Subsections 169(1) and 141.01(2) allow the Appellant to claim an input tax credit to the extent that the property was acquired for use directly **or indirectly** in the making of taxable supplies for consideration.

[159] It is difficult for the Court to understand how the Minister could conclude that the Appellant acquired the common areas located within the buildings (the Internal Common Areas) for the purpose of making both taxable supplies for consideration and exempt supplies and, at the same time, acquired the common areas located outside of the buildings (the External Common Areas) only for the purpose of making exempt supplies. This appears to be an arbitrary administrative

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[69] The Respondent notes in her written submissions that she relied on subsection 141.01(3). However, since I am dealing with the acquisition of the Campus, the relevant subsection is 141.01(2). The two subsections contain identical rules: subsection 141.01(2) applies on the acquisition of property, while subsection 141.01(3) applies to consumption or use subsequent to the acquisition.

[70] See for example, Department of Finance Technical Notes, February 1994, *Subsection 141.01(2)* – Acquisition for Purpose of Making Supplies.

decision rather than a decision based on applying the provisions of the GST Act to the actual intended use of the External Common Areas.

[160] In summary, the treatment of the External Common Areas under the Appellant's Final Methodology is fair and reasonable and is consistent with the provisions of the GST Act. However, the treatment of the External Common Areas under the Respondent's Methodology does not comply with the provisions of the GST Act. As a result, the Respondent's Methodology cannot be used to determine the Appellant's entitlement to input tax credits.

D. The Indexing Factor

[161] The second adjustment that the Respondent argues is required in order for the Appellant's Final Methodology to be fair and reasonable is the application of the indexing factor.

[162] As I explained previously, the CRA calculated an indexing factor based upon the replacement value of the Campus on January 21, 2009. The Respondent's Methodology applies this indexing factor to the Appellant's Final Methodology to determine the Appellant's intended use of the Campus in commercial activities on February 1, 2006.

[163] The Respondent's argument for the use of the indexing factor is set out in her written submissions as follows:

> The respondent's submission is that it is not fair and reasonable to compare a unit of space with a lower value of improvements to a unit of space with a higher value of improvements. Lower cost space contributes comparatively less GST input cost and BTC [basic tax content] to a title than does higher cost space. A correcting factor must be utilized to match spaces of the title upon which GST was paid or payable, to areas from which ITCs [input tax credits] are sought to be recovered.

[164] I do not agree with the Respondent that the use or non-use of the indexing factor is a question of what is fair and reasonable as that term is used in subsection 141.01(5). With respect to the acquisition of property, paragraph 141.01(5)(*a*) applies the fair and reasonable test to the determination of the extent to which

property was acquired for the purpose of making taxable supplies for consideration or for other purposes.

[165] The addition of an indexing factor does not in any way help in the determination of the purpose of the acquisition of the Campus.

[166] Once the Appellant determines, using a fair and reasonable method, the extent (expressed as a percentage) to which it acquired the Campus for the purpose of making taxable supplies for consideration, then, under subsection 169(1), it is required to apply the percentage to the tax that was deemed to have been paid on the deemed acquisition of the Campus (the basic tax content).

[167] This is exactly what the Appellant did using the Appellant's Final Methodology and the basic tax content of the Campus on the date of the deemed acquisition.

[168] In my view, the Respondent is simply arguing that her method is better than the Appellant's method on the basis that it results in a more accurate correlation between the Appellant's use of the Campus and the tax the Appellant is deemed to have paid in respect of certain buildings and land.

[169] As my colleague, Justice Owen, noted in *Sun Life*,[71] the CRA cannot simply substitute its method for that of the GST registrant. A GST registrant is entitled to use any method that is fair and reasonable provided it complies with the provisions of the Act.

[170] Regardless, I am not convinced that the use of the indexing factor proposed by the Respondent results in a more accurate calculation.

[171] The Appellant was created in 1908. As a result, a significant portion of the Campus was constructed prior to the introduction of the GST. The Appellant did not pay GST on property or services acquired to construct buildings at that time or to make pre-GST improvements to the buildings. The use of the indexing factor ignores this fact.

[172] The GST at issue is equal to the basic tax content on the date of the deemed acquisition of the Campus. It is the tax paid since the introduction of the GST. The

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[71] *Sun Life*, *supra*, paragraph 40.

application of the CRA's indexing factor to buildings constructed prior to the introduction of the GST seriously decreases the reliability of the resulting ratios.

[173] My second concern relates to the timing of the valuation of the Campus. It was done in January 2009, nearly three years after the deemed acquisition. I would expect that costs would have changed over the three years, in absolute and in relative terms.

[174] The third concern I have with respect to the use of the indexing factor is that it requires the Appellant to hire a valuator in order to determine its entitlement to input tax credits. This would place an unreasonable financial burden on the Appellant and other GST registrants who would be required to perform similar calculations. Further, if the Court accepted this method, the Appellant would be required to retain a valuator each time the section 206 change-in-use rules apply to its capital real property.

[175] In my view, a GST registrant should be entitled to determine its input tax credits on the basis of information in its possession, without having to resort to hiring expensive third parties, such as valuators.

[176] In summary, I do not accept the Respondent's argument that the Appellant's Final Methodology requires an indexing factor in order to satisfy the subsection 141.01(5) fair and reasonable test.

E. Improvements to the Campus

[177] I will now address the input tax credits the Appellant is entitled to claim with respect to GST paid on improvements to the Campus that occurred after the deemed disposition.

[178] As discussed previously, the Appellant is entitled to claim input tax credits for GST paid on improvements to the Campus according to the extent to which it was using the Campus in the course of commercial activities immediately after it last acquired the Campus.

[179] Since the Appellant made the subsection 211(1) election, the section 206 change-in-use rules must be considered when determining the Appellant's entitlement to claim input tax credits for improvements to the Campus.

[180] The parties argue that either the single percentage determined under the Appellant's Final Methodology or the single percentage determined under the Respondent's Methodology should be used to determine the Appellant's entitlement to input tax credits at the time of the deemed acquisition and at the time of subsequent improvements to the Campus.

[181] This means the parties have accepted that there was no significant change in the use of the Campus during the relevant periods. Because of the application of section 197, the Appellant would only have to change the percentage that represents use in commercial activities if it had changed its use of the Campus by 10% or more of the total use of the property.

[182] Therefore, in view of the finding that the Appellant's Final Methodology satisfies the provisions of the GST Act with respect to the determination of the Appellant's entitlement to input tax credits for the GST it was deemed to have paid on the deemed acquisition, the methodology also satisfies the provisions of the GST Act with respect to GST paid on subsequent improvements to the Campus.

VII. **Disposition of Appeals**

[183] For the foregoing reasons, the appeals from the reassessments made under the *Excise Tax Act* and dated July 25, 2011 and November 8, 2011 are allowed with costs. The reassessments are referred back to the Minister for reconsideration and reassessment on the basis that, during the relevant periods, the Appellant used the property identified as Plan 221 ET Block 1 and Block 2 to the extent of 25.36% in its commercial activities.

[184] The parties have thirty days from the date of this judgment to make representations with respect to the amount of costs that the Court should award the Appellant. If no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

Signed at Ontario, Canada, this 21st day of December 2015.

"S. D'Arcy"

D'Arcy J.

CITATION:	2015 TCC 336
COURT FILE NO.:	2013-3740(GST)G
STYLE OF CAUSE:	UNIVERSITY OF ALBERTA v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATES OF HEARING:	October 29 and 30, 2014. Written submissions received from the Respondent on April 2, 2015 and from the Appellant on April 6, 2015.
REASONS FOR JUDGMENT BY:	The Honourable Justice Steven K. D'Arcy
DATE OF JUDGMENT:	December 21, 2015

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