Docket: 2018-644(GST)G

BETWEEN:

9056-2059 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 26 and 27, 2021, in Québec, Quebec

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant:	Mylène Leblanc
Counsel for the respondent:	Alex Boisvert

JUDGMENT

The appeal from the reassessments made under Part IX of the *Excise Tax Act*, dated December 13, 2012 for the 2002 to 2005 reporting periods and dated June 11, 2013 for the 2009 to 2012 reporting periods is dismissed with costs.

Signed at Ottawa, Canada, this 12th day of January, 2022.

"Patrick Boyle"

Boyle J.

Citation: 2022 TCC 6
Date: 20220112
Docket: 2018-644(GST)G

BETWEEN:

9056-2059 QUÉBEC INC.,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Boyle J.

I. Overview

[1] The Appellant operates a successful agri-tourism and outdoor recreational park, which incorporates among other things artisanal beekeeping activities, which has grown into the "Domaine de la forêt perdue". In the years in question, visitors to the park were charged a single admission price by which they were entitled to both admission to the park trail system for hiking and skating, known as the "labyrinth", and a small honey, maple or related food product. The key issue in each of the years under appeal is the allocation for Goods and Services Tax ("GST") purposes of the amount paid by the Appellant's customers as between the taxable supply of access to the labyrinth's activities and the zero-rated food products.

[2] The Appellant has appealed the reassessments of its 2002 to 2005 reporting periods and its 2009 to 2012 reporting periods. The Appellant previously appealed reassessments of the periods in 2002 to 2005and that appeal was dismissed by this Court, but it successfully appealed that decision to the Federal Court of Appeal ("FCA"). The issue before those Courts was whether the incidental supply rule in section 138 of the *Excise Tax Act* ("ETA") applied and, if so, whether the honey product or access to the labyrinth was the incidental product. The Appellant treated the entire admission as zero-rated. The Respondent treated the entire admission charge as a taxable supply on the basis that the food product entitlement was incidental for the purposes of section 138. The Tax Court of Canada ("TCC") judge

found that the food product was incidental to the principal supply of admission to the labyrinth. The FCA held that the incidental supply rule in section 138 had no application and ordered that the Minister reassess on the basis that section 138 did not apply to the determination of the consideration paid by guests for the taxable admission to the labyrinth at Domaine de la forêt perdue. The Minister thereafter reassessed on the basis that the total admission price charge should be allocated as $1.50 to the zero-rated food product entitlement and the balance to the taxable access to the labyrinth. Those reassessments of the 2002 to 2005 periods bring the Appellant back to this Court.

[3] The 2009 to 2012 reporting periods were reassessed as the result of an audit conducted while the Minister was reassessing the 2002 to 2005 periods in accordance with the FCA decision. The three-plus years of reporting periods in between (January 1, 2006 to March 31, 2009) were not reassessed even though the Appellant had not collected or remitted any GST for the admission revenues, as the periods in those years were beyond the normal reassessment period.[1] In its appeal of the reassessment of the 2009 to 2012 periods, the Appellant maintains that the allocation it made starting in 2010 between the taxable and zero-rated portion of the consideration paid was correct and should apply throughout. In addition, the Appellant maintains that changes to how the business was operated in those years meant that, if any more GST should have been remitted, that was the responsibility of another corporation under common, related control and was not properly assessed against the Appellant.

[4] In these circumstances, it make sense for this Court to first address the allocation of the consideration between taxable and zero-rated supplies in the 2002 to 2005 periods previously litigated. The Court will then consider how that is impacted, if at all, by the Appellant's changes to its admission charge structure and to its operations in later years.

II. The Federal Court of Appeal Decision (2011 FCA 296)

[5] It is helpful to quote from the FCA decision:

> [5] Registered in 1997, 9056 is an agri-tourism business interested in beekeeping. To promote sales of their cottage-industry products, the appellant, and its shareholders Jean-Pierre Binette and Madeleine Courchesne before it, developed on their land a network of intersecting trails in the form of a labyrinth, better known

[1] It is noted that the TCC judge in the initial decision had found that the Appellant should not have been subject to gross negligence penalties.

to its users as the “labyrinthe du domaine de la forêt perdue”, or labyrinth of the lost forest estate (the labyrinth). These trails provide a setting for engaging in various outdoor activities all year long, including hiking; in-line skating or ice skating; watching deer, moose, elk and other wildlife; etc. (see promotional pamphlet, appeal record, volume II, tab 38). This use was approved, although not without great difficulty, by the Commission de la protection du territoire agricole du Québec, or Quebec agricultural land protection board (CPTAQ). Indeed, after three previous refusals, the CPTAQ made a decision on April 25, 1997, authorizing non-agricultural use of the land required for 9056’s activities, given that this would not cause major harm to the agricultural surroundings and that this project, on the whole, would contribute to agri-tourism development in the region beyond the summer peak season (*ibid*., tab 22, page 195).

[6] There is no doubt that 9056 achieved its aim. Particularly during the winter season, the labyrinth receives a high volume of visitors, which the appellant relies on to sell its honey and honey-based products (the honey or its honey). The appellant also offers other independently sourced, locally produced products.

[7] The marketing strategy is that the user must purchase a farm product to gain access to the trails. The transaction is carried out through the purchase of tickets. The first ticket is sold at $12 for an adult and $10 for a child. In practice, an adult who pays $12 obtains a first farm product, priced at one ticket (assessed at $1.50), and need do nothing more to be able to use the trails that day for as many hours as desired. According to the the appellant’s pricing sheet, one ticket can be used to obtain one of the following products: 50 g of honey or maple syrup, a bag of 8 candies, a maple lollipop or a 454-g bag of buckwheat flour. By comparison, a 500-g jar of churned liquid honey, assessed at $6, is priced at 4 tickets, whereas the 1-kg jar, assessed at $9, is priced at 6 tickets. Exceptions aside, additional tickets cost $1.50 each. Those are just a few examples of the pricing scheme established by 9056 (list of prices of products sold, *ibid*., tab 25, page 211).

…

[9] This is the context in which section 138 of the ETA was raised. The Minister of National Revenue took the position that the sale of honey and the access to the labyrinth were mixed supplies.

…

[12] On appeal in the Tax Court of Canada, 9056 took the following alternative legal positions:

> [TRANSLATION]

> 7. The appellant's position is unequivocal: the sale of honey and the access to the trail are one and the same supply for the purposes of the ETA.
>
> 8. This single supply is the sale of honey by the appellant, a zero-rated supply within the meaning of the ETA.
>
> 9. However, and only in the alternative, the appellant submits that if the sale of honey and the access to the trail are multiple supplies, which it strongly denies, then the access to the trail is incidental to the sale of the honey, under section 138 of the ETA.
>
> 10. If the Court accepts neither of the appellant's two positions, then the appellant submits, last, that the supply of the honey is not incidental to access to the trail and that, therefore, section 138 of the ETA does not apply (additional documents in the appellant's record, volume III, tab 46, page 433).

[13] The judge dismissed the single supply argument. On appeal before this Court, the appelant abandoned that position, and rightly so, in my view. Single supply is generally characterized by the fact that one element of the transaction is so dominated by another element that it loses all identity for tax purposes. Camp Mini, above, is a good example of single supply. In that case, the evidence established that it was not possible to charge one amount for the religious services offered to the children who went to Camp Mini-Yo-We and another amount for the recreational and athletic services. This was the context in which section 138 was found to be inapplicable, since there was a single supply having multiple components. The facts in this appeal do not point in that direction at all.

…

[41] In this regard, the judge found that the honey "[was] the equivalent of the surprises found in cereal boxes" (Reasons for Judgment, paragraph 94). He deemed the cost of the first ticket to be disproportionate in comparison to the quantity of honey received ($12 for a 50-g jar of honey). For him, the honey had only symbolic worth in respect of the value of the first ticket sold to a customer.

[42] Like the judge, I note the disproportionate gap between the price of the first ticket and the quantity of honey to which the purchaser was entitled. The comparison between the nature and scope of the activities available upon purchase of a ticket, that is, several hours of outdoor activities as opposed to 50 g of honey or a maple lollipop, suggests that the apiary aspect of the transaction is secondary to the recreational and touristic aspect. But this secondary status does not automatically give the honey an incidental role in relation to the other service offered.

…

[45] The production costs for honey and the honey-based products are too significant for them to be considered small in comparison to the price of the first ticket. The above-noted policy emphasizes that section 138 "is intended to apply in situations where the dollar value of the purported incidental supply is small. It generally will not apply to transactions where its application would have significant tax revenue implications". That is what would happen here, if it applied.

[46] The appellant has satisfied me that the judge erred in not accepting those factors in his analysis of the applicability of section 138. In light of the appropriate legal standard, these facts were sufficient to rebut the Minister's assumption that farm products were obtained incidentally to payment of admission fees (Reasons for Judgment, paragraph 3(*h*)). [Emphasis added.]

[47] Since I have answered the second question in the negative, section 138 does not apply in the case at bar. For the period at issue, the appellant had to remit only the net tax resulting from its sales in connection with the labyrinth. That is the basis on which 9056 should have been assessed.

Conclusions

[48] I would therefore allow the appeal with costs in both Courts, set aside the judgment of the Tax Court of Canada and, delivering the judgment which that Court should have made, I would vacate the assessment at issue and refer the file back to the Minister of National Revenue for reconsideration and reassessment, taking into account the fact that section 138 of the ETA does not apply in this case and that the appellant is required to pay the net tax from its sales in connection with the labyrinth and the interest on those amounts.

III. The Law

[6] Section 153(2) of the ETA provides:

Combined consideration

153 (2) For the purposes of this Part, where

(a) consideration is paid for a supply and other consideration is paid for one or more other supplies or matters, and

(b) the consideration for one of the supplies or matters exceeds the consideration that would be reasonable if the other supply were not made or the other matter were not provided,

> the consideration for each of the supplies and matters shall be deemed to be that part of the total of all amounts, each of which is consideration for one of those supplies or matters, that may reasonably be attributed to each of those supplies and matters.

[7] The Federal Court described the scope of this subsection in *Ladas v. Canada*, 2002 FCA 237:

> [2] The *Excise Tax Act*, R.S.C. 1985, c. E-15, subsection 153(2), provides that the consideration for multiple supplies must be allocated reasonably among the supplies.[2]

Justice Campbell of this Court wrote in *Reid's Heritage Homes Ltd. v. The Queen*, 2001-1661(GST)G, 9 December 2002 (TCC):

> [31] The next issue is whether the Minister properly applied subsection 153(2) to re-allocate the consideration paid in respect to servicing costs from the residential unit to the land. A re-allocation of consideration pursuant to this section is permitted where it is determined that the consideration is excessive for one supply. According to the testimony of the CCRA appeals officer, David Thorpe, the Minister relied on subsection 153(2) of the *Act* as authority to allow the reallocation of the consideration. Subsection 153(2) states:
>
> (2) For the purposes of this Part, where
>
> (a) consideration is paid for a supply and other consideration is paid for one or more other supplies or matters, and
>
> (b) the consideration for one of the supplies or matters exceeds the consideration that would be reasonable if the other supply were not made or the other matter were not provided,
>
> the consideration for each of the supplies and matters shall be deemed to be that part of the total of all amounts, each of which is consideration for one of those supplies or matters, that may reasonably be attributed to each of those supplies and matters.
>
> …
>
> [37] Although this disposes of the matter, I want to provide my comments on several additional arguments raised by Appellant counsel. Counsel compared subsection 153(2) to section 68 of the *Income Tax Act*. Section 68 permits re-allocation of an amount paid by a taxpayer for property and services on a reasonable

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[2] It was clear from the TCC decision in *Ladas* that the Court was apportioning a single consideration for multiple supplies.

> basis "irrespective of the form or legal effect of the contract or agreement" (quotes added). Counsel pointed out that the words in quotes do not appear in subsection 153(2), although she did not go on to elaborate why this might be significant. It seems Appellant counsel is trying to draw the conclusion that because subsection 153(2) does not contain these same words that section 68 of the *Income Tax Act* does, one is barred from looking to external sources of evidence, other than the terms of the transaction documents themselves, in the application of subsection 153(2) as is done in section 68. I disagree. I do not believe that the omission of these words in subsection 153(2) is a bar to looking behind the consideration specified in the documents to determine whether subsection 153(2) applies. The provision would have very little use if one could not look behind the numbers in the Appellant's documents.

IV. Allocation of Admission Charges for the Periods from 2002 to 2005

[8] A reasonable allocation of the admission price to Domaine de la forêt perdue between access to the labyrinth and other available activities, and the required purchase of a ticket to be exchanged during the visit for a honey- or maple-based food product must be undertaken. The Appellant referred to the ticket purchased upon entry as the base product purchase ticket.

[9] In this particular case, it is clearly easier, more accurate and more reasonable to valuate each of the taxable access and zero-rated food product tickets by first determining the value of the $1.50 denominated ticket, and then the access rights as the balance of the admission price. That is how the CRA approached the audit that formed the basis of the reassessments in issue in these appeals. Neither party has provided the Court with any comparable admission-only prices for comparable recreational parks that could support a valuation of the fair value of the right to enter and use the Domaine de la forêt perdue's nature hiking and skating trails, and potentially use other park services for additional charges.

[10] The honey and maple food products were sold in the Appellant's store. It priced products by the number of $1.50 tickets required to purchase each product. Prices ranged from one ticket to fifty tickets for products ranging in size from a tasting-size jar or a lollipop to a twenty-five pound pail, with a range of sizes in between. Customers purchased the tickets and then paid for their store purchases in tickets. All tickets were denominated at "$1.50", printed prominently on the face of the ticket. Guests received one such ticket with each admission purchased. All other tickets needed for guests' store purchases could be bought for $1.50, without limit, and a good number of customers did purchase additional tickets. There were four (4) products available for one ticket: a 50g jar of honey, a small jar of maple syrup, a maple lollipop, or a small bag of maple- or honey-based candies. Guests could use

their ticket bought upon entry to pay for one of these four (4) products, or they could pool their tickets with those of friends or family at the park with them, or they could purchase as many additional tickets for $1.50 each as needed to purchase more, or more expensive, products.

[11] There were no distinctions between the initial base product ticket and the additional tickets purchased for $1.50. All were prominently denominated at $1.50 and all could be used to pay for a product costing one ticket.

[12] While admission and food product prices changed over the years, tickets remained denominated at $1.50 and were sold for $1.50, and food products remained priced in tickets. The use of the $1.50 ticket as a currency for store purchases was adopted because the founder and chief apiculturist had difficulty working with numbers, counting money and making change, etc.

[13] Customers regularly used their initial tickets in these different ways--buying a one-ticket product, pooling their ticket with the tickets of others in their group, or buying their chosen products after purchasing additional tickets at $1.50 each.

[14] Customers would also ask to just pay for access to the park and not be required to purchase the initial base product ticket from time to time. These requests can be expected to have increased once the Appellant started to post its allocation of the entrance fee as between access to the park and the initial base ticket, as that showed that guests were paying multiples of the $1.50 face amount for the ticket and were required to do so to enter.

[15] The operation of the Appellant's store demonstrates that all tickets were denominated at $1.50, that the aggregate face amount of the number of tickets charged and paid for each product reflected the product's value between the Appellant and its arm's length customers, and that all $1.50 tickets sold by the Appellant were sold for $1.50 with the exception of the initial base product ticket that was required to be purchased on entry.

[16] Each guest entering the park was required to pay a single admission price that provided them with access to the park, including taxes, along with their initial ticket that could be used in the park's store. In these circumstances, guests could reasonably be expected to recognize that, since they were obliged to pay for both the access and the ticket:

1. the allocation of the price paid as between taxable supplies of park access, tax on the supply, and their initial $1.50 ticket was of no consequence to the client; and

2. the $1.50 ticket could only be used to pay towards the cost or value of the food products at the park store.

[17] All of these considerations lean very strongly to the value of a ticket being $1.50, which in turn leads to the reasonable allocation of $1.50 of the admission price being paid for the zero-rated food product ticket and the balance being allocated to the taxable access to the park's labyrinth of nature, hiking and skating trails.

[18] In the 2002 to 2005 periods, the Appellant did not allocate any of the admission price to the taxable supply of access to the park. Following the TCC decision, it continued to charge a single admission price for adults and a lower one for children, but allocated that consideration as between the taxable supply and the zero-rated supply and, as stated, allocated to the base product ticket consideration of multiples of $1.50, as much as $8.00 for adults and $6.00 for children.

[19] The Appellant was unable to put forward any sound reason why the value of the initial ticket could reasonably be any amount other than $1.50, which is what it charged for the same tickets when sold separately. The Appellant was also unable to explain how or why a ticket could reasonably be valuated at different amounts when purchased as part of an adult's admission than when purchased as part of a child's admission.

[20] Valuating tickets at $1.50 results in a profitable sale of its honey products using the Appellant's own cost of production per pound of honey in the years in issue (which I note appeared to be significantly less than that mentioned in paragraph 44 of the FCA decision). The Appellant's accountant calculated the cost of production of a pound of honey and then informed the Respondent of that cost for most of the years during the audit.

[21] Valuating the ticket at $1.50 also places the Appellant's posted price of its honey in its store in the range of the average sale price of honey sold directly to consumers at farms, at stands, at fairs, etc., according to the reports from the Institut de la statistique du Québec in evidence.

[22] For all of these reasons, I find on a balance of probabilities, after weighing the evidence before me, that the Appellant's $1.50 ticket had a fair market value of $1.50, including when such tickets were supplied and purchased upon admission as the initial base product ticket. That ticket was the same as, and was worth the same as, every other ticket. On this basis, I find that the proper and reasonable allocation of the admission charge for the years 2002 to 2005 is to allocate $1.50 of the admission price to the initial base product $1.50 ticket to be used at the park store for zero-rated purchases, and to allocate the balance of the admission charge to the taxable supply of access to Domaine de la forêt perdue.

[23] For the 2009 to 2012 periods, the Appellant takes the position that, since it did make allocations in these years and they were made known to guests buying admission, those allocations should be respected. I do not accept that argument, as it is inconsistent with the reasonable allocation requirements of subsection 153(2), and because the Appellant has been unable to explain satisfactorily how the supplier can unilaterally determine the supply's fair market value or the reasonableness of the allocation of the consideration paid.

[24] The FCA referred in paragraph 42 of its reasons to the disproportionate price of the initial ticket and, in paragraph 44, to the Appellant's honey production costs and pricing of its cottage-industry product compared to that of supermarket honey products. These remarks confirm that the supply of the honey products, while secondary to the supply of access to the park, could not be described as incidental for the purposes of section 138. The FCA did not suggest that these observations affect the value of the ticket, which it described in paragraph 7 as "assessed at $1.50".

[25] The Appellant maintains that, at some point later on, it transferred the operation of the taxable supplies of access to Domaine de la forêt perdue to a related company in order to separate the taxable supplies of admission to the park's labyrinth and trails from the production and sale of honey and related products. That other company was under common control with the Appellant and had been dormant since being used earlier in connection with the separate activities of the controlling shareholder. The Appellant maintains that it transferred to that company its allocated share of each admission price collected and the GST thereon, based on its allocation of the admission price between the ticket and park access. The Appellant says that if more GST should have been remitted in respect of the taxable supplies based upon a different allocation, it is not the Appellant but its related company that should have been reassessed. The very limited evidence before the Court on this topic does not appear sufficient to support a finding on a balance of probabilities that this was in

fact done in the manner and on the terms described. One officer of the Appellant testified that she understood this was done for this reason, but that she was not familiar with the terms or details. The only supporting evidence was the CRA auditor's audit notes indicating that the Appellant's accountant, since deceased, had told her of this transfer of the taxable business activities, and one January bank statement showing the transfer of funds four (4) times that month from the Appellant to the sister company in amounts in round thousands, without any accounting or breakdown.

[26] Even if I were to accept that the taxable portion of the business operations had been transferred to another company, it would not move the GST liability to the sister company for the admission amounts not transferred but retained by the Appellant. The Appellant's evidence is that it transferred the portion of the purchase price received that it allocated to the park access and GST thereon and that the sister company remitted that GST. However, the reassessments under appeal are for GST on the portion of the admission price the Appellant had allocated to the $1.50 initial base product ticket that exceeded a reasonable amount. That portion of the admission price was retained by the Appellant and, since it has been found reasonable to determine that it was further consideration for park access, the Appellant is indeed the person who collected that amount and kept that amount for itself, such that the Appellant is indeed the supplier responsible for remitting the GST thereon.

[27] The appeals for all of the periods in question from 2002 to 2005 and 2009 to 2012 are dismissed with costs.

Signed at Ottawa, Canada, this 12th day of January, 2022.

"Patrick Boyle"

Boyle J.

CITATION:	
COURT FILE NUMBER:	2018-644(GST)G
STYLE OF CAUSE:	9056-2059 QUÉBEC INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Québec, Quebec
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APPEARANCES:

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