Docket: 2005-2981(GST)I

BETWEEN:

GIN MAX ENTERPRISES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 4 and 5, 2006, at Montréal, Québec
Before: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Charles Leibovich and Kim Nelson
Counsel for the Respondent:	Michael Ezri

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act*, notice of which is dated May 8, 2005, and bears number 01EE0102577, is allowed and referred back to the Minister of National Revenue for reconsideration and reassessment only on the basis that the penalties are waived.

Signed at Ottawa, Canada, this 4th day of May, 2007.

"C.H. McArthur"

McArthur J.

Citation: 2007TCC223
Date: 20070504
Docket: 2005-2981(GST)I

BETWEEN:

GIN MAX ENTERPRISES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] This is an appeal under the *Excise Tax Act*[1] (the "*Act*") for the period of September 1, 1999 to November 30, 2001. The Minister of National Revenue (the Minister) reassessed the Appellant in the amounts of $90,324.64 for tax, $5,522.57 in interest, and a $7,546.60 penalty.

[2] The Appellant was in the business, amongst other things, of collecting residential curbside garbage in the New Brunswick municipalities (the "Municipalities") of Quispamsis, Grand Bay-Westfield, and Rothesay.[2] It collected Harmonized Sales Tax (HST)[3] on the garbage collection portion of its billing to homeowners, but not on the "tipping fees"[4] imposed by the provincially owned and

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1 R.S.C. 1985, c. E-15 (as amended).

2 The Appellant carried on business during the relevant years under several names, including Dominion Refuse Collector and Campbell Stillwell Residential Services.

3 In New Brunswick, GST and PST are combined into HST.

4 Tipping fees refers to the charges imposed for dumping refuse at the landfill site.

operated landfill facilities. Each municipality used the local Crane Mountain Landfill owned and operated by Fundy Region Solid Waste Commission (Fundy), which was created by the Province of New Brunswick to operate a solid waste facility. Fundy charged a tipping fee for persons who wished to dispose of garbage at Crane Mountain; for small loads such as a few bags of garbage, a per bag charge was levied; for larger loads, the charge was based on weight and type of garbage. Local residents could either take their garbage to Crane Mountain or hire a private contractor, such as the Appellant, to haul it for them.

[3] Briefly the problem is this. About two-thirds of the cost of garbage removal to the homeowners is the tipping fee.[5] If a homeowner took his or her garbage in the trunk of a car to Crane Mountain and paid the tipping fee directly to Fundy, the tipping charge was GST-exempt pursuant to either section 20 or section 21 of Part VI of Schedule V (section 21/VI/V) of the *Act*. When the Appellant delivers a resident's garbage and pays the tipping fee, the Minister states that this is a supply of an entire service including the curbside pickup and is not HST-exempt.

[4] The Appellant filed a typical customer invoice that includes:

Quispamsis	Price	HST	Total
Landfill Charge	$134.50	$0.00	$134.50
Garbage Collection	$50.00	$7.50	$57.50
Total			$192.00

[5] Counsel for the Appellant described the facts concisely as follows:

> Gin Max is a private hauler engaged in the disposal of solid waste which it collects from residents of the municipalities which it serves. The Appellant billed homeowners for this disposal service and the invoice broke the services into two components: garbage for collection and tipping fees. The Appellant charged sales tax on the collection service but not on the tipping fee.

[6] James D'Entremont was the Appellant's only witness. He was the Appellant's general manager during the relevant period and worked with the company for over 30

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5 A typical invoice was introduced at Exhibit A-1, Tab R. This invoice was dated December 1, 2001 for the 2002 calendar year and, as such, it not germane to the time period in this appeal. However, it is clear that while the tipping fees may have been lower in the years 1999, 2000, and 2001, they were certainly much more than the garbage collection amount.

years. He stated that Fundy charged the Appellant a tipping fee for each truck of refuse at Crane Mountain, based on the tonnage of garbage. Using estimates from previous years, the Appellant would calculate the average fee for each customer without regard to the actual amount collected at each curbside; the Appellant charged the same tipping fee to each customer on the route. Mr. D'Entremont testified that the Appellant did not have any contracts with any of the Municipalities.

[7] The Respondent called three witnesses: Michael Brennan, Bruce Gauld and Allison Walker. Michael Brennan, a certified general accountant, was the Chief Administrative Officer for the Town of Quispamsis during the relevant time period. He testified that the Town did not have a budget for garbage collection and it did not enter the garbage business as it was not financially feasible. Bruce Gauld, a professional engineer, was the Works Commissioner for the Town of Grant Bay-Westfield. He also testified that his Town was not involved in the garbage collection or disposal business and there was no allocation in the Town's budget for such services. Allison Walker, a chartered accountant, is the chairman for Fundy. Mr. Walker was referred to documents that were not prepared by him since he was not employed by Fundy during the relevant time period. At best, his testimony corroborated much of Mr. D'Entremont's testimony. On cross-examination, he made it clear that residents of the Municipalities cannot choose to dump their garbage somewhere other than Crane Mountain.

Legislation

[8] Section 21/V/VI of the *Act* states:

> 21. [Municipal services] -- A supply of a municipal service, if
>
> *(a)* the supply is
>
> (i) made by a government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area, or
>
> (ii) made on behalf of a government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area and that is not the government or municipality ;
>
> *(b)* the service is
>
> (i) one which the owner or occupant has no option but to receive, or

(ii) supplied because of a failure by the owner or occupant to comply with an obligation imposed under a law; and

(c) the service is not one of testing or inspecting any property for the purpose of verifying or certifying that the property meets particular standards of quality or is suitable for consumption, use or supply in a particular manner.

[9] Before analyzing the positions of the respective parties, it should be noted that in the Notice of Appeal the Appellant had argued that it was the agent of either Fundy, the Municipalities, or the resident customers. These arguments were made in an attempt to fit the Appellant's supply under the exemptions in paragraphs 20*(h)* or 20*(i)* of Part VI of Schedule V of the *Act*, which only applies to supplies made by a government or municipality, or a board, commission or other body established by a government or municipality. At trial, it appeared that the Appellant correctly abandoned this argument. I need only to rely on *Glengarry Bingo Association v. R.*[6] Amongst other defects, there was never any consent provided by the Municipalities, Fundy, or the residential customers, to the Appellant to act as agent on their behalf.

The Appellant's Position

[10] The Appellant contends that it rendered an exempt service under section 21/VI/V of the *Act*, as regards to the tipping service it provided to its customers. The Appellant argues that it was supplying a non-optional, basic municipal service to the residents of the Municipalities on behalf of the Municipalities. The Appellant submits that had the customers gone directly to Fundy and tipped the garbage, they would not have to pay sales tax. The Appellant notes that ultimately, the residents would have to pay the sales tax on dumping if the Appellant has to pay because that charge would be passed on to them.

The Respondent's Position

[11] The Respondent submits that the Appellant was making a single supply of a garbage collection service; it was not making a supply of a right to deposit refuse, either as an agent, or otherwise. The Respondent contends that the tipping fee portion of the bill was simply an element of the overall supply and not a stand alone supply.

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6 [1999] G.S.T.C. 15, 99 G.S.C. 7101 (F.C.A.).

[12] The Respondent adds that the garbage collection service was not exempt under section 21/VI/V of the *Act* because the supply was made by the Appellant on its own behalf and not on behalf of the municipality; as well, the residential clients had an option not to receive the service.

[13] The issues to be decided are:

(a) Whether the garbage collection and disposal are two elements of the same single supply or are they two distinct supplies?

(b) Whether the exempting provision in 21/V/VI of the *Act* applies?

Analysis

(a) Whether the garbage collection and disposal are two elements of the same single supply or are they two distinct supplies?

[14] At paragraph 9(x) of the Reply, the Minister makes the assumption of fact that "the Appellant's service was a single, indivisible service" and contends that the different elements of the Appellant's service are so closely connected to each other as to constitute a single and integrated supply. Subsection 123(1) of the *Act* defines a "supply" as:

> "supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;

[15] There is a mountain of jurisprudence on the question of a single supply, which is essentially a combination of property or services considered all to be one supply. The decision of Rip J. in *O.A. Brown Ltd. v. Canada*[7] is of assistance. The Appellant bought livestock for customers on its own account and charged them a commission and disbursements in addition to the cost of the livestock it had sold to them. The following lengthy analysis of Rip J. is helpful in deciding if the garbage disposal was a single supply or two separate supplies.

> In deciding this issue, it is first necessary to decide what has been supplied as consideration for the payment made. It is then necessary to consider whether the overall supply comprises one or more than one supply. The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate

[7] [1995] G.S.T.C. 40, 3 G.S.T. 2092 (T.C.C.).

supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transaction to determine the tax consequences. The test was set out by the Value Added Tax Tribunal in the following fashion:

> In our opinion, where the parties enter into a transaction involving a supply by one to another, the tax (if any) chargeable thereon falls to be determined by reference to the substance of the transaction, but the substance of the transaction is to be determined by reference to the real character of the arrangements into which the parties have entered.

One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply. This is not conclusive but is a factor that assists in determining the substance of the transaction. The position has been framed in the following terms:

> What should constitute a single supply of services as opposed to two separate supplies, is not laid down in express terms by the value added tax enactments. It would therefore be wrong to attempt to propound a rigid and precise definition lacking statutory authority. One must, it seems to us, merely apply the statutory language, interpreting its terminology, so far as the ordinary meaning of the words allows, with the aim of making the statutory system of value added tax a practical workable system. For this purpose one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered, but for the reasons given above are not conclusive. Taking the nature, content and method of execution of the services, and all the circumstances, into consideration against the background of the value added tax system, particularly its methods of accounting for and payment of tax, if the services are found to be so interdependent and intertwined, so much integral parts or mere components or items of a composite whole, that they cannot sensibly be separated for value added tax purposes into separate supplies of services, then Parliament, in enacting the value added tax system, must be taken to have intended that they should be treated as a single system, otherwise, they should be regarded for value added tax purposes as separate supplies.

The fact that a separate charge is made for one constituent part of a compound supply does not alter the tax consequences of that element. Whether the tax is charged or not charged is governed by the nature of the supply. In each case it is useful to consider whether it would be possible to purchase each of the various elements separately and still end up with a useful article or service. For if it is not possible then it is a necessary conclusion that the supply is a compound supply which cannot be split up for tax purposes.

[16] The approach taken in *O.A. Brown* was expressly followed by the Federal Court of Appeal in *Hidden Valley Golf Resort Assn. v. R.*[8] and there are numerous Tax Court decisions on this issue.[9]

[17] As well, the Canada Revenue Agency's position, while not binding on me, is helpful. It is set out in P-077R2[10] and states in part:

> … two or more elements are part of a single supply when the elements are integral components; the elements are inextricably bound up with each other; the elements are so intertwined and interdependent that they must be supplied together; or one element of the transaction is so dominated by another element that the first element has lost any identity for fiscal purposes.
>
> When performing an analysis, it is important that the analysis be confined to the transaction at issue, rather than referring to other possible transactions containing the same or similar elements. This process should not involve artificially splitting something that commercially is a single supply. Moreover, when examining an agreement, it should not be viewed in isolation. Rather, it must be examined in the context of other factors such as the intent of the parties, the circumstances surrounding the transaction, and the supplier's usual business practices. It may be appropriate in some cases to discount the terms of an agreement if they do not reflect the reality of the transaction.

[18] From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense. It must be considered whether in substance and reality the collection and disposal service are so intertwined and interdependent that they must be supplied together. Justice Hershfield clarified these considerations in *1219261 Ontario Inc.*:[11]

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8 [2000] G.S.T.C. 42, 2000 G.T.C. 4104 (F.C.A.).

9 See *Oxford Frozen Foods Ltd. v. R.*, [1996] G.S.T.C. 76; *Club Med Sales Inc. v. R.*, [1997] G.S.T.C. 28; *Winnipeg Livestock Sales Ltd. v. R.*, [1998] G.S.T.C. 87; *Camp Kahquah Corp. v. R.*, [1998] G.S.T.C. 100; *Sterling Business Academy Inc. v. R.*, [1998] G.S.T.C. 130; *Avenue Business Campuses Ltd. v. R.*, [2001] G.S.T.C. 125; *Robertson v. R.*, [2002] G.S.T.C. 13; *1219261 Ontario Inc. [Hidden Bay Lodge] v. R.*, [2004] G.S.T.C. 4; *Canada Trustco Mortgage Co. v. R.*, [2004] G.S.T.C. 169.

10 *Single and Multiple Supplies*, dated April 26, 2004.

11 *Supra* footnote 9, at paras. 12-14.

> As recognized by the English authorities cited in *O.A. Brown Ltd.*, it would, lacking statutory authority, be wrong to attempt to propound a rigid and precise definition of a single (compound) supply. Factors include: the degree of interconnectedness of constituent elements of a supply; the extent of interdependence; and, whether each is an integral part or component of a composite whole. Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered but are not conclusive. How can they be? To so find would mean the Minister could never assess a separate taxable supply where it is coupled with a non-taxable supply under one contract at one price.

[19] Similar to tests in *Wiebe Door Services Ltd. v. M.N.R.*,[12] regarding the classification of an employee or independent contractor relationship, no one test is conclusive and this Court must examine and weigh all of the evidence.

[20] The fact that the Appellant separates the garbage collection and disposal services in the invoices to the residential customers is certainly not determinative. I must look to the question of whether the supplies are so inextricably linked and interdependent that they constitute a single supply. Having said that, the separation of the two services, in the invoices, is one indicia of having separate supplies, albeit a weak one.

[21] The important test enunciated in *O.A. Brown* asks whether it is possible or realistic to omit one component from the overall supply. From the evidence, it is clear that to do the job intended by the parties, the tipping or disposal service cannot be realistically offered independently from the collection service.

[22] The Appellant did not offer the residential clients the option of providing only one of the services, be it the collection or disposal. It is does not make sense for a customer to ask for a tipping service without the collection service. In essence, the only service offered was the entire package. In conclusion, I find that the collection and disposal of garbage was one supply. It is unnecessary to determine whether one of those supplies is incidental to the other such that it may be deemed to form part of a single supply pursuant to section 138 of the *Act*.[13]

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12 [1986] 3 F.C. 553. Four in one tests set out by McGuigan J. in determining whether a worker is an employee or independent contractor.

13 See P-159R1 — Meaning of the Phrase “Reasonably Regarded as Incidental” (March 8, 1999) and P-160R — Meaning of the Phrase “Where a Particular Property or Service Is Supplied Together With Any Other Property Or Service” (April 1, 1998) for the Canada Revenue Agency’s administrative stance.

(b) Whether the exempting provision in 21/V/VI of the *Act* applies?[14]

[23] For section 21/V/VI exempting provision to apply to the Appellant, it must satisfy five essential elements within the provision:

(i) There must be a supply;

(ii) The supply must be that of a municipal service;

(iii) The supply must be made to the owner or occupant of real property situated in a particular geographic area;

(iv) The supply must be made "by or on behalf of" a government or municipality; and

(v) The service must be one which the occupant has no option to receive.

Only the last two elements of the test are in dispute.

[24] For the reasons that follow I find that the supply was not made on behalf of a municipality.

[25] The June 2003 Technical Notes are helpful:

> Under restructured section 21, the second type of supply dealt with under the section, namely a supply of a municipal service made by a person other than the municipal authority, is referred to in subparagraph (a)(ii). This addresses a situation where a person, such as a private sector company, acts as the legal supplier in delivering the service to municipal residents, but does so "on behalf of" the municipal authority in the sense that the provision of the service would otherwise fall within the mandate of the municipal authority to ensure that residents of its jurisdiction have access to that service. The reference to the service being supplied "on behalf of" the municipal authority thus qualifies the nature of the service covered by the provision.
>
> [emphasis added]

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[14] Section 21/V/VI is included under Schedule A.

[26] “On behalf of” is certainly broader than "agency" which was referred to earlier. The representatives from both the Town of Quispamsis and Grand Bay-Westfield testified that they did not have a garbage collection program, or any budgetary allocation for such a program. As well, the *Municipalities Act* is permissive in nature as the municipalities “may” provide a garbage service. None of the municipal authorities had legal contracts or written agreements that the Appellant would provide garbage collection services on behalf of the Municipalities for ordinary curbside garbage collection.[15] There were no letters specifying the services to be provided. The bylaws did not prevent individuals from bringing their own garbage to the landfill if they chose to. In fact, some municipal residents did take their garbage to Crane Mountain. Grand-Bay Westfield had no bylaw regulating the collection of garbage of any kind. As well, the Appellant contacted its customers by its own advertising and not through or directed to by the Municipalities.

[27] If I was wrong in finding that the Appellant did not provide a separate supply of a disposal service, the Appellant would still fail on this ground because it did not provide the disposal service on behalf of a government or municipality.

[28] The final criteria the Appellant must satisfy is that it provides a service that the owner or occupant has no option to receive.

[29] The evidence is clear that at all times, municipal residents had the option of taking their garbage to Crane Mountain on their own initiative. In summary, the Appellant did not meet the exempting provisions of Part IV of the *Act*. In particular, the Appellant failed to meet the tests set out in section 20 because it is not a municipality or other specifically established body, and it did not act as agent for either Fundy, the Municipalities or the municipal residents. As well, the Appellant failed to meet the tests as set out in section 21 of Part IV as the Appellant did not act on behalf of the municipalities, and the municipal residents are not compelled to accept a garbage collection service. Finally, in general, the Appellant failed to demolish many of the Minister’s assumptions. There was simply no *prima facie* evidence adduced by the Appellant to rebut most of the important assumptions.

Penalties

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15 Evidence was introduced regarding contracts for “bulky” item pick up, such as discarded appliances and furniture. As these agreements occurred outside the relevant time period, they are not particularly relevant. However, it does demonstrate that a private contractor can and has performed certain municipal services on behalf of a municipality.

[30] The Minister's reassessment includes a $7,546.60 penalty for the period September 1, 1999 to November 30, 2001. This was not seriously pursued by the Respondent. I presume the penalty was imposed under section 280 for late GST remittances. The decision of Bowman J. affirmed in *Pillar Oilfield Projects Ltd. v. R.*[16] by the Federal Court of Appeal in *Consolidated Canadian Contractors Inc. v. R.*[17] concluded that the penalty under section 280 is not automatic. As Bowman J. pointed out, it would be abhorrent without any possibility of exculpating oneself by demonstrating due diligence.

[31] I have no difficulty in concluding that the Appellant has met the high standard of due diligence set out in *Pillar Oilfield.* It is understandable that the Appellant concluded that there were two separate supplies, (i) the collection of garbage and (ii) the disposal of it. The decision is neither simple nor crystal clear. The interlocking sections of the *Excise Tax Act* are complex. I have no difficulty in waiving the penalties.

[32] The appeal is allowed only to the extent of the penalties. No costs are awarded as the appeal being under the informal procedure of this Court and the GST in issue being in excess of $7,500. In all other respects, the appeal is dismissed.

Signed at Ottawa, Canada, this 4th day of May, 2007.

"C.H. McArthur"

McArthur J.

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16 [1993] G.S.T.C. 49 (T.C.C.) [Informal Procedure]

17 98 G.T.C. 6303 (F.C.A.).

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