Docket: 2001-3940(GST)G

BETWEEN:

COMMISSION SCOLAIRE DU FER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 19, 2003, at Québec, Quebec

Before: The Honourable Justice P. R. Dussault

Appearances:

Counsel for the Appellant: Jules Turcotte

Counsel for the Respondent: Michel Morel

JUDGMENT

The appeal from the assessments made under the *Excise Tax Act* (Part IX) in relation to the Goods and Services Tax for the periods from July 1, 1996, to June 30, 1998, and from July 1, 1998, to March 31, 2000, notices of which are dated October 23 and November 6, 2000, are dismissed with costs in favour of the Respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 19th day of October 2004.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 1st day of February 2005
Aveta Graham, Translator

Citation: 2004TCC702
Date: 20041019
Docket: 2001-3940(GST)G

BETWEEN:

COMMISSION SCOLAIRE DU FER,

Appellant,

and

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Respondent.

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REASONS FOR JUDGMENT

Dussault J.

[1] These appeals, heard under the general procedure, relate to the Goods and Services Tax ("GST") for the periods from July 1, 1996, to June 30, 1998, and from July 1, 1998, to March 31, 2000.

[2] Through an assessment, notice of which is dated October 23, 2000, and numbered 0090551, the Appellant's net tax, for the period from July 1, 1996, to June 30, 1998, was increased by $23,312.41 with interest and penalties.

[3] Through an assessment, notice of which is dated November 6, 2000, and numbered 0090566, the Appellant's net tax, for the period from July 1, 1998, to March 31, 2000, was increased by $16,549.06 with interest and penalties.

[4] The parties filed a list of admissions that reads as follows:

[TRANSLATION]

(1) The Appellant is the successor of the Commission scolaire Port-Cartier and the Commission scolaire de Sept-Îles et de Fermont, which were merged in July 1998 to form the Commission scolaire du Fer (hereinafter "the merger");

(2) The Appellant is a public service body duly registered for the purposes of GST administration;

(3) The Appellant and the City of Port-Cartier are undivided co-owners of Block "C" of the Centre éducatif l'Abri (hereinafter the "Sports Complex") located in Port-Cartier pursuant to a Memorandum of Understanding entered into between those parties in May 1981 (hereinafter the "Memorandum of Understanding")

(4) The Memorandum of Understanding indicates that the Appellant and the City jointly own the land on which a pool, gymnasium, arena, functional annexes and the adjacent parking lot were constructed in undivided ownership;

(5) The Appellant is also the exclusive owner of some land and a building (hereinafter "École Polyvalente") located in Port-Cartier in which the municipal library is located as well as a multi-purpose room, a weight room, the dojo and rooms used for ceramics and movement education;

(6) The facilities mentioned in paragraph 5 are for the exclusive use of the City;

(7) Under the Memorandum of Understanding, the City's electricity consumption was established at 48.62% of the overall cost of electricity for all the buildings, including the Sports Complex and the École Polyvalente;

(8) There is only one electric meter in the Appellant's name for all of the buildings;

(9) The Appellant submits, pursuant to the Memorandum of Understanding, a bill to the City covering its electricity consumption;

(10) The Quebec Deputy Minister of Revenue (hereinafter "the Deputy Minister"), for and on behalf of the Minister of National Revenue and the Canada Customs and Revenue Agency, issued the Appellant a notice of assessment on October 23, 2000, bearing the number 0090551 pursuant to the *Excise Tax Act* for the period from July 1,

1996, to June 30, 1998, increasing its net tax by $23,312.41 with interest and penalties;

(11) The Deputy Minister, for and on behalf of the Minister of National Revenue and the Canada Customs and Revenue Agency, issued the Appellant a notice of assessment on November 6, 2000, bearing the number 0090566 pursuant to the *Excise Tax Act* for the period from July 1, 1998, to March 31, 2000, increasing its net tax by $16,549.06 with interest and penalties;

(12) On January 15, 2001, notices of objection were duly filed against the abovementioned assessment notices;

(13) On August 2, 2001, the assessment notices bearing the numbers 0090551 and 0090566 were confirmed by notices of notification;

(14) In those notices of notification, the Respondent upheld the assessments under which the Respondent assessed the GST on the bills sent by the Appellant to the City during the periods in question on the basis that:

> The assessment was made in accordance with the provisions of the Act, notably, but without limiting the generality of the foregoing, in the sense that the assessed net tax was established in accordance with sections 165, 169, 221 and 228 of the *Excise Tax Act*.

(15) The issue is whether the Appellant was to have collected the GST on the bills sent to the City with respect to its electricity consumption established at 48.62%.

[5] The amounts and calculations are not in dispute. Later, I will discuss the way in which the Appellant, the Commission scolaire du Fer ("School Board") dealt with billing the City of Port Cartier ("City") for the electricity and the manner in which the assessments were made.

Summary of the evidence

[6] Robert Smith, director of financial and material resources at the School Board, and Diane Bertin, administrative officer, testified for the Appellant. Annie Bédard, analyst with the Ministère du Revenu du Québec, testified for the Respondent.

[7] In his testimony, Mr. Smith described the different components of the complex or building at the centre of the dispute as well as the agreements between the School Board or its predecessors and the City concerning the management, use and sharing of costs of those different components over the years.

[8] The building is made up of three parts, Blocks “A,” “B” and “C.” Blocks “A” and “B” are the property of the School Board whereas Block “C” is the joint property of the School Board and the City.

[9] Block “A” is made up of classrooms and workshops in particular and is for the exclusive use of the School Board.

[10] Block “B,” which was constructed by the School Board at the request and based on the needs of the City in the early 1980s, houses the municipal library, offices, a cafeteria, exercise rooms, rooms used for folklore and movement education, an agora and a service room. Most of the rooms in Block “B” including those designated as “social and recreational facilities” are used exclusively by the City and were redesignated as Block “D.”

[11] Block “C” is essentially a sports complex with an arena, gymnasium, pool, service and storage rooms. Block “C” is used by both the School Board and the City. However, the School Board has priority use of it during what may be described as “the daily school session” based on a predetermined schedule presented to the City.

[12] Under an agreement signed on January 22, 1991, for the period from July 1, 1990, to May 29, 1995, but tacitly renewed since, Blocks “C” and “D” were leased for $1 each by the School Board to the City which from that point forward took over the management of the Blocks and assumed the costs.

[13] For clarification, let us say that the School Board paid the City part of the operational costs for Blocks “C” and “D,” but especially Block “C” based on how much they used the different rooms designated as “facilities.” The operational costs of the different “facilities” that the City managed were determined according to their surface area based on the expenses of the previous year and then converted into hours. The City then billed the School Board for part of the “hourly” costs of operation according to the number of hours the facilities were used as established in the schedule sent in advance by the School Board. I must mention here that the price of electricity paid by the City, like the salaries and insurance, was part of the expenses used to determine the “hourly” costs of operation for the different

“facilities” a part of which was in the end paid by the School Board to the City. According to Ms. Bertin’s testimony, the City had not initially added the taxes (GST and QST) to the bill that it sent to the School Board, but they were later added following an audit by the Ministère du Revenu du Québec.

[14] Over the years, a number of agreements were entered into between the School Board or its predecessors and the City concerning the sharing of the costs for the sports complex (Block “C”) and the recreational complex (Block “B”). From 1975, in preparation for the construction of those complexes, the parties signed a first Memorandum of Understanding (Appellant’s book of exhibits, tab 14). Article 11 of the document set out the following:

> [TRANSLATION]
>
> (a) [t]he BOARD undertakes to provide mechanical and electrical services for all of the complexes.
>
> (b) The costs of electricity and heating, ventilation, refrigeration and housekeeping, administration fees and the fees for the removal of snow from the parking lot, pathways and service roads chargeable to the Sports Complex, will be chargeable to the CITY in a proportion of two thirds (2/3) and to the BOARD in a proportion of one third (1/3).

[15] According to Mr. Smith, a second agreement was signed in 1981 in which the allocation of electricity costs remained the same, that is, 2/3 chargeable to the City and 1/3 chargeable to the School Board (Appellant’s book of exhibits, tab 4).

[16] In 1984, estimating that the allocation of costs did not correspond to the reality, the parties signed an “ad hoc” arrangement under which the proportion of the electricity costs chargeable to the town increased to 42% (Appellant’s book of exhibits, tab 15). That arrangement was renewed in 1986 (Appellant’s book of exhibits, tab 16).

[17] Finally, in 1991, the parties signed a last agreement that was to remain in force until 1995, but has been tacitly renewed since (Appellant’s book of exhibits, tab 6). That last agreement came following a study report for the reasonable use and more equitable sharing of the costs for Block “C.” (Appellant’s book of exhibits, tab 5)

[18] It has already been mentioned that in the agreement signed on January 22, 1991, the School Board leased the City its “part” of Block “C” as well as part of Block “B” for the exclusive use of the City (Block “D”) for $1 each. The agreement also set out that the City would henceforth provide for the management of those Blocks and assume the costs.

[19] In paragraph 11 of that agreement, it was also provided that measures would be taken jointly by the School Board and the City to change the electrical and mechanical connections in order to make the operation of all the facilities associated with Blocks “C” and “D” as independent as possible.

[20] However, those independent connections were not made and there is still only one electric meter for the entire real property complex. That electric meter is in the name of the Appellant, which receives the Hydro-Québec electric bill for the entire complex.

[21] As the situation progressed, the School Board and the City came to believe, given their respective consumption, that the electricity costs should be allocated at 48.62% to the City and the balance to the School Board. It was on that basis that the School Board billed the City during the periods in question.

[22] In practice, the School Board sent 13 bills a year to the City. First, each month, after receiving the Hydro-Québec bill, which included the consumption costs and taxes (GST and QST), the School Board billed the City for exactly 48.62% of the total amount of the Hydro-Québec bill without adding taxes (GST and QST) on the amount billed because the School Board considered that at that stage it was an exempt supply. The School Board thus sent 12 bills a year to the City for its electricity consumption in relation to Block “C,” that is, the Sports Complex.

[23] A 13th bill, annual this time, was also issued by the School Board and sent to the City for its electricity consumption in relation to Block “D,” taking into account the monthly amounts already billed to the City for its electricity consumption in relation to Block “C.”

[24] Essentially, what is in dispute in this case are the amounts the School Board billed the City under the above-mentioned terms and conditions.

[25] Annie Bédard from the Ministère du Revenu du Québec explained how the School Board dealt with the GST and how she herself made the assessments in dispute.

[26] Considering that the bill to the City was an exempt supply, the School Board did not bill the GST to the City. Furthermore, it claimed, as a school authority, a 68% rebate of the total GST paid with regard to the Hydro-Québec bills (see section 259 of the *Excise Tax Act* (the "Act") and paragraph 5(*c*) of the *Public Service Body Rebate (GST/HST) Regulations* ("Rebate Regulations").

[27] According to Ms. Bédard, because the City would only be entitled to a 57.14% rebate of the GST paid under paragraph 5(*e*) of the Rebate Regulations, the School Board did not bill the GST to the City so that the City would not increase its billing of the costs for using the facilities in Blocks "C" and "D" to the School Board.

[28] In any case, the School Board did not bill the City for the GST on the bills establishing the proportion of the electricity costs payable by the City based on the bills received from Hydro-Québec. Ms. Bédard stated that during discussions with Ms. Laperrière, an agent of the School Board, Ms. Laperrière allegedly told her that the bill to the City was essentially considered to be electricity cost-sharing. In his testimony, Mr. Smith confirmed that from the School Board's perspective, it was simply a matter of dividing the electricity consumption cost between the School Board and the City just as that consumption was established on the Hydro-Quebec bills. In his opinion, the School Board did not bill kilowatts to the City and it never claimed to or had the intention to carry on an electricity business. Furthermore, he admitted that the School Board did not have authorization from Hydro-Québec to sell electricity.

[29] The assessments made against the Appellant were made by assuming that the bills sent by the School Board to the City constituted a taxable supply in the context of a commercial activity and, therefore, the School Board should have billed the GST to the City. However, as to the proportion of the amount of the electricity consumption re-billed to the City, that is, 48.62%, Ms. Bédard considered that the School Board was entitled to an input tax credit of 100% of the tax paid.[1] Moreover, as to the GST paid on the balance of the amount billed by

[1] However, according to Ms. Bédard, there was an error in the computing of the input tax credit granted to the Appellant because it was established based on 48.62% of the total amount of the Hydro-Québec bill re-billed to the City. As that amount included the taxes

Hydro-Québec for the electricity consumption, Ms. Bédard considered that that part of the electricity consumption could be attributed to the School Board which it used for its own purposes and that it was therefore entitled to a 68% rebate with regard to that part of the GST paid given its status as a school authority.

[30] Three arguments were raised by counsel for the Appellant against the assessments. According to each of those arguments, the bills sent by the School Board to the City would constitute an exempt supply.

[31] The first argument is based on the application of paragraph 6(*a*) of Part VI (Public Sector Bodies) of Schedule V to the Act (Exempt Supplies). According to counsel for the Appellant, that provision would be applicable to the monthly bills that the School Board sent to the City concerning Block "C" held in co-ownership with the City. Paragraph 6(*a*) reads as follows:

> **6. [Service provided in the course of a business for the purpose of making a supply or tangible real property]** – A supply by way of sale made by a public service body to a recipient of tangible personal property (other than capital property of the body), or of a service purchased by the body for the purpose of making a supply by way of sale of the service, if the total charge for the supply is the usual charge by the body for such supplies to such recipients and
>
> (*a*) if the body does not charge the recipient any amount as tax under Part IX of the Act in respect of the supply, the total charge for the supply does not, and could not reasonably be expected to, exceed the direct cost of the supply; and
>
> (*b*) N.A.

[32] It is by invoking the presumption in section 906 of the *Civil Code of Québec*, which establishes that waves or energy are deemed corporeal movables, that counsel for the Appellant considers that paragraph 6(*a*) of Part VI of Schedule V to the Act is applicable. In his opinion, the reason why the School Board did not sell electricity is not because it did not have authorization to do so.

[33] Counsel for the Respondent submits that the School Board could not sell the electricity acquired in light of section 77 of *Bylaw No. 634 respecting the*

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billed by Hydro-Québec, the input tax credit granted to the Appellant is higher than that to which it was indeed entitled.

conditions governing the supply of electricity by Hydro-Québec ((1996) 128 G.O. II, 2292; R.R.Q., c. H-5, r.0.2), which prohibits the resale, except for an undertaking engaged in the distribution of electricity within the meaning of the *Act respecting municipal and private electric power systems* (R.S.Q., c. S-41). Also, he states that the evidence fully demonstrates that the School Board did not in fact resell electricity to the City.

[34] In my view, counsel for the Appellant's first argument must be dismissed given the evidence adduced. I believe that the School Board did not acquire electricity with a view to reselling it. In the words of the School Board's agents themselves, the purpose and effect of the monthly bills sent to the City in relation to the electricity consumption for Block "C," which represents 48.62% of the bills received from Hydro-Québec, was essentially the sharing the cost of the electricity consumed between the City and the School Board and not for the resale of electricity to the City.

[35] The second argument deals with the 13th annual bill sent by the School Board to the City, that is, the bill sent once a year in order to make an adjustment as to the electricity consumed by the City in relation to Block "D." This time, counsel for the Appellant relies on the application of section 25 of Part VI of Schedule V to the Act to state that the amount billed by the School Board and paid by the City presumably represents a part of the consideration for the supply of a movable by the School Board. In his view, that supply would be exempt under section 25 given that the exception in paragraph 25(*f*) would not be applicable in the circumstances. That provision reads as follows:

> **25. [Real Property]** – A supply of real property made by a public service body (other than a financial institution, a municipality or a government), but not including a supply of:
>
> ...
>
> (*f*) real property (other than short-term accommodation) made by way of
>
> (i) lease, where the period throughout which continuous possession or use of the property is provided under the lease is less than one month,
>
> (ii) a licence,
>
> where the supply is made in the course of a business carried on by the body;

[36] According to counsel for the Appellant, the exception in paragraph 25(*f*) is not applicable in the case at bar because the evidence shows that the City, pursuant to the agreement entered into on January 22, 1991, with the School Board, had had possession and ongoing use of Block "D" for over a month. In fact, first, the agreement was initially for a term of five years and it was later tacitly renewed and, second, the Block "D" facilities are those that were, for the most part, used exclusively by the City. According to him, as the lease granted in the agreement for $1 also provided that the City would assume the costs related to Block "D," payment of electricity by the City should therefore be considered as part of the consideration payable by the City for the lease of Block "D."

[37] Counsel for the Respondent points out that the assessment is in no way based on the supply of real property but rather on the supply of electricity whether or not it is considered to be a service. In his view, the issue of sharing the electricity cost has always been dealt with in different ways in the various agreements between the School Board and the City. Furthermore, in the agreement signed on January 22, 1991, paragraph 11 specifically provides that the parties will take the necessary measures to change the electrical connections so as to make Blocks "C" and "D" independent. Thus, in his view, the parties' intention was not to consider the cost of electricity as being part of the consideration to be paid by the City for the lease of Block "D."

[38] Counsel for the Respondent also points out, to the extent that it would be the supply of real property, that the evidence shows that the lease provided for the ongoing use for less than a month because the use of the facilities was shared between the City and the School Board. In that situation, the exception in paragraph 25(*f*) would be applicable and the supply would become taxable. The decision in *Commission scolaire des Découvreurs v. The Queen*, 2003TCC295, [2003] 2 G.S.T.C. 86, [2003] T.C.J. No. 258 (Q.L.), is cited in support of that argument.

[39] The interpretation of the January 22, 1991, agreement suggested by counsel for the Appellant is far from consistent. In fact, with respect to Block "C" and Block "D," the agreement is conducive to considering that the electricity was sold by the School Board to the City with regard to Block "C" and that the City assumed the electricity costs in consideration for the lease granted by the School Board concerning Block "D." Both Blocks "C" and "D" were leased to the City for $1 each and paragraph 5 of the agreement specifies that the City would be responsible for managing Blocks "C" and "D" and would assume the costs.

However, the issue of electricity is dealt with separately in paragraph 11 of the agreement. That provision sets out that measures will be taken to change the electrical connections so as to enable all the facilities in Blocks “C” and “D” to function independently. In my opinion, it was therefore clear that there was no question that the City pays some amount to the School Board for the electricity since Blocks “C” and “D” were to be made independent precisely to avoid the City making payments to the School Board for the electricity consumed for Blocks “C” and “D.” It is because the parties did not comply with the agreement in order to change the electric connections that the School Board had to continue to bill the City for the electricity consumed for Blocks “C” and “D” since there had always only been one electrical meter and Hydro-Québec therefore continued to only bill the School Board for the electricity consumed in the entire real property complex.

[40] In my view, in that context, it is completely inappropriate to deal with the payment of the electricity consumed in relation to Block “D” as being consideration made by the City to the School Board for the supply of real property, specifically Block “D” under the lease granted in the January 22, 1991 agreement.

[41] Counsel for the Appellant’s third and final argument raised the concept of a mandate. Thus, the School Board’s billing of the City would constitute an exempt supply because the School Board would have acted as an agent of the City with respect to the payment of electricity to Hydro-Québec. In such case, the bills sent by the School Board to the City would only represent a request to repay amounts paid for and on behalf of the City to Hydro-Québec for its electricity consumption in relation to Blocks “C” and “D.” At first, that argument is attractive even more so because the School Board and the City are co-owners of Block “C.”

[42] However, as counsel for the Respondent points out, none of the evidence supports that conclusion. Although the evidence shows that the School Board could have acted as an agent of the City during the construction of Blocks “C” and “D” in the early 1980s, the existence of a mandate for the performance of a legal act like the payment of an amount owing by the City to Hydro-Québec was never established. Furthermore, it was not shown that the City ever had a contract with Hydro-Québec or that it owed any amount at all to Hydro-Québec because the only existing electrical metre is in the name of the School Board who, moreover, is the sole entity that had been billed by Hydro-Québec. In fact, there was not contractual relationship for the supply of electricity by Hydro-Québec to the City in relation to the real property complex in question. Furthermore, none of the Appellant’s agents, whether Mr. Smith or Ms. Bertin in their testimony or Ms. Laperrière during her conversations with Ms. Bédard from the Ministère du Revenu de

Québec, claimed that the School Board acted as an agent of the City with Hydro-Québec. All are agreed that the School Board and the City shared the cost of the electricity consumed in the entire real property complex and the School Board's bills to the City indeed represented the part attributable to the City for Blocks "C" and "D," of which it was the leaseholder under the January 22, 1991, agreement.

[43] Furthermore, how can a claim be made that there was a mandate when the School Board claimed a rebate of 68% of the total GST paid with regard to the Hydro-Québec bills as a school authority under section 259 of the Act and paragraph 5(*c*) of the Rebate Regulations?

[44] In my view, the only conclusion that can be drawn is that the bills sent by the School Board to the City for the electricity consumed in Blocks "C" and "D" represent a sharing of the electricity costs and as such it is a taxable supply.

[45] Evidently, that supply has nothing to do with the School Board's primary teaching activities. Also, as counsel for the Appellant pointed out, it could not be claimed that the School Board operates an undertaking engaged in the supply or service of electricity. However, the evidence adduced by the Appellant itself, both testimonial and documentary, establishes without a shadow of a doubt that there is a supply of real property through a lease by the School Board to the City. Furthermore, it is one of the facts on which counsel for the Appellant relied to claim application of section 25 of Part VI of Schedule V to the Act with regard to the payment by the City of the electricity bill sent annually by the School Board and representing the proportion of the cost of the electricity consumed in Block "D." The lease concerning Blocks "C" and "D" granted by the School Board to the City in the January 22, 1991, agreement is undoubtedly a "commercial activity" within the meaning given to that expression in paragraph (*c*) of the definition found in subsection 123(1) of the Act. That definition reads as follows:

> "**commercial activity"** of a person means
>
> > (*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
> >
> > (*b*) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals),

> except to the extent to which the adventure or concern 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.

[46] The sharing of the electricity costs negotiated between the parties allocating 48.62% of that cost to the City does not result directly from the January 22, 1991, agreement or the lease concerning Blocks “C” and “D” that is stipulated therein. However, the billing of the City for the electricity consumed by it is definitively in the course of or in connection with that supply of real property by the School Board to quote the terms used in paragraph (*c*) of the definition of “commercial activity.” As it is not an exempt supply, that billing of the electricity costs is a taxable supply.

[47] Accordingly, the appeals are dismissed with costs in favour of the Respondent.

Signed at Ottawa, Canada, this 19th day of October 2004.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 1st day of February 2005
Aveta Graham, Translator

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APPEARANCES:

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