Docket: 2006-2168(GST)G

BETWEEN:

DOMAINE DE LA VOLIÈRE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 12, 2008, at Montreal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Martin Fortier

Counsel for the Respondent: Mario Laprise

JUDGMENT

The appeal is allowed with costs, and the assessment respecting the GST on the services provided to school boards by the appellant, which did not collect any GST on those services, is vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 7th day of October 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 26th day of May 2009.

Erich Klein, Revisor

Citation: 2008 TCC 507
Date: 20081007
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REASONS FOR JUDGMENT

Bédard J.

[1] The issue is essentially whether the appellant was required to charge the goods and services tax (GST) on the services it provided to school boards and/or schools from February 1, 2001, to January 31, 2005 (the "relevant period"), or if those services were exempt supplies of child care services pursuant to section 1 of Part IV of Schedule V to the *Excise Tax Act* (the "Act").

[2] The appellant, a for-profit corporation, was operating, during the relevant period, a recreational accommodation centre also referred to by the appellant as an accommodation and leisure centre (Exhibit I-1, page 12). For that activity, the appellant has 55 acres of land (a large part of which is wooded) on which there are four cottages, four condominiums, a big tent and a reception office. The appellant also has a private lake (with a sandy beach), picnic tables, a heated pool, canoes, pedal boats, swings and areas set up for activities such as archery, volleyball, pétanque, soccer, and baseball. The wooded area has a number of trails developed specifically for nature interpretation, bird watching, hebertism, cycling, snowshoeing, cross-country skiing, and snowmobiling. Finally, for the winter season, the Appellant builds a skating rink and illuminated ice slides.

[3] The appellant's main activities during the relevant period were as follows:

(i) providing accommodations (renting condos and cottages), which activity accounted for approximately 45% of the appellant's sales;

(ii) providing outdoor activity days for schools and day-care centres, which activity accounted for approximately 45% of the appellant's sales;

(iii) holding summer day camps, which activity accounted for approximately 10% of the appellant's sales.

[4] The case at bar concerns the supply of outdoor activity days by the appellant to schools and day-care centres. The appellant did not charge GST to the recipients of this supply during the relevant period because the appellant considered that this service consisted primarily in providing care and supervision to children 14 years of age or under for periods of normally less than 24 hours per day, and that the service was therefore an exempt supply of child care services pursuant to section 1 of Part IV of Schedule V to the Act.

[5] With respect to the supply or service that is the subject of the case at bar, the evidence revealed the following:

(i) this supply was made almost exclusively to school boards and/or schools during the school year;

(ii) from their arrival on the bus (at around 9:00 a.m.) until their departure (at around 2:30 p.m.), the pupils from these school boards and/or schools were entirely in the keeping of the appellant's counsellors, who saw to it that the pupils participated in as many recreational and/or educational activities as possible during the day; the pupils were all 14 years of age or under;

(iii) the teachers accompanying their pupils on the bus had no part at all in looking after them during the time they were in the keeping of the appellant's counsellors; the evidence showed that the appellant placed at the teachers' disposal a cottage where they could entertain themselves or work.

[6] The evidence also revealed that the supply of summer day camp services resembled in all regards the supply of outdoor activity days made by the appellant to schools during the school year: from their arrival (at around 9:00 a.m.) until their departure (at around 4:00 p.m.), the children, aged 14 years and under, were entirely in the keeping of the appellant's counsellors, who saw to it that they participated in as many sports and/or educational activities as possible during the day, which activities were in all respects similar to the activities the pupils participated in where the recipient of the service was the school and/or school board. In fact, in both cases, the services provided by the appellant were the same; the ultimate beneficiaries were children 14 years of age and under, the difference being that in the case of the supply of summer day camp services, the recipients were parents, whereas in the case of the supply of outdoor activity days, the recipient of the supply or service was a school board and/or school.

Respondent's Position

[7] Counsel for the respondent submitted essentially that, in order to decide whether or not this activity constitutes a child care service in a particular case, the Court must use the test enunciated by Mr. Justice Rip (as he then was) in *Bailey*.[1] According to counsel for the respondent, Rip J. determined, in *Bailey*, *supra*, that the fundamental issue is to determine the primary reason for which a child is registered for an activity. In other words, counsel for the respondent submitted that the Court must answer the following question in the case at bar: Did the recipients of the service, in this case essentially school boards and/or schools, use the appellant's services primarily to have the appellant watch over their pupils or protect them, in which case the service is an-exempt supply, or primarily to have the appellant entertain and/or educate the pupils, in which case it is a taxable supply. Counsel for the respondent argued that the outdoor activity days were simply extracurricular activities (like museum outings, trips to zoos or botanical gardens, downhill skiing days, etc.) that the schools organized for their pupils during the school year and that were chiefly intended to provide occasional rest days for pupils while having them participate in recreational-educational activities outside the school setting; the object was not the provision of care. Counsel for the respondent submitted that the appellant's supervision service which the pupils at these schools benefited from was, in this context, merely incidental to the entertainment service primarily sought by the schools.

[1] *Bailey*, 2005 TCC 305, [2005] T.C.J. No. 203 (QL).

Appellant's Position

[8] In my opinion, the first question that must be answered in our analysis is as follows: Is it the test enunciated by Rip J. (as he then was) that should be used for GST purposes? In other words, is it up to the service provider (in light of its obligation to collect GST from its client if a taxable service is provided to that client) to determine for each client the main reason this client is using the supplier's services? If the answer is affirmative, it may be that for one client the supplier must collect GST, whereas for another it may not be required to do so, even if the service provided to both clients is identical. If this were the case, the result would be nonsensical. If the service provided is identical in both cases, the supplier's obligation with respect to collecting GST must, in my opinion, also be identical in both situations.

[9] In my opinion, it is not necessary here to determine the main reason the school boards used the appellant's services. Rather, what must be determined is whether, intrinsically, in light of the evidence submitted with respect to the services provided to the school boards, those services consisted primarily in providing care or supervision to pupils or in providing them with educational and/or sporting activities. This approach does not mean, however, that the main reason the school boards used the appellant's services should not be looked at. Indeed, establishing the main reason for using the services may, in some cases, light the way in the determination of the services primarily provided by the supplier. In the present case, the evidence very clearly shows that the appellant provided two kinds of services to the school boards, in that the pupils were both cared for and entertained (and/or educated) by the appellant. The question that must be asked, then, is this: Was the appellant's supervision service merely incidental to its entertainment and/or educational services from which the pupils benefited? Or was it the other way round? In the present case, the evidence shows that from their arrival (at around 9:00 a.m.) until their departure (at around 4:00 p.m.), the pupils, aged 14 years and under, were entirely in the keeping of the appellant's many counsellors. During that time, the children were not under the care and supervision of teachers, as the teachers were entertaining themselves or working in cottages made available to them by the appellant. It is clear the appellant was responsible for watching over the children for a period of least seven hours during which the teachers were not watching them. The counsellors provided first aid to the children and ensured their comfort. The period during which the pupils were committed to the care and keeping of the appellant was too long for one not to conclude that the predominant element of the service provided consisted of the care of the children during that period. The fact that the appellant offered pupils the opportunity to participate in many recreational and/or educational activities was

completely foreseeable and reasonable since it had to look after them for a long period of time. It is expected that anyone responsible for the care of children 14 years of age or under during a 7-hour period would arrange activities for them, and it would be unreasonable to argue that the above-mentioned provision of Part IV of Schedule V to the Act applies solely to situations where the only service offered is the care of children and where no activities are arranged for them. That could not have been the intention of Parliament. Consequently, the services provided to the school boards for which no GST was charged met the conditions set out in section 1 of Part IV of Schedule V to the Act, and, as these services were exempt supplies, it was appropriate that GST was not charged on them.

[10] Accordingly, the appeal is allowed with costs, and the assessment respecting the GST on the services provided to school boards by the appellant, which did not collect any GST on those services, is vacated.

Signed at Ottawa, Canada, this 7th day of October 2008.

"Paul Bédard"

Bédard J.

Translation certified true
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Erich Klein, Revisor

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APPEARANCES:

Counsel for the Appellant:	Martin Fortier
Counsel for the Respondent:	Mario Laprise

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