

Dockets: 2013-4844(GST)G
2013-4845(GST)G
2013-4846(GST)G

BETWEEN:

407 ETR CONCESSION COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence on October 15 and 16, 2015
at Toronto, Ontario

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant: W. Jack Millar
Ka Yuk (Jenny) Siu
Counsel for the Respondent: Gordon Bourgard

JUDGMENT

In accordance with the attached Reasons for Judgment:

1. The following appeals are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the supply by the Province of Ontario of the OPP's policing services constituted an exempt supply for the purposes of the *Excise Tax Act*:

- a) The appeal from a reassessment made under the *Excise Tax Act* by notice of reassessment No. 11339504012370002 dated July 31, 2012, for the period of July 1, 2010 to October 31, 2011;
 - b) The appeal from a reassessment made under the *Excise Tax Act* by notice of reassessment No. 09041008712360020 dated January 31, 2011, for the GST reporting period ending December 31, 2008; and
 - c) The appeal from reassessments made under the *Excise Tax Act* by notices of reassessment Nos. 07354003112360139 and 08051000512360131, both dated January 31, 2011, for the GST reporting periods ending October 31, 2007 and December 31, 2007 respectively.
2. Costs are awarded to the Appellant. The parties shall have thirty days from the date of this judgment to make submissions with respect to the costs awarded. Such representations shall not exceed 10 pages. If no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

Signed at Antigonish, Nova Scotia, this 27th day of September 2016.

“S. D’Arcy”

D’Arcy J.

Citation: 2016 TCC 213
Date: 20160927
Dockets: 2013-4844(GST)G
2013-4845(GST)G
2013-4846(GST)G

BETWEEN:

407 ETR CONCESSION COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

[1] The Appellant has filed three notices of appeal in respect of reassessments issued by the Minister. All three appeals relate to the same issue: whether the supply by the Province of Ontario to the Appellant of police services provided by the Ontario Provincial Police (the "OPP") constitutes an exempt supply under section 21 of Part VI of Schedule V of Part IX of the *Excise Tax Act* (Part IX of the *Excise Tax Act* will be referred to as the "*GST Act*").

[2] The three appeals were heard together on common evidence.

[3] The parties filed a statement of partial agreed facts and documents (the "PASF"). A copy of the PASF is attached as Appendix A to my reasons for judgment.

[4] I also heard from three witnesses. The Appellant called Mr. Craig White and Staff Sergeant Chuck Kaizer. The Respondent called Inspector Burt McDonald. I found all three witnesses to be credible.

[5] Mr. White is an employee of the Appellant. Between October 2007 and his promotion in 2010 he was the director of highway operations. In this role he had operational responsibility for the toll highway known as Highway 407 (the “407 ETR”). In 2010 he was promoted to vice-president of highway and tolling operations. He is now responsible for the operation of the highway.

[6] Staff Sergeant Kaizer is the commander of the Highway 407 Detachment of the OPP. This is the detachment of the OPP that polices the 407 ETR.

[7] Inspector McDonald is the manager of the Municipal Policing Bureau of the Ontario Provincial Police.

I. Summary of Facts

[8] I will now summarize the facts as set out in the PASF, incorporating the testimony of the three witnesses.

[9] The 407 ETR is an “all-electronic open-access highway”¹ located north and west of Toronto, Ontario. It is a toll highway. Mr. White testified that the highway starts at Brock Road in the Regional Municipality of Durham, in Ontario (the “Durham region”). It runs through the Regional Municipality of York (the “York region”) and the Regional Municipality of Peel (the “Peel region”) into the Regional Municipality of Halton (the “Halton region”), and ends in Burlington, Ontario where it meets the QEW highway.² Staff Sergeant Kaizer testified that approximately 380,000 vehicles use the 407 ETR on a daily basis.

[10] The 407 ETR is not under the jurisdiction or control of any municipality and is not part of the road system of any municipality.³ Further, no municipality or local authority may interfere with the 407 ETR or construct or change the use of any private road, entranceway, gate or other structure or facility as a means of access to the 407 ETR.⁴

¹ PASF, paragraph 14.

² See also PASF, paragraph 20.

³ PASF, paragraphs 18 and 19.

⁴ See *Highway 407 Act, (1998)*, S.O. 1998, c. 28, subsection 35(4).

[11] The original portion of the 407 ETR was built and operated by the Province of Ontario through a crown agency, the Ontario Transportation Capital Corporation (the “OTCC”). Construction began in 1994 and the highway opened, as a toll highway, on June 7, 1997.⁵

[12] On April 6, 1999, the OTCC was continued as a corporation with share capital under the name 407 ETR Concession Company Ltd. (i.e., the Appellant). On that day, the Appellant entered into a Concession and Ground Lease Agreement (the “Ground Lease”), a 99-year concession agreement, with the Province of Ontario.⁶ Paragraph 2.1 of the Ground Lease summarizes the effect of the concession as follows:

... the Grantor [Province of Ontario] grants to the Concessionaire [the Appellant] the exclusive concession to develop, design and build the Highway 407 Central Deferred Interchanges, Highway 407 West and Highway 407 East Partial and to finance, operate, manage, maintain, rehabilitate and toll the Project [the 407 ETR] in accordance with the provisions of this Agreement.

[13] Basically, the Appellant was given the right to complete construction of the highway and operate the toll highway subject to the terms of the Ground Lease. However, the Province of Ontario retained the fee simple title to the highway lands.⁷ The operation of the 407 ETR is also subject to the *Highway 407 Act, 1998*, (the “*Highway 407 Act*”).

[14] On May 5, 1999, 407 International Inc., a consortium of non-public corporations, acquired the shares of the Appellant from the Province of Ontario.⁸ As a result, a private corporation took over the operation of the 407 ETR.

[15] Mr. White described the operation of the 407 ETR as a classic public-private partnership. He noted that the Appellant and the Ontario Government have been recognized through joint awards in respect of the partnership.

⁵ See PASF, paragraphs 1 to 4, and 7.

⁶ See PASF, paragraphs 10 and 11. Exhibit A/R 3 is a copy of the Ground Lease.

⁷ See PASF, paragraph 26.

⁸ See PASF, paragraph 13.

[16] During its construction phase, the 407 ETR was policed by the relevant regional municipal police force. For example, the portion of the highway in York was policed by the York Regional Police Force and the portion in Peel was policed by the Peel Regional Police Force.

[17] When the highway opened in 1997, it was part of the King's Highway.⁹ Pursuant to subsection 19(1) of the *Police Services Act*, R.S.O. 1990, c.p. 15 (the "*Police Services Act*"), the OPP is responsible for maintaining a traffic patrol on the King's Highway. As a result, from the time it opened until the time the shares of the Appellant were sold to private investors, the OPP policed the 407 ETR on behalf of the Province of Ontario.¹⁰

[18] Mr. White testified that there are three components of the lands leased from the Province of Ontario under the Ground Lease. The main component is the highway itself, the 407 ETR. The PASF states that the 407 ETR is "a fenced-in corridor with fencing which restricts access to the highway." In other words, the fence defines the area of the highway.

[19] The other two components of the leased land are the operation centre land and the patrol yard lands. Mr. White discussed each of these components. The operations centre land is located on Steeles Avenue in the York region. It contains the main building of the Appellant, including its operations centre. It is policed by the York Regional Police Force. The Appellant does not pay a fee for this service; however it does pay realty tax on the operations centre land.

[20] There are two patrol yards; one is in the York region and the other is in the Halton region. The patrol yards contain storage facilities for salt, patrol trucks and equipment. They are policed by the respective regional police forces. As with the operations centre land, the Appellant does not pay a fee for this service, but does pay realty tax on the lands.

[21] Mr. White referred to two other types of land that are either adjacent to or intersect with the 407 ETR. The first is the so-called "corridor lands". The PASF describes the corridor lands as "lands and rights that are (i) adjacent to, over or under the Highway 407 Lands [the 407 ETR], (ii) owned by the Province and (iii)

⁹ See PASF, paragraph 5.

¹⁰ See PASF, paragraph 9 and testimony of Staff Sergeant Kaizer.

not leased to 407 ETR Concession Company Limited [the Appellant].” The Province of Ontario retains the fee simple title to these lands.¹¹

[22] Mr. White described the corridor lands as lands that are outside the 407 ETR’s fenceline. He noted that the corridor lands are policed by the regional police force responsible for the particular area. For example, the corridor lands in the Halton region are policed by the Halton Regional Police.

[23] The other lands that are adjacent to the 407 ETR are the municipal roads that cross over the 407 ETR. Although these roads cross over the 407 ETR lands, they are under the authority and jurisdiction of the municipal (or regional) authority and are policed by the relevant regional police force.

[24] The 407 ETR is policed by the OPP. This is the result of the *Highway 407 Act*, the *Police Services Act* and the Ground Lease.

[25] Subsection 12(2) of the *Highway 407 Act* states that, despite any designation under section 36 of the *Public Transportation and Highway Improvement Act*, Highway 407 is not part of the King’s Highway. However, subsection 59(2) of the *Highway 407 Act* provides that, for the purposes of paragraph 3 of subsection 19(1) of the *Police Services Act*, Highway 407 shall be deemed to be part of the King’s Highway. As I noted previously, paragraph 3 of subsection 19(1) of the *Police Services Act* provides that the OPP is responsible for maintaining a traffic patrol on the King’s Highway.

[26] Paragraph 59(3) of the *Highway 407 Act* states that the OPP may, with the approval of the Solicitor General, charge the Appellant the reasonable costs of providing services under paragraph 3 of subsection 19(1) of the *Police Services Act* on a full cost recovery basis. Paragraph 59(4) of the *Highway 407 Act* provides that the Solicitor General may enter into an agreement with the Appellant for the provision of such services.

[27] Section 14.1 of the Ground Lease provides that the Appellant shall permit the OPP to maintain traffic patrol and provide other services which the OPP is required to perform pursuant to “Laws and Regulations” in respect of the 407 ETR. “Laws and Regulations” is defined in section 1.1 of the Ground Lease to mean “any requirements under or prescribed by the common law and any federal,

¹¹ PASF, paragraph 26.

provincial or municipal laws, court orders or judgments, orders-in-council, by-laws, codes, orders, rules, policies, regulations or statutes affecting, applicable to or otherwise relating to, the Concessionaire [the Appellant], the Project [which includes the 407 ETR] or the use thereof, including Environmental Laws.”

[28] Section 14.1 of the Ground Lease also provides that the Appellant shall perform and observe its covenants and obligations under the “Police Services Agreement”.

[29] Exhibit A/R 7 contains a copy of the “Police Services Agreement” between the Province of Ontario and the Appellant (the “Police Services Agreement”). Mr. White testified that this version was in force from October 1, 2005 to September 30, 2010. It was then extended to December 31, 2011.

[30] The actual police services provided are set out in Schedule A to the Police Services Agreement. One of the recitals to Schedule A to the agreement states the following:

Highway 407 ETR requires policing that is both pro-active (preventative patrols, speed and seatbelt enforcement programs, toll evasion enforcement, etc) and reactive (collision investigation, stranded motorists, etc), twenty four (24) hours a day, seven (7) days a week. *The services that are provided as part of this contract include all policing services related to Highway 407 ETR, including specialized services.*

[Emphasis added.]

[31] Section 3.1 of the Police Services Agreement provides that the police services provided by the OPP shall be provided in the same manner and to the same extent as provided by the OPP on comparable controlled access highways in the GTA and in accordance with the Laws and Regulations.

[32] Section 3.3 provides that the OPP shall be solely responsible for all operational policing decisions.

[33] Staff Sergeant Kaizer testified that the services that the OPP provides on the 407 ETR are not limited to “traffic patrol” or enforcement of the provisions of the *Highway Traffic Act*. He acknowledged that the OPP provides the same services on the 407 ETR that municipal police forces are required to provide under subsection 4(2) of the *Police Services Act*, namely, crime prevention, law enforcement, assistance to victims of crime, maintenance of public order and emergency response.

[34] His testimony was consistent with the OPP business plans. For example, the 2008 plan notes that the OPP'S Highway 407 Detachment provides full policing services on Highway 407. It also notes that the Highway 407 Detachment of the OPP provides effective and efficient policing services that address local needs while fulfilling its provincial mandate for policing.¹²

[35] In short, the OPP provides all policing services required to enforce the law. This is acknowledged by the parties at paragraph 28 of the PASF, which states: “. . . The policing service on Highway 407 is provided by the Highway 407 Detachment of the OPP which provides full policing service on Highway 407 to ensure that public and contractual needs are met.”

[36] Pursuant to the terms of the Police Services Agreement, the Appellant pays the Province of Ontario for the OPP's policing services. Section 2.3 of the Police Services Agreement states that Ontario shall charge for the reasonable costs of providing services under the Agreement on a full cost recovery basis.¹³

[37] Mr. White testified that the OPP uses the same cost structure to determine the amount it bills the Appellant as it uses to determine the amount it bills a municipality for policing services it provides to the municipality. This is evidenced by Schedule B to the Police Services Agreement entitled “O.P.P. Cost Schedule For Municipal Policing for the Year 2005”.¹⁴

[38] When asked why the OPP uses the OPP cost schedule for municipal policing to determine the amount it bills the Appellant, Inspector McDonald stated: “It's a common schedule we use for front-line policing services.”¹⁵

[39] The Province of Ontario invoices the Appellant on a monthly basis for the OPP's services. Prior to June 30, 2010, the Province did not charge GST on its invoices. However, beginning with its July 21, 2010 invoice, the Province charged the tax.

¹² See Exhibit A/R 13, page 3 and 4. See also A/R 14, A/R 15, A/R 16 and A/R 17.

¹³ See Exhibit A/R 7, page 7.

¹⁴ Exhibit A/R 7, pages 28-29.

¹⁵ Transcript, page 162.

[40] For the relevant periods prior to July 1, 2010, the Minister assessed the Appellant for GST it claimed the Appellant should have paid in respect of amounts invoiced by the Province.

[41] The Appellant claimed a rebate for tax paid in error in respect of the tax it paid to the Province after July 1, 2010.

[42] The Minister denied the Appellant's rebate claim and confirmed the original assessments. It appears the amount of tax at issue is \$1,277,586.

II. The Relevant Provisions of the *GST Act*

[43] This appeal is concerned with the GST levied under subsections 165(1) and (2) of Division II of the *GST Act*.

[44] Those subsections read as follows:

165 (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

165 (2) Subject to this Part, every recipient of a taxable supply made in a participating province shall pay to Her Majesty in right of Canada, in addition to the tax imposed by subsection (1), tax in respect of the supply calculated at the tax rate for that province on the value of the consideration for the supply.

[45] The 5% rate imposed under subsection 165(1) was 7% prior to July 2006 and 6% from July 2006 to the end of 2007.

[46] The effect of subsections 165 (1) and (2) is to levy a single federal value-added tax at two rates: the 5% rate for supplies made in so-called non-participating provinces¹⁶ and a 13%, 14% or 15% rate for supplies made in participating provinces. The tax is referred to as the GST when levied with respect to a supply made in a non-participating province and the HST when levied in a participating province. I will refer to the tax as the GST.

¹⁶ 7% prior to July 2006 and 6% from July 2006 to the end of 2007 of para. 46.

[47] The supply in question was made in the Province of Ontario. The Province of Ontario elected to become a participating province effective July 1, 2010.¹⁷ As a result, the rate at which the federal value-added tax was levied in Ontario under the *GST Act* increased on July 1, 2010 from 6% to 14%.¹⁸

[48] As I noted previously, the Province of Ontario began charging GST on invoices it issued after July 1, 2010 for the OPP's police services. In a letter dated July 7, 2010, an official from the OPP explained the reason for the change as follows:

The Province of Ontario's new 13% Harmonized Sales Tax (HST) came into effect July 1st, 2010. We have recently been advised by The Business and Financial Planning Branch (BFPB) of the Ministry of Community Safety and Correctional Services that the 407 OPP policing services are subject to the new tax. This tax status was determined in consultation with senior government tax experts of the Ministry of Revenue.¹⁹

[49] Counsel for the Respondent was not sure which Ministry of Revenue is being referred to in the letter. However, he noted that it was not the agency that administers the tax, that is the Canada Revenue Agency. It appears clear to me that the letter is referring to the Ontario Ministry of Revenue.

[50] It is important to note that a new tax was not imposed on July 1, 2010. Rather, the rate at which the GST was imposed under the *GST Act* in respect of taxable supplies made in Ontario was increased from 6% to 14%. The GST has been in existence since 1991. Further, the section at issue, section 21 of Part VI of Schedule V of Part IX of the *GST Act*, was not amended on July 1, 2010. The last time the section was amended was 2003. That amendment was made retroactive to the introduction of the GST.

[51] The supply of the OPP's police services will be subject to GST if the supply is a taxable supply.

¹⁷ Subject to various transition rules which are not at issue in this appeal.

¹⁸ It was subsequently reduced to 13% at the beginning of 2008.

¹⁹ Exhibit A/R 12.

[52] A taxable supply is defined as a supply made in the course of a commercial activity.²⁰ Commercial activity is defined, in part, as a business carried on by a person²¹ except to the extent to which the business involves the making of exempt supplies by the person.

[53] It is accepted by both parties that if the supply of the OPP's services is not an exempt supply, then the supply is a taxable supply.

[54] Exempt supply is defined to mean a supply included in Schedule V.²²

[55] Part VI of Schedule V (the "Exempting Schedule") exempts numerous supplies made by a public sector body, which is defined to mean either a government or a public service body. Government is defined to mean the Federal Government and the provincial governments. Public service body is defined to mean a non-profit organization, a charity, a municipality, a school authority, a hospital authority, a public college or a university.²³

[56] As noted previously, the relevant section for the purposes of this appeal is section 21 of the Exempting Schedule. Throughout the relevant period that section read as follows:

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;

²⁰ Subsection 123(1).

²¹ 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.

²² Subsection 123(1).

²³ All the terms are defined in subsection 123(1).

(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.

[57] Section 21 of the Exempting Schedule will apply to the supply of the OPP's policing services if the following conditions are satisfied:

1. The supply is a supply of a municipal service;
2. The supply of the municipal service is made by a government or municipality;
3. The supply is made by the government or municipality to a recipient that is an owner or occupant of real property situated in a particular geographic area; and
4. The municipal service is one which the owner or occupant has no option but to receive.

[58] The parties agree that the supply of the OPP's services was made by a government, the Province of Ontario. They also agree that the Appellant, the recipient of the supply, is an occupant of real property situated in a particular geographic area (i.e., the 407 ETR) and that the Appellant had no option but to receive the OPP's services.

[59] The sole issue before the Court is therefore whether the OPP's policing services constitute "a municipal service" for the purposes of section 21 of the Exempting Schedule.

[60] This issue is important to the Appellant since the OPP's policing services were consumed by the Appellant in the course of making exempt supplies. The supply of a toll highway is exempt under section 2 of Part VIII of Schedule V. As a result, the Appellant is not entitled to claim an input tax credit for any GST paid in respect of the supply of the OPP's policing services.

III. Positions of the Parties

[61] The position of the Respondent is that the supply made by the Appellant is not a supply of “a municipal service” for the purposes of section 21 of the Exempting Schedule because the supply was a supply of providing traffic patrol on the King’s Highway, which is not within the mandate of any municipal authority. The Respondent’s counsel argued that the police services provided by the OPP are police services that are not a municipal responsibility; they are exclusively a provincial responsibility and for that reason fall outside of the opening words, “a municipal service”, in section 21 of the Exempt Schedule.

[62] The Appellant argues that the term “a municipal service” as used in section 21 of the Exempt Schedule is to be interpreted more broadly to include all services that are in the nature of services typically provided by municipalities.

What is “a municipal service” for the purposes of section 21 of the Exempting Schedule?

[63] As has been stated by this Court on numerous occasions, the general rule for interpreting statutes is the textual, contextual and purposive approach, as confirmed by the Supreme Court of Canada in *Canada Trustco Mortgage Co v Canada*.²⁴

[64] Furthermore, an interpretation of a statute must be consistent with the presumption against tautology, which requires that, to the extent possible, a court should avoid adopting an interpretation that renders any portion of a statute meaningless or redundant.²⁵

[65] In my view, the key to interpreting the phrase “a municipal service” is the fact that Parliament decided that the supply of the “municipal service” may be made by either a government or a municipality. For the purposes of a supply made in Ontario, government is defined as either the Federal Government or the

²⁴ 2005 SCC 54, [2005] 2 SCR 601, at paragraph 11.

²⁵ *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715 at paragraph 45.

Province of Ontario.²⁶ In short, section 21 contemplates the “municipal service” being provided by the Province of Ontario, a municipality or the Federal Government.

[66] A review of the Exempting Schedule shows that Parliament distinguished between supplies made by either a government or a municipality and supplies made only by a municipality. For example, sections 20 and 21 of the Exempting Schedule refer to supplies made by either a government or a municipality, while sections 21.1 and 22 only refer to supplies made by a municipality.²⁷

[67] The Respondent is asking me to adopt an interpretation that would result in section 21 only applying if the supply of a “municipal service” is made by a municipality. Counsel referred to services within the “mandate” of the municipality and services that are a municipal “responsibility”. In my view, if the service is within the mandate of the municipality or is a municipal responsibility, then that service would only be supplied by the municipality.

[68] It is difficult to think of a situation where a provincial government would supply a service that is the responsibility of a municipality to a landowner or an occupant of land. It would seem to me that in such a situation the provincial government would supply the service to the municipality, which in turn would supply the service to the landowners or occupant of land. For example, I heard evidence that the OPP supplies policing services for a fee to a number of municipalities. In fact, such a supply is specifically exempted under paragraph 20(g) of the Exempting Schedule.

[69] In short, the interpretation suggested by the Respondent is not consistent with the presumption against tautology. Section 21 applies, in part, to a supply of a municipal service made by a government, i.e., the Federal Government or a province. An interpretation of municipal service that limits the application of section 21 to supplies made by a municipality renders the words “made by a government” meaningless.

²⁶ Subsection 123(1).

²⁷ Sections 21.1 and 22 also refer to organizations established by a municipality or designated to be a municipality.

[70] The words municipal service must be interpreted in a way that allows for the service to be supplied by either a government or a municipality. I agree with the Appellant: interpreting “a municipal service”, as that phrase is used in section 21, to mean a service that is in the nature of services typically provided by municipalities satisfies Parliament’s intention that the service may be supplied by either a government or a municipality.

[71] This is so since it is reasonable to assume that the Federal Government or a province do make supplies of services that are typically provided by a municipality. As I will discuss shortly, this is the exact fact situation before me.

[72] I believe such an interpretation is consistent with the purpose of section 21. The section is intended to exempt supplies of services that are made by a government authority (federal, provincial or municipal) that the owner or occupant of land has no option but to receive and that would normally be financed by taxes charged by the provider of the services (i.e., the federal, provincial or municipal government). The section is intended to cover such services regardless of whether they are provided by a municipality, the federal government or a province.

[73] My interpretation is consistent with the Technical Notes issued by the Federal Department of Finance in June 2003 to explain the purpose of the amendment to section 21. The Technical Notes state, in part, the following:

Section 21 of Part VI of Schedule V to the *Excise Tax Act* (Public Sector Bodies) exempts from the GST/HST certain municipal services supplied by or on behalf of a municipality **or** government (here referred to as the “municipal authority”) to property owners or occupants (i.e., municipal residents) in a particular geographic area. These are services that the owners or occupants have no option but to receive . . .

. . .

In the vast majority of cases, municipal authorities [a municipality **or** government] raise revenues to fund the provision of the types of municipal services covered by section 21 through the general property tax **or other taxes** that do not constitute consideration. Such services are rarely made by municipal authorities [a municipality **or** government] for consideration charged to their residents who receive the services. Therefore, in most cases, section 21 need not be relied upon to achieve exempt status for the supplies made by municipal authorities [a municipality **or** government] of the type of services covered by the section . . . However, section 21 ensures that, should the municipal authority [a municipality **or** government] choose to charge consideration (e.g., in the form of a specific user fee) to a municipal resident for a municipal service covered by the

provision, that supply remains part of the exempt activities of the municipal authority [a municipality **or** government] and the resident is not required to pay any GST/HST on the consideration.

[Emphasis added.]

IV. Application of the Law to the Facts

[74] In my view, the OPP policing services provided by the Province of Ontario to the Appellant are in the nature of services typically provided by municipalities. In fact, policing services are one of the core services provided by a municipality.

[75] The 407 ETR is located in various regional municipalities. As a result, the various regional municipal police forces would police the 407 ETR if it were not designated a King's Highway for the purposes of paragraph 3 of subsection 19(1) of the *Police Services Act*. This can be seen from the corridor lands that are adjacent to the 407 ETR and owned by the Province of Ontario. Since such lands are located in the regional municipalities and are not part of a King's Highway, they are policed by the relevant regional municipal police force. It also can be seen from the fact that during its construction phase the 407 ETR was policed by the relevant regional municipal police force.

[76] Similarly, the Appellant's operations centre land and patrol yard lands are policed by the relevant regional municipal police force. These lands are leased to the Appellant by the Province but, since they are not physically part of the King's Highway, they are policed by the regional municipal police force for the region in which they are situated.

[77] More importantly, as noted by Staff Sergeant Kaizer, the policing services provided by the OPP on the 407 ETR are the same services that municipal police forces provide under subsection 4(2) of the *Police Services Act*. His testimony was consistent with the testimony of Inspector McDonald and the annual business plans of the OPP's Highway 407 Detachment.

[78] For these reasons, I have concluded that the policing services provided by the OPP to the Appellant were of the same nature as services typically provided by municipalities. As a result, the supply of the services constituted "a supply of a municipal service" for the purposes of section 21 of the Exempting Schedule.

[79] Since the parties agree that the other conditions of section 21 are satisfied, the supply by the Province of Ontario of the OPP's policing services to the

Appellant constituted an exempt supply pursuant to section 21 of the Exempting Schedule.

V. Disposition of Appeals

[80] For the foregoing reasons, the appeals are allowed with costs. The reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the supply by the Province of Ontario of the OPP's policing services constituted an exempt supply for the purposes of the *GST Act*.

[81] The parties have thirty days from the date of this judgment to make submissions with respect to the amount of costs that the Court should award to the Appellant. Such representations shall not exceed 10 pages. If no submissions are received, costs shall be awarded to the Appellant as set out in the Tariff.

Signed at Antigonish, Nova Scotia, this 27th day of September 2016.

“S. D’Arcy”

D'Arcy J.

APPENDIX A

Court File Nos.: 2013-4844(GST)G
2013-4845(GST)G
2013-4846(GST)G

TAX COURT OF CANADA

BETWEEN:

407 ETR CONCESSION COMPANY LIMITED

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF PARTIAL AGREED FACTS AND DOCUMENTS

The parties agree to the following statement of facts, without prejudice to the right to call evidence which does not contradict the facts below. The parties also agree that the documents included as exhibits in this binder are the documents that will be offered by one or the other party at the trial. The documents in category "A" are fully admissible without further identification and the documents in category "B" are admissible if there is no objection to relevance and the Court accepts that the documents have been satisfactorily identified by a witness.

Agreed Facts

1. The Province of Ontario established the Ontario Transportation Capital Corporation ("OTCC") as a Crown Agency to oversee the

design, construction, operation, maintenance and management of Highway 407.

2. OTCC's operation of Highway 407 was pursuant to the legislative authority granted to it under the *Capital Investment Plan Act, 1993* and its regulations.
3. Actual construction of Highway 407 commenced in 1994.
4. Highway 407 opened initially under the management of the OTCC on June 7, 1997.
5. At that time the lands and highway comprising Highway 407 were designated as part of the King's Highway.
6. At that time, Highway 407 was owned by the Crown in Right of Ontario and was under the jurisdiction and control of the Province of Ontario's Minister of Transportation for the purposes of the *Public Transportation and Highway Improvement Act* (section 2(1)). The Minister of Transportation was also the Minister responsible for the administration of the *Capital Investment Plan Act, 1993* (section 3(2)) in respect of the OTCC.
7. The Province operated Highway 407 as a toll highway, first through OTCC and then 407 ETR Concession Company Limited, from October 14, 1997 to May 5, 1999.
8. For illustrative purposes, a map of Highway 407 ETR is found at Tab 1 of the Agreed Documents and a map showing regional municipalities in the GTA is found at Tab 2.
9. Until the time that 407 ETR Concession Company Limited became

owner of the Highway 407 Lands as defined in the *Highway 407 Act, 1998* as the tenant under a ground lease and entered into the CGLA with Ontario, the OPP was responsible for providing the traffic patrol on Highway 407.

10. OTCC was continued as a corporation with share capital as 407 ETR Concession Company Limited by Articles of Continuance dated April 6, 1999.
11. Also on April 6, 1999, 407 ETR Concession Company Limited entered into the Concession and Ground Lease Agreement ("CGLA"), a 99 year concession agreement, with the Province. The CGLA, with amendments and selected schedules are found at Tabs 3-10 of the Agreed Documents. In particular, The Police Services Agreement and an amendment to it, which form part of the CGLA are found at Tabs 7 and 10.
12. The CGLA was an agreement between The Crown in Right of Ontario, as Represented by the Minister without Portfolio with Responsibility for Privatization and 407 ETR Concession Company Limited.
13. The shares of 407 ETR Concession Company Limited were acquired by 407 International Inc., a consortium of non-public corporations, from the Province under a share purchase agreement dated April 12, 1999 with a closing date of May 5, 1999.
14. Highway 407 is an all-electronic open-access highway. 407 ETR

Concession Company Limited is the "owner" of the highway as that term is defined in s. 1(1) of the *Highway 407 Act, 1998*.

15. Section 12 of the *Highway 407 Act, 1998* was proclaimed in force on May 5, 1999. Subsection 12(1) designates the highway as a private toll highway that is a controlled-access highway. Subsection 12(2) provides that despite any designation under section 36 of the *Public Transportation and Highway Improvement Act*, Highway 407 is not part of the King's Highway.
16. Sections 36, 55, 56, 57 and 59 of the *Highway 407 Act, 1998* deem Highway 407 to be part of the King's Highway for the purposes of those sections.
17. 407 ETR Concession Company Limited is not a municipality.
18. Highway 407 is not under the jurisdiction or control of any municipality.
19. Highway 407 is not part of the road system of any municipality.
20. Highway 407 runs through and is situated in the Regional Municipalities of Halton, Peel, York and Durham.
21. 407 ETR Concession Company Limited does not pay realty tax on the longitudinal highway lands that are the "Highway 407 Lands". It does pay realty tax on its "Operations Centre Lands" and its "Patrol Yards Lands" as those terms are defined in the CGLA.
22. In the relevant period between January 1, 2007 and December 31, 2011, 407 ETR Concession Company Limited did not use, receive or was provided with police services, assistance or response on Highway 407 from any of:

- a. the Halton Regional Police Service,
 - b. the Peel Regional Police,
 - c. the York Regional Police,
 - d. the Durham Regional Police,
 - e. the Toronto Police Service; or
 - f. any other municipal police service.
23. In the period between January 1, 2007 and December 31, 2011, no municipal police service provided a traffic patrol on Highway 407.
24. Highway 407 is a fenced-in corridor with fencing which restricts access to the highway.
25. The highway fence defines the area of responsibility of the Highway 407 Detachment of the Ontario Provincial Police ("OPP").
26. "Corridor Lands" and "Highway 407 Lands" are defined terms of the CGLA. "Corridor Lands" means lands and rights that are (i) adjacent to, over or under the Highway 407 Lands, (ii) owned by the Province and (iii) not leased to 407 ETR Concession Company Limited. The Province of Ontario retains the fee simple title in both.
27. The OPP is the provincial police force for the Province of Ontario.
28. The OPP provides policing service to 407 ETR Concession Company Limited on Highway 407 Lands, but this does not include the Corridor Lands. The policing service on Highway 407 is provided by the Highway 407 Detachment of the OPP which provides full policing service on Highway 407 to ensure that public and contractual needs are met.
29. None of the police services provided by the OPP to 407 ETR

Concession Company Limited are provided pursuant to sections 4, 5 or 10 of the *Police Services Act*.

30. During the relevant period the Highway 407 Detachment of the OPP was described by the OPP as one of the eight OPP regional traffic detachments in the Greater Toronto Region and was part of the OPP's Highway Safety Division.
31. Subsection 59(4) of *The Highway 407 Act, 1998* provides that the Solicitor General (now the Minister of Community Safety and Correctional Services) may enter into an agreement with the owner for the provision of services under paragraph 3 of subsection 19(1) of the *Police Services Act*.
32. Article 14.1(1) of the CGLA requires 407 ETR Concession Company Limited to "permit the OPP to maintain traffic patrol and provide other services which the OPP is required to perform pursuant to Laws and Regulations in respect of Highway 407".
33. Schedule 15 of the CGLA is the Police Services Agreement between Her Majesty the Queen in Right of Ontario as represented by the Minister of Community Safety and Correctional Services and 407 ETR Concession Company Limited. The version of Schedule 15 for the term commencing October 1, 2005 and expiring on September 30, 2010 found at **TAB 7** of the Agreed Documents includes as Schedule "B" the "O.P.P. Cost Schedule for Municipal Policing for the year 2005". The version of Schedule 15 for the period October 1, 2010 to December 31, 2001 [sic] found at **TAB 10** includes as Schedule "B" the "O.P.P. Cost Schedule for Municipal Policing for the year 2012

(Based on 2010 Costing Formula”.

A. Documents agreed to be fully admissible without further identification

34. For illustrative purposes a map of Highway 407 at **TAB 1** and a map of Regional Municipality Boundaries at **TAB 2**.
35. The Highway 407 Concession and Ground Lease Agreement (CGLA) between the Crown in Right of Ontario, as represented by the Minister Without Portfolio With Responsibility for Privatization and 407 ETR Concession Company Limited made as of the 6th day of April 1999 at **TAB 3**.
36. The following Schedules from the CGLA:
 - a. Schedule 1, Affected Highway Protocol, at **TAB 4**;
 - b. Schedule 3, Corridor Management Protocol, at **TAB 5**;
 - c. Schedule 13, Ministry of Transportation Enforcement Services at **TAB 6**;
 - d. Schedule 15, Police Services Agreement, for the term commencing October 1, 2005 and expiring on September 30, 2010 at **TAB 7**; except, for avoidance of doubt, the parties to this litigation disagree on the meaning and significance of the inclusion of the OPP's "Cost Schedule for Municipal Policing" which is found at Schedule "B" to Schedule 15.
37. The following amendments to the CGLA:
 - a. Amendment to the CGLA made as of March 6, 2008 at **TAB 8**;

- b. Amending Agreement to Schedule 13 of the CGLA effective April 1, 2009 at **TAB 9**;
- c. Amending Agreement to Schedule 15, The Police Services Agreement between The Minister of Community Safety and Correctional Services and 407 ETR Concession Company Limited effective from the 1st day of October, 2010 to the 31st day of December, 2011 at **TAB 10**.

B. Documents which may be admissible, if relevant and if identified by a witness

- 38. Invoices from Ontario's Ministry of Community and Social Services – OPP to 407 ETR Operations Centre for the period January 15, 2007 to April 13, 2012 at **TAB 11**.
- 39. A letter dated July 7, 2010 from Andrew Earmer, Bureau Commander, OPP Business and Financial Services Bureau, to Ken Walker, Chief Financial Officer, 407 ETR Concession Company Ltd. regarding "Revised 2010 Policing Costs – Implementation of New Harmonized Sales Tax" at **TAB 12**.
- 40. The following OPP Highway 407 Detachment Business Plans:
 - a. 2008 Business Plan at **TAB 13**;
 - b. 2009 Business Plan at **TAB 14**;
 - c. 2010 Business Plan at **TAB 15**;
 - d. 2011 Business Plan at **TAB 16**;
- 41. The following OPP Annual Reports:
 - a. 2008 Annual Report at **TAB 17**;
 - b. 2009 Annual Report at **TAB 18**;

c. 2010 Annual Report at **TAB 19**;

42. **The following OPP Presentations:**

a. OPP Municipal Policing Framework at **TAB 20**;

b. "Dedicated Policing for an Open Road Electronic Highway"
at **TAB 21**;

c. The Municipality of Port Hope Contract Policing Proposal
dated May, 2012 at **TAB 22**;

d. OPP Municipal Policing Billing Review, March 2014 at **TAB 23**.

43. Sample news clip regarding criminal investigation work performed by
the OPP Highway 407 Detachment on Highway 407 at **TAB 24**.

44. Statistics Canada, Police Resources in Canada, 2011, excerpted at
TAB 25.

...

CITATION: 2016 TCC 213

COURT FILE NOS.: 2013-4844(GST)G
2013-4845(GST)G
2013-4846(GST)G

STYLE OF CAUSE: 407 ETR CONCESSION COMPANY
LIMITED v. HER MAJESTY THE
QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 15 and 16, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice Steven K. D'Arcy

DATE OF JUDGMENT: September 27, 2016

APPEARANCES:

Counsel for the Appellant: W. Jack Millar
Ka Yuk (Jenny) Siu

Counsel for the Respondent: Gordon Bourgard

COUNSEL OF RECORD:

For the Appellant:

Name: W. Jack Millar

Firm: Millar Kreklewetz
Toronto, Ontario

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada