Federal Court of Appeal Cour d'appel fédérale

Date: 20210520

Docket: A-177-19

Citation: 2021 FCA 96

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on February 16, 2021.

Judgment delivered at Ottawa, Ontario, on May 20, 2021.

PUBLIC REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.

DISSENTING REASONS BY: STRATAS J.A.

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PUBLIC REASONS FOR JUDGMENT

WEBB J.A.

[1] The Canadian Imperial Bank of Commerce (CIBC) made substantial payments to Aeroplan Limited Partnership (Aeroplan) under the agreement between these companies related to the Aeroplan credit cards issued by CIBC. CIBC paid GST to Aeroplan based on the amount paid by CIBC. CIBC submitted an application to the Minister of National Revenue (Minister) for a rebate of this GST, which was denied by the Minister. CIBC filed an appeal to the Tax Court of

Canada. Its appeal was dismissed (2019 TCC 79, *per* Visser, J.). CIBC then appealed from that judgment to this Court.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] CIBC initially entered into an agreement with Air Canada, which agreement was subsequently assigned to Aeroplan. CIBC entered into this agreement because it wanted to increase its credit card and retail banking business. The main focus of the Statement of Agreed Facts (Partial) that was submitted at the Tax Court hearing is on the credit card business of CIBC, with a notation in paragraph 10 that, in addition to using certain CIBC credit cards to earn Aeroplan Miles, other activities (including paying interest on certain mortgages) could result in a customer earning Aeroplan Miles. The focus of the reasons of the Tax Court and the submissions made in this appeal were related to the credit card business. Therefore, these reasons will focus on the credit card business.

[4] During the period from March 25, 2005 to February 26, 2007, CIBC made substantial payments to Aeroplan and paid GST. If CIBC would have been carrying on a commercial activity, it could have claimed input tax credits for the GST that it paid. However, because CIBC was carrying on a financial services business, CIBC was unable to claim any input tax credits for the GST that it paid to Aeroplan. CIBC subsequently attempted to recover this GST by submitting a claim for a rebate under section 261 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the

Act) on the basis that it had paid the GST in error. CIBC took the position that the supplies made by Aeroplan were financial services and therefore were exempt supplies. CIBC also advanced the alternate positions that it was carrying on a joint venture with Aeroplan or that it was paying to have gift certificates issued to its customers.

[5] When the matter was argued before the Tax Court, CIBC's position was reduced to its argument that it was paying Aeroplan to issue Aeroplan Miles to its customers and that Aeroplan Miles are gift certificates. If Aeroplan Miles are gift certificates that are issued for consideration, then the issuance or sale of such miles would be deemed to not be a supply and there would be no GST payable by CIBC (section 181.2 of the Act).

[6] The facts on which the parties had agreed are set out in the Statement of Agreed Facts (Partial) attached to the Tax Court Judge's reasons. It is not necessary to repeat all of these facts. In essence, the arrangement between CIBC and Aeroplan was that Aeroplan would provide a list of its members to CIBC and promote CIBC's credit cards. Aeroplan Miles would be issued to the holders of these cards based on the eligible amounts that such holders charged to their cards each month. The eligible amounts would also be included in the formula used to determine the amount payable by CIBC to Aeroplan.

[7] The holders of the credit cards would accumulate Aeroplan Miles that could be redeemed for flights, merchandise or gift cards.

II. Decision of the Tax Court Judge

[8] Both parties submitted that there was a single supply that was made by Aeroplan to CIBC. The Tax Court Judge also found that there was a single supply and neither party has challenged that finding in this appeal.

[9] The dispute relates to the determination of what in particular was supplied as the single supply. The Tax Court Judge, in paragraph 32 of his reasons, found that "the true nature or raison d'être of the Aeroplan Mile Program, the 2003 Credit Card Agreement and the resulting Aeroplan Supplies is to market and promote applications for and increased use of participating CIBC credits cards (and other participating CIBC financial products such as mortgages)".

[10] The Tax Court Judge made this finding by determining what was supplied by Aeroplan to CIBC for the consideration paid by CIBC under the applicable agreement. In particular, section 9 of the agreement between Aeroplan and CIBC is set out in paragraph 22 of the Tax Court Judge's reasons:

> 9. Referral Fees
>
> In consideration of [Aeroplan] referring or arranging for Aeroplan Members and other members of the public to make Card Applications and in consideration of [Aeroplan] performing its other obligations herein which are incidental to the foregoing, CIBC shall pay to [Aeroplan] in respect of the Cardholders a fee calculated in accordance with Appendix "D".

[11] Appendix "D" of the agreement, which is reproduced, in part, in paragraph 23 of the Tax Court Judge's reasons, sets out the formula that was used to calculate the amount payable by CIBC to Aeroplan (to which GST was added and paid):

> 1. <u>Referral Fees (Section 9(a))</u>
>
> (a) In consideration of [Aeroplan] referring or arranging for Aeroplan members and other members of the public to make Card Applications and in consideration of [Aeroplan] performing its other obligations herein which are incidental to the foregoing, CIBC shall pay to [Aeroplan], in respect of the Cardholders a fee calculated as follows:
>
> the sum of:
>
> (i) the total dollars of purchased goods and services billed to all Card Accounts for which at least a minimum payment has been received (other than cash advances, interest, and Card fees and less credit vouchers);
>
> less
>
> (ii) the total dollars outstanding of all Card Accounts for which CIBC has not received a minimum payment within 6 months of billing, all Card Accounts of Cardholders who have declared bankruptcy and all Card Accounts written off by CIBC in accordance with its usual practices other than outstanding dollars in respect of cash advances and Card fees;
>
> multiplied by the "Cost of an Aeroplan Mile" as defined below: ...

[12] The Tax Court Judge also noted that section 1 of Appendix "D" stipulated that the amounts payable did not include taxes. Under paragraph 1(f) of Appendix "D" CIBC was obligated to pay any applicable sales or value-added taxes imposed in relation to the purchase of goods and services by CIBC.

[13] The general description included in each invoice that was issued by Aeroplan, was "Participation of CIBC … in the Aeroplan Program". Following "CIBC" was a reference to the particular credit card (VISA AEROGOLD, AERO BUSINESS, AEROCORPORATE, or AERO CLASSIC). The amount owing was based on the number of Aeroplan Miles issued to CIBC's customers and the amount charged per mile. GST was added to determine the total amount owing.

[14] The referral services that were to be provided by Aeroplan are summarized by the Tax Court Judge in paragraph 20 of his reasons:

> […]
>
> c) section 5 – Aeroplan agreed to undertake various referral activities for CIBC, including:
>
> i. providing CIBC with information relating to Aeroplan members "as may be required by CIBC for promotion planning and model development ...";
>
> ii. providing CIBC with its list of Aeroplan members at least three times per 12 month period for the purposes of enabling the parties to undertake mailings to the persons shown on the list of material related to CIBC's cards;
>
> iii. allow CIBC to place insertions in four mailings per 12 month period to selected Aeroplan members and include CIBC card applications in Aeroplan Welcome Kits;
>
> iv. the insertion of articles about the CIBC cards would be placed in three of the six Aeroplan Bulletins issued per year;
>
> v. providing space for CIBC card applications to be displayed at Maple Leaf Lounges and other Air Canada counter locations; and
>
> vi. providing space for advertising of the cards at airport bridge poster locations;
>
> […]

[15] The Tax Court Judge concluded at paragraph 35 of his reasons that the single supply was promotional and marketing services provided by Aeroplan to CIBC. Since this was a taxable supply, CIBC was not entitled to a rebate of the GST that it paid. Having found that the single supply made by Aeroplan to CIBC for which the consideration was paid by CIBC was promotional and marketing services, this was a sufficient basis to dismiss CIBC's appeal. However, the Tax Court Judge chose to also address the issue of whether the Aeroplan Miles were gift certificates. In essence, he concluded that since Aeroplan Miles do not have attributes similar to money, Aeroplan Miles are not gift certificates for the purposes of the Act.

III. Issue and standards of review

[16] The issue in this appeal is whether the Tax Court Judge erred in finding that CIBC acquired promotional and marketing services from Aeroplan and not Aeroplan Miles. If the Tax Court Judge so erred, the next issue would be whether he erred in finding that Aeroplan Miles are not gift certificates for the purposes of the Act.

[17] The standard of review for any question of fact or mixed fact and law is palpable and overriding error and for any question of law is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) (*Housen*).

[18] CIBC, in paragraph 24 of its memorandum, submits that "[t]he character of a single composite supply is determined by reference to its predominant element, which is a question of law". The authority cited for the proposition that the determination of the predominant element is

a question of law is *Club Intrawest v. Canada*, 2017 FCA 151, [2017] G.S.T.C. 51 (*Club Intrawest*), at paragraph 82:

> What I take from *Global Cash Access* is that when applying the Act regard must be had to the predominant element of a single supply. It is an error of law to apply the Act having regard to services that do not form the predominant element of a single supply (see also: *Great-West Life Assurance Company v. Her Majesty The Queen*, 2016 FCA 316, [2016] F.C.J. No. 1408, at paragraph 43).

[19] In *Great-West Life Assurance Company v. Canada*, 2016 FCA 316, [2016] G.S.T.C. 118 (*Great-West Life*), this Court stated:

> [43] In *Global Cash*, this Court held that the inclusions and exclusions in the "financial service" definition should be determined by the predominant elements of the supply. This principle is important because it would be an error to interpret the inclusions and the exclusions by having regard to services that are not predominant elements.

[20] Both *Club Intrawest* and *Great-West Life* refer to and rely upon *Global Cash Access (Canada) Inc. v. Canada*, 2013 FCA 269, 451 N.R. 358 (*Global Cash*). In *Global Cash*, the issue and the standard of review are set out in paragraphs 3 and 4:

> [3] The parties agree that the total amount of the commissions should be treated the same way, without allocation. Global argues that the commissions are entirely exempt from GST because they are consideration for a supply that falls within the statutory definition of "financial service". The Crown argues that the commissions are entirely taxable because they are not consideration for a "financial service" as defined.
>
> <u>Standard of review</u>
>
> [4] As this is an appeal from a judgment after a trial, the standard of review is governed by the principles in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The resolution of this appeal requires an interpretation of the statutory definition of "financial service", and an interpretation of the contracts under

> which Global paid the commissions in issue. These are questions of law that are reviewable on the standard of correctness (*City of Calgary v. Canada*, 2010 FCA 127, affirmed 2012 SCC 20 with no discussion on this point); *McNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306.

[21] The analytical framework followed by this Court in *Global Cash* to resolve the issues was further refined in paragraph 26:

> To determine whether that single supply falls within the statutory definition of "financial service", the questions to be asked are these: (1) Based on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global? (2) Does that service fall within the statutory definition of "financial service"?

[22] The determination of what was supplied for the consideration that was paid was based on the interpretation of the relevant contracts. At that time, the interpretation of the relevant contracts was a question of law. However, *Global Cash* was decided in 2013, which was before the Supreme Court of Canada released its decision in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 SCC 53, [2014] 2 S.C.R. 633 (*Sattva*). In that case, the Supreme Court found, at paragraph 50, that the interpretation of a contract is a question of mixed fact and law. The principle as set out in *Sattva* is not restricted to only cases involving a contractual dispute between the parties to the contract. In *Urquhart v. Canada*, 2016 FCA 76, 2016 D.T.C. 5039, at paragraph 5, this Court confirmed that the principle as set out in *Sattva* also applies when this Court is reviewing a Tax Court Judge's interpretation of a contract where only one of the parties to the contract is before the court.

[23] In this case, CIBC argues that the determination of the predominant element of the supply should be determined based on the testimony of Mr. Webster (which is discussed further below)

and certain provisions of the agreement between CIBC and Aeroplan (paragraph 36 of its memorandum). This would mean that the determination of the predominant element of the supply in this case is a question of fact or mixed fact and law.

[24] Just as in *Global Cash,* the first issue that is to be decided is what was supplied by Aeroplan for the consideration paid by CIBC. To the extent that this determination will be based on the interpretation of the agreement between CIBC and Aeroplan and an assessment of the testimony of Mr. Webster, it will be a question of mixed fact and law for the interpretation of the agreement and a question of fact for the assessment of the testimony of Mr. Webster.

[25] As a result, the standard of review for the determination of what was supplied by Aeroplan to CIBC for the consideration paid by CIBC is palpable and overriding error.

[26] Palpable and overriding error is a high standard. In *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, the majority of the Supreme Court noted:

> [38] It is equally useful to recall what is meant by “palpable and overriding error”. Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review ... . “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in J.G. v. Nadeau, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] “a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions.”

[27] If the single supply was the purchase of Aeroplan Miles, then the issue of whether Aeroplan Miles are gift certificates would require an interpretation of "gift certificate" for the purposes of the Act, which is a question of law.

IV. Analysis

[28] GST is payable by recipients of taxable supplies:

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 (1)** Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5 % sur la valeur de la contrepartie de la fourniture.

[29] A recipient is defined in section 123 of the Act:

recipient of a supply of property or a service means	***acquéreur***
(***a***) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,	***a***) Personne qui est tenue, aux termes d'une convention portant sur une fourniture, de payer la contrepartie de la fourniture;
[…]	[…]
and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply; (acquéreur)	Par ailleurs, la mention d'une personne au profit de laquelle une fourniture est effectuée vaut mention de l'acquéreur de la fourniture. (recipient)

[30] In this case, CIBC is the person who was liable to pay the consideration under the agreement with Aeroplan. Therefore, the question is what supply of property or services was made to CIBC? The Tax Court Judge found that a single supply was made to CIBC by Aeroplan and this was the supply of promotional and marketing services. The Tax Court Judge's finding that the supply that was made to CIBC was promotional and marketing services was based on his interpretation of the agreement under which the consideration was payable.

[31] CIBC does not dispute that a single supply was made by Aeroplan but contends that the supply that was made to CIBC by Aeroplan was the provision of Aeroplan Miles to CIBC's customers and that Aeroplan Miles are gift certificates for the purposes of the Act. CIBC describes the supply as "the provision of Aeroplan Miles to CIBC's customers" (paragraph 15(a) of its memorandum) and in paragraph 21 it states that it "purchases them to reward its customers".

[32] CIBC does not argue in either its notice of appeal or its memorandum that the Tax Court Judge made any palpable and overriding error in interpreting paragraph 9 and Appendix "D" of the agreement between CIBC and Aeroplan. Rather, CIBC's submissions focus on the value of the Aeroplan Miles to CIBC's customers. Essentially, its submission is that since these points have value because they can be redeemed for goods or services, the Aeroplan Miles must have been the predominant supply made by Aeroplan under the agreement.

[33] However, this submission is based on viewing the agreement from the perspective of CIBC's customers, not CIBC. CIBC's customers were not the persons who were liable to pay the

consideration under the agreement between CIBC and Aeroplan and, hence, they were not the persons who were obligated to pay GST in relation to the supplies made under this agreement. Instead, CIBC is the person who was liable to pay the consideration under this agreement, and hence was liable to pay the GST. The focus is therefore on CIBC and its perspective of what it was being supplied under the agreement.

[34] In *Global Cash* the test for determining what is the dominant supply was succinctly stated in paragraph 26: “what did the Casinos provide to Global to earn the commissions payable by Global?” To adopt this question for this appeal: what did Aeroplan provide to CIBC to earn the amounts payable by CIBC?

[35] To determine what was supplied for the commissions payable in *Global Cash*, this Court found that the “commercial efficacy of the arrangement depends critically on access to the Casinos’ cash” (paragraph 28). It was necessary to consider the commercial efficacy of the arrangement because the commissions were paid for completed transactions (without any indication of which element was the predominant element) and, as noted in paragraph 27 of *Global Cash*, there were three elements to the supply:

> [27] The Casinos earned commissions for completed Funds Access Service transactions. To complete those transactions, the Casinos were required to provide (1) access to the physical premises of the Casino for Global's equipment (such as its dedicated computer terminals and kiosks), (2) the clerical services of the cashiers, and (3) the cash required to pay the patrons.

[36] The issue was which one of these elements would justify or warrant, on a commercially reasonable basis, the payment of the commissions. This Court then concluded, at paragraphs 29

and 30, that the transactions fell within paragraph (g) of the definition of "financial service" in the Act "(the making of any advance, the granting of any credit or the lending of money […]) […] because the heart of each transaction is an advance of money by the Casinos, disbursed to casino patrons at Global's direction, and repayable by Global".

[37] In *Great-West Life*, this Court also posed the same question as set out in paragraph 26 of *Global Cash*:

> [47] The first question is simply to determine what services were provided for the consideration received. […]

[38] In paragraph 50 of *Great-West* Life, this Court confirmed that the appropriate test for determining the predominant elements of a supply was to determine "the parts of the service that resulted in the payment of the benefits".

[39] Therefore, the question to be addressed is what was supplied by Aeroplan to CIBC for the consideration paid by CIBC? To answer that question it is not necessary to consider the commercial efficacy of the agreement between CIBC and Aeroplan because the applicable agreement explicitly identifies the predominant supply and those supplies that were incidental thereto.

[40] Section 9 of the agreement clearly links the payment of the consideration to Aeroplan's obligation to refer or arrange "for Aeroplan Members and other members of the public to make Card Applications" (the promotional and marketing services provided by Aeroplan to CIBC):

> In consideration of [Aeroplan] referring or arranging for Aeroplan Members and other members of the public to make Card Applications and in consideration of [Aeroplan] performing its other obligations herein which are incidental to the foregoing, CIBC shall pay to [Aeroplan] in respect of the Cardholders a fee calculated in accordance with Appendix “D”.

[41] Appendix “D” is consistent with section 9:

> In consideration of [Aeroplan] referring or arranging for Aeroplan members and other members of the public to make Card Applications and in consideration of [Aeroplan] performing its other obligations herein which are incidental to the foregoing

[42] In both section 9 and Appendix “D”, the obligation to pay the consideration is linked to the promotional and marketing services to be provided by Aeroplan to CIBC. Both section 9 of the agreement and Appendix “D” also specifically state that the other obligations of Aeroplan (which would include issuing Aeroplan Miles to CIBC’s customers) are incidental to the promotional and marketing services.

[43] The formula itself in Appendix “D” also confirms this. The focus of the formula is on the amounts charged to the Aeroplan credit cards issued by CIBC. In effect, the consideration payable by CIBC is linked to the success of the promotional and marketing services.

[44] CIBC acknowledged, during the hearing of this appeal, that there is nothing in the agreement with Aeroplan to indicate that CIBC was purchasing Aeroplan Miles. Likewise, there is no direct statement in this agreement that the amounts were paid by CIBC as consideration for Aeroplan issuing Aeroplan Miles.

[45] Article 13 of the agreement between CIBC and Aeroplan addresses the "Aeroplan Accounts" and, in particular, the crediting of Aeroplan Miles to CIBC credit card holders. Articles 13(a)(i) and (ii) state:

> (ii) Thereafter, [Aeroplan] <u>at its own cost</u> shall credit the mileage points to the Aeroplan Account of a Cardholder as reported and calculated by CIBC pursuant to Subsection 13(c) hereof 2 Business Days following receipt of CIBC's tape or electronic transmission; provided that in the event the net number of mileage points for a Cardholder is a negative number, [Aeroplan] may deduct from such Cardholder's AeropIan Account such negative mileage points.
>
> [emphasis added]

[46] Article 13(c) provides for the "Calculation of Aeroplan Points". The number of mileage points is based on the amounts charged to the credit card accounts of CIBC's customers less amounts outstanding on these accounts.

[47]

[redacted] In any event, there is nothing in these provisions that would support a finding that CIBC was paying the consideration that it did for the issuance of Aeroplan Miles to credit card holders. These provisions do not contradict the statement in section 9 and Appendix "D", that the other obligations of Aeroplan (which would include the obligation of Aeroplan to credit Aeroplan Miles to the Aeroplan accounts of CIBC's customers) were incidental to "[Aeroplan] referring or arranging for Aeroplan members and other members of the public to make Card Applications".

[48] CIBC submitted that the testimony of its witness, Mr. Webster, at the Tax Court hearing, supported CIBC's position that it was purchasing Aeroplan Miles and that this was the predominant element of the supply. The excerpts from the testimony that are identified by CIBC at paragraph 31 of its memorandum, are from pages 26, 27 and 33 of the transcript from the Tax Court hearing:

From pages 26 and 27:

> Q. What is your understanding of why CIBC chose Aeroplan?
>
> A. CIBC chose Aeroplan, I think, for two key reasons and these have remained, I think, pretty constant throughout the time we have offered Aeroplan.
>
> One is that the Air Canada Frequent Flyer Programme [*sic*], Aeroplan, is appealing to frequent flyers, and frequent flyers are an appealing demographic group for CIBC, in that they tend to spend more money and they are a profitable group of clients from a credit card perspective.
>
> The second reason which is closely related to the first is that by offering Aeroplan Miles when you use your credit card it encourages clients to consolidate their spending on our card, rather than spending on competitive credit cards.

> So, by offering Aeroplan Miles, we are able to get more business from these clients who we've attracted.
>
> Q. How do you know that you are able to get more business?
>
> A. We know that we are able to get more business because we can see that these clients spend more money on their credit card, when you see that each and every month that they use their card.

From page 33:

> Q. What is your understanding of CIBC's business rationale for awarding Aeroplan Miles?
>
> A. So our business rationale was that they were a very attractive reward that clients wanted, and so would allow us, as I said, to attract more customers to CIBC, which we did, and that they would use their card more which they did.

[49] Although Mr. Webster spoke in general terms about the objectives of CIBC (to increase its credit card business by having frequent flyers acquire and use its credit cards), he does not state that CIBC was purchasing Aeroplan Miles, or that the issuance of Aeroplan Miles by Aeroplan to CIBC's customers was not incidental to having access to Aeroplan's members.

[50] Rather Mr. Webster's statement that "frequent flyers are an appealing demographic group for CIBC, in that they tend to spend more money and they are a profitable group of clients from a credit card perspective" supports a finding that CIBC's primary objective was to have access to Aeroplan's database of its members by having Aeroplan provide a list of its members and send credit card applications to its members. This was described in the agreement as Aeroplan "referring or arranging for Aeroplan Members and other members of the public to make Card Applications" and more specifically in section 5 (as described in paragraph 14 above). His

testimony in general confirms CIBC's objective of increasing its credit card business, which would be accomplished by having more people apply for and use its credit cards.

[51] To the extent that Mr. Webster's testimony could be interpreted as elevating the significance of the issuance of the Aeroplan Miles, this would conflict with section 9 and Appendix "D" of the agreement which clearly state that the "other obligations" of Aeroplan (which would include Aeroplan's obligation to issue Aeroplan Miles to the customers of CIBC) were incidental to its obligations to refer or arrange "for Aeroplan Members and other members of the public to make Card Applications".

[52] As noted by Justice Iacobucci, writing on behalf of the majority of the Supreme Court in *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470, at page 538:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances. […]

[53] In *MacDonald v. Canada*, 2020 SCC 6, 443 D.L.R. (4th) 124, Justice Abella, writing on behalf of the majority of the Supreme Court noted:

> [43] Mr. MacDonald's *ex-post facto* testimony regarding his intentions cannot overwhelm the manifestations of a different purpose objectively ascertainable from the record.

[54] Any statements made by Mr. Webster at the Tax Court hearing that could be interpreted as changing the basis for the payment of the consideration by CIBC to Aeroplan from that as set out in the agreement, cannot override the statement in the agreement that CIBC was paying for Aeroplan "referring or arranging for Aeroplan Members and other members of the public to make Card Applications" and that the other obligations were incidental.

[55] CIBC submits that the Tax Court Judge placed too much weight on the agreement. In its memorandum, CIBC stated:

> 34. The Judge concluded as he did mainly on the basis of the contractual provisions that described the CIBC payments as "referral fees" or consideration for Aeroplan LP referring or arranging for Aeroplan members and other members of the public to apply for CIBC Visa cards, and the contractual provisions that described the performance of Aeroplan LP's other obligations as being "incidental thereto" (Reasons, ¶32-33).
>
> 35. The Judge's conclusion is based on two errors of law:
>
> (a) The Judge erred when he gave determinative weight to what he took to be the parties' agreement as to the predominant element of the supply.
>
> (b) The Judge erred when he failed to ask himself the question he should have asked, which was whether the linchpin of the Aeroplan LP supply – the one element of the supply that resulted in the payment of the consideration or upon which the commercial efficacy of the contract depended – was the Aeroplan Miles purchased for CIBC's customers, or Aeroplan LP's marketing and promotional services.

[56] CIBC is challenging the weight that the Tax Court Judge gave to the agreement between CIBC and Aeroplan. In essence, CIBC is asking us to reweigh the evidence and assign less weight to this agreement. However, the weight to be given to any evidence is a matter for the

trial judge. It is not the role of this Court to reweigh the evidence (*Barnwell v. Canada*, 2016 FCA 150, 2016 D.T.C. 5062, at para. 12).

[57] To suggest that the agreement between the parties under which the consideration for the supply is payable should not play a dominant role in the determination of the tax implications arising under the Act is not consistent with the Act. As noted, tax is imposed on a recipient of a taxable supply (section 165 of the Act) and the recipient is the person who is liable to pay the consideration for that supply under the applicable agreement (definition of "recipient" in section 123 of the Act). Therefore, it is logical that the agreement under which such consideration is payable will play a dominant role in determining the tax implications arising under the Act.

[58] In particular, in determining what was supplied in *Global Cash*, the agreement under which the consideration was paid played a dominant role. In *Global Cash*, the first question that was addressed was "[b]ased on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global?" Just as in *Global Cash*, the agreement under which the consideration for the supply was paid by CIBC should play a dominant role in determining what was acquired for the amounts that were paid.

[59] CIBC, in paragraph 35(b) of its memorandum, submits that "the Aeroplan Miles purchased for CIBC's customers" were "Aeroplan LP's marketing and promotional services". The "marketing and promotional services" are generally described in section 9 of the agreement as Aeroplan "referring or arranging for Aeroplan Members and other members of the public to

make Card Applications". The referral activities, which were to be undertaken by Aeroplan, are set out in section 5 of the agreement and summarized in paragraph 14 above. The issuance of Aeroplan Miles to CIBC's customers is not included in any of these referral activities and therefore cannot be considered as part of the obligation of Aeroplan to refer or arrange for Aeroplan Members and other members of the public to make Card Applications. Hence, the obligation of Aeroplan to credit Aeroplan Miles to the Aeroplan accounts of CIBC cardholders (as provided in Article 13) is not part of the marketing and promotional services that were identified by the Tax Court Judge as the predominant element of the supply. The issuance of Aeroplan Miles to CIBC's customers cannot be elevated to be the predominant supply when such issuance of Aeroplan Miles is not even mentioned in the referral activities for which the consideration was payable.

[60] The Supreme Court in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 178 D.L.R. (4th) 26, at para. 39, confirmed that the *bona fide* legal relationships of taxpayers will be respected in tax cases.

[61] The legal relationship between CIBC and Aeroplan is defined by the agreement between these two parties. There is nothing to suggest that this agreement is not a *bona fide* agreement. In essence, CIBC is asking us to rewrite section 9 and Appendix "D" of the agreement to provide that CIBC was paying the consideration for the purchase of Aeroplan Miles and not for Aeroplan "referring or arranging for Aeroplan Members and other members of the public to make Card Applications". There is nothing in the record that would suggest that the words chosen by the

parties for section 9 and Appendix “D” do not reflect what was intended by the parties, or that the actual legal effect of these provisions differs from what the words stipulate.

[62] At the hearing of the appeal, CIBC raised an additional ground of appeal. CIBC submitted that the Tax Court Judge erred in finding that the predominant supply was promotional and marketing services because the Crown had not raised this argument before the Tax Court Judge. CIBC submitted that there are paragraphs in the Reply filed by the Crown with the Tax Court and the Statement of Agreed Facts (Partial) submitted at the Tax Court hearing that indicate that the Crown was admitting that CIBC was paying for Aeroplan Miles.

[63] However, CIBC did not raise this ground of appeal in either its notice of appeal or in its memorandum. If CIBC was of the view that the Tax Court Judge had made a decision that was not based on the submissions of the parties or contrary to any admitted facts, this should have been raised in its notice of appeal and its memorandum.

[64] While this Court may permit a party to raise a new arguments during the hearing of an appeal if the opposing party has a fair opportunity to respond, this is not such a case. This new ground is significantly different from the grounds as raised by CIBC. There is also no reason why CIBC could not have raised this ground in its notice of appeal and memorandum. In my view, it was not appropriate for CIBC to raise this ground during the oral argument and I would not address it.

[65] In any event, the Tax Court was not bound by any admissions that may have been made by the Crown. This Court, in *Hammill v. Canada*, 2005 FCA 252, 257 D.L.R. (4th) 1, noted:

> [31] In an appeal against an assessment under the Act, the outcome does not belong to the parties. Public funds are involved and the Tax Court is given, in the first instance, the statutory mandate to confirm or vary the assessment based on the facts, proven or admitted. In this respect, while the Court will not generally look behind a formal admission, the parties cannot by agreement dictate the outcome of a tax appeal. The Tax Court is not bound by an admission which is shown, through properly tendered evidence, to be contrary to the facts.

[66] The Tax Court Judge was not bound by any admission that CIBC was paying for Aeroplan Miles in light of the agreement, which was properly tendered as evidence at the Tax Court hearing, and which clearly states that the payments made by CIBC were in consideration of Aeroplan "referring or arranging for Aeroplan Members and other members of the public to make Card Applications".

[67] There is no basis to find that the Tax Court Judge erred in his interpretation of the agreement between Aeroplan and CIBC and therefore there is no basis to conclude that he erred in finding that the predominant supply that was made by Aeroplan to CIBC was the supply of promotional and marketing services. As a result, I would dismiss this appeal.

[68] The Tax Court Judge also addressed the issue of whether Aeroplan Miles are gift certificates. The classification of Aeroplan Miles under the Act (whether as gift certificates or coupons or otherwise) will have an impact on the persons redeeming Aeroplan Miles and Aeroplan, who will be accepting such miles as consideration for goods or services. However, neither the persons redeeming Aeroplan Miles nor Aeroplan were parties to this appeal. The Tax

Court Judge also noted, at paragraph 77 of his reasons, that it was not clear how the redemption of Aeroplan Miles was treated by Aeroplan.

[69] As a result, I would not address the issue of whether Aeroplan Miles are gift certificates for the purposes of the Act. Nothing in these reasons should be construed as an endorsement of the Tax Court Judge's conclusion that Aeroplan Miles are not a gift certificate or that in order to qualify as a gift certificate, the property must have attributes similar to money.

V. Conclusion

[70] I would, therefore, dismiss this appeal with costs.

"Wyman W. Webb"
J.A.

"I agree
Donald J. Rennie J.A."

STRATAS J.A. (Dissenting Reasons)

[71] I reach a different result from my colleague.

[72] To determine the predominant element of a single multi-element, compound or composite supply, one must identify all of the elements of the supply and ask what element gives the supply its commercial efficacy or which element, in a practical or commercial sense, caused the payment of the consideration: *Global Cash Access (Canada) Inc. v. Canada*, 2013 FCA 269, 451 N.R. 358 at paras. 26-30; *Great-West Life Assurance Company v. Canada*, 2016 FCA 316, [2016] G.S.T.C. 118 at para. 50. In other words, in a practical, commercial sense, what was the taxpayer really getting out of that part of the deal?

[73] This question gets at more than just the technical content of the legal obligations found in a contract. As the appellant submits, “the terms of the contract are relevant, but they cannot be determinative” and “[t]he parties cannot, by a contractual provision, bind each other or the Minister to a particular determination of the predominant element of a single composite supply for GST purposes”: see appellant’s memorandum at para. 27. The legal obligations in a contract can tell us who can sue for what. But who can sue for what, at best, is just one clue to the larger issue of what the taxpayer was getting out of that part of the deal in a practical, commercial sense.

[74] My colleague focuses on literal contractual language and exclusively so. At paragraph 10 of his reasons, he relies upon contractual language that Aeroplan’s obligations are “incidental” to

Aeroplan referring or arranging for Aeroplan members to make applications for CIBC card accounts. He also relies on Appendix “D” to the agreement that repeats this language and sets out the formula that was used to calculate the amount payable by CIBC to Aeroplan. The formula, put generally, largely relies upon the total dollars of purchased goods and services on CIBC card accounts. He adds (at para. 39) that he does not need to consider commercial efficacy because the contract says one obligation is incidental to another:

> Therefore, the question to be addressed is what was supplied by Aeroplan to CIBC for the consideration paid by CIBC? To answer that question it is not necessary to consider the commercial efficacy of the agreement between CIBC and Aeroplan because the applicable agreement explicitly identifies the predominant supply and those supplies that were incidental thereto.

In my view, this approach deviates from the test in *Global Cash* and *Great-West Life*, cases that bind us, cases that encourage us to get to the practical, commercial substance of the supply. Now that my colleague’s approach is law, I fear that in the future parties will add words not to change their contractual obligations or the practical, commercial substance of the supply but merely to trigger favourable GST treatment. This may be a boon for cunning drafters and their bag of tricks. But it will be a bust for the important aims the *Excise Tax Act*, R.S.C. 1985, c E-15 is meant to serve.

[75] We must follow the approach in paragraphs 72 and 73 above. Under this approach, the first step is to identify the various elements of the supply. The Tax Court did this (at paras. 20-22):

- CIBC received customer information from Aeroplan (see sections 5(i) and (ii) of the 2003 Credit Agreement);

- Both Aeroplan and CIBC received advertising opportunities, through flyers and in the other’s place of business (see sections 5(iii)-(vi) and section 8(iv)-(v) of the 2003 Credit Agreement);

- Aeroplan and CIBC agreed to develop an annual marketing plan for the CIBC Card and share promotion costs (see section 8(i) of the 2003 Credit Agreement);

- CIBC received the right to allocate Miles (see section 13 of the 2003 Credit Agreement).

[76] Now to the predominant element. The predominant element is the element that gives the supply commercial efficacy or, in other words, the reason for the consideration. On this point, the reasons of the Tax Court are diffuse and opaque and I cannot determine the basis for its decision on this point. This permits this Court to make its own assessment and, if necessary, interfere with the Tax Court’s decision.

[77] In my view, the element that gives the supply commercial efficacy—the predominant element of the supply—is the right to allocate Miles. But for the right to allocate Miles, there would have been no point in the parties performing their other obligations. For example, there would have been no point in CIBC receiving Aeroplan customer information, or advertising opportunities if CIBC were not able to offer Aeroplan Miles to its customers. This approach echoes this Court’s finding on the facts in *Global Cash* at para. 28 that but for the predominant

element in that case, “there would have been no point in [the parties performing the other obligations]”.

[78] Both my colleague and the Tax Court are influenced by the fact that CIBC plans to use its right to allocate Miles to strengthen its credit card business. They both say that, because CIBC is going to use the Miles as a promotion, the Miles themselves are a promotional and marketing service.

[79] The mere fact that CIBC plans to use its property, the rights to allocate Miles, to make money does not support the view that we are dealing with promotional and marketing services. I offer four reasons.

[80] First, the Miles—a form of property as defined in section 123(1) of the ETA—cannot become a service. Property cannot become a service because service is defined as “anything other than property”: *ETA,* s. 123(1).

[81] Second, the mere intent to make money down the road is too diffuse a basis to change the characteristics of the supply between CIBC and Aeroplan. In today’s economy, almost every pre-consumer transaction is done with an eye to attracting consumers and making money, *i.e.*, marketing and promotion. For example, a repairer of all-terrain vehicles may pay for the right to use and display the trademarks of manufacturers to promote the fact that it can repair machines made by the manufacturers. The purpose is marketing and promotion but the fact remains that the repairer has obtained property. In the same way, CIBC has obtained the right to allocate

Miles, which the Minister has pleaded is the same as obtaining the Miles themselves, to attract new customers for its cards.

[82] Third, it is contrary to the scheme of the *Excise Tax Act*, R.S.C. 1985, c E-15 which taxes supplies. The tax treatment of a transaction or supply should be determined by analyzing that particular transaction or supply, not looking down the road to other transactions or supplies. Put another way, the focus must be on the nature of the particular supply, here the acquisition of a form of property, the right to allocate Miles: *Camp Mini-To-We Inc. v. Canada*, 2006 FCA 413, 357 N.R. 318 at para. 33.

[83] Finally, Mr. Webster's evidence does not support the Tax Court's conclusion that CIBC hoped to expand its business by relying primarily on the marketing and promotional services that Aeroplan was obliged to supply CIBC under the contract. Rather, it shows that CIBC was motivated to reward holders of CIBC cards with Miles because it believed this would attract new customers and expand its credit card business.

[84] The above analysis has the virtue of being consistent with the assumptions pleaded by the Minister. Absent something in the evidence displacing an assumption—and there is nothing here—the Court should stick to those assumptions. As well, no one argued in this Court or before the Tax Court that the characterization of the predominant element of a single multi-element, compound or composite supply should be based on the technical wording of the obligations in the contract, probably because they properly recognized that the approach of *Global Cash* and *Great-West Life* is binding on us.

[85] Since I have concluded that Miles were the predominant element of the supply, it is necessary to consider whether the Miles are gift certificates under the *Excise Tax Act*. As these reasons will not be the majority reasons of this Court, I will be brief.

[86] The Goods and Services Tax under the *Excise Tax Act* is imposed only on the consumption of taxable property and services acquired for consideration. No sales tax is imposed on money, which is a medium of exchange, not a consumable property or service: see the definitions of “service” and “property” in section 123(1) of the Act, both of which exclude money. And Parliament has specified unique treatment for other exchange devices such as coupons, gift certificates or barter units: see sections 181-181.3.

[87] The Act does not define a gift certificate. However, its ordinary meaning is a device, paper or electronic, that may be used, subject to its terms, as full or partial consideration for a supply offered by a supplier. This gives it very much the same quality as money and is nothing like a consumable property or services. On this definition, Miles qualify as gift certificates.

[88] The Tax Court found (at para. 83) that Miles cannot be gift certificates because they do not have a fixed dollar value. The requirement of a fixed dollar value does not have a foundation in the text, context or purpose of the Act. It is noteworthy that the Act does not require a fixed dollar value on other exchange devices, such as foreign currency, whose value in Canadian dollars may change from time to time.

[89] I would affirm earlier decisions of the Tax Court of Canada and their supporting reasoning to the effect that reward points need not have a fixed dollar value in order to be considered a gift certificate: see *Royal Bank v. The Queen,* 2007 TCC 281, [2007] G.S.T.C. 122 at paras. 47-51. However, the mere fact that rewards points may be cancelled by the issuer does not mean they are not a gift certificate so I would not follow *Royal Bank v. R.* on that point.

[90] In the commercial world, Miles function as gift certificates. Miles are purchased by accumulation partners of Aeroplan to be used as rewards for their customers. They are an exchange device because they may be used as consideration for property or services in the same way as money or a gift certificate. Aeroplan accepts Miles as consideration for airline tickets, merchandise or gift cards with few conditions on their redemption. This is not a case like *Canasia Industries Ltd. v. The Queen,* 2003 TCC 33, 2003 G.T.C. 647 where the onerous conditions on redemption meant the reward points in that case did not function like exchange devices.

[91] In this case, as CIBC paid consideration for the Miles, for GST purposes the Miles constitute gift certificates, consistent with the scheme of the *Excise Tax Act*. As a result, section 181.2 applies to deem CIBC's acquisition of the Miles not to be a supply. Thus, CIBC paid GST in error. It is entitled to the rebates it claims.

[92] Therefore, I would allow CIBC's appeal with costs throughout and refer the assessments to the Minister for reassessment on the basis that CIBC is entitled to the rebates it claims.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED APRIL 16, 2019, CITATION NO. 2019 TCC 79, DOCKET NO. 2012-1261(GST)G

DOCKET:	A-177-19
STYLE OF CAUSE:	CANADIAN IMPERIAL BANK OF COMMERCE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	FEBRUARY 16, 2021
PUBLIC REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A.
DISSENTING REASONS BY:	STRATAS J.A.
DATED:	MAY 20, 2021

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