

Docket: 2003-4048(GST)G

BETWEEN:

LES PROMOTIONS D.N.D. INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on September 29, 2005, at Montreal, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Appellant: Steve Robitaille

Counsel for the Respondent: Martine Bergeron

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**JUDGMENT**

The appeal from the assessment, the notice of which is numbered 5770891 and dated October 22, 2002, made under the *Excise Tax Act* for the period from December 1, 1997, to November 3, 2001, is dismissed without costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 27th day of January 2006.

“Louise Lamarre Proulx”

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Lamarre Proulx J.

Translation certified true  
on this 16th day of April 2007.

Erich Klein, Revisor

Citation: 2006TCC63  
Date: 20060127  
Docket: 2003-4048(GST)G

BETWEEN:

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### **REASONS FOR JUDGMENT**

Lamarre Proulx J.

[1] This is an appeal from a reassessment for the period from December 1, 1997, to November 3, 2001.

[2] The issue is whether certain activities of the appellant are in the nature of financial services. Did the appellant arrange for a service referred to in one of paragraphs (a) to (i) of the definition of “financial service” in subsection 123(1) of the *Excise Tax Act* (the “Act”)?

[3] For the appellant, the issue arises in connection with a claim for an input tax credit (“ITC”). According to subsection 169(1) of the Act, the input tax credit is based on the use in the course of commercial activities of the goods or services acquired.

[4] The meaning of “commercial activity” in subsection 123(1) of the Act excludes an exempt supply. According to this same subsection, an exempt supply is a supply included in Schedule V of the Act. The supply of financial services is dealt with in Part VII of Schedule V.

[5] I reproduce below the statutory provisions that apply in this case with regard to the meaning of “financial service”:

“financial service” means

- (a) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,
- (b) the operation or maintenance of a savings, chequing, deposit, loan, charge or other account,
- (c) the lending or borrowing of a financial instrument,
- (d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,
- (e) the provision, variation, release or receipt of a guarantee, an acceptance or an indemnity in respect of a financial instrument,
- (f) the payment or receipt of money as dividends (other than patronage dividends), interest, principal, benefits or any similar payment or receipt of money in respect of a financial instrument,
- (f.1) the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy,
- (g) the making of any advance, the granting of any credit or the lending of money,
- (h) the underwriting of a financial instrument,
- (i) any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued,
- (j) the service of investigating and recommending the compensation in satisfaction of a claim where
  - (i) the claim is made under a marine insurance policy, or
  - (ii) the claim is made under an insurance policy that is not in the nature of accident and sickness or life insurance and
    - (A) the service is supplied by an insurer or by a person who is licensed under the laws of a province to provide such a service, or

(B) the service is supplied to an insurer or a group of insurers by a person who would be required to be so licensed but for the fact that the person is relieved from that requirement under the laws of a province,

- (j.1) the service of providing an insurer or a person who supplies a service referred to in paragraph (j) with an appraisal of the damage caused to property, or in the case of a loss of property, the value of the property, where the supplier of the appraisal inspects the property, or in the case of a loss of the property, the last-known place where the property was situated before the loss,
- (k) any supply deemed by subsection 150(1) or section 158 to be a supply of a financial service,
- (l) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (a) to (i), or
- (m) a prescribed service,

but does not include

...

- (t) a prescribed service.

[6] Subsection 4(2) of the *Financial Services (GST/HST) Regulations* (the “Regulations”) reads as follows:

4. (1) In this section,

...

(2) Subject to subsection (3), the following services, other than a service described in section 3, are prescribed for the purposes of paragraph (t) of the definition “financial service” in subsection 123(1) of the Act:

- (a) the transfer, collection or processing of information, and
- (b) any administrative service, including an administrative service in relation to the payment or receipt of dividends, interest, principal, claims, benefits or other amounts, other than solely the making of the payment or the taking of the receipt.

[7] The facts on which the Minister of National Revenue (the “Minister”) relied in making his reassessment are set out in paragraph 21 of the Reply to the Notice of Appeal (the “Reply”):

[TRANSLATION]

- (a) the Appellant is a registrant for the purposes of Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (hereinafter the “E.T.A.”), and submits its returns quarterly;
- (b) during the period in question, the Appellant claimed and obtained ITCs totalling \$187,670.00, which corresponds to the whole of the GST paid on the goods and services acquired by the Appellant in the course of its business;
- (c) the audit conducted by the Minister showed that the business carried on by the Appellant is not carried on in its entirety within the framework of commercial activities;
- (d) indeed, the business carried on by the Appellant involves the provision of services consisting in the solicitation of applications for the credit cards of financial institutions and major stores, these being supplies considered to be exempt under the E.T.A., and the provision of long-distance and sub-contract services, which supplies are considered to be taxable under the E.T.A.;
- (e) the supplies made by the Appellant during the period in question were accordingly analysed by the Minister to determine the amount of taxable supplies and the amount of exempt supplies;
- (f) following the calculation of the amount of the exempt supplies made by the Appellant during the period in question, adjustments of \$166,312.07 to the ITCs claimed and initially obtained were made in calculating the Appellant's net tax on the ground that the goods and services were not acquired in the course of commercial activities;
- (g) following the analysis of the Appellant's supporting documentation, adjustments of \$523.46 were made to the ITCs in calculating the Appellant's net tax on the ground that the Appellant was not the recipient of the goods.

[8] The facts set out in the Notice of Appeal are as follows in paragraphs 3, 4, 7, 10, 11 and 12:

[TRANSLATION]

3. The Appellant is a company incorporated under the Quebec *Companies Act* for the exclusive purpose of providing marketing and promotion services to

financial institutions and to businesses providing credit-card-issuing services within the province of Quebec.

4. The Appellant's activities are as follows:
  - (a) using its employees to distribute applications for credit cards in a specific location;
  - (b) placing certain employees in shopping centres in order to promote the acquisition of a particular credit card;
  - (c) having the potential client complete the credit card application form handed to him or her by the Appellant;
  - (d) once the form is completed by the potential client, forwarding the form to the Appellant's client for a decision on whether or not to issue the credit card;
  - (e) the Appellant makes no decision as to whether or not to approve credit;
  - (f) the Appellant has no decision-making power respecting acceptance of an application and makes no recommendation in this regard.

...

7. On or about December 16, 2002, the Appellant forwarded to the Quebec Department of Revenue a notice of objection to this notice of assessment, asking the Quebec Department of Revenue to cancel the assessment for the reasons given below:

"Furthermore, we made a request in July 2000 through the Canadian Federation of Independent Business to the tax accounting unit to find out whether we should invoice our clients for GST and describing in detail the type of activity we carried on for our clients, and that unit clearly replied to us (see copy of document attached) that we must indeed bill for the taxes (GST and QST) on our services and that we were consequently entitled to claim our inputs.

In short, we are firmly convinced that the status of 'financial services business' which the Department has given us clearly does not reflect reality because, as we said earlier, we do not perform any function that can be considered to be a 'financial service'. We therefore simply request that the Department cancel assessment notice No. 5770891 and refund to us in full the amounts that have already been paid."

...

10. The Appellant has always acted diligently and reasonably in applying the Act and in July 2002 even made a request for an interpretation to the GST/QST Accounting Service through the Canadian Federation of Independent Business.
11. The purpose of this request was to obtain clarification of the Appellant's situation, namely to determine whether it should invoice its clients for GST and whether it could subsequently claim input tax credits for the GST it had paid on the costs and expenditures it incurred in providing services to its clients.
12. On August 16, 2000, the Department of Revenue sent a written decision stating that the services provided by the Appellant were taxable services and that the Appellant could thus claim tax refunds (ITC).

[9] The auditor, Ngoc Ha Duong, was the first witness for the Appellant. His report was filed as Exhibit A-1. He refused the claim for an input tax credit for the goods or services required in order to make an exempt supply. He explained that he had concluded that the Appellant's services were exempt supplies because they were included in the definition of "financial service" in subsection 123(1) of the Act. He considered in this regard Policy Statement P-239, filed as Exhibit A-2, especially the passage thereof entitled "Elements of an Arranging For Service":

To qualify as a service of "**arranging for**" the supply of a financial service, each of the following elements should be present:

- the intermediary will help either the supplier or the recipient or both, in the supply of a financial service,
- the supplier and/or the recipient count on one or more intermediaries for assistance in the course of a supply of a financial service, and
- the intermediary is directly involved in the process of the provision of a financial service and will therefore, expend the time and effort necessary with the intent to effect a supply of a service described in paragraphs (a) to (i) of the definition of financial service.

...

[10] He explained that, according to his assessment of the facts, the appellant acted as an intermediary between the financial institution and the purchaser in the supply of a financial service. He referred to certain contracts between the appellant



and the financial institutions, including that with the Royal Bank of Canada (Exhibit A-3) and that with the Bank of Montreal (Exhibit A-4).

[11] A letter from the appellant dated March 25, 2002, addressed to Mr. Duong (Exhibit A-5) indicates that from December 1, 1997, to November 30, 2001, it had seven clients. In addition to those mentioned above, it had agreements with some major stores and with other banks.

[12] Diane Nantel, the president of the appellant, was the next witness for the appellant. She explained that the appellant was an agency that, since 1989, had acted as an intermediary for banks or retailers in promoting credit cards in public places such as shopping centres, fairs and exhibition sites. Applicants were given a form and were told about the benefits of the card; they then completed the form and were given a bonus gift. The appellant ensured that the form was correctly completed and that it contained all the information required, but it did not conduct the credit checks.

[13] The methods of remuneration could depend on the actual number of applications or on the number of applications accepted by the appellant's client. In the latter case, the client informed the appellant of the number of applications accepted and the appellant invoiced the client accordingly. In either case, the appellant's invoice included an amount of tax.

[14] In 2000, at the suggestion of her accountant, the president of the appellant made an inquiry of the Canadian Federation of Independent Business. On July 18, 2000, the Federation requested an interpretation from the GST/QST Accounting Service of Revenu Québec (Exhibit A-6).

[15] A reply dated August 16, 2000, was sent to the Canadian Federation of Independent Business (Exhibit A-7).

[16] This letter reads as follows:

[TRANSLATION]

Dear Madam,

This is in response to your letter dated July 18 concerning the soliciting and promotion services provided by businesses belonging to your organization. You submitted the situation described below.

A business providing solicitation/promotion services receives a contract from a financial institution or a business offering credit cards such as Visa, Master Card, the Hudson Bay Company or Canadian Tire. The employee of the soliciting business must approach individuals in various public places, such as shopping centres, to invite them to apply for whatever credit card is being offered.

As part of his or her work, the employee, in addition to soliciting potential clients, must fill out the applications and return them, duly completed, to the financial institution or the credit company concerned.

The soliciting business does not carry out any credit check or give credit approval or make any promise to the potential client.

The services rendered by the soliciting business consist in the supply of a service that is taxable for GST and QST purposes, regardless whether the services in question were provided to financial institutions or commercial businesses.

Moreover, the soliciting business may claim input tax credits (ITC) and input tax refunds (ITR) for the GST and QST paid respectively on the acquisition of the goods and services used, consumed or supplied in the course of its commercial activities.

The preceding comments constitute our general opinion on the subject of your letter. Our interpretation could be different if proposed or future amendments were made to the legislation. These comments are not rulings and, in accordance with the guidelines in the *GST/HST Memoranda Series 1.4*, they are not binding on the Department in respect of any particular situation.

We hope these comments will answer all your questions. Should you require further information, please do not hesitate to contact us again.

[17] The president of the appellant stated that she could have accepted a change in the Minister's position, but not one that was retroactive. Once the Minister informed her that she was providing an exempt supply, she stopped charging the tax.

[18] The assessment dated October 22, 2002, was filed as Exhibit A-8. The total of the input tax credits claimed from the taxpayer was \$166,835.53 plus interest of \$17,874.07 for a total of \$184,709.60. The period covered extended from February 1998 to November 2001. The president of the appellant asserted that for a small business like hers such an assessment was too onerous.

[19] On re-examination concerning the letter dated August 16, 2000, the auditor stated that he felt that there were some distinctions to be made between the activities described in the letter from Revenu Québec and those carried on by the appellant. In any event, he considered the letter to be incorrect.

[20] The date on which Policy Statement P-239 was issued was January 30, 2002.

### Arguments

[21] Counsel for the appellant referred to the decision on an objection dated August 11, 2003 (Exhibit A-10), which reads as follows:

[TRANSLATION]

...

the assessment was issued in accordance with the provisions of the Act, in particular, but without restricting the generality of the foregoing, in that the adjustments of \$166,835.53 in respect of the period from 1997-12-01 to 2001-11-30 were made correctly in accordance with the provisions of section 169 and paragraph 123(1)(l) of the *Excise Tax Act*. Of these amounts, the input credits of \$166,312.07 were refused since the service of soliciting clients and promoting credit cards provided by Les Promotions D.N.D. Inc. to financial institutions and stores is covered by the meaning of the expression “arranging for” in paragraph (l) of the definition of “financial service” in subsection 123(1) of the *Excise Tax Act*. The supply is an exempt supply.

[22] Counsel wondered whether the Minister did not have a duty to indicate with which of paragraphs (a) to (i) paragraph 123(1)(l), under which the appellant was assessed, is linked.

[23] Counsel referred to paragraph 123(1)(t), which excludes prescribed services from the definition of “financial service”. He suggested that the services provided by the appellant were in the nature of data collection or administrative services.

[24] He asserted that the services provided by the Appellant were in the nature of collection or processing of information or administrative services.

[25] He also submitted that a person who provides a financial service is a person who may influence the process. The appellant was not a person who arranged for the granting of credit.

[26] Concerning the remark made by counsel for the appellant that the assessment did not specify which of paragraphs (a) to (i) came into play, counsel for the respondent stated that in both the audit report and the Reply, reference is made to credit-granting activities. It was subsection (g) that was involved. However, the assessment was based on subsection (l).

[27] Counsel for the respondent admitted that the letter dated August 16, 2000, and the Policy Statement dated January 30, 2002, were contradictory, but she asserted that an interpretation made by an official is not binding on the Minister and cannot be contrary to the Act. The Court's role is to interpret the Act. Counsel relied in this regard on the decision of Judge Sarchuk of this Court in *Panar v. Canada*, [2001] T.C.J. No. 233 (QL).

[28] Counsel for the Respondent argued that the service provided by the appellant was much more than the mere collection of data. It included solicitation and preparing a properly completed application form. It was at this stage that the appellant was involved. It was an important service provided by the appellant as intermediary between the recipient of the financial service and the supplier thereof. The client's application was essential for the conclusion of a credit contract.

### Analysis and conclusion

[29] With respect to the first point made by counsel for the appellant, it is my opinion that it is a point that causes uncertainty as to the facts and should have been raised by some means prior to the hearing. If it is a point of law, it should have been mentioned in the pleadings as a legal argument.

[30] In my opinion, the facts in this case and the basis for the assessment were clearly set out both in the pleadings and in the evidence at the hearing itself. Nevertheless, I consider it preferable to explicitly link paragraph (l) in the definition of "financial service" to one of paragraphs (a) to (i) describing such services.

[31] Concerning the existence of the letter setting forth a different interpretation from that which was applied in the assessment, regrettable though that is, I agree with counsel for the respondent's argument that this Court is not bound by administrative interpretations of the Act. Because of this letter, counsel asked this Court to cancel the interest and penalties. The assessment does not include any penalties. With respect to the interest, the Act does not confer on this Court any discretion to cancel all or part of the interest. Only the Minister has this power under section 281.1 of the Act.

[32] Regarding the application of subsection 4(2) of the Regulations, it seems sufficiently clear to me that the services provided by the appellant are not in the nature of the collection or processing of information, or of administrative services.

[33] We come now to the meaning to be given to the expression "arranging for". The expression used in the French version of the Act is "prendre les mesures en vue de l'effectuer".

[34] In the British legislation, the original expression was "the making of arrangements". It is interesting to note that in 1999, this provision was amended to read "the provision of intermediary services . . . by a person acting in an intermediary capacity", both of which expressions were subsequently defined as follows in *Value Added Tax Act 1994*:

(5) For the purposes of item 5 "intermediary services" consist of bringing together with a view to the provision of financial services—

- (a) persons who are or may be seeking to receive financial services, and
- (b) persons who provide financial services,

together with (in the case of financial services falling within item 1, 2, 3 or 4) the performance of work preparatory to the conclusion of contracts for the provision of those financial services, but do not include the supply of any market research, product design, advertising, promotional or similar services or the collection, collation and provision of information in connection with such activities.

(5A) For the purposes of item 5 a person is "acting in an intermediary capacity" wherever he is acting as an intermediary, or one of the intermediaries, between—

- (a) a person who provides financial services, and
- (b) a person who is or may be seeking to receive financial services.

[35] Paragraph (*l*) of the definition of “financial service” refers to two situations: the act of agreeing to provide a service and the act of arranging for a service. It is my view that the first situation concerns the person who, in the final analysis, provides the service. The other situation concerns intermediary persons.

[36] A person who agrees to provide a service described in one of paragraphs (*a*) to (*i*) may contract with the person acquiring the service without having to use intermediaries. In the field of financial services, however, there are often intermediaries. We need only think of brokers, insurance agents, etc. These intermediaries may act for the seeker of a financial service or for the service provider. They are, within the meaning of paragraph (*l*) of the definition of “financial service”, the persons who arrange for a financial service.

[37] The services provided during the transition between the acquisition of the service and the provision of the service sought are exempt, provided that they are linked in their purpose. Thus, in this case, between the person obtaining credit and the financial institution granting it there is an intermediary, and that is the appellant. The appellant’s services are an integral part of the business of the person agreeing to provide the service of granting credit.

[38] For all these reasons, the appeal must be dismissed. In the circumstances of this appeal, I do not award any costs.

Signed at Ottawa, Canada, this 27th day of January 2006.

“Louise Lamarre Proulx”

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Lamarre Proulx J.

Translation certified true  
on this 16th day of April 2007.

Erich Klein, Revisor

CITATION: 2006TCC63

COURT FILE NO.: 2003-4048(GST)G

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PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: September 29, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Louise Lamarre  
Proulx

DATE OF JUDGMENT: January 27, 2006

APPEARANCES:

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Counsel for the Respondent: Martine Bergeron

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