2017-1012(GST)I

BETWEEN:

SAMUEL S. AXELROD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeals heard on December 14 & 17, 202l at Toronto, Ontario
Written submissions received on January 28, 2022 and February 7, 2022.
By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Mark Tonkovich Zvi Halpern-Shavim Allan Gelkopf
Counsel for the Respondent:	William Switzer Carrie Calabrese

JUDGMENT

The Appeals are dismissed, without costs.

Signed at Edmonton, Alberta this 12th day of December 2022.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2022 TCC 157
Date: December 12, 2022
Docket: 2017-1012(GST)I

BETWEEN:

SAMUEL S. AXELROD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. **INTRODUCTION**

[1] These reasons pertain to the Appeals commenced by Dr. Samuel S. Axelrod in respect of Notices of Assessment issued by the Canada Revenue Agency (the "CRA"), on behalf of the Minister of National Revenue (the "Minister"), for the 2013 and 2014 reporting periods. The assessments ("Assessments") embodied in the above-mentioned Notices of Assessment were issued under Part IX of the *Excise Tax Act* (the "ETA").[1] The Assessments disallowed input tax credits ("ITCs") in the total amount of $16,782 (more specifically $6,882 for 2013 and $9,900 for 2014), which had been claimed by Dr. Axelrod.

[2] The ITCs claimed by Dr. Axelrod, who is a dentist, related to the harmonized sales tax ("HST") paid by him in respect of the supply to him of property or services acquired by him for consumption, use or supply in the course

[1] *Excise Tax Act*, RSC 1985, c. E-15, as amended.

of his professional activities pertaining to the supply of dental prostheses and dental services by him to his patients.[2]

II. **ISSUES**

[3] In general terms, the broad issue in these Appeals is whether Dr. Axelrod has satisfied the requirements of subsection 169(1) of the ETA, so as to be entitled to claim the above-referenced ITCs for the 2013 and 2014 reporting periods. In part, this necessitates a determination of whether the supplies made by Dr. Axelrod in respect of dental services and artificial teeth were exempt supplies or zero-rated supplies. To resolve these issues, a number of other, more specific, questions must be addressed. Those questions are:

a) When Dr. Axelrod supplied an artificial tooth or artificial teeth to a patient, did Dr. Axelrod make a single supply of property and services, or did he make multiple supplies of property and services?

b) If, in providing an artificial tooth or artificial teeth to a patient, Dr. Axelrod made a single supply, did that supply come within section 5 of Part II of Schedule V ("section V-II-5") of the ETA, or within section 11 of Part II of Schedule VI ("section VI-II-11") of the ETA?

c) If, in providing an artificial tooth or artificial teeth to a patient, Dr. Axelrod made multiple supplies, were some supplies incidental to other supplies?

d) If, in providing an artificial tooth or artificial teeth to a patient, Dr. Axelrod made multiple supplies, did some or all of those supplies come within section V-II-5 of the ETA, or within section VI-II-11 of the ETA?

e) How does section 34 of Part II of Schedule VI ("section VI-II-34") of the ETA apply to these Appeals?

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[2] For the purposes of these Reasons, I have used the terms "dental prostheses" and "artificial teeth" interchangeably, to refer to dentures, dental implants, bridges, crowns and significant tooth reconstructions. "Artificial teeth" is the term used in the ETA.

III. **FACTUAL BACKGROUND**

[4] Dr. Axelrod, who is a registrant for the purposes of the ETA, carries on a general dentistry practice. Slightly less than one-third of Dr. Axelrod's practice might be said to relate to artificial teeth, categorized as follows:

a) dentures,

b) crowns,

c) bridges,

d) dental implants, and

e) reconstruction of a tooth in a patient's mouth, so as to fabricate a replacement of 50% or more of the anatomical surface of the original natural tooth.

[5] Dr. Axelrod and the Respondent (together, the "Parties") provided the Court with a joint letter, setting out some of the facts pertinent to these Appeals.[3] While the Parties disagree as to whether there were single supplies of zero-rated artificial teeth, or multiple supplies of both zero-rated artificial teeth and exempt dental services, they did reach agreement concerning the revenue amounts attributable to various facets of Dr. Axelrod's practice.

[6] On the assumption that Dr. Axelrod made single supplies of zero-rated artificial teeth to his patients, the Parties agree that the revenue from those supplies may be categorized as follows:[4]

Table 1

Reporting Period	2013	2014
Filling Reconstruction	$95,159.87 (11.76%)	$75,124.39 (9.03%)
Dentures	$10,088.27 (1.25%)	$15,474.12 (1.86%)
Crowns	$57,113.21(7.06%)	$76,182.25 (9.16%)

[3] Letter dated December 9, 2021, signed by counsel for Dr. Axelrod and by counsel for the Respondent, as set out in Exhibit AR-1, tab 6, p. 20-23.

[4] *Ibid*, p. 22.

Bridges	$15,580.98 (1.92%)	$28,725.80 (3.45%)
Laboratory	$67,837.49 (8.38%)	$67,679.67 (8.14%)
Total Revenue from Supplies in Issue	$245,779.82 (30.36%)	$263,186.23 (31.64%)
Total Revenue for Period	$809,508.21 (100%)	$831,707.16 (100%)

[7] The Parties also analyzed the relevant revenue amounts on the assumption that Dr. Axelrod made multiple supplies (rather than single supplies) to the patients who obtained artificial teeth. That revenue allocation is set out in the following table:[5]

Table 2

Category	Supply	Percentage of Revenue per Relevant Supply	Percentage and Amounts of Relevant Revenues per Reporting Period	
			2013	2014
Manufactured Cost of Tooth	Pre-laboratory supply	20%	$49,155.96	$52,637.25
	External laboratory-related supply	30%	$73,733.95	$78,955.87
	Temporary crown/etc.	30%	$73,733.95	$78,955.87
Installation Cost of Tooth	Installation supply	20%	$49,155.96	$52,637.25
Total Revenue from Supplies in Issue		100%	$245,779.82	$263,186.23

IV. **LEGISLATIVE FRAMEWORK**

[8] As indicated above, these Appeals relate to Dr. Axelrod's claims for ITCs in 2013 and 2014. Subsection 169(1) of the ETA provides that, where a registrant pays HST in respect of the supply of a property or service, the registrant is entitled to an ITC computed by reference to the amount of that HST, to the extent

[5] *Ibid*, p. 23.

(expressed as a percentage) to which the registrant acquired the property or service for consumption, use or supply in the course of commercial activities of the registrant. Subsection 123(1) of the ETA defines the term "commercial activity" of a person as including a business carried on by the person (subject to an exclusion that is not applicable here),"except to the extent to which the business involves the making of exempt supplies by the person…." In other words, to the extent that a business involves the making of exempt supplies, that business is not a commercial activity, and no ITCs are available.

[9] Subsection 123(1) of the ETA provides that, subject to two sections that are not of significant import to these Appeals, a "supply" means "the provision of property or a service in any manner…." As will be discussed further below, the jurisprudence in Canada has determined that, in some situations, what would otherwise be two or more supplies of properties or services are, for the purposes of the ETA, to be considered as a single supply.

[10] Subsection 123(1) of the ETA also provides that:

a) an "exempt supply" means a supply included in Schedule V to the ETA;

b) a "taxable supply" means a supply that is made in the course of a commercial activity; and

c) a "zero-rated supply" means a supply included in Schedule VI to the ETA.

[11] Subsection 141(3) of the ETA states, in essence, that, where substantially all of the intended consumption or use of a property or a service by a person is in the course of particular activities of the person that are not commercial activities, all of the consumption or use of the property or service by the person is deemed to be in the course of those particular activities.[6]

[12] Section 1 of Part II of Schedule V to the ETA defines "medical practitioner" as including a provincially licensed dentist. Section V-II-5 of the ETA provides that an exempt supply includes:

> A supply of a consultative, diagnostic, treatment or other health care service that is rendered by a medical practitioner to an individual.

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6 Subsection 141(3) of the ETA excludes a person that is a financial institution. That exclusion is not relevant here.

[13] Section VI-II-11 of the ETA states that a supply of artificial teeth is a zero-rated supply. Section VI-II-34 of the ETA states that the following is also a zero-rated supply:

> A supply of a service (other than a service the supply of which is included in any provision of Part II of Schedule V except section 9 of that Part) of installing, maintaining, restoring, repairing or modifying a property the supply of which is included in any of sections 2 to 32 and 37 to 41 of this Part….

V. **POSITIONS OF THE PARTIES**

A. Position of the Appellant

[14] It is the position of Dr. Axelrod that for each of the transactions in question, he made a single supply of an artificial tooth or artificial teeth to the particular patient, and that each such supply was a zero-rated supply, by reason of section VI-II-11 of the ETA.

B. Position of the Respondent

[15] The Respondent takes the position that, in the context of an artificial tooth or artificial teeth made by a laboratory, Dr. Axelrod made multiple supplies to his patients. One supply was the supply of the artificial tooth or teeth obtained by Dr. Axelrod from the laboratory, and the other supplies were the supply of the pre-laboratory services (such as the taking of impressions and providing instructions to the laboratory), the supply of fabricating and installing a temporary tooth or teeth, and the supply of installing the artificial tooth or teeth subsequently received by Dr. Axelrod from the laboratory. According to the Crown, the supply by Dr. Axelrod of the artificial tooth or teeth *per se*, as acquired from the laboratory, to the patient was a zero-rated supply, by reason of section VI-I-11 of the ETA, while the supplies of the pre-laboratory services and the installation services were exempt supplies, by reason of section V-II-5 of the ETA.

VI. **ANALYSIS**

A. Artificial Teeth

[16] The ETA does not define the term "artificial teeth." The dictionary defines "artificial" as meaning (among other things) "**1** produced by human skill or effort rather than originating naturally…. **4** designating a device etc. that performs the

functions of an organ, limb, etc. (*artificial heart*; *artificial leg*)."[7] *Black's Law Dictionary* defines "artificial" as meaning (among other things) "Made or produced by a human or human intervention rather than by nature…."[8]

[17] Both parties agree that the dentures, bridges, crowns and implants that are the subject of these Appeals constituted artificial teeth for the purposes of section VI-II-11 of the ETA. The parties also agree that an artificial tooth, for the purposes of section VI-II-11, need not be an entire tooth, provided that the fabricated surface portion represents more than half the total surface of the tooth. In this regard, the CRA has stated:

> A supply of artificial teeth (e.g., dentures, crowns and bridges) is zero-rated. Generally, a crown that is fabricated to replace 50% or more of the anatomical surface of a natural tooth will qualify for zero-rating as an artificial tooth.[9]

Thus, it is my view that, when Dr. Axelrod reconstructed a tooth in a patient's mouth, if the reconstructed or fabricated portion of the tooth, measured by surface area, represented more than half the tooth, the resultant work product was an artificial tooth.

[18] When Dr. Axelrod provided a patient with a crown or bridge, he often needed to do preparatory work, which involved removing a portion of the tooth on which the crown would be placed or removing portions of the teeth that would be the supports for the bridge. As there was generally a period of days or weeks between the preparatory work and the installation of the crown or bridge, Dr. Axelrod, on the same day that he did the preparatory work, also fabricated and installed a temporary tooth or temporary teeth to cover and protect the tooth or teeth that had been prepped. I view these temporary teeth as being artificial teeth.

B. Single Supply or Multiple Supplies?

[19] In *City of Calgary*,[10] the Supreme Court of Canada applied the test enunciated in *O.A. Brown*,[11] in which Justice Rip (as he then was), stated that the

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7 Katherine Barber (editor), *Canadian Oxford Dictionary*, 2nd ed. (Don Mills: Oxford University Press, 2004), p. 74.

8 Bryan A. Garner (editor), *Black's Law Dictionary*, 9th ed. (St. Paul: West-Thomson Reuters, 2009), p. 128.

9 Canada Revenue Agency, *Medical and Assistive Devices*, GST/HST memorandum 4.2 (now sometimes shown as 4-2), January 2, 2002 (modified June 22, 2017), ¶18.

10 *City of Calgary v. The Queen*, [2012] 1 SCR 689, 2012 SCC 20, ¶32-36.

11 *O.A. Brown Ltd. v. The Queen*, [1995] GSTC 40 (TCC).

test to be applied in determining whether there is a single supply or multiple supplies is to determine "whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply."[12] The Supreme Court noted that Justice Rip went on to quote from the *Mercantile Contracts* case, which stated that "one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole."[13] As well, the Supreme Court observed that common sense should be generously applied when making the determination.[14]

[20] In *Hurd Dentistry*, Justice Campbell framed the *O.A. Brown* test in this manner:

> In summary, the facts must be analyzed to determine the nature of what has been supplied for consideration and whether, in substance and reality, the alleged separate supply is such an integral component of the overall supply that it cannot be omitted or separated and still retain value and be a useful item on its own. If the individual parts are so intertwined or interconnected to the overall arrangement that they cannot be realistically separated, then they will be considered to be part of a single whole rather than regarded as separate and distinct parts or entities.[15]

[21] In *Hurd Dentistry*, one of the issues considered by Justice Campbell was whether Dr. Hurd's professional corporation ("Hurd PC") provided a single supply of orthodontic treatment to its patients or provided multiple supplies of orthodontic appliances (primarily braces) and the accompanying orthodontic services. Justice Campbell concluded that Hurd PC made a single supply of orthodontic treatment to each patient for a single consideration or fee. In other words, both the appliance and the services were indispensable components of the single supply of orthodontic treatment to a patient.[16]

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12 *Ibid*, ¶22.

13 *Mercantile Contracts Ltd. v. Customs & Excise Commissioners*, File No. LON/88/786, U.K. (unreported).

14 *City of Calgary*, *supra* note 10, ¶37. See also *O.A. Brown*, *supra* note 11, ¶27-28, 31; and *Gin Max Enterprises Inc. v. The Queen*, 2007 TCC 223, ¶18. The approach taken in *O.A. Brown* and *Gin Max* was applied by Justice D'Arcy in *Jema International Travel Clinic Inc. v. The Queen*, 2011 TCC 462, ¶29-32.

15 *Dr. Brian Hurd Dentistry Professional Corporation v. The Queen*, 2017 TCC 142, ¶17.

16 *Ibid*, ¶29.

[22] As noted in the preceding paragraph, *Hurd Dentistry* considered the situation where an orthodontist provided a health care service to a patient, and, in analyzing the question of whether there was a single supply or two supplies, concluded that there was a single supply of orthodontic treatment. On the other hand, in *Davis Dentistry*, Justice Wong stated that the ETA makes it clear (and Parliamentary intent confirms) that a conventional orthodontic practice consists of exempt supplies of services and zero-rated supplies of appliances (such as braces), such that it is not necessary to apply the *O.A. Brown* test to determine whether there is a single supply or multiple supplies, as the ETA has directly addressed the tax status of both supplies.[17]

[23] In *Davis Dentistry*, Justice Wong made her comments in the context of a conventional orthodontic practice. The key issue in that case was whether Dr. Davis's supplies of orthodontic appliances (primarily braces) were exempt or zero-rated. Dr. Davis did not suggest that the provision of his orthodontic services to a patient was part of a single zero-rated supply of orthodontic services and appliances intertwined together. As the dental services that are the subject of Dr. Axelrod's Appeals related to prosthodontic, rather than orthodontic, procedures, and as Dr. Axelrod submits that both his dental services and the prostheses were part of a single zero-rated supply, *Davis Dentistry* may be distinguished. Therefore, I am of the view that I should follow the approach set out in *O.A. Brown* and *City of Calgary*, in order to determine whether there were multiple separate supplies or a single overall or composite supply.

[24] In *Hurd Dentistry*,[18] Justice Campbell briefly discussed *Haden v. McCarty*,[19] which considered the question of whether the transfer of dentures and other prosthetic devices from a dentist to his patients constituted a sale for the purposes of the *Alabama Sales Tax Act* (the "ASTA"), or was incidental to the professional treatment rendered by the dentist. The trial judge, who was quoted extensively by the Supreme Court of Alabama, held that the transfer of dentures and other prosthetic devices from a dentist to a patient was not a sale for the purposes of the ASTA.

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17 *Dr. Kevin L. Davis Dentistry Professional Corporation v. The Queen*, 2021 TCC 25, ¶41. The Crown appealed Justice Wong's decision to the Federal Court of Appeal, which heard that appeal on November 1, 2022, but which has not yet released its decision publicly.

18 *Hurd Dentistry*, *supra* note 15, ¶28.

19 *Haden (Commissioner of Revenue) v. McCarty*, (1963) 275 Ala 76, a decision of the Supreme Court of Alabama.

[25] In explaining his reasoning, the trial judge stated the following, as quoted by the Supreme Court of Alabama:

> When a dentist furnishes a prosthesis to his patient, this is an inseparable and indivisible part and parcel of the professional service of dentistry, which concerns itself with diagnosis, treatment, restoration, and prevention.… A patient goes to a dentist seeking treatment and professional care and attention, and that is what he gets, and the amount paid the dentist by the patient is the dentist's fee for professional services.
>
> The fashioning and furnishing of dentures, crowns, inlays, bridges, and similar medical prostetic [sic] devices, by a dentist, incidental to his professional care and treatment of his patient, is not a retail sale of tangible personal property…. Skilled professional service is that which is required of the dentist, furnished by him to the patient, charged for by the dentist, and paid for by the patient.[20]

[26] On appeal, the Supreme Court of Alabama upheld the trial judge. In its reasons, the Supreme Court made several comments that, while not specifically applicable to the issues raised in Dr. Axelrod's Appeals, do provide some limited guidance. The Supreme Court stated:

> We feel, as did the trial court that the transfer of dentures and other prosthetic devices from a dentist to his patient is not a sale within the meaning of the Act. It is… a mere incident to the professional treatment rendered by dentists….[21]
>
> … dentistry is a branch of the science of the healing arts which relates strictly to the diagnosis, treatment, restoration and prevention of diseases and abnormalities of the oral cavity and related structures. Dentists treat diseases, being specially trained in oral pathology. We do not feel that restorative dentistry can be placed in a class by itself, that is separated from diagnosis and dental treatment…. A dentist does more than prescribe and fit dentures into the mouth of a patient. The prosthesis is merely the end result of what has taken much time to develop…. The denture itself could not be separated from the treatment, examination, and other things leading up to fitting it in one's mouth….
>
> We, therefore, entertain the view that a transfer of dentures or other prosthesis can not be distinguished or separated from the diagnosis and treatment rendered a dental patient.[22]

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20 *Ibid*, p. 78-79.

21 *Ibid*, p. 78.

22 *Ibid*, p. 79.

[27] Although *Haden v. McCarty* is not on all fours with these Appeals, some of the observations made by the trial judge and the appellate judges concerning the relationship between a dentist's professional services and a prosthesis provided by the dentist to a patient have some application to these Appeals. As the trial judge noted, providing a prosthesis to a patient is typically "an inseparable and indivisible part and parcel of the professional service of dentistry."[23] As the appellate judges observed, the provision of dentures and other prosthetic devices by a dentist to a patient is generally "a mere incident to the professional treatment rendered by dentists."[24] Thus, in my view, the provision of a prosthesis by a dentist to his or her patient is integral and incidental to the professional dental services provided to the patient in designing, prescribing, fitting, adjusting and installing the prosthesis.

[28] Concerning the above-noted need for "a generous application of common sense,"[25] I turn to the *Albert* case, which, in an income tax context, considered whether a dental imaging and milling machine, described as a CEREC 3D and purchased by Dr. Albert (a dentist), qualified for an investment tax credit under the *Income Tax Act* (the "ITA").[26] The machine in question was a precision instrument, used for dental restoration, to make ceramic fillings and crowns. In deciding that issue, Justice Bédard considered two questions:

a) Was a filling or crown provided by Dr. Albert to a patient actually the object of a contract of sale?

b) Was the filling or crown, instead, provided by Dr. Albert to his patient as part of a contract for services, i.e., in conjunction with a request for dental services by a patient?[27]

Justice Bédard determined that Dr. Albert had only one contract with each of his patients. He set out his reasoning as follows:

> The fact that the Appellant's [i.e., Dr. Albert's] patients are billed separately for the materials and the work for placing these materials does not necessarily lead to the conclusion that the parties actually entered into two separate contracts: a contract of sale and a contract for services. In my opinion, the Appellant and

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23 *Ibid*, p. 78.

24 *Ibid*, p. 78.

25 *Gin Max, supra* note 14, ¶18, as quoted in *City of Calgary*, *supra* note 10, ¶37.

26 *Income Tax Act*, RSC 1985, c.1 (5th Supplement), as amended.

27 See *Albert v. The Queen*, 2009 TCC 16, ¶15.

> [each of] his patients entered into only one contract. The separate billing for materials and placement services is aimed at masking the true contractual relationship between the parties and especially to meet the needs of insurers of patients with respect to separate billing. It is hard to imagine a patient wanting to buy a crown without the placement services, especially given that a dentist is the only individual capable and authorized, by virtue of Quebec law, to place the crown. In other words, the crown in itself cannot be a consumer good for a dentist's patient. The purchase of a crown without the purchase of the service to have it placed by a dentist simply does not make sense.[28]

Thus, the separate billing by Dr. Albert for materials (i.e., the ceramic fillings or crowns) and dental work (i.e., the placement services) did not mean that there were necessarily two separate contracts between Dr. Albert and his patient.

[29] Insofar as Dr. Axelrod's billings were concerned, he explained that the Royal College of Dental Surgeons of Ontario, which is the dental licensing body in that province, has promulgated regulations that require a segregation of the laboratory charges, without a mark-up, "from the conglomerate of all the other fees" charged by the particular dentist.[29] Dr. Axelrod also stated that the applicable regulations provided that he and other dentists could "only bill at the completion of a series of things involved in a single item."[30] This comment supports the view that the provision of a prosthesis and the provision of related dental services are elements of a single supply.

[30] Although *Albert* was decided in the context of the ITA, Justice Bédard's reasoning has merit here. It is difficult to imagine that a patient of Dr. Axelrod would have wanted to acquire dentures, a bridge, a crown or an implant without Dr. Axelrod having first done all of the preliminary work necessary to ensure that the particular prosthesis would fit and function properly in the patient's mouth, and without Dr. Axelrod actually installing the prosthesis in the patient's mouth. Similarly, all of the dental services rendered by Dr. Axelrod would have made no sense if they had not related to the prosthesis desired by the patient. To use the language of *O.A. Brown*, both the supply of the prosthesis and the supply of the dental services were integral parts or components of the overall supply. They were interconnected, interdependent and intertwined. It is even more evident that all aspects of Dr. Axelrod's reconstruction, in a patient's mouth, of a significant

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28 *Ibid*, ¶16.

29 Transcript, vol. 1, p. 33, lines 6-16; and p. 34, lines 17-20.

30 Transcript, vol. 1, p. 76, lines 16-19; and p. 77, lines 15-16.

portion of a tooth, using appropriate filling or restorative materials, were integral components of a composite supply.

[31] Accordingly, I have concluded that the provision by Dr. Axelrod to a patient of dentures, a crown, a bridge, a dental implant or a reconstructed tooth was a single supply of both the artificial tooth or teeth and the professional dental services of designing, prescribing, fitting, adjusting and installing the artificial tooth or teeth, or reconstructing a significant portion of a tooth in a patient's mouth, as the case may have been.

C. Characterization of the Single Supply

[32] Having determined that Dr. Axelrod made a single supply (rather than multiple supplies) to each of his patients, I must determine whether those single supplies are best categorized as a provision of artificial teeth or a provision of dental services. The general principle is that, where there is a single supply of multiple elements, the supply "takes on the status of the dominant element of the supply for GST/HST purposes."[31] To make such a determination, "the factual situation must be approached with a view to understanding the substance and reality of the underlying transactions."[32]

[33] In its recent decision in *Canadian Imperial Bank of Commerce*,[33] the Federal Court of Appeal considered the test for determining what is the predominant element of a single multi-element compound or composite supply. Writing for the majority in *CIBC*, Justice Webb reviewed the test applied in the *Global Cash* case[34] and the *Great-West Life* case,[35] after which he stated:

> 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?….

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31 David M. Sherman, *Canada GST Service* (Toronto: Thomson Reuters Canada Limited), binder C2, p.123-1043 (dated 2014-04-15).

32 *Winnipeg Livestock Sales Ltd. v. The Queen*, [1998] GSTC 87, ¶12.

33 *Canadian Imperial Bank of Commerce v. The Queen*, 2021 FCA 96 ("*CIBC*").

34 *Global Cash Access (Canada) Inc. v. The Queen*, 2013 FCA 269.

35 *Great-West Life Assurance Company v. The Queen*, 2016 FCA 316.

> 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?...[36]

[34] Although Justice Stratas dissented in *CIBC*, based on my reading of his reasons and Justice Webb's reasons, it appears that Justice Stratas' view of the applicable test *per se* is similar to Justice Webb's view of the test. In this regard, Justice Stratas stated:

> 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…. In other words, in a practical, commercial sense, what was the taxpayer really getting out of that part of the deal?...
>
> 76. … The predominant element is the element that gives the supply commercial efficacy or, in other words, the reason for the consideration….[37]

[35] Thus, it is necessary to determine what was supplied by Dr. Axelrod to his patients for the consideration (i.e., the fees) that they paid to him, or, in other words, what was the reason for the payment of those fees?

(1) Dentures, Bridges and Crowns

(a) General Description of Dental Procedures

[36] During the hearing, Dr. Axelrod explained the procedures that he followed when providing services to a patient who was in need of full or partial dentures, a bridge or a crown. In each such situation, Dr. Axelrod engaged the services of an external laboratory (in Dr. Axelrod's testimony, often called a "lab") to fabricate the particular prosthesis, in accordance with written instructions provided by Dr. Axelrod to the laboratory. In due course, perhaps after communication back and

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36 *CIBC*, *supra* note 33, ¶34, 38-39.

37 *Ibid*, ¶72 & 76. The ellipsis in paragraph 72 designates the names and citations of the two cases cited by Justice Stratas as authority for the proposition in the sentence preceding the ellipsis. Those cases are *Global Cash* and *Great-West Life*, which are the same two cases that were relied on by Justice Webb.

forth between Dr. Axelrod and the laboratory, the laboratory sent the fabricated prosthesis to Dr. Axelrod for installation in the patient's mouth. The details of this entire process, as explained by Dr. Axelrod, are summarized below:

a) Dr. Axelrod performed preparatory work to enable him to give written instructions (sometimes referred to as a prescription) to the lab, which then fabricated the dentures, bridge or crown.[38] That preparatory work included taking impressions of the patient's existing teeth, sometimes taking X-rays of the patient's teeth, and sometimes making working models of the patient's existing teeth to be sent to the lab.[39]

b) In the case of dentures, after the lab had fabricated the dentures, it sent them to Dr. Axelrod for his review. He marked the dentures to indicate any reshaping, extensions or other adjustments that may have been required, and he then sent the dentures back to the lab for those adjustments, which, in some cases, included the movement of some of the teeth in the particular denture.[40]

c) In many situations relating to dentures, the lab often provided Dr. Axelrod with a wax model of the proposed dentures (called a "wax-up"), after which the particular patient came to Dr. Axelrod's office to try the wax-up. Typically, Dr. Axelrod proposed modifications to the wax-up and then sent it back to the lab for those changes to be made. When Dr. Axelrod was finally satisfied with the wax-up and the patient felt that the fit, bite and aesthetic quality were good, the lab used the wax-up to prepare acrylic dentures.[41]

d) When the acrylic dentures were received, Dr. Axelrod again met with the patient to determine whether the dentures fit properly. Generally, adjustments were required at this stage because the acrylic dentures often did not fit exactly as anticipated.[42] In Dr. Axelrod's words, "It's an inexact science. There's a lot of adjustment. Almost always, there's an adjustment in the bite because the [occlusion] between the upper and lower jaw doesn't work properly."[43] Even when Dr. Axelrod and the patient thought that they

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38 Transcript, vol. 1, p. 30, lines 15-18; p. 35, lines 24-26; and p. 42, lines 3-14.

39 Transcript, vol. 1, p. 35, lines 1-19; p. 43, lines 4-5; and p. 81, lines 13-17.

40 Transcript, vol. 1, p. 35, line 27 to p. 36, line 4.

41 Transcript, vol. 1, p. 36, lines 5-20.

42 Transcript, vol. 1, p. 36, lines 21-25.

43 Transcript, vol. 1, p. 36, line 26 to p. 37, line 1.

had the right fit with the wax-up, the acrylic dentures often required further adjustments.[44]

e) Generally, by this stage the process was complete, but, on occasion, the acrylic dentures were sent back to the lab for "a final finishing on things that [Dr. Axelrod saw] that [were] problematic with it."[45]

f) As labs "have a tendency to put acrylic everywhere," Dr. Axelrod was sometimes required to remove excess acrylic from a denture in order to put it in the patient's mouth.[46]

g) Sometimes (particularly in the case of a smaller prosthesis, such as a partial denture, a bridge or a crown), it was necessary to adjust and reshape the patient's natural teeth so that they would work well with the particular prosthesis.[47]

h) Sometimes, the prosthesis needed to be adjusted in terms of appearance, because the artificial teeth were too long or too short.[48]

i) A considerable amount of bite adjustment was typically required.[49]

j) Sometimes, Dr. Axelrod was required to add material (generally, a cold-cure acrylic) to a denture, in order to bulk out certain areas, so that it would fit against the gum tissue better. In other words, Dr. Axelrod was sometimes required to reconstruct a portion of the denture while the patient was in Dr. Axelrod's office.[50]

k) Sometimes, Dr. Axelrod found that the bite was too short in some areas, such that he was required to add acrylic to the surface of the artificial teeth.[51]

l) On occasion, a patient's natural teeth required adjustment, typically by adding a filling material or a restorative material to the natural teeth.[52]

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44 Transcript, vol. 1, p. 37, lines 1-3.

45 Transcript, vol. 1, p. 37, lines 4-11.

46 Transcript, vol. 1, p. 37, lines 18–20.

47 Transcript, vol. 1, p. 37, lines 21-23.

48 Transcript, vol. 1, p. 37, lines 24-27.

49 Transcript, vol. 1, p. 37, lines 1-3.

50 Transcript, vol. 1, p. 38, lines 4-12.

51 Transcript, vol. 1, p. 38, line 27 to p. 39, line 11.

[37] A review of the above procedures undertaken by Dr. Axelrod in respect of a prosthesis fabricated in a laboratory shows that his professional services were critical to the fabrication of the prosthesis. It was Dr. Axelrod who determined the nature of the required prosthesis, who designed the prosthesis (often by taking impressions and sometimes x-rays, and by making models), and who instructed the laboratory that had been engaged to fabricate the prosthesis. After the prosthesis or a wax-up had been fabricated by the laboratory and sent to Dr. Axelrod, he needed to ascertain whether the prosthesis or wax-up would fit and function properly in the patient's mouth. In many situations, the prosthesis required adjustments, which often meant returning the prosthesis to the laboratory, although Dr. Axelrod was sometimes able to make the adjustments himself. As well, in the case of a bridge or a crown, after all fitting and adjusting procedures had been completed, Dr. Axelrod cemented the bridge or crown in place or otherwise installed it.

[38] In many situations where a patient needed a bridge or a crown, after Dr. Axelrod had done the requisite preparatory work and had sent instructions to the laboratory for fabrication of the permanent bridge or crown, it was necessary for Dr. Axelrod to fabricate and install a temporary bridge or crown in the patient's mouth. During his testimony, when asked about the cost of the material used to construct a temporary bridge or crown, Dr. Axelrod stated the following, which not only answered the question put to him, but also explained the work that he did in respect of a temporary crown:

> The [cost of the] material itself would be minimal. It's really the time effectively involved in constructing that.
>
> From taking the initial impression of the original – the way I usually do it is I take an impression of the teeth as they stand. I'll modify that impression in the negative effectively to create a mould for the final restoration.
>
> Once I've done all the preparatory work to the tooth – if we're talking about a crown – I will then put that original impression with the modifications in it to act as a mould with some liquid or acrylic material inside of it and reseat that into the mouth and that will harden and form the shape essentially of a final crown – of a final temporary crown – remove that from the mouth, shape and shape the edges, do everything I have to, do that, polish it, put it back in the mouth, check the bite. If that's okay, maybe I have to adjust it. Maybe not. And then what I'll do is I'll cement that in place. That's what's involved in, you know, forming a temporary crown.

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52 Transcript, vol. 1, p. 38, lines 21-24.

> The actual cost of the material itself, the actual acrylic material, is minimal.[53]

[39] As explained by Dr. Axelrod in the above statement, a fair amount of work was required by him in fabricating a temporary crown (and presumably a temporary bridge, as well), while the cost of the material in the crown or bridge was minimal.

(b) Description of Specific Dental Procedures

[40] As representative illustrations of the process whereby Dr. Axelrod provided lab-fabricated prostheses to patients,[54] Dr. Axelrod entered into evidence copies of documents pertaining to two of his patients, to whom he had provided dental services and one or more prostheses. The surnames of those patients were redacted. For the purposes of these Reasons, I will refer to them as "Patient A" and "Patient J" (referencing the first letter of each patient's first name).[55]

[41] Before Dr. Axelrod began to treat Patient A, Dr. Axelrod provided Patient A with a written estimate of the costs (entitled "Financial Arrangement") that would be incurred by Patient A in respect of the treatment that had been proposed by Dr. Axelrod.[56] That estimate related to upper and lower dentures, with estimated total fees in the amount of $3,350. The document stated that estimated material and laboratory costs were included in the fee.

[42] Dr. Axelrod also provided the Court with a copy of an Account Statement in respect of Patient A.[57] A reproduction of the relevant entries in the Account Statement are as follows:

Table 3

Description	Charge
Dentures W/Retention Man[58]	1280.00

53 Transcript, vol. 1, p. 90, lines 2-23.
54 Transcript, vol. 1, p. 50, line 26 to p. 51, line 15.
55 The documents pertaining to Patient A and Patient J are behind tabs 7 and 8 respectively in Exhibit AR-1.
56 Financial Arrangement, dated July 31, 2013, Exhibit AR-1, tab 7, p. 24.
57 Exhibit AR-1, tab 7, p. 25.

Partial Maxillary Denture	518.00
Laboratory Charge	1221.00

Although not shown on the Account Statement, the total of the three charges was $3,019 (i.e., $1,280 + $518 + $1,221), and the total of the first two charges (i.e., $1,280 + $518), which presumably related to Dr. Axelrod's dental services, was $1,798.

[43] While the estimated total to be paid by Patient A, as shown in the Financial Arrangement, was $3,350, the amount actually charged was slightly less, i.e., $3,019. Of this amount, $1,798 seems to have related to Dr. Axelrod's dental services, while $1,221 related to the amount paid by Dr. Axelrod to the laboratory for the dentures. Thus, the fees pertaining to the dental services represented approximately 60% (i.e., $1,798 ÷ $3,019 × 100) of the total amount charged, while the laboratory charge represented approximately 40% (i.e., $1,221 ÷ $3,019 × 100) of the total amount. Hence, insofar as the consideration paid by Patient A to Dr. Axelrod was concerned, the fee for the dental services was more significant than the laboratory charge.

[44] The proposed treatment plan for Patient J was summarized in a document entitled "Financial Arrangement."[59] The treatment plan proposed by Dr. Axelrod to Patient J included repairing and/or replacing two upper bridges, with the upper front bridge being replaced with a three-unit implant bridge and crowns, and the upper left bridge being removed, repaired and re-cemented. The treatment plan also called for Dr. Axelrod to remove decay, rebuild damaged teeth and place crowns for strength.

[45] The above-mentioned document provided to Patient J contained a table describing the various dental procedures, the teeth that were the subject of those procedures and the estimated fees.[60] For the purposes of these Reasons, it is sufficient to reproduce only the description of the dental procedures and the fees, as follows:

Table 4

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58 I understand that "Man" is an abbreviation for "Mandibular". See Transcript, vol. 1, p. 53, lines 23-24.

59 Exhibit AR-1, tab 8, p. 26.

60 *Ibid*.

Dental Procedure	Fees
Root Canal	427.00
Tooth Colored Filling with Post & Pins	340.00
Tooth Color Filling	311.00
[Four] (4) Crowns	3924.00
[Three] (3) Implant Supported Bridge	2902.00
Removal, Sectioning & Re cementation of Existing Bridges	463.00
[Two] (2) Implants	4566.00
Temporary Bridges & Crowns	0.00
10% Discount on Professional Fees Less:	-1293.30
Estimated Total:	$11639.70

Under the above table in the Financial Arrangement, there is a note indicating that estimated laboratory and materials charges were included in the estimated total.

[46] Also included in the Financial Arrangement document is a two-page appointment schedule, which summarized the things to be done during the three appointments that Dr. Axelrod initially scheduled with Patient J. The key elements of that schedule are set out below:

> **[First] Appointment** [length: 2.5 hours; approximate fee: $6,000]
>
> Upper Front Bridge
> The entire bridge will be removed. After the bridge is removed, Dr. Axelrod will complete a root canal on the 1.3 (upper front tooth), rebuild the tooth and place 2 implants in the space beside…. Your existing bridge will be temporar[il]y cemented into place.
>
> Upper Left Bridge
> Dr. Axelrod will be removing the bridge, tightening the loose implant abutment and re cementing the existing bridge.
>
> **[Second] Appointment** [length: 2 hours; approximate fee: nil]
>
> Upper Front Bridge

> Dr. Axelrod will remove the temporary bridge. The implants will be exposed to allow placement of the abutments. An impression will be taken of the abutments and surrounding area and sent to the laboratory, where a permanent bridge will be fabricated. A temporary bridge (teeth) will be placed.
>
> Crowns
> After the four teeth are prepared, an impression will be taken of the teeth and surrounding area and sent to the laboratory, where permanent crowns will be fabricated. Four Temporary [*sic*] crowns will be placed.
>
> **[Third] Appointment & Final Appointment** [length: 1.25 hours; approximate fee: $5,640]
>
> The Temporary Bridge & Crowns will be removed and the Lab Fabricated Bridge and Crowns will be permanently cemented[.][61]

[47] Dr. Axelrod also provided the Account Statement for the appointment that he had with Patient J on October 16, 2013.[62] That Account Statement pertained to the final billing for the four crowns and the bridge.[63] The services related to the root canal, the post and the build-up of certain other teeth were billed in a previous Account Statement, which was not adduced into evidence.[64] The particulars of the Account Statement dated October 16, 2013 are set out below:

Table 5

Description	Charge
Porcelain Fused to Metal Crown….	612.90
Porcelain Fused to Metal Crown….	612.90
Porcelain Fused to Metal Crown….	612.90
Porcelain Fused to Metal Crown….	612.90
Retainers Porcelain/Ceramic….	740.70
Bridge – Artificial/Pontic….	320.40
Retainers Porcelain/Ceramic….	740.70
Laboratory Charge….	1827.00

61 Exhibit AR-1, tab 8, p. 27-28.
62 Exhibit AR-1, tab 8, p. 29-30.
63 Transcript, vol. 1, p. 62, line 23 to p. 63, line 23.
64 Transcript, vol. 1, p. 63, line 24 to p. 64, line 9.

Although not shown on the Account Statement, the total of the charges for the four crowns, the two retainers, the bridge and the laboratory was $6,080.40 ($612.90 + $612.90 +$612.90 + $612.90 + $740.70 + $320.40 + $740.70 + $1,827.00). The total of the first seven items in the above table, which appear to relate to Dr. Axelrod's dental services, was $4,253.40.

[48] Given that the first of the two Account Statements in respect of Patient J was not put into evidence, it is difficult to do the same type of proportional analysis that was conducted above in respect of Patient A. If we simply do a proportional analysis of the Account Statement dated October 16, 2013, the fees paid by Patient J for Dr. Axelrod's dental services represented approximately 70% (i.e., $4,253.40 ÷ $6,080.40 × 100) of the total amount billed in that Account Statement. The laboratory charge billed in the Account Statement represented approximately 30% (i.e., $1,827.00 ÷ $6,080.40 × 100) of the total amount billed in that Account Statement.

(2) Partial Reconstructions

[49] As a representative illustration of the process whereby he reconstructed a significant portion of a patient's tooth in the patient's mouth, Dr. Axelrod entered into evidence copies of a Treatment Plan Report dated March 25, 2014 and an Account Statement dated April 29, 2014, in respect of a patient whose surname was redacted and to whom I will refer as "Patient D" (referencing the first letter of that patient's first name).[65]

[50] Dr. Axelrod explained that the Treatment Plan Report in respect of Patient D was prepared for internal use and was not shared with Patient D.[66] While Dr. Axelrod and a dental hygienist working in his office provided various dental and hygienic services to Patient D, the dental services that are relevant for the purposes of these Appeals are described as follows in the Treatment Plan Report:[67]

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65 Exhibit AR-1, tab 9.

66 Transcript, vol. 1, p. 69, lines 1-4.

67 Exhibit AR-1, tab 9, p. 33. The three numbers (i.e., 4, 2 and 3) shown in the "Item" column in Table 6 were handwritten by Dr. Axelrod on both the Treatment Plan Report and the Account Statement. The procedure designated by Dr. Axelrod on those two documents as item 1 was described by him as "a relatively simple filling," representing "maybe 15 per cent of the tooth [that] was rebuilt" (see Transcript, vol. 1, p. 69, lines 5-7; and p. 71, line

Table 6

Item	Description	Fee
4	Resto, Tooth Coloured. Perm Post, Molar. Bonded 3 surf	225.00
2	Resto, Tooth Coloured, Perm Post, Molar, Bonded 4 surf	312.00
3	Pins, Retentive per restoration – Four Pins	59.00

The Treatment Plan Report and Account Statement for Patient D also contemplated various procedures that Dr. Axelrod described as general dentistry, routine dentistry and general maintenance of Patient D's natural teeth, i.e., typical fillings, rebuilding less than 50% of a tooth's surface, and dental hygiene. Those items from the Treatment Plan Report are not reproduced in Table 6.[68]

[51] The Account Statement for Patient D shows the corresponding entries for the three items set out above:[69]

Table 7

Item	Description	Charge
2	Tooth Coloured Filling	280.80
3	4 Retentive Pins	53.10
4	Tooth Coloured Filling	280.80

[52] In explaining why there was not a laboratory charge on the Account Statement, Dr. Axelrod stated:

> There wasn't one [i.e., a laboratory charge]. This was all … at this point, all we had accomplished was to rebuild some broken-down teeth and construct … functional teeth for him on the lowers and do the cleaning. There was no external lab.
>
> All of the lab, effectively, in constructing the teeth was in-house. Me doing it, … with my hands.[70]

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16); therefore, I have not included item 1 in Table 6. I presume that, in Table 6, "Resto" means "restoration" and "surf" means "surface".

68 Transcript, vol. 1, p. 71, lines 9-22.

69 Exhibit AR-1, tab 9, p. 31. The Account Statement indicated that a 10% discount had been applied.

[53] Dr. Axelrod described the restoration designated as item 2 as "a full build-up of a tooth out of direct restorative material."[71] In a handwritten note on the Account Statement, Dr. Axelrod (or someone else in his office) wrote, "Note that the 3 surface 'tooth coloured filling' for tooth 36 on the treatment plan was treated with a 4 surface restoration," which was labelled with a circled 4 on both the Account Statement and the Treatment Plan Report.[72]

[54] Dr. Axelrod explained that the work done by him, as described in items 2, 3 and 4 in Tables 6 and 7, was part of what he described as "Filling Reconstruction" in Table 1 above. It is my understanding that the reconstructed teeth referenced by items 2, 3 and 4 were major reconstructions, involving a replacement of more than 50% of the anatomical surface of the teeth in question, such that those teeth may be considered as artificial teeth for the purposes of section VI-II-11 of the ETA. As well, the dental services provided by Dr. Axelrod in reconstructing those teeth came within the phrase "consultative, diagnostic, treatment or other health care service" for the purposes of section V-II-5 of the ETA.

(3) Application

[55] As explained in *CIBC*, to determine the predominant element of the single multi-element supply made by Dr. Axelrod to a patient, it is necessary to identify all of the elements of the supply and then determine which element gave the supply its commercial efficacy, or in other words which element caused the payment of the consideration.[73]

[56] In broad terms, the various elements of a typical prosthodontic supply by Dr. Axelrod were:

a) the diagnosis of the patient's dental need (such as a damaged or missing tooth or teeth), the formulation of a treatment plan to address that need, the conceptualization and design of the requisite prosthesis, the taking of measurements and making of impressions, prepping the tooth or teeth to which the prosthesis will be affixed, and the provision of written instructions (i.e., a prescription) to a laboratory;

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70 Transcript, vol. 1, p. 70, line 23 to p.71, line 3.
71 Transcript, vol. 1, p. 71, lines 24-25.
72 Exhibit AR-1, tab 9.
73 *CIBC*, *supra* note 33, ¶34, 38-39, 72 & 76.

b) the fabrication by the laboratory of the prosthesis and the delivery of the prosthesis to Dr. Axelrod;

c) if necessary, while awaiting the fabrication of the permanent prosthesis, fabricating (in Dr. Axelrod's office) a temporary prosthesis to cover and protect any natural teeth that had been prepped; and

d) making modifications to the prosthesis that are readily apparent (such as the removal of excess acrylic), checking the prosthesis to ensure a proper fit and bite, adjusting the prosthesis (if required), returning the prosthesis to the laboratory for more extensive modifications (if necessary), adjusting neighbouring natural teeth (if required), installing the prosthesis, and (if applicable) fixing it in place.[74]

[57] Based on the evidence, I am of the view that, in the context of these Appeals, the predominant element of the supply made by Dr. Axelrod to a patient was his professional dental services, and not the prosthesis *per se*. My reasons for coming to this conclusion are based on the following aspects of the evidence:

a) The procedures described in subparagraphs a), c) and d) in the preceding paragraph are professional dental services provided by Dr. Axelrod, while only subparagraph b) relates to the fabrication of the permanent prosthesis itself.

b) While subparagraph c) in the preceding paragraph relates to Dr. Axelrod's fabrication of a temporary prosthesis, his professional dental services in designing, fabricating, fitting, adjusting and installing the temporary prosthesis, rather than the temporary prosthesis itself (which, by its very nature, was only temporary), were the predominant aspects of that portion of the supply.

c) Dr. Axelrod explained that the cost of the acrylic material used to fabricate a temporary crown or bridge was minimal. He indicated that the significant aspect of the cost of a temporary crown or bridge is "really the time effectively involved in constructing that."[75]

d) The Financial Arrangement documents provided by Dr. Axelrod to his patients focused on the treatment (i.e., dental procedures) that he would be

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74 See the four categories listed in the second column of Table 2.

75 Transcript, vol. 1, p. 90, lines 2-23. See also paragraph 38 above.

providing. In the case of Patient J, the Financial Arrangement document specified the anticipated lengths (2.5 hours, 2 hours and 1.25 hours respectively) of the three appointments that were initially contemplated. The Financial Arrangement documents provided a total estimated fee, with a notation indicating that the laboratory and material charges were included in the fee (rather than being specified separately).

e) As noted above, the cost of the professional dental services provided by Dr. Axelrod to Patient A was approximately 60% of the total cost of the treatment, while the laboratory charge represented approximately 40% of the total cost. The cost of the dental services provided by Dr. Axelrod to Patient J (to the extent that there is available evidence, bearing in mind that only one of the two Account Statements for Patient J was put into evidence) represented approximately 70% of the total cost, while the laboratory charge represented approximately 30% of the total cost.[76] With respect to Patient D, there was no laboratory charge, and the cost of materials (i.e., the white filling material or other restorative material)[77] was minimal. Therefore, the amount paid by Patient D related almost entirely to the professional services provided by Dr. Axelrod.

f) During his testimony, in describing what was involved in providing a prosthesis to a patient, Dr. Axelrod often spoke in terms of what he did for, or the treatment that was provided to, the patient. Here are some examples:

   i. In describing the Financial Arrangement document for Patient A, Dr. Axelrod explained that the purpose of the document was to enable Patient A to understand "what it is that they're going to have done and what their obligations are."[78] Dr. Axelrod also said that the Financial Arrangement document was prepared by his office manager/treatment coordinator to discuss "the case of what has to be done to them [i.e., to

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[76] See *Albert*, *supra* note 27, ¶17, which suggests, albeit in a different context, that the relative cost of two elements of a particular supply may be germane in determining which of those two elements is predominant.

[77] Dr. Axelrod explained that the terms "amalgam composite resin material," "white filling material," "direct filling material," "direct restorative material" and "composite resin" are different terms for describing the same thing, which is a urethane-based, very thick paste material, with a sand silica component, which is almost semi-solid, and which may be set by application of a special blue light. See Transcript, vol. 1, p. 74, lines 2-25.

[78] Transcript, vol. 1, p. 49, lines 17-18.

Patient A]."[79] When asked what Patient A received, Dr. Axelrod said that "he would have received upper and lower … removable partial dentures and that was the *service* provided for them…."[80] [*Emphasis added.*]

Dr. Axelrod explained that it is typically easier to obtain a stable retentive fit with an upper denture (i.e., a maxillary denture) than with a lower denture (i.e., a mandibular denture), because the upper denture typically covers the whole palette, which provides suction and thus retentive stability, whereas the tongue precludes a similar design for the lower denture. In the case of Patient A, there was a metal bar sitting above his lower gum and supported by two implants, to which Dr. Axelrod hoped to attach, by means of a clip, the lower denture to increase the stability.[81] However, at the insertion appointment, Dr. Axelrod decided that it would be better not to clip the lower denture to the bar, which required him to reconstruct and rebuild, at chair-side, the "whole portion of the lower denture to fit the bar without the clip."[82]

Thus, based on my understanding of the treatment provided to Patient A, it seems that the dental services provided by Dr. Axelrod, rather than the dentures themselves, were the more significant aspect of the treatment.

ii. In the case of Patient J, although Dr. Axelrod had initially hoped to complete the treatment in three appointments,[83] ultimately significantly more work was required, as he explained:

> A. …. It turned out that this did take eight appointments. It was a lot more work than when it – it required going back and forth to the lab and various other things that had to be done in order to complete the treatment as expected….
>
> Q. … at a high level, what did [Patient J] receive from you?

79 Transcript, vol. 1, p. 49, line 28 to p.50, line 1.

80 Transcript, vol. 1, p. 50, lines 22-25.

81 Transcript vol. 1, p. 52, line 2 to p. 53, line 7.

82 Transcript, vol.1, p. 53, lines 8-13.

83 Transcript, vol. 1, p. 54, line 25 to p. 55, line 2.

> A. Oh, boy. She received a lot of – a lot of work. She received a lot of work. She received temporary bridges. She received two implants in this particular time that we're covering with this. She received individual crowns. She received restorative material build-up of teeth. She received a root canal, which we understand is part of a, you know, a normal dentistry, as we would say. And that was it, I think.[84]

While Patient J received several prostheses, Dr. Axelrod, in describing her treatment, emphasized the amount of work that he performed.

iii. In the case of a partial reconstruction of a tooth, nothing was fabricated in a laboratory. Rather, as illustrated by the case of Patient D, Dr. Axelrod did all of the reconstruction himself, generally using white filling material, while working chair-side. Thus, the dental services provided by Dr. Axelrod were clearly the significant aspect of the partial reconstruction treatment.

iv. Dr. Axelrod stated that, when he received a prosthesis from the laboratory, it was typically accompanied by an invoice from the laboratory. However, Dr. Axelrod could not render his own invoice to his patient until his services had been completed.[85] More particularly, the regulations governing dentists indicated that they "can only bill for a completed service."[86] In applying the approach enunciated in *CIBC*, it seems to me that it was the completion of all of the dental services provided by Dr. Axelrod that resulted in the payment of his fee.

[58] The above overview of the evidence supports my conclusion that the predominant element of the respective supplies made by Dr. Axelrod to his prosthodontic patients was his professional dental services, and not the prostheses.

D. Paramountcy

[59] As noted above, the Respondent is of the view that the supply by Dr. Axelrod of artificial teeth came within section VI-II-11 of the ETA. However, the Respondent takes the position that the supply by Dr. Axelrod of his services in respect of artificial teeth also came within section V-II-5 of the ETA, as the

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84 Transcript, vol. 1, p. 55, lines 3-7 & 15-24.

85 Transcript, vol. 1, p. 77, lines 4-16.

86 Transcript, vol. 1, p. 76, lines 18-19.

services provided by Dr. Axelrod to the patients in question constituted "consultative, diagnostic, treatment or other health care service[s] … rendered by a medical practitioner to an individual."[87] According to the Respondent, where a supply of artificial teeth comes within both Schedule V and Schedule VI, it is necessary for there to be a tiebreaker rule to provide that one schedule is paramount to the other. The Respondent submits that the applicable paramountcy rule derives from the following statement by Justice Kempo in *Buccal Services*:[88]

> In my opinion, where the service is clearly included in Schedule V, the exempt status of that service would govern and take precedence over the zero-rating provisions. However, if any medical or reconstructive dental services are to be found in Schedule VI that are outside of the exempting provisions, then its zero-rating provisions would apply.[89]

[60] While the first sentence quoted above seems to support the paramountcy argument put forward by the Respondent, the second sentence quoted above seems to indicate that the zero-rating provisions of Schedule VI are ousted by the exempting provisions of Schedule V only where there is a clear and actual overlap between the exempting provisions and the zero-rating provisions.

[61] Dr. Axelrod takes the position that there is no need for a paramountcy rule or tiebreaker rule, as, in his view, his supplies did not come within both section V-II-5 and section VI-II-11 of the ETA. Rather, all of his supplies relating to dentures, bridges, crowns, implants and filling reconstructions related only to zero-rated artificial teeth, and thus came within only section VI-II-11 of the ETA.[90] However, if I find otherwise, Dr. Axelrod submits that,[91] as Justice Wong stated in *Davis Dentistry*, there does not appear to be "a legislative basis for finding that Schedule V takes precedence over Schedule VI where there is an apparent or potential conflict between the two."[92]

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87 As noted above, paragraph 1 of Part II of Schedule V to the ETA defines "medical practitioner" in such a manner as to include a dentist.

88 Transcript, vol. 2, p. 147, lines 3-16; p. 150, line 27 to p. 151, line 8; p. 153, line 25 to p. 154, line 1; and p. 154, lines 10-13.

89 *Buccal Services Ltd. v. The Queen*, [1994] GSTC 70 (TCC), ¶14. See also *CIBC World Markets Inc. v. The Queen*, 2018 TCC 103, ¶49.

90 Transcript, vol. 2, p. 140, lines 15-17.

91 Transcript, vol. 2, p. 140, lines 9-14 and 24-27.

92 *Davis Dentistry, supra* note 17, ¶42.

[62] As noted above, I have found that Dr. Axelrod made single supplies, rather than multiple supplies, to his patients. As explained above, based on the evidence, the predominant element of those supplies was the provision of dental services. However, if those supplies can be viewed as coming within both section V-II-5 and section VI-II-11 of the ETA, i.e., if the supplies have both exempt status and zero-rated status (to which view I do not subscribe), the exempt status of the supplies will preclude Dr. Axelrod's dental practice (which is a business) from being a commercial activity, by reason of the exception at the end of paragraph (a) of the definition of the term "commercial activity" in subsection 123(1) of the ETA.[93]

E. Incidental Supplies

[63] Turning to the question set out in subparagraph 3(c) above, section 138 of the ETA states:

> For the purposes of this Part, where
>
> > (a) a particular property or service is supplied together with any other property or service for a single consideration, and
> >
> > (b) it may reasonably be regarded that the provision of the other property or service is incidental to the provision of the particular property or service,
>
> the other property or service shall be deemed to form part of the particular property or service so supplied.

[64] Section 138 of the ETA requires that there be two or more supplies made for a single consideration.[94] As I have found that Dr. Axelrod made single supplies, rather than multiple supplies, to his patients, section 138 is not applicable to these Appeals.

F. Allocation of Multiple Supplies

[65] As I have found that Dr. Axelrod made single supplies, rather than multiple supplies, to his patients, I do not need to consider the question set out subparagraph 3(d) above.

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93 In essence, that exception provides that a business that involves the making of exempt supplies is not a commercial activity. See Sherman, *Canada GST Service*, *supra* note 31, binder C11, p. VI-298.3 (dated 2012-01-16).

94 *Jema International Travel Clinic*, *supra* note 14, ¶37.

G. Section VI-II-34

[66] Dr. Axelrod takes the position that the services which he provided were not simply "installing, maintaining, restoring, repairing or modifying"[95] artificial teeth. Rather, his services were "part and parcel of the fabrication of[,] a provision of[,] those artificial teeth."[96] As set out below, counsel for Dr. Axelrod submitted that, for section VI-II-34 of the ETA to apply, there must be a standalone supply of a service, which, as he submitted, was not the case on the facts of these Appeals:

> Let me start with section 34…. I want to emphasize … section 34, which does explicitly bring in an interaction between the exempt rated schedule, the zero-rated schedule. It happens, that attraction happens, where there is a supply and a service of these various types. It's a healthcare service, … but there has to be a supply of a service, a standalone service. It's not a situation where the component of a different supply is engaged by section 34. So, in order to get to section 34, the Court must determine that some of what Dr. Axelrod was doing is a standalone supply of a service of these things, or these types of services.[97]

Accordingly, Dr. Axelrod is of the view that his services pertaining to artificial teeth did not come within section VI-II-34 of the ETA.[98]

[67] The Respondent did not speak to section VI-II-34 of the ETA directly, other than to comment in respect of the interpretation of that provision by former Chief Justice Bowman in the *Singer* case.[99] The Respondent submits that, rather than undertaking a "general versus specific [interpretational] analysis," in *Singer*, Chief Justice Bowman should have simply observed that, if a particular supply is both exempt and zero-rated, the exempt status would take priority, such that ITCs could not be claimed, because there would not be a commercial activity.[100]

[68] As it is not necessary for me to base my decision on section VI-II-34 of the ETA, and as neither party has suggested that I should consider that provision, I will not do so, other than to say that the conclusion that I have reached is consistent with the legislative approach taken in section VI-II-34.

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95 See section VI-II-34 of the ETA.

96 Transcript, vol. 2, p. 138, lines 11-12.

97 Transcript, vol. 2, p. 166, line 28 to p. 167, line 13.

98 Transcript, vol. 2, p. 138, lines 8-13.

99 *Dr. James Singer Inc. v. The Queen*, 2006 TCC 205.

100 Transcript, vol. 2, p. 150, line 18 to p. 151, line 3.

VII. **CONCLUSION**

[69] For the reasons set out above, these Appeals are dismissed, without costs.

Signed at Edmonton, Alberta this 12th day of December 2022.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2022 TCC 157
COURT FILE NO.:	2017-1012(GST)I
STYLE OF CAUSE:	SAMUEL S. AXELROD AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	December 14 & 17, 2021
DATES OF SUBMISSIONS:	January 28, 2022 and February 7, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF JUDGMENT:	December 12, 2022

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