

Docket: 2017-689(GST)G

BETWEEN:

A-SUPREME NURSING & HOME CARE SERVICES INC.,
Appellant,

and

HIS MAJESTY THE KING,
Respondent.

Appeal heard on October 3, 4, and 6, 2022, at Toronto, Ontario.

Before: The Honourable Justice Ronald MacPhee

Appearances:

Counsel for the Appellant: Tony De Bartolo

Counsel for the Respondent: Isida Ranxi
Sahara Douglas (Articling Student)

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed, and the reassessment is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant's net tax be reduced by \$1,050,756.

Signed at Ottawa, Canada this 3rd day of April 2023.

“R. MacPhee”

MacPhee J.

Citation:2023 TCC 39
Date: 20230403
Docket: 2017-689(GST)G

BETWEEN:

A-SUPREME NURSING & HOME CARE SERVICES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

MacPhee J.

I. FACTS

[1] A-Supreme Nursing & Home Care Services Inc. (the Appellant) places nurses in long-term care facilities and nursing homes (the “Clients”). These arrangements are made by way of contracts entered into between the Appellant and various Clients. The Appellant did not collect GST/HST from their Clients for providing Registered Nurses (RN) and Registered Practical Nurses (RPN) because the Appellant believed it was providing nursing services to its Clients, and therefore the supply was exempt.

[2] The Minister of National Revenue (the “Minister”) reassessed the Appellant on the basis that the Appellant made a taxable supply to the Clients. Specifically, the supply provided was a placement service of RNs and RPNs and therefore the Appellant should have collected GST/HST on the revenue it received. In order to determine whether the Appellant should have collected GST/HST, I must determine whether the supply provided by the Appellant was the exempt supply of nursing services or in the alternative was a taxable supply.

A. Issue:

[3] The Appeal deals with whether the supplies of personnel and nursing by the Appellant to the Clients during the Reporting Periods was a taxable supply subject to GST, or an exempt supply of nursing services as contemplated under section 6 of Part II of Schedule V of the *Excise Tax Act* RSC 1985, c. E-15.(the “Act”).

B. Background:

[4] The Appellant is incorporated under the *Business Corporations Act of Ontario*, with its head office located in Toronto, Ontario. All of the Appellant’s business was conducted in Ontario.

[5] The Appellant’s Clients are nursing homes and long-term care facilities. It is these relationships that are before the Court. The Appellant entered into services agreements (the “Services Agreements”) with its Clients. These Service Agreements were for the most part the same for all Clients¹.

[6] The personnel that the Appellant placed with the Clients were RNs, RPNs and personal support workers (PSWs). These personnel were both employees of the Appellant and in some cases independent contractors.

[7] The personnel in question had individual contracts with the Appellant. They did not contract with the Clients. The Client paid the Appellant directly. The Appellant then paid the personnel.

[8] One of the terms of the Service Agreement between the Appellant and the Clients was as follows:

A-Supreme shall provide staff (Registered Nurses and Registered Practical Nurses and Personal Support Workers) to perform nursing duties as long term home may require. Registered staff will have a current and valid license in good standing with the College of Nurses of Ontario or certificate and/or diploma where necessary. All of our caregivers are bonded and insured and covered by Professional Liability Insurance and with Workers Safety and insurance Board.

[9] Pursuant to the Service Agreements:

¹ There might be some small differences, described as “some tweaking” by Shawna Flynn. This tweaking might be determining whether the cost of paying for the orientation is split between the Appellant and a Client, or paid entirely by the Appellant.

- a. the Appellant provides RNs, RPNs and PSWs to the Clients on an as-needed basis;
- b. the Appellant did not collect GST on the fees charges to the Clients;
- c. the Clients decided the shifts, days and hours for which they needed RNs, RPNs and PSWs from the Appellant;
- d. the Appellant paid the RNs, RPNs and PSWs for the work they performed in the Client's facilities;
- e. the Clients did not pay the RNs, RPNs and PSWs; and
- f. an employee of the Appellant was not to be hired by the Client until the employee completed 500 hours of service. After this point, the Client could hire the individual.

[10] Pursuant to the offer of employment between the RNs, RPNs and PSWs and the Appellant, the Appellant is described as an employment agency.

[11] As part of its business, the Appellant also provides nursing care to individuals in their private homes, on a one to one basis. The Minister does not question that this was an exempt supply of nursing services.

[12] At the outset of trial, the parties jointly took the position that this was a case of a single supply by the Appellant to various Clients. I agree that the supply in issue is a single compound supply.

II. WITNESSES

[13] Four witnesses testified at trial, all on behalf of the Appellant. They were as follows:

- a. Shawna Flynn, who was the managing director of the Appellant;
- b. Rhonda Soames, the marketing director of the Appellant, who was responsible for the daily operations of the Appellant, and ensured that the personnel acted according to the standards set by the company;
- c. Sandra Knight, who both ran a separate care facility and was also an RPN working for the Appellant;
- d. Novelette Robinson, a Registered Nurse with the Appellant.

[14] The witnesses' testimony will be explored in more detail in the analysis section of the decision. In summary, the witnesses described the work they did for the Appellant, as well as the work the Appellant provided to Clients. Each of the witnesses was helpful, forthright and assisted in making the facts of this case clear.

[15] A Partial Agreed Statement of Facts was also entered into evidence at trial.

III. POSITIONS OF THE PARTIES

A. Position of the Appellant

[16] The Appellant submits that the services provided to the Clients by the Appellant, through the RNs and the RPNs were an exempt supply of nursing services pursuant to section 6 of Part II of Schedule V of the Act.

[17] The Appellant further submits that upon a review of the facts of this case, several factors support the conclusion that nursing services were provided by the Appellant². Therefore, the predominant element of the single supply provided by the Appellant was nursing services.

[18] The Appellant also submits that the Minister incorrectly draws a distinction between the services they provide to private individuals and the services provided to the Clients. Specifically the Appellant argues that these services are analogous and thus should both be exempt.

B. Position of the Respondent

[19] The Respondent submits that the Appellant provided the Clients a taxable supply of nursing personnel and was required to collect GST/HST in respect of those supplies.

[20] Specifically the Respondent submits that the Appellant's services to the Clients are not exempt under section 6 of Part II of Schedule V of the Act, as the supplies provided by the Appellant to the Clients were not a supply of a nursing service but rather, a supply of personnel. This is a supply of property, not a service. Furthermore, the Respondent argues that the supplies provided by the Appellant were not rendered to an individual (with respect to the definition of nursing services found at Section 6 of Part II of Schedule V of the Act) but rather, the

² Appellant's Notice of Appeal at paras 25-37.

supplies the Appellant made was to the Clients. Therefore, the supplies were not rendered within a “nurse-patient relationship”.

IV. LAW

[21] As correctly set out in the Respondent’s submissions, subsection 221(1) of the Act provides that every person who makes a taxable supply shall collect the GST/HST payable by the recipient in respect of the supply. Subsection 225(1) provides that all amounts that became collectible or were collected in the particular reporting period are to be taken into account in calculating the amount of net tax to be remitted to the Receiver General in accordance with subsection 228(2) of the Act.

[22] GST/HST is collectible in respect of a “taxable supply”, which is defined at s. 123(1) of the Act as “a supply that is made in course of commercial activity”. A “commercial activity” is defined as s.123 as including “a business carried on by the person [...] except to the extent to which the business involves the making of exempt supplies by the person”. An “exempt supply” is defined in s.123(1) as “a supply included in Schedule V”.

[23] Section 6 of Part II of Schedule V of the Act provides that a nursing service is an exempt supply, where the supply is:

[Nursing service] A supply of a nursing service rendered to an individual by a registered nurse, a registered nursing assistant, a licensed or registered practical nurse or a registered psychiatric nurse, if the service is rendered within a nurse-patient relationship.

[24] In the matter before the Court, the only contract that must be interpreted is the contract between the Appellant and the Clients. The Clients clearly meet the definition of recipient as set out in the Act. The question becomes, does the supply provided by the Appellant meet the definition of nursing services as defined under Section 6 of Part II of Schedule V of the Act.

[25] I note that in reviewing the description of nursing service set out above, the legislation uses the phrase “nursing service rendered to an individual”. It does not require that the recipient (in this case the Client) of the supply must be the party to whom the nursing services were rendered³.

³ Discussion of the words “rendered to” in this context may also be found in *Hôpital Santa Cabrini v Canada*, 2015 TCC 264 at para 67 [“HSC TCC”].

[26] The intent of section 6 of Part II of Schedule V is clearly to exempt the provision of nursing services in general⁴. This is demonstrated by the explanatory notes justifying the amendment of the wording of section 6 announced in the 2008 Federal Budget:

Nursing has evolved since the inception of the GST and nurses are increasingly providing their services outside of institutional and residential settings. This has resulted in certain anomalies. For example, a vaccination performed by a registered nurse in a hospital or medical clinic is exempt, whereas the same service performed in the office of a registered nurse in private practice is subject to GST/HST.

Budget 2008 proposes to exempt from GST/HST nursing services rendered to an individual by a registered nurse, a registered nursing assistant, a licensed or registered practical nurse or a registered psychiatric nurse if the service is provided within a nurse-patient relationship, regardless of where the service is performed.

[27] Therefore I must determine if the supply the Clients purchased has the following characteristics:

- a. a “service” per section 123(1) (i.e. not a supply of property);
- b. the service is a “nursing service”;
- c. the service is “rendered” to an “individual”;
- d. the service is “rendered within a nurse patient relationship”; and
- e. the supply has a health care purpose.

⁴ This point was made in the commentary of Jacques Roberge, “Nurse, Employment Agencies, and Tax: A Cocktail More Complex Than Expected”, Canadian GST/HST Monitor No. 337 (Wolters Kluwer, 2016).

V. Jurisprudence on Nursing Services

[28] My analysis on this matter must start with the *Hôpital Santa Cabrini v Canada*⁵, (“HSC”) a Tax Court of Canada decision, which was later upheld in the Federal Court of Appeal. In the 2015 HSC decision, the Tax Court of Canada (the “TCC”), held that the supply of nurses by a staffing agency, to a hospital, was a taxable supply of nursing personnel and not an exempt supply of nursing services. Specifically, after analyzing the legal relationships between the agencies and the hospital the TCC concluded that the agencies had the right to control and manage the work of nurses,⁶ and were simply leasing this right rather than supplying nursing services:

[44] Here, in my opinion, the object of the prestation is the right conferred on the Hôpital by the Agencies to require their employees to carry out work for a period of time to which is added as an accessory the delegation of the right of direction and control over the work, a right held by the Agencies with respect to the work performed by their employees under their contracts of employment. The Agencies’ employees are in some way loaned or leased to the Hôpital. That is what happens when the Agencies assign their employees to the Hôpital: these employees become subject to the Hôpital’s rights to require them to perform their work and to exercise direction and control over said work.⁷

[29] Furthermore, the Court held that the legal relationship between the agencies and the hospital was not a contract of enterprise or services (which in the Court’s mind would constitute providing nursing services). Specifically the Court reasoned that:

- (1) an analogy to a subcontractor (where all that matters is the end product) could not be drawn as the hospital had direction and control over the performance of the nurses’ work;⁸
- (2) based on the *Act Respecting Health Services and Social Services* it would not be appropriate for the hospital to subcontract any of its health care services;⁹
- (3) the nurses had to integrate into various teams providing various services which necessarily required the direction and control of the hospitals;¹⁰ and

⁵ *HSC TCC*, *supra* note 3.

⁶ *Ibid* at paras 40, 42 and 46.

⁷ *Ibid* at para 44.

⁸ *Ibid* at para 31.

⁹ *Ibid* at para 32.

(4) the agencies' mission are not to provide health care services;¹¹ rather than providing healthcare services, they leased the right of direction and control over the nurses' work.¹²

[30] Further, the Court held that there are several necessary conditions for a supply to be classified as an exempt nursing service under section 6, notably:¹³

- a. there is a "service" per section 123(1) (i.e. not a supply of property);
- b. the service is a "nursing service";
- c. the service is "rendered" to an "individual";
- d. the service is "rendered with a nurse patient relationship"; and
- e. the supply has a health care purpose.

[31] Ultimately, the TCC concluded that leasing the right to manage and control the work of nurses was not an exempt supply of nursing services, as it was a supply of property.¹⁴ In the alternative, the Court concluded that even if such a lease constituted a service, the supply provided was a lease of nursing personnel rather than a nursing service. Specifically, the supply could not have been nursing services, as the agencies rendered no health care services.¹⁵

[32] The Federal Court of Appeal (the "FCA") upheld the TCC's decision. In their analysis the FCA held that it must be determined if the agencies provide health care services to the hospital.¹⁶ Thus, "the nature of the services provided by the agencies to the hospital" was determinative of whether there was an exempt nursing services supply.¹⁷ In other words, the FCA set out to determine if the nature of the supply was personnel services or nursing services.

[33] The FCA held that the facts of the case were sufficient to find that the agencies provided a "placement services system" as opposed to health care

¹⁰ *Ibid.*

¹¹ *Ibid* at para 42.

¹² *Ibid* at para 44, 48.

¹³ *Ibid* at paras 56-57.

¹⁴ *Ibid* at para 57, 59 and 67.

¹⁵ *Ibid* at para 57.

¹⁶ *Hôpital Santa Cabrini v Canada*, 2016 FCA 207 at para 17 [*"HSC FCA"*].

¹⁷ *Ibid* at para 20.

services.¹⁸ Specifically, the FCA found that the hospital, not the agencies, maintained management and control over the provision of health care services; and thus the agencies simply supplied the nursing personnel not the nursing services:

[21] [...] The evidence submitted before the Judge and the testimony heard reveal the following:

- There is no agreement between the Hôpital and the nurses placed by the Agencies;
- The Hôpital agreed not to recruit a nurse placed by an Agency that it has employed in the previous twelve (12) months;
- The only object of the agreement between the Hôpital and the Agencies is the supply of nursing staff;
- The Agencies' function is not to provide health care services but rather to place nurses;
- The Hôpital is responsible for the delivery of health care services and the management and control of nurses;
- The Agencies have no control over the work of nurses placed at the Hôpital.

[...]

[22] In addition, the Judge correctly took the *Act Respecting Health Services and Social Services*, CQLR c S-4.2, into consideration. That provincial act could not be any clearer: hospitals are responsible for carrying out the duties related to health care services. Common sense dictates that a hospital cannot delegate control of health care services to a placement agency, whether it be in its emergency room or for intensive care.

[...]

[23] Several indicia also emphasize the fact that the Hôpital is responsible for the management and control over nurses from the Agencies, which confirms that it is the Hôpital—not the Agencies—that provides the health care services. In particular, I note: (i) that no representative of the Agencies is on site when the nurses are working at the Hôpital; (ii) that the Agencies have no access to patients' files at the Hôpital; (iii) that the nurses do not hold themselves out to patients as nurses from an agency, even though they wear the agency's identity card; and (iv) that the Hôpital remains the entity responsible for providing the

¹⁸ *Ibid* at para 24.

care in question. I also note that the Hôpital is not contesting that the nurses placed there by the Agencies are under its control and management.

[24] In the light of the above, it was open to the Judge to conclude that the object of the agreements between the Hôpital and the Agencies is the supply of nurses by the Agencies, that the Hôpital is responsible for the provision of health care services by nurses from the Agencies and that the nurses from the Agencies are under the Hôpital's control and management. In short, the Agencies provide a placement services system, meet a need for nursing services for the Hôpital and do not provide health care services, while the exemption in section 6 of Part II of Schedule V of the Act is explicitly limited to the supply of care. That, in itself, is sufficient to dismiss the appeal.¹⁹

[34] It is crucial to parse exactly what legal holdings the FCA made in HSC in order to apply these binding holdings to the present case. In deciding the matter, the FCA emphasized two factors, to support the conclusion that the hospital maintained responsibility for the provision of health care services. First, the Court found that provincial statute assigned responsibility of health care service to the hospital and prevented them from delegating this responsibility. Second, the Court found that the hospital maintained management and control over the nurses, which meant the hospital was responsible for the provision of health care services.

[35] The FCA's emphasis on these factors should only be read to the extent that they inform the distinction between supplying personnel rather than supplying nursing services. That is, not having responsibility over health-care services tips the scale towards classifying a supply as a personnel service rather than a nursing service.

[36] However, it is my conclusion that the FCA's decision should not be read to suggest that having *general* responsibility over the provision of health care services is a necessary condition to providing an exempt nursing services supply. Specifically, this interpretation, which is consistent with the position of the Respondent²⁰ would be inconsistent with the idea that a sole-practitioner nurse could contract with a hospital to provide exempt nursing services on an as-needed basis. That is, in this example, the sole-practitioner nurse would not have responsibility, control or management over the *general* provision of health care services provided by the hospital yet there is no doubt they would be providing an exempt supply of nursing services. Finding otherwise would lead one to conclude that any service provided by a contractor is a supply of personnel rather than the service actually provided for.

¹⁹ *Ibid* at paras 21-24.

²⁰ Respondent's written submissions at para 42.

[37] The FCA's conclusion in HSC requires significant consideration in my final decision due to its binding nature and the case's somewhat analogous factual circumstances. Specifically, in HSC, the FCA determined the nature of the supply in question by looking at the facts of the case. Thus, in analyzing the present appeal it is appropriate to consider both the similarities and distinctions to HSC.

VI. Distinctions between the Present Appeal and HSC

Distinction in Management and Control over Nurses

[38] The degree of management and control by the Clients over the Appellant's nurses is distinct from the degree of management and control by the hospital over the agencies' nurses in HSC.

[39] The TCC in HSC found that:

[I]t is essential that the worker placed by the Agencies integrate into the team of various services or care units within which the worker works and this provision of services necessarily requires the Hôpital to exercise a right of direction and control over his or her work.²¹

[40] In contrast, the evidence given at trial in this matter indicated that the Appellant's nurses required no supervision in conducting their work.²² Further, the Appellant's nurses were regularly²³ responsible for the Client's facilities (or the "charge nurse").²⁴ In addition, if nurses had issues related to their work, they would report them to the Appellant not the Clients;²⁵ for example, if a nurse needed to leave a facility they would contact the Appellant, who then would be responsible for making alternative arrangements.²⁶

[41] Furthermore, Ms. Robinson specifically testified that hospitals exercise larger amounts of management and control over nurses than care-homes:

²¹ *HSC TCC*, *supra* note 3 at para 32.

²² October 3, 2022 Transcript, Flynn at pp. 100-101 (lines 23-28, 1-3), pp. 108 (lines 6-12); October 4, 2022 Transcript, Soames at pp. 37-38 (lines 17-28, 1); October 4, 2022 Transcript, Knight at pp. 87-88 lines (16-28, 1); October 4, 2022 Transcript, Robinson at pp. 102 (lines 18-22), pp. 114-116 (lines 25-28, 1-28, 1-17).

²³ October 3, 2022 Transcript, Flynn at pp. 106-107 (lines 22-28, 1-3), pp. 108 (lines 1-5).

²⁴ October 3, 2022 Transcript, Flynn at pp. 81-82 (lines 23-28, 1-15); October 4, 2022 Transcript, Robinson at pp. 102 (lines 10-17), pp. 110-111 (lines 20-28, 1-13), pp. 113-116 (lines 21-28, 1-28, 1-28, 1-6).

²⁵ October 3, 2022 Transcript, Flynn at pp. 39 (lines 13-19).

²⁶ October 3, 2022 Transcript, Flynn at pp. 39-40 (lines 28, 1-8).

MR. De BARTOLO:

What is the difference, if any, in regards to the direction and control of your nursing duties at a hospital, such as Etobicoke General, as opposed to the direction and control of your nursing duties at a care home?

MS. ROBINSON: Okay, so at the care home, I'm in charge of residents as well as the building. So I'm in charge of the entire building, meaning I'm the boss when I'm there at night. I'm the fire chief, everything. I'm the everything at the long-term care.

When I'm at Etobicoke, I have a nurse manager that can facilitate other emergency, while at the long-term care, I'm the one who facilitate and direct any emergency events that happen.²⁷

[...]

MR. De BARTOLO: Okay, at Etobicoke General, who directs and controls what you do in terms of performing your nursing services?

MS. ROBINSON: Well, no one really directs us. Once we're there, we're doing our job. So everyone knows what job to do when they walk into -- when they come on duty, basically. But what I'm allowed to do in a long-term -- as an agency nurse, I'm an agency nurse, I go to a facility and I'm in charge. That would never happen at Etobicoke. I'm a staff there but I--

MR. De BARTOLO: What would never happen? I'm sorry.

MS. ROBINSON: They would never have an agency staff be in charge at Etobicoke. I also do charge nurse at Etobicoke at times, so I know that position would never be filled by agency staff, never.

MR. De BARTOLO: So when you mean by "agency staff", is it because they want someone regular and full-time there?

MS. ROBINSON: Yeah, they have to have their own staff. They have to have their own staff in the hospital. In a long-term care, they hire us, agency staff, to be charge.

MR. De BARTOLO: And who supervises your nursing duties at a hospital?

MS. ROBINSON: I would say our charge nurse, our manager -- nurse manager. Supervising, it's -- no one is watching over us as we do our jobs.

MR. De BARTOLO: Okay.

²⁷ October 4, 2022 Transcript, Robinson at pp. 130 (lines 14-28).

MS. ROBINSON: But if anything arise that beyond our capability, then we would refer to the nurse manager.²⁸

[42] The fact that the Appellant's nurses were regularly the single charge nurse responsible for running the Client's facilities demonstrates that the Appellant's nurses had greater management and control over their work when compared to the nurses in HSC. Furthermore, in HSC the TCC specifically noted that the services provided by the nurses "cannot be defined beforehand because the services are too varied."²⁹ In the present appeal no evidence suggests there was great variation in the work needed or that the Clients' facilities had several units. Rather the evidence showed that every floor of the Clients' care homes consisted of residents that needed similar one-on-one treatment, such as administering medication.³⁰ These facts weigh in favor of classifying the Appellant's supply as nursing services rather than the supply of nursing personnel.

Distinction in Governing Statute

[43] The provincial statutes that govern the Clients versus the hospital in HSC are distinct.³¹ In HSC, both the TCC and FCA found the *Act Respecting Health Services and Social Services* to be relevant. However, in Ontario, the relevant statute to consider, as best that I can determine, is the *Long-Term Care Homes Act*.³²

[44] Similar to the *Act Respecting Health Services and Social Services*, the *Long-Term Care Homes Act, 2007* clearly puts the general responsibility of health care services on the operators of care homes. For example, subsections 6(1), (3) and (8) set out that care home operators must have a written plan for residents that covers all aspect of care (including nursing); also, operators must ensure that all people providing direct care (e.g. both employees and agency nurses) are kept informed of this plan. Furthermore, subsections 8(1), and (3) obligate operators of care homes

²⁸ October 4, 2022 Transcript, Robinson at pp. 131-132 (lines 11-28, 1-15).

²⁹ *HSC TCC*, *supra* note 3 at para 31.

³⁰ October 3, 2022 Transcript, Flynn at pp. 99-100 (lines 8-28, 1-22); October 4, 2022 Transcript, Knight at pp. 91 (lines 9-18); October 4, 2022 Transcript, Robinson at pp. 100-102 (lines 18-28, 1-28, 1), pp. 114-115 (lines 25-28, 1-7).

³¹ During oral submissions there was some contention between the parties as to where the nurses in HSB actually worked (i.e. if they worked in both the hospital and in long-term care or just the hospital). However, per paragraphs 26-28 of the TCC's decision it is evident that the work analyzed was work done in the hospital.

³² *Long Term Care Homes Act, 2007*, SO 2007, c 8.

to ensure there are nursing services available to meet resident's needs, and that a nurse is present in the home 24 hours a day (the "24 Hour Rule").

[45] In HSC, the FCA noted that hospitals could not delegate control over health care services to the agencies. However, subject to certain conditions, the regulation³³ to the *Long-Term Care Homes Act, 2007*, allows operators to fulfill the 24 Hour Rule by using agency nurses:

24-hour nursing care — exceptions

45. (1) The following are the exceptions to the requirement that at least one registered nurse who is both an employee of the licensee and a member of the regular nursing staff of the home is on duty and present in the home at all times, as required under subsection 8 (3) of the Act:

1. For homes with a licensed bed capacity of 64 beds or fewer,

i. [...]

ii. in the case of an emergency where the back-up plan referred to in clause 31 (3) (d) of this Regulation fails to ensure that the requirement under subsection 8 (3) of the Act is met,

A. a registered nurse who works at the home pursuant to a contract or agreement between the licensee and an employment agency or other third party may be used if the Director of Nursing and Personal Care or a registered nurse who is both an employee of the licensee and a member of the regular nursing staff is available by telephone, or

B. [...]

2. For homes with a licensed bed capacity of more than 64 beds and fewer than 129 beds,

i. [...]

ii. in the case of an emergency where the back-up plan referred to in clause 31 (3) (d) of this Regulation fails to ensure that the requirement under subsection 8 (3) of the Act is met, a registered nurse who works at the home pursuant to a contract or agreement between the licensee and an employment agency or other third party may be used if,

³³ O Reg 79/10.

A. the Director of Nursing and Personal Care or a registered nurse who is both an employee of the licensee and a member of the regular nursing staff is available by telephone, and

B. a registered practical nurse who is both an employee of the licensee and a member of the regular nursing staff is on duty and present in the home.

3. For all homes, in the case of a pandemic that prevents a registered nurse from getting to the home, and where the back-up plan referred to in clause 31 (3) (d) of this Regulation fails to ensure that the requirement under subsection 8 (3) of the Act is met,

i. a registered nurse who works at the home pursuant to a contract or agreement with the licensee or who works at the home pursuant to a contract or agreement between the licensee and an employment agency or other third party may be used,

ii. a registered practical nurse who is an employee of the licensee or who works at the home pursuant to a contract or agreement with the licensee or who works at the home pursuant to a contract or agreement between the licensee and an employment agency or other third party may be used if the Director of Nursing and Personal Care or a registered nurse is available for consultation, or

iii. [...] ³⁴

[46] In any case, as discussed in paragraph 36 above, I do not believe the FCA in HSC intended to make the *general* responsibility over the provision of health care services a necessary condition to providing nursing services. Thus, as previously written, it is my conclusion that the fact that the Clients delegated significant responsibility to the Appellant's nurses on a regular basis³⁵ suggests that they were supplying nursing services.

The Appellant was Responsible for Insurance, Orientation and Re-Training

[47] In the course of providing services, the Appellant maintained several other responsibilities that are indicative of nursing services.

[48] Per the Services Agreements, the Appellant was obliged to maintain general liability insurance for its nurses. Such an obligation shifts some of the

³⁴ *Ibid* s 45.

³⁵ *Supra* notes 23-24.

responsibility of providing nursing services onto the Appellant (i.e. via risk mitigation). In contrast, no such provision existed in the services agreement between the agencies and HSC.

[49] The Appellant was also responsible for orientating the nurses on both their own code of conduct and the Client's policies. Such orientation is consistent with the provision of nursing services as it informs the nurses how to perform their nursing duties.

[50] Furthermore, the Appellant was also responsible for re-educating nurses when the Clients took issue with the nursing service provided.³⁶ Similar to orientating the nurses, the responsibility to re-educate the nurses in how to fulfill their nursing duties is consistent with the provision of nursing services.

The Appellant is also in the Business of Providing Exempt Nursing Services

[51] The Appellant also provided exempt nursing services to individuals in their private homes; however, there was no suggestion of this being the case for the agencies in HSC. At trial, the Respondent argued that the exempt nursing services the Appellant provides to private individuals is not relevant as it is not in issue (i.e. CRA already agreed such services were exempt).³⁷ However, I have concluded that I may consider this as a relevant fact as it, in small part, helps to distinguish the present appeal from HSC. Moreover, it helps demonstrate that the Appellant was capable of providing exempt nursing services on their own which helps inform the characterization of the services being provided to the Clients.

Other miscellaneous factors

[52] Although not necessarily a distinct factor from HSC, one other fact that came out at trial, which supports the contention that nursing services were being provided by the Appellant, is the fact that the RNs and RPNs wore identification badges at the facilities which identified them as nurses.

VII. Similarities between the Present Appeal and HSC

³⁶ October 3, 2022 Transcript, Flynn at pp 85-86 (lines 9-28, 1-10), pp. 89-90 (lines 2-28, 1-13).

³⁷ October 3, 2022 Transcript, the Respondent at page 110 (lines 17-22).

[53] In HSC the Court outlined various indicia which helped determine that the hospital and not the agencies were responsible for the management and control of the nurses; several of these indicia are present in this case. Specifically:

- a. there is no representative of the Appellant on site when the nurses are working;
- b. there is no agreement between the Clients and the nurses;
- c. the Clients agree to limits on their ability to hire away the Appellants staff;
- d. the Appellant does not have access to the care home patients files; and
- e. the nurses do not hold themselves out as nurses of the Clients at their job.

VIII. Other Relevant Case Law Principles

[54] The evidence led at trial showed that the Appellant's supply had characteristics of both a supply of nursing services and a supply of personnel. This is therefore a situation where there is both an exempt supply (nursing services) mixed with a supply that is taxable (supply of personnel).

[55] In the recent *River Cree Resort Limited Partnership and Her Majesty the Queen* 2022 TCC 45, Justice Graham reviewed the case law and method to apply to determine what the nature of the supply is in a situation such as this:

[103]The courts have set out tests to use in these circumstances to determine the nature of the supplies. The following is an attempt to assimilate those tests into a comprehensive step-by-step test:

(1) *What was provided*: Determine what goods and/or services the supplier provided for the consideration received (*O.A. Brown Ltd. v. The Queen*; *Global Cash Access (Canada) Inc. v. The Queen*, ;*Great-West Life Assurance Co. v. The Queen*; *SLFI Group v. The Queen*; *CIBC v. The Queen*²).

(2) *Single compound supply or multiple supply*: Determine whether the goods and/or services provided should be characterized as "a single supply comprised of a number of constituent elements or multiple supplies of separate goods and/or services" (*O.A. Brown Ltd.*; *Hidden Valley Golf Resort Association v. The Queen*; *City of Calgary v. The Queen*; *SLFI Group*; *Global Cash Access*; *CIBC v. The Queen*³).

(3) *Determine how the resulting supply should be treated:* Determine whether that supply was or those supplies were taxable supplies or exempt supplies:

(a) *Single Compound Supply:* For a single compound supply, determine what the predominant element of the supply was. This analysis should focus on the purchaser's perspective of the supply. The supply will be taxed in the same manner as that predominant element (*Global Cash Access; Great-West Life; SLFI Group*).

(b) *Multiple Supply:* For multiple supplies, determine whether each of those individual supplies was a taxable supply or an exempt supply.

- i. If one of the multiple supplies was, itself, a single compound supply, apply the test in paragraph (a) to that supply (*Jema International Travel Clinic Inc. v. The Queen*).
- ii. If there was a single consideration paid for the multiple supplies, consider whether sections 138(incidental supplies) or 139 (financial services in mixed supply) apply to nonetheless deem there to have been a single compound supply (*Camp Mini-Yo-We Inc. v. The Queen*; *9056-2059 Québec v. The Queen*; *Canada Trustco Mortgage Co. v. The Queen*; *Maritime Life Assurance Co. v. The Queen*; *Jema International*; *CIBC v. The Queen*).

[56] My application of the test is as follows.

What was provided

[57] Pursuant to the contract between the Appellant and the Clients, the Appellant supplies staff who perform nursing services. The fact that they provide staff is irrefutable. The question is, does the Appellant, pursuant to their contract with their Client, provide nursing services.

[58] Based on the evidence provided by the witnesses, I accept that they also provide nursing services. The reason for this conclusion is set out in more detail in paragraph 67. In summary, the Appellant's RN's and RPNs (which were in many instances long time employees of the Appellant) were regularly the single charge nurse responsible for running the Client's facility, thus demonstrating that the Appellant's nurses had management and control over their work (when compared to the nurses in HSC). Furthermore, the nursing duties the Appellant's nurses

provided were consistently one-on-one treatments of residents. I am satisfied that the characteristics necessary to define this as a nursing service (set out in paragraph 27) are present.

Single Compound or Multiple Supply

[59] As stated above, both parties took the position that the supply provided by the Appellant is a single supply. In my review of the facts of this case, I agree that the supply in issue is a single compound supply.

Treatment of the supply

[60] In classifying a single supply the Courts, generally look to the “purpose”, “essence”, “nature”, or “substance” of the supply or the circumstance surrounding the supply. Moreover, the Courts have developed various analytical methodologies for discerning such fundamental characteristics. The essence is to determine what the predominant element of the supply is.

[61] In this instance, I find the predominant element, which the Client sought to acquire, is nursing services. I have come to this conclusion based on the following analysis.

[62] The perspective of the purchaser is widely considered to be a key factor in classifying a supply. That is, what the recipient believes they are purchasing informs the nature of the business that supplier is engaging in.

[63] For example in *Sterling Business Academy Inc. v The Queen*, the Court held that the supply of books, tuition and lectures constituted a single supply of “a course of instruction” as this is what the students were purchasing.³⁸

[64] Similarly, in *Oxford Frozen Foods Ltd. v Canada*, the taxpayer produced and sold frozen blueberries and carrots. It was argued that, the storage of food (in a freezer) was its own supply as this was a separate line item on the taxpayer’s invoices to customers. However, the Court concluded that the taxpayer supplied frozen food not storage services:

Herein, the true nature of the contract is the sale by the appellant of frozen product. This is the real character of the appellant's business. The storage of the

³⁸ *Sterling Business Academy Inc. v The Queen* (1998), 99 GTC 3038 (TCC) at para 28, 1998 CanLII 183.

frozen product is a necessary component to the appellant so that it can sell frozen products.³⁹

[65] In HSC, the FCA held that “the nature of the services provided by the agencies to the hospital” was determinative of whether there was an exempt nursing services supply.⁴⁰ The Court concluded the facts were sufficient to find the supply was properly classified as a placement service rather than nursing services.⁴¹ However, as noted above the facts of HSC are not identical to the present case; that is, the nature of the supply the Clients purchased from the Appellant is not clear. At the risk of being redundant, I will repeat the various factors in support of both arguments.

[66] Several factors indicate that from the Clients’ perspective they were purchasing the supply of nursing personnel, purely for staffing or placement purposes. Specifically:

- a. the Services Agreement contained a clause by which the Clients could pay a penalty in order to procure the right to hire one of the Appellant’s nurses;⁴²
- b. per the Services Agreement the Clients specify when they require a nurse to work;⁴³
- c. there is no representative of the Appellant on site when the nurses are working and there is no indication that the Services Agreement relinquishes any of the responsibilities the Clients had to provide nursing services;
- d. the Appellant is responsible for recruiting, vetting, and placing nurses and specifically employees several staff to achieve this;
- e. the Appellant re-trained the nurses to ensure they could meet the Clients’ codes of conduct (e.g. uniform rules);

³⁹ *Oxford Frozen Foods Ltd. v Canada* (1996), 4 GTC 3180 (TCC) at 3183, 1996 CarswellNat 2076.

⁴⁰ *HSC FCA*, *supra* note 16 at para 20.

⁴¹ *Ibid* at para 24.

⁴² Service Agreement between A-Supreme Nursing and Homecare and Rykka Care Centers clause 8, Joint Book of Documents (“JBD”), Tab 12.

⁴³ Service Agreement between A-Supreme Nursing and Homecare and Rykka Care Centers clause 2a, JBD, Tab 12.

- f. the Appellant does not have access to the care home patients files; and
- g. the nurses do not hold themselves out as nurses of the Clients at their job.

[67] In contrast, several factors indicate that from the Clients' perspectives they were purchasing the supply of nursing services. Specifically:

- a. the Appellant's nurses were regularly left in charge of the Clients' facilities;
- b. the Appellant re-trained their nurses to ensure they could perform their nursing duties as required by the Clients;
- c. the Appellant provides nursing services to other private Clients;
- d. many of the Appellants nurses have provided nursing services to the Clients' for several years;⁴⁴
- e. the Services Agreement required the nurses perform nursing duties;
- f. the Services Agreement required the Appellant to pay the nurses wages; and
- g. the Services Agreement required the Appellant to maintain general liability insurance for the nurses.

The Principal or Dominant Component of the Supply

[68] Previously, in cases that deal with a single supply, which contains two or more integral components, the Court has held that the "principal" or "dominant" component should classify the supply.

[69] For example, in *Royal Bank of Canada v. The Queen*, the Court had to classify a payment made by RBC to an airline in the context of an arrangement that involved RBC issuing credit cards to customers and the airline issuing points to customers. RBC argued the payment was for exempt financial services as it was made for services that were in the nature of arranging for the granting of credit. The Respondent argued that the payment was made for the consideration of the points issued by the airline (a taxable supply). The TCC considered which

⁴⁴ October 3, 2022 Transcript, Flynn at pp. 141 (lines 6-16).

component was the “dominant element of the supply”;⁴⁵ and concluded the reward points in questions were “the most substantive aspect of the supply to which all else relates but there is in my view no substantive single supply of the financial services variety relied on by the Appellant.”⁴⁶

[70] I have concluded that the supply the Appellant provided to the Clients is best classified as a supply of nursing services. I believe the following facts, in particular, tilt the scale towards the supply being of nursing services:

- a. the Appellant already provides nursing services to private individuals meaning they are capable of providing nursing services;
- b. the Appellant has employed many of its RNs and RPNs for several years and have trained them on how to meet their obligations for the Clients;
- c. the Appellant regularly provides the services of a charge nurse to the Client’s facilities meaning they are at least in part responsible for the provision of nursing service; and
- d. in order to meet the 24 hour rule the *Long Term Care Home Act*, in section 45, *allows* the Clients to meet their nursing obligations by acquiring nurses through an employment agency.

IX. Conclusion

[71] Based on the above analysis, I conclude that the dominant element of the supply provided by the Appellant to the Clients was nursing services.

[72] The appeal is allowed. A spreadsheet showing the net tax assessed is attached as Appendix “A”. The Minister increased the Appellant’s net tax by the amount of \$1,050,756 set out in Appendix A. The reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant’s net tax be reduced by \$1,050,756.

[73] Costs will be payable by the Respondent.

Signed at Ottawa, Canada this 3rd day of April 2023.

⁴⁵ *Royal Bank of Canada v The Queen*, 2007 TCC 281 at para 16.

⁴⁶ *Ibid* at para 27.

“R. MacPhee”

MacPhee J.

Appendix “A”

Reporting Period	Additional Net Tax Payable
January 1, 2012 to March 31, 2012	\$65,124
April 1, 2012 to June 30, 2012	\$84,514
July 1, 2012 to September 30, 2012	\$135,694
October 1, 2012 to December 31, 2012	\$100,030
January 1, 2013 to March 31, 2013	\$111,016
April 1, 2013 to June 30, 2013	\$93,278
July 1, 2013 to September 30, 2013	\$101,822
October 1, 2013 to December 31, 2013	\$78,446
January 1, 2014 to March 31, 2014	\$93,003
April 1, 2014 to June 30, 2014	\$81,015
July 1, 2014 to September 30, 2014	<u>\$106,814</u>
Total	\$1,050,756

CITATION: 2023 TCC 39

COURT FILE NO.: 2017-689(GST)G

STYLE OF CAUSE: A-SUPREME NURSING & HOME CARE
SERVICES INC. AND
HIS MAJESTY THE KING

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 3, 4, and 6, 2022

REASONS FOR JUDGMENT BY: The Honourable Justice Ronald MacPhee

DATE OF JUDGMENT: April 3, 2023

APPEARANCES:

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