

Docket: 2018-4823(GST)G

BETWEEN:

THE TORONTO-DOMINION BANK,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeals heard on December 11, 12, 13 and 14, 2023,
at Toronto, Ontario

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant: Al Meghji
Pooja Mihailovich
Mark Sheeley
Roger Smith

Counsel for the Respondent: Craig Maw
Natasha Tso
Natasha Mukhtar

JUDGMENT

The appeals of the reassessments of the Appellant's reporting periods ended between January 1, 2014 and October 31, 2016 are dismissed.

Costs are awarded to the Respondent. The parties shall have until May 30, 2024 to reach an agreement on costs, failing which the Respondent shall have until July 2, 2024 to serve and file written submissions on costs and the Appellant shall have until July 12, 2024 to serve and file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have

reached an agreement and no submissions are received within the foregoing time limits, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Fredericton, New Brunswick, this 30th day of April 2024.

“David E. Graham”

Graham J.

Citation: 2024 TCC 50
Date: 20240430
Docket: 2018-4823(GST)G

BETWEEN:

THE TORONTO-DOMINION BANK,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] This appeal concerns the proper characterization of an agreement involving the supply of Aeroplan Miles. It is, at its heart, a re-litigation of the same issues that were dealt with by this Court and by the Federal Court of Appeal in *Canadian Imperial Bank of Commerce v. The Queen*.¹ The result is the same, but for different reasons.

I. Overview

[2] In the periods in question, Aimia Canada Inc. (“Aeroplan”) operated the Aeroplan loyalty reward program. The program offered active members the ability to accumulate points called Aeroplan Miles by purchasing products and services from Aeroplan’s accumulation partners. Those partners included various credit card brands, grocery stores, airlines and retailers.

[3] The Aeroplan Miles could be redeemed by members through Aeroplan, subject to certain terms and conditions.

¹ 2019 TCC 79 (“*CIBC (TCC)*”); upheld on appeal 2021 FCA 96 (“*CIBC (FCA)*”).

[4] The Toronto-Dominion Bank (“TD”) entered into an Affinity Program Agreement with Aeroplan (the “Agreement”).² The Agreement allowed TD to add the Aeroplan Miles reward feature to certain of its TD Visa cards.

[5] Aeroplan invoiced TD for various amounts under the Agreement. Aeroplan applied GST/HST to those invoices. TD paid the invoices. Later, TD decided that it had paid the GST/HST in error and applied for rebates.

[6] Adjusting for certain concessions made by TD, the total rebate in issue for the reporting periods ended between January 1, 2014 and October 31, 2016 is \$141,060,608.

[7] In order to determine whether TD is entitled to the rebates that it is requesting, I will first have to first determine what Aeroplan supplied to TD under the Agreement and then determine how that supply should be taxed.

[8] TD takes the position that Aeroplan supplied it with Aeroplan Miles and that Aeroplan Miles are “gift certificates”. Since section 181.2 of the *Excise Tax Act* (the “Act”) deems there not to have been a supply when a gift certificate is sold, TD says that Aeroplan should not have charged GST.

[9] The Respondent takes the position that Aeroplan made a taxable supply of marketing services. In the alternative, the Respondent argues that Aeroplan Miles are not gift certificates.

II. Issues

[10] There are two main issues in this appeal:

- (a) Was the predominant element of the supply that Aeroplan made to TD promotional and marketing services or the right to allocate Aeroplan Miles to its cardholders?
- (b) If the predominant element was the right to allocate Aeroplan Miles, is an Aeroplan Mile a “gift certificate” within the meaning of section 181.2?

² The Agreement was amended from time to time, as set out in paragraph 7 of the Partial Agreed Statement of Facts.

[11] There is also an ancillary issue regarding a series of payments that TD made to the Canadian Imperial Bank of Commerce (“CIBC”).

III. Test to Be Applied When More Than One Good or Service Supplied

[12] Aeroplan did not just supply one good or service to TD. Under the Agreement, Aeroplan supplied a number of different goods and services.

[13] In *River Cree Resort Limited Partnership v. The Queen*, I set out the tests that the case law has established should be used when determining the nature of a supply consisting of more than one element:³

- 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) 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) 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

³ 2022 TCC 45, at para. 103 [footnotes omitted].

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*).

[14] I will apply those tests to the supply that Aeroplan made to TD.

IV. What Was Provided?

[15] The first step is to determine what goods and/or services were provided for the consideration received. I will first describe which goods and services were provided and then discuss which ones were not.

A. Elements of the Supply

[16] The following goods and services were supplied under the Agreement.

Aeroplan Miles

[17] Customers who used TD's Aeroplan cards earned Aeroplan Miles for purchases that they made on their cards. The number of Aeroplan Miles that they earned depended on which card they had.

[18] TD established four types of Aeroplan co-branded cards: an entry-level card, a premium card, a high net-worth card and a business card. The cards had different annual fees. Cards with higher annual fees offered a higher number of Aeroplan Miles for each dollar spent.

[19] In order to fulfil its obligation to its customers to provide them with these Aeroplan Miles, TD had to cause Aeroplan to issue Aeroplan Miles to those customers. Every month, TD would tell Aeroplan how many Aeroplan Miles each of its customers had earned. Aeroplan would then deposit those Aeroplan Miles into those customers' Aeroplan accounts.

[20] TD did not actually acquire the Aeroplan Miles. It acquired the right to cause Aeroplan to issue Aeroplan Miles. For the purposes of the issues before me, it makes no difference whether Aeroplan supplied TD with Aeroplan Miles or the right to cause Aeroplan to issue Aeroplan Miles. Therefore, for simplicity, in the rest of these Reasons for Judgment, I will refer to TD as having purchased Aeroplan Miles.

Welcome Bonuses

[21] New TD Aeroplan cardholders received welcome bonuses of additional Aeroplan Miles. If the new cardholder was an existing TD customer, then Aeroplan supplied these welcome Aeroplan Miles at no cost to TD. If the new cardholder was not an existing TD customer, then TD purchased the welcome Aeroplan Miles from Aeroplan. There were also situations where Aeroplan and TD would share the cost.

Bonus Miles

[22] Aeroplan offered cardholders bonus Aeroplan Miles if they purchased certain goods or services. The bonus Aeroplan Miles available for purchases with Air Canada were particularly appealing to cardholders.⁴ TD and Aeroplan agreed that TD, Aeroplan and Air Canada would each provide a certain portion of these bonus Aeroplan Miles. Aeroplan supplied TD with the Aeroplan Miles that TD needed to provide.

Exclusive Issuer

[23] Prior to TD's involvement with Aeroplan, Aeroplan had an agreement with CIBC under which CIBC issued co-branded Aeroplan Visa credit cards. When the CIBC agreement came to an end, Aeroplan looked for a new credit card provider to partner with.

[24] Under the Agreement, TD obtained the exclusive right to issue Aeroplan Visa cards. The only exception to this exclusivity was that CIBC would continue to be able to issue Aeroplan Visa cards to its banking customers if those customers asked for such a card in a CIBC branch.

⁴ During the periods in question, although Aeroplan Miles were most often used to acquire flights on Air Canada, Aeroplan was not part of Air Canada.

[25] The flip side of this exclusivity was that TD was not allowed to be involved in any other rewards programs with the exception of its pre-existing in-house program.

Most Favoured Nation

[26] TD obtained what it called “most favoured nation” status. This meant that

This was important as

Marketing

[27] TD and Aeroplan agreed that they would each commit a specific amount of money to marketing each year. TD’s share would be used to promote the co-branded credit cards. Aeroplan’s share would be used to promote both the Aeroplan program and the co-branded cards. Aeroplan’s marketing included marketing aimed at its existing members who did not have Aeroplan credit cards.

[28] The Agreement placed certain restrictions on both parties’ marketing. TD was not allowed to market the co-branded credit cards alongside its other credit cards and had limits on the amount of money that it could spend promoting its in-house reward points program. Aeroplan was not allowed to market towards CIBC customers and had restrictions on how it could market Amex Aeroplan cards.

Licence to Use Trademarks

[29] Aeroplan granted TD a royalty-free licence to use the Aeroplan trademark on its cards and in its advertising. TD granted Aeroplan a similar licence for the use of its trademarks in Aeroplan’s advertising.

Preferred Card Status

[30] Aeroplan was required to position TD’s Aeroplan cards as Aeroplan’s preferred cards.

Avoiding Expiration of Aeroplan Miles

[31] In the periods in question, Aeroplan Miles expired if an Aeroplan member did not either accumulate new Aeroplan Miles or redeem existing Aeroplan Miles in a 12-month period. Knowing that its cardholders would be upset if their Aeroplan Miles expired before they had the chance to use them, TD had Aeroplan agree that TD would automatically purchase one Aeroplan Mile for any TD cardholder whose Aeroplan Miles would otherwise expire.

Member Enrollment and Account Management

[32] Aeroplan agreed to enroll TD cardholders who were not Aeroplan members in the Aeroplan program and to administer those members' Aeroplan accounts, including dealing with any member disputes.

Cooperation

[33] TD and Aeroplan agreed to form a Joint Marketing Committee and a Joint Steering Committee.

[34] The Joint Marketing Committee coordinated the promotion of the program. The purpose of this committee was to review what each party was doing in terms of marketing to avoid, for example, duplicating the same message in the same medium at the same time.

[35] The Joint Steering Committee coordinated the operation of the program. The committee looked at the full business relationship between the parties, not just the marketing aspects. The committee reviewed an overall business plan each year. Through the committee, Aeroplan told TD how its customers (as a whole) were using their points. The parties also used this committee to try to resolve any disputes.

Data Analytics and Sharing

[36] Aeroplan provided TD with data analytics to help TD increase credit card spending and better target its marketing. TD and Aeroplan also shared certain customer data through a third party anonymization process.

Aeroplan 2.0

[37] Aeroplan agreed to upgrade its program to make it more appealing to members. TD referred to the upgraded program as "Aeroplan 2.0".

[38] Prior to Aeroplan 2.0, an Aeroplan member who wanted to redeem their Aeroplan Miles for a flight would determine the number of Aeroplan Miles that they would have to spend by consulting a redemption chart. The chart set out the number of Aeroplan Miles needed for short-haul, long-haul and international flights in both economy and business class. Only a certain number of seats were available for redemption on any given flight. This meant that an Aeroplan member might not be able to purchase a flight in busy seasons or when travelling to popular destinations. This could be a considerable irritant to Aeroplan members.

[39] Aeroplan 2.0 introduced the idea of market fare redemptions. This type of redemption allowed an Aeroplan member to redeem Aeroplan Miles for a flight based on the market price of the flight. Market fare redemptions were available for any seat on any Air Canada flight. This improvement to the Aeroplan program ensured that members could purchase the flight that they wanted so long as they were willing to redeem more Aeroplan Miles to do so. TD saw this as a significant improvement to the program that would remove a major customer irritant.

[40] Aeroplan 2.0 also involved the creation of a number of tiers of Aeroplan membership, with additional benefits for members at higher tiers.

B. Elements That Were Not Part of the Supply

[41] There were certain supplies made under the Agreement or in different agreements that were not part of the supply.

Credit Card Operations

[42] Under the Agreement, TD maintained full responsibility for its actual credit card operations. This was not a service that Aeroplan provided.

Air Canada Benefits

[43] Aeroplan provided TD with certain Air Canada benefits that it could offer to its customers, such as lounge access, complementary checked baggage and priority boarding. The parties agree that those were separate taxable supplies.

Acquisition of CIBC Cardholders

[44] When TD took over from CIBC as the exclusive provider of Aeroplan Visas, something had to be done with CIBC's existing Aeroplan Visa cardholders. TD,

CIBC and Aeroplan agreed that those cardholders would be divided into two groups. Cardholders who had other banking relationships with CIBC would be allowed to continue to use their CIBC Aeroplan Visa cards. Cardholders who did not have other banking relationships with CIBC would be transitioned to TD Aeroplan Visa cards.

[45] The cardholders that TD acquired from CIBC significantly increased TD's annual volume of credit card transactions. Acquiring these cardholders was undoubtedly a huge part of what made the overall deal attractive to TD. It could even have been the most attractive part of the overall deal for TD. However, acquiring these cardholders was not an element of the supply that Aeroplan made to TD. TD acquired the cardholders from CIBC, not Aeroplan. It paid CIBC for their accounts, not Aeroplan.

V. Single Compound Supply or Multiple Supply

[46] Having established what goods and services Aeroplan supplied, I now turn to the second step, which is to determine whether those goods and services should be characterized as a single compound supply or as multiple supplies of separate goods and services.

A. General

[47] Subject to the issue described below regarding Aeroplan 2.0, the parties agree that the goods and services supplied were part of a single compound supply. I agree.

B. Aeroplan 2.0 Payment

[48] Under the Agreement, TD paid Aeroplan a significant amount of money up front for what the Agreement describes as a "compensation for expenditures to be incurred by Aeroplan" to move to the Aeroplan 2.0 program (the "Aeroplan 2.0 Payment").⁵ Aeroplan charged GST on this payment. The rebate that TD has claimed includes that GST.

[49] TD takes the position that the Aeroplan 2.0 Payment was part of the consideration for the single compound supply. The Respondent disagrees. The Respondent also raised two preliminary objections in respect of this issue. TD has raised one of its own.

⁵ Agreement, section 4.1(1).

Specified Person Objection

[50] First, the Respondent argues that TD did not properly identify the Aeroplan 2.0 Payment in its notice of objection and is therefore precluded by the specified person rule in section 306.1 from raising it in its appeal. I disagree.

[51] TD is a specified person. Subsection 306.1(1) states that a specified person may only raise issues and seek relief in this Court if the person has complied with subsection 301(1.2).

[52] Subsection 301(1.2) requires a notice of objection filed by a specified person to reasonably describe each issue to be decided, to specify the relief sought in respect of each issue and to provide the facts and reasons relied upon for each issue.

[53] While subsection 301(1.2) requires a specified person to set out the facts and reasons in respect of each issue, so long as the specified person raises the issue in their notice of objection, they are not precluded from adding new facts or reasons in support of that issue (*British Columbia Transit v. The Queen*).⁶

[54] In its notice of objection, TD raised the issue of its entitlement to a rebate in respect of amounts paid to Aeroplan in error. The relief sought in respect of that issue included a rebate of the GST that TD had paid on the Aeroplan 2.0 Payment. While TD did not specifically identify the Aeroplan 2.0 Payment or explain why it viewed the Aeroplan 2.0 Payment to be part of a single compound supply under the Agreement, I consider those to be facts and reasons supporting the issue that it raised, not new issues. Accordingly, I find that TD is not precluded from arguing that the Aeroplan 2.0 Payment was part of the single compound supply.

Pleadings

[55] In the alternative, the Respondent argues that TD did not properly identify this issue in its pleadings or plead the material facts and reasons with respect to this issue and was therefore precluded from arguing it at trial. Again, I disagree.

⁶ *British Columbia Transit v. The Queen*, 2006 TCC 437; *CIBC v. The Queen*, 2013 TCC 170.

[56] While TD should have pled this issue more clearly and the Respondent may not have been fully aware of this issue at the outset, the Respondent became aware of it and, in fact, addressed it in the Amended Reply and dealt with it on discovery.

Respondent Has Not Conceded the Issue

[57] TD argues that the Respondent agreed in paragraph 26 of the Amended Reply that the Aeroplan 2.0 Payment was part of the single compound supply. I disagree.

[58] It is clear to me that paragraph 26, read in the context of paragraph 32 of the Amended Reply, was not referring to the Aeroplan 2.0 Payment. The Respondent specifically identifies the Aeroplan 2.0 Payment in a number of places and argues that that payment did not involve the supply of Aeroplan Miles. I take this to mean that the Respondent did not consider it to be part of the single compound supply.

[59] In addition, I do not interpret the read-in provided by TD from its examination for discovery of the Respondent's representative to amount to a concession.

Merits

[60] Having dealt with the preliminary objections, I can now consider whether the Aeroplan 2.0 Payment was in respect of a separate supply of an upgraded Aeroplan 2.0 program or was part of the single compound supply. I find that it was part of the single compound supply.

[61] TD's desire to have the Aeroplan program upgraded to Aeroplan 2.0 was inextricably linked to its desire to participate in the program. TD was concerned about the flexibility of the Avion program offered by the Royal Bank of Canada and wanted to be able to compete with that program. Aeroplan 2.0 would make it easier for cardholders to use their Aeroplan Miles and would reward cardholders who spent more money.

[62] Had the Aeroplan 2.0 Payment been made several years into TD's involvement in the program, I may have viewed it differently. However, as it was an up-front payment that was a part of the Agreement, I have difficulty conceiving of it as anything other than part of the single supply. TD did not just want to buy Aeroplan Miles, it wanted to buy more valuable Aeroplan Miles. Aeroplan 2.0 allowed that to happen.

[63] Having determined that Aeroplan made a single compound supply that included the Aeroplan 2.0 Payment, I can now move on to determining the predominant element of that supply.

VI. Predominant Element

[64] For years, the Federal Court of Appeal has held that, where there is a single compound supply composed of a number of elements, one must determine what the predominant element of the supply was. The supply will then be taxed in the same manner as that predominant element. This test has been described as determining the “commercial efficacy” of the arrangement (*Global Cash Access (Canada) Inc. v. The Queen*;⁷ *SLFI Group v. The Queen*;⁸ *Great-West Life Assurance Co. v. The Queen*⁹).

[65] However, the recent decision in *CIBC (FCA)* has cast doubt on this test.

[66] I will first apply the test set out in *Global Cash Access*, *SLFI* and *Great-West Life*. I will then consider whether *CIBC (FCA)* affects my conclusion.

A. The Traditional Test

[67] The Respondent says that the predominant element was the supply of promotional and marketing services. TD says that the predominant element of the single compound supply made under the Agreement was the supply of Aeroplan Miles. I agree with TD.

No Commercial Efficacy Without Aeroplan Miles

[68] TD wanted to grow its credit card business. To do that, it needed to acquire new customers and retain existing customers. TD was particularly interested in having customers who spent large amounts on their credit cards and paid their balances when due. It believed that customers who were frequent fliers with Air Canada would be likely to fit their desired profile. It knew that those types of customers were interested in accumulating Aeroplan Miles. Therefore, to attract those customers, TD wanted to be able to offer a credit card with Aeroplan Miles.

⁷ 2013 FCA 269 (“Global Cash Access”).

⁸ 2019 FCA 217 (“SLFI”).

⁹ 2016 FCA 316 (“Great-West Life”).

[69] TD called Jason Rasmussen as a witness. In the reporting periods in question, Mr. Rasmussen was an Associate Vice President dealing with TD Aeroplan credit card relationships. I found Mr. Rasmussen to be credible.

[70] Mr. Rasmussen testified that the primary thing that TD obtained under the Agreement was the ability to give Aeroplan Miles to its customers.

[71] Mr. Rasmussen stated that there were approximately 3,000,000 Aeroplan members in 2013 and that approximately 1,200,000 of those members had Aeroplan-branded credit cards. TD wanted to be part of that business.

[72] Mr. Rasmussen explained that customers love Aeroplan Miles and that a credit card that helped them to accumulate more Aeroplan Miles was very attractive to them. Aeroplan was a premier loyalty rewards program. It had access to the dominant airline in Canada. Its customer base consisted of premium customers who were very appealing to TD. They tended to have higher-than-normal incomes and higher-than-normal spending. Since TD earned income on each dollar spent on its credit cards, it valued higher-spending customers.

[73] The Respondent called Michael Rhodes as a witness. In the reporting periods in question, Mr. Rhodes was the Executive Vice President, North American Credit Cards & Merchant Services at TD. Mr. Rhodes was responsible for negotiating the Agreement with Aeroplan. I found him to be generally credible. Mr. Rhodes testified that he had been involved with credit card programs since the 1990s and that, in his experience, frequent flyer points are the premium product that a credit card provider can attach to its cards.

[74] Mr. Rhodes testified that TD's primary objective in negotiating the Agreement was to get access to Aeroplan Miles. While he may have over-emphasized this point in his testimony to the point of slipping into advocacy, I nonetheless accept that he viewed the ability to provide customers with Aeroplan Miles as the single most important element of TD's agreement with Aeroplan.

[75] I acknowledge that the other elements of the supply had value. TD went to great lengths to include them in the Agreement. However, there would have been no point in obtaining marketing services from Aeroplan, exclusive rights to use the Aeroplan logo, and data analytics about existing and potential customers if TD could not provide those customers with Aeroplan Miles.

[76] The method of calculating payments under the Agreement strongly supports the idea that the predominant element of the supply was Aeroplan Miles. The amount that TD paid Aeroplan every month under the Agreement was calculated based on the number of Aeroplan Miles that Aeroplan credited to TD cardholders in the month. There was a set price per Aeroplan Mile. The price did not vary with the amount of marketing or data analytics provided by Aeroplan.

[77] TD's most favoured nation status ensured that [REDACTED]. If TD had been paying for marketing, given the restrictions that the Agreement imposed on Aeroplan's ability to market in respect of [REDACTED], I would have expected TD to be paying far more [REDACTED].

[78] In summary, there would have been no commercial efficacy to the Agreement if TD could not provide Aeroplan Miles to its cardholders. Whether those Aeroplan Miles came from credit card spending, bonus miles or welcome bonuses, the fact was that TD's cardholders wanted them. Offering a credit card under the Aeroplan brand that did not actually provide Aeroplan Miles would have misled, annoyed and ultimately alienated those cardholders.

Promotional and Marketing Services Were Not the Predominant Element

[79] The Respondent submits that marketing and promotional services were the predominant element of the supply. I disagree.

[80] Mr. Rasmussen testified that TD did not pay Aeroplan anything for the marketing that Aeroplan did. There is nothing in the Agreement or the invoices that would suggest otherwise. The money that each side was required to spend on marketing was something that they contributed to further their joint business interests.

[81] TD marketed TD Aeroplan cards. That benefited TD by attracting more cardholders. However, it also benefited Aeroplan. Aeroplan makes money selling Aeroplan Miles. The more people use Aeroplan-branded credit cards, the more Aeroplan Miles Aeroplan sells.

[82] In some of its advertising, Aeroplan marketed the Aeroplan program. That clearly benefited Aeroplan but it also benefited TD by increasing awareness of the benefits of earning Aeroplan Miles. In other types of advertising, Aeroplan marketed

TD Aeroplan cards alongside the Aeroplan program. Again, this benefited both parties.

[83] At no point did Aeroplan do any marketing that was exclusively for TD's benefit. It did not, for example, market TD's banking, lending or investing services.

[84] The Agreement specified how much each side was to spend each year. TD was required to spend [REDACTED] what Aeroplan had to spend in the first year of the Agreement. Thereafter, [REDACTED]. This sharing of marketing costs is completely inconsistent with the idea that Aeroplan was providing marketing services to TD.

[85] The amount that TD paid Aeroplan each month bore no relation to the amount that Aeroplan spent on marketing each year. In fact, the typical amount that Mr. Rasmussen testified TD spent on Aeroplan Miles each month was [REDACTED] the amount that the Agreement required Aeroplan to spend on marketing for the entire year. This clearly indicates that TD was paying for something other than marketing.¹⁰

[86] Mr. Rasmussen testified that, in his view, Aeroplan's marketing was not that effective as very few cardholders came in through Aeroplan. On cross-examination, it became clear that Mr. Rasmussen's conclusion was based on the faulty assumption that the 65% to 70% of cardholders who opened an account at a TD branch had come to the branch because of TD's marketing. As a result, I give no weight to Mr. Rasmussen's views of the effectiveness of Aeroplan's marketing.

[87] Mr. Rasmussen also testified that the data analytics and sharing aspects of the Agreement had little value. His impressions of the value of these elements comes from his experiences with their value after the fact. He testified that he did not recall TD ever using the anonymized third party data. He explained that, since most cardholders came through TD's own channels, TD already had the information about them that it needed.

[88] That said, Mr. Rasmussen was not directly involved in the negotiation of the Agreement so he does not know what value TD placed on the data analytics and

¹⁰ Exhibit J-1, Tab 4, section 6.2(4)(a). Aeroplan was required to spend the greater of a fixed annual amount and [REDACTED]. There was no indication that the [REDACTED] applied in the periods in question. Therefore, for the purposes of this calculation, I have used the fixed annual amount.

sharing during negotiations. Whether it ultimately used the data or not, I find that TD must have attached some value to it or it would not have been included in the Agreement. However, that value was clearly insignificant compared to the value that TD placed on obtaining Aeroplan Miles for its cardholders.

The Reason for Acquiring a Good Does Not Change the Nature of the Good

[89] The Respondent knows the relative amounts that TD and Aeroplan were required to spend on marketing under the Agreement. The Respondent also knows that TD paid Aeroplan sums so far in excess of Aeroplan's actual marketing expenditures that the payments must have been for something else. Finally, the Respondent knows that it would be pointless to market a TD Aeroplan card if TD could not provide its customers with actual Aeroplan Miles. So why is the Respondent arguing that the predominant element of the supply was marketing services?

[90] While the Respondent does not expressly say so, what the Respondent is really doing is acknowledging that the predominant element was the purchase of Aeroplan Miles but asking me to re-characterize that purchase as a purchase of marketing services. That is not how the predominant element test works.

[91] It is a predominant element test, not a predominant purpose test. The test requires me to consider which of the actual elements of the supply was the predominant one and to tax the entire supply based on that predominant element. It does not require me to re-characterize the actual elements of the supply into something different based on the purpose for which they were acquired.

[92] Doing so would be a complete departure from the Act. Generally speaking, when dealing with taxable supplies, the Act imposes GST on what a person buys, not why they buy it. The purpose for buying a good or service is generally only relevant when considering whether there was an exempt supply, whether the person can claim an input tax credit or whether the person is entitled to certain rebates, such as the new housing rebate.

[93] There is no question that TD bought the Aeroplan Miles for marketing purposes. But that does not change the fact that what it bought was Aeroplan Miles. That is what it should be taxed on.

[94] Justice Stratas addressed this same argument in *CIBC (FCA)*, albeit in dissent. I agree with and adopt his reasoning.¹¹

Exclusivity Was Worthless Without Aeroplan Miles

[95] Clearly, the exclusivity that Aeroplan provided to TD had significant value. It meant that TD did not have to compete with other financial institutions that offered Visa cards. It gave TD a premier market position. However, exclusivity would have been worthless without actual Aeroplan Miles. It was not enough for TD to be able to prevent other financial institutions from offering Aeroplan Visa cards. To succeed, TD needed to be able to give its customers Aeroplan Miles.

Other Elements Were Not Predominant

[96] The remaining elements of the supply simply supported the predominant element. Member enrollment and account management were incidental to the operation of the program. The joint committees benefited both parties and were simply a way of ensuring that they met their joint business goals. Exclusivity simply ensured that competitors could not offer the same Aeroplan Miles that TD was offering. Finally, the Aeroplan 2.0 program was simply a means of ensuring that TD was buying more valuable Aeroplan Miles.

Other Witnesses

[97] Before moving on, I need to quickly comment on three other witnesses whom the Respondent called: Riaz Ahmed, Matthew Hall and Edmund Clark.

[98] In the reporting periods in question, Mr. Ahmed was the Group Head – Insurance, Credit Cards and Enterprise Strategy at TD. I found Mr. Ahmed to be credible. The reason that I do not refer to his testimony elsewhere is not that I did not accept it, but rather that I found that it did not add much to the overall evidence.

[99] In the reporting periods in question, Mr. Hall was the General Manager, TD and MBNA Partnerships at Aeroplan. He was Mr. Rasmussen’s principal contact at Aeroplan. While I initially found Mr. Hall to be generally credible in his direct evidence, he became so evasive on cross-examination in his attempts to pretend that Aeroplan was not in the business of selling Aeroplan Miles that I am left with no

¹¹ *CIBC (FCA)* at paras. 80 to 82.

choice but to disregard his entire testimony. Except as specifically noted elsewhere in these Reasons for Judgment, I have not relied on anything that he said.

[100] In the reporting periods in question, Mr. Clark was the Group President and CEO of TD. I give no weight to any of Mr. Clark's testimony. He was evasive and non-responsive. He clearly had a point that he wanted to make about buying Aeroplan Miles and he just kept returning to it over and over.

Preliminary Conclusion

[101] On the basis of all of the foregoing, applying the test set out in *Global Cash Access*, *SLFI* and *Great-West Life*, I find that the predominant element of the single compound supply was the supply of Aeroplan Miles.

[102] I will now consider whether *CIBC* (FCA) forces me to change this conclusion.

B. The Test from CIBC (FCA)

[103] *CIBC* involved very similar facts to the facts in this appeal. Pursuant to an agreement between Aeroplan and CIBC, CIBC issued Aeroplan-branded credit cards to its customers. The agreement between Aeroplan and CIBC involved a single compound supply.

Tax Court Decision

[104] At trial, Justice Visser found that there were a number of elements to the supply: providing all CIBC cardholders with Aeroplan membership, crediting Aeroplan Miles to such members and undertaking specified referral activities or services and marketing in respect of CIBC's cards.¹²

[105] Justice Visser applied the test in *Global Cash Access* and *Great-West Life* and found that the *raison d'être* of the agreement between CIBC and Aeroplan was to market and promote applications for and increased use of participating CIBC credit cards.¹³ He therefore concluded that the marketing and promotional services were the predominant element of the supply.¹⁴ In reaching that conclusion, Justice Visser

¹² *CIBC* (TCC) at para. 29.

¹³ *CIBC* (TCC) at para. 32.

¹⁴ *CIBC* (TCC) at para. 33.

noted that the agreement between CIBC and Aeroplan “explicitly stipulates that the marketing and promotional services ... are the predominant element” of the supply.¹⁵

Federal Court of Appeal – Majority Decision

[106] On appeal, the majority upheld Justice Visser’s decision. However, in doing so, the majority went much further than Justice Visser did.

[107] While they acknowledged the law in *Global Cash Access* and *Great-West Life*, the majority specifically stated that it was not necessary to consider the predominant element of the agreement between CIBC and Aeroplan because the agreement explicitly identified the predominant supply and the supplies that were incidental thereto.¹⁶

[108] The majority emphasized that there was nothing in the agreements to indicate that CIBC was purchasing Aeroplan Miles, nor was there any direct statement that the amounts paid by CIBC had been paid as consideration for Aeroplan Miles.¹⁷ The majority explained that oral testimony could not override the explicit statements in the agreement between CIBC and Aeroplan.¹⁸

Federal Court of Appeal - Dissent

[109] Justice Stratas dissented. He stated that the majority had focused exclusively on the literal contractual language and that, in doing so, they had deviated from the test in *Global Cash Access* and *Great-West Life*, which encourages the court to get to the practical, commercial substance of the supply.¹⁹

[110] Justice Stratas stated that he feared that the majority’s reasoning would encourage parties to “add words not to change their contractual obligations or the

¹⁵ CIBC (TCC) at para. 32.

¹⁶ CIBC (FCA) at para. 39. The majority uses the term “commercial efficacy” instead of “predominant element”. That was the term used by the Federal Court of Appeal when determining the predominant element of a supply in *Global Cash Access* at paragraph 28. In this context, the two terms have the same meaning.

¹⁷ CIBC (FCA) at paras. 44 and 47.

¹⁸ CIBC (FCA) at para. 54.

¹⁹ CIBC (FCA) at para. 74.

practical, commercial substance of the supply but merely to trigger favourable GST treatment.”²⁰

[111] Justice Stratas found that the predominant element of the supply between Aeroplan and CIBC was the right to allocate Aeroplan Miles. He stated that, “[b]ut for the right to allocate Miles, there would have been no point in the parties performing their other obligations.”²¹ He went on to explain in detail why the “mere fact that CIBC plans to use its property, the rights to allocate Miles, to make money does not support the view that we are dealing with promotional and marketing services.”²²

[112] With respect, I prefer Justice Stratas’ approach to that of the majority.

[113] I share Justice Stratas’ concern that the majority’s decision will lead to taxpayers inserting self-serving statements into agreements declaring the predominant element of the agreement to be whatever the parties want it to be.

[114] The majority referred to the Supreme Court of Canada’s decision in *Shell Canada Ltd. v. The Queen*²³ as confirming that the *bona fide* legal relationships of taxpayers must be respected in tax cases.²⁴ That is clearly the law, but I do not think that Justice Stratas was suggesting that the *bona fide* legal relationships between CIBC and Aeroplan should be altered. He was not suggesting that the agreement be re-characterized as a lease, licence, loan or some other type of transaction in order to better represent its true economic substance. That would be contrary to *Shell*.

[115] In fact, it does not appear to me that Justice Stratas was trying to re-characterize the legal relationship at all. He was simply trying to establish (in accordance with *Global Cash Access* and *Great-West Life*) which of the many elements that CIBC was supplying was the predominant element. Looking for the predominant element of a supply, while still respecting the form of the supply, is very different from looking at economic substance over form.

How to Apply CIBC

²⁰ *CIBC* (FCA) at para. 74.

²¹ *CIBC* (FCA) at para. 77.

²² *CIBC* (FCA) at paras. 79 to 83.

²³ [1999] 3 S.C.R. 622 (“*Shell*”).

²⁴ *CIBC* (FCA) at paras. 60 and 61.

[116] Despite my support of Justice Stratas' dissent, I am bound by the decision of the majority. However, I am also bound by the prior decisions of the Federal Court of Appeal in *Global Cash Access*, *SLFI* and *Great-West Life*, none of which were specifically rejected by the majority.

[117] Thankfully, I do not have to choose which Federal Court of Appeal decision to follow. The majority in *CIBC* (FCA) relied on an explicit statement in the relevant agreement that set out the parties' view of the predominant element of the supply. The Agreement in the present case contains no such statement. Similarly, the majority relied on the fact that there was nothing in the *CIBC* agreements to indicate that *CIBC* was purchasing Aeroplan Miles. That is not the case in this appeal.

[118] In the circumstances, since *CIBC* (FCA) can be distinguished on its facts, and since the majority did not reject the law as set out in *Global Cash Access* or *Great-West Life*, I will follow the approach laid out in those cases and used by Justice Stratas in his dissent.

C. Conclusion

[119] On the basis of all of the foregoing, I find that the predominant element of the single compound supply made by Aeroplan to TD was the supply of Aeroplan Miles.

[120] The final step in the test is to determine how that supply should be treated. TD submits that the single compound supply of Aeroplan Miles was a supply of gift certificates under section 181.2 of the Act and was thus deemed not to have been a supply. The Respondent submits that the supply was a taxable supply of property. While the Respondent does not explicitly say so, the Respondent is essentially arguing that Aeroplan Miles are coupons.

VII. What Is a Gift Certificate?

[121] Section 181.2 deals with gift certificates. It states that:

For the purposes of this Part, the issuance or sale of a gift certificate for consideration shall be deemed not to be a supply and, when given as consideration for a supply of property or a service, the gift certificate shall be deemed to be money.

[122] The term "gift certificate" is not defined in the Act. To understand what a gift certificate is, one has to first understand what a coupon is.

[123] Subsection 181(1) states that “‘coupon’ includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit”. This definition makes two things clear. First, coupons, gift certificates and barter units are all types of devices. Second, since subsection 181(1) specifically defines “coupon” as not including a gift certificate or barter unit, any device that is not a gift certificate or a barter unit is, by definition, a coupon.

[124] Section 181.3 contains enough other conditions that it is not difficult to determine what a barter unit is. Therefore, the key question is what distinguishes a gift certificate from the catch-all category of coupon.

[125] In order to determine whether an Aeroplan Mile was a gift certificate, I need to answer four questions:

- (a) What is the ordinary meaning of the term “gift certificate”?
- (b) Does the context or purpose of the Act change that ordinary meaning?
- (c) What characteristics does a gift certificate have?
- (d) Does an Aeroplan Mile have those characteristics?

[126] The courts have dealt with gift certificates on four occasions *CIBC (FCA)*, *Canasia Industries Limited v. The Queen*,²⁵ *Royal Bank of Canada v. The Queen*²⁶ and *CIBC (TCC)*). On each of those occasions, the courts have applied different, and sometimes conflicting, criteria.

A. CIBC (FCA)

[127] In *CIBC (FCA)*, the majority declined to comment on the meaning of the term “gift certificate”.²⁷ However, Justice Stratas expressed his views in his dissent. While I am not bound by those views, TD submits that I should adopt them.

[128] Justice Stratas held that the ordinary meaning of a gift certificate is “a device, paper or electronic, that may be used, subject to its terms, as full or partial consideration for a supply offered by a supplier.”²⁸ This description suggests that a

²⁵ 2003 TCC 33 (“*Canasia*”).

²⁶ 2007 TCC 281 (“*Royal Bank*”).

²⁷ *CIBC (FCA)* at para. 69.

²⁸ *CIBC (FCA)* at para. 87.

gift certificate must have two key characteristics: it must be a device and it must be possible to use it as full or partial consideration for a supply.

[129] I agree that both of those are characteristics of a gift certificate. However, a contextual analysis shows that this description is too broad to be helpful. A gift certificate must be something different from a coupon or a barter unit. The characteristics that Justice Stratas describes are also characteristics of both coupons and barter units.

[130] Subsections 181(2) to (5) each describe a coupon being accepted “in full or partial consideration” for a supply. Similarly, subsection 181.3(1) defines a “barter unit” as a credit that members of a barter exchange network have agreed to accept “as full or partial consideration for supplies of property or services between members”.

[131] I acknowledge that section 181.3 contains enough other conditions that it is not difficult to distinguish a gift certificate from a barter unit. However, respectfully, any interpretation of “gift certificate” must encompass more characteristics than those proposed by Justice Stratas. It must, at a minimum, describe the key characteristics that differentiate a gift certificate from the default device—a coupon.

B. Canasia

[132] In *Canasia*, Chief Justice Garon offered a more specific ordinary meaning of a gift certificate:²⁹

... a gift certificate is a very broad term for a voucher which entitles the bearer to redeem it according to its governing terms for goods or services or for a value towards the purchase of goods or services. ...[emphasis added]

[133] However, a contextual analysis shows that even this more specific description of “gift certificate” is still too broad. Requiring that it be possible to redeem a gift certificate for goods or services or for a value towards the purchase of goods or services still does not distinguish gift certificates from coupons.

[134] Subsections 181(4) and (5) use the same terms to describe coupons: “a coupon that may be exchanged for the property or service or that entitles the recipient of the supply to a reduction of, or a discount on, the price of the property or service”. Similarly, subsections 181(2) and (3) refer to “a coupon that entitles the recipient of

²⁹ At para. 29.

the supply to a reduction of the price of the property or service equal to a fixed dollar amount”.

[135] What Chief Justice Garon’s description does do, however, is add the idea that a gift certificate can either be redeemed for certain goods or services or be redeemed for a value towards purchasing goods and services.

[136] In making this important distinction, Chief Justice Garon recognized that there are two types of devices that are commonly called “gift certificates” and that those devices work differently:

- (a) Pre-Paid Card: One device can be used like money to purchase goods or services from the issuer or anyone else who accepts the device. A typical example would be a \$100 gift card from a movie theatre chain that the bearer could use to pay for movies, popcorn, etc. For simplicity, I will call this device a “Pre-Paid Card”.
- (b) Service or Good Voucher: The other device requires the issuer to provide the bearer a certain good or service free of charge. A typical example would be a voucher for a one-hour spa treatment. For simplicity, I will call this device a “Service or Good Voucher”.

[137] TD did not direct me to an ordinary meaning of “gift certificate” that would encompass anything other than these two devices. I cannot think of any such ordinary meaning.

C. Royal Bank

[138] In *Royal Bank*, Justice Hershfield adopted Chief Justice Garon’s understanding of gift certificates, although he expressed some doubt as to whether a Service or Good Voucher was, in fact, a gift certificate.³⁰

[139] In expressing these doubts, Justice Hershfield referred to a voucher entitling the bearer to a free car wash. He thought that the bearer of such a voucher would expect that the GST had been pre-paid and that they would not have to pay GST when they presented the voucher for the car wash.

³⁰ At para. 49.

[140] Despite his concerns, Justice Hershfield felt he should follow *Canasia* and thus accepted that Service or Good Vouchers could be gift certificates.³¹

[141] I share Justice Hershfield's concerns. If I give my mother a voucher entitling her to a free pedicure at a local spa, I expect that whatever I paid for the voucher will cover the entire cost, including GST. The last thing I would want or expect is for my mother to have to pull out her wallet and pay GST on my gift.

[142] If the voucher I have given my mother is a gift certificate, subsection 181.2 would deem there not to have been a supply when I bought it (meaning that I would have paid no GST) and would deem the device to be money when my mother presents it (meaning that she would pay the GST). By contrast, if the voucher is a coupon, I would have paid GST when I purchased it. When my mother redeems the voucher, subsection 181(4) would deem her to have acquired the pedicure for no consideration. As a result, she would not have to pay any GST.

D. CIBC (TCC)

[143] In *CIBC (TCC)*, Justice Visser specifically addressed the question of whether Service or Good Vouchers were gift certificates. He held that the term "gift certificate" only captures a Pre-Paid Card, not a Service or Good Voucher.³²

[144] Justice Visser concluded that Parliament intended gift certificates to be equivalent to money and therefore that gift certificates should have attributes similar to those of money. Since Service or Good Vouchers do not have those attributes, he found that they are not gift certificates. I agree with Justice Visser. A contextual and purposive analysis supports his conclusion.

[145] A Pre-Paid Card works harmoniously with section 181.2. Deeming a Pre-Paid Card to be money when it is used is consistent with the scheme of the Act. A Pre-Paid Card is nothing more than a repository of money. As Justice Visser observed, it is not that different from a deposit. In the same way that subsection 168(9) only requires GST to be paid on a deposit when it is applied as consideration for a supply, section 181.2 only requires GST to be paid on a gift certificate when it is given as consideration for a supply.³³

³¹ At para. 52.

³² At para. 80.

³³ At para. 79.

[146] By contrast, a Service or Good Voucher does not act as a repository of money. It acts as a repository of a service or good that has already been purchased but has yet to be delivered. As a result, treating it as a gift certificate and having section 181.2 deem it to be money results in the unexpected outcome described in the pedicure example above.

[147] Treating a Service or Good Voucher as a coupon ensures that GST is paid when the purchase is made, not when the service or good is delivered. This is consistent with the general scheme of the Act. The general rule for collecting GST set out in subsection 168(1) requires GST to be paid when the consideration is paid or becomes due, not when the good or service is delivered.

E. Conclusion

[148] The ordinary meaning of “gift certificate” encompasses both Pre-Paid Cards and Service or Good Vouchers. However, the context and purpose of section 181.2 support the conclusion that Parliament only intended Pre-Paid Cards to be gift certificates. Accordingly, I find that only Pre-Paid Cards are gift certificates.

VIII. Characteristics of a Gift Certificate

[149] Having established the general types of devices that can and cannot be gift certificates, I will now attempt to further define the characteristics of a gift certificate and determine whether an Aeroplan Mile has those characteristics. However, before doing so, I need to emphasize two points.

[150] First, although TD purchased hundreds of millions of Aeroplan Miles from Aeroplan, for TD to receive the rebates that it is seeking, it must show that each individual Aeroplan Mile that it purchased was a gift certificate. As a result, when determining whether the following characteristics were present, I will consider whether a single Aeroplan Mile had the necessary characteristics.

[151] Second, I am not trying to decide whether an Aeroplan Mile is more like a coupon or a gift certificate. By definition, a device that is not a gift certificate or a barter unit is a coupon. This is the case whether or not it has characteristics that one would normally associate with the term “coupon”. As no one is suggesting that an Aeroplan Mile meets the many conditions under section 181.3 to be a barter unit, my task is to determine whether an Aeroplan Mile is a gift certificate. If it is not, then it is, by default, a coupon.

A. Core Characteristic

[152] In *CIBC (TCC)*, Justice Visser found that, at its core, a gift certificate is a storage mechanism for money and must therefore have attributes similar to those of money.³⁴ Similarly, Justice Stratas concluded that gift certificates have “very much the same quality as money”.³⁵ I agree. This overarching characteristic informs my analysis of all of the other characteristics of a gift certificate.

[153] The following list is not exhaustive.

B. Stated Monetary Value

Characteristic

[154] I find that, for a device to be a gift certificate, it must state its monetary value.

[155] The case law uses three different terms to describe this characteristic. It is variously described as a “stated value”, a “stated monetary value” or a “fixed dollar value”. I will adopt the term used by Justice Visser: “stated monetary value”.

[156] Whatever this characteristic is called, there is considerable disagreement in the case law about whether a device has to have it to be a gift certificate. This disagreement stems from the debate over whether a Service or Good Voucher is a gift certificate.

[157] Service or Good Vouchers state the service or good for which they can be redeemed rather than the monetary value of that good or service. Therefore, if one concludes that a Service or Good Voucher is a gift certificate, then one has no choice but to conclude that those types of gift certificates do not have to have a stated monetary value.

[158] *Canasia* dealt with a Service or Good Voucher. The device in question entitled the bearer to a free flight (i.e. a specific service). Therefore, when Chief Justice Garon concluded that there was no requirement that the device have a stated monetary value, he was simply stating that Service or Good Vouchers need not have

³⁴ *CIBC (TCC)* at para. 80.

³⁵ *CIBC (FCA)* at para. 87.

a stated monetary value. He was by no means concluding that Pre-Paid Cards do not need a stated monetary value.

[159] On the contrary, Chief Justice Garon specifically referred to certain devices (i.e. Service or Good Vouchers) as entitling the bearer to a good or service and other devices (i.e. Pre-Paid Cards) as entitling the bearer to a “stated value”:³⁶

What is essential is that the bearer of the certificate who could be anyone to whom the certificate was transferred by the original purchaser of the certificate or by a subsequent bearer, is entitled to receive free of charge from the issuer of the certificate either a product or a service or the stated value towards a product or service. ...

[emphasis added]

[160] It is clear from this passage that Chief Justice Garon concluded that a Pre-Paid Card would need to have a stated monetary value.

[161] In *Royal Bank*, Justice Hershfield reviewed the paragraph quoted above and concluded that *Canasia* stood for the proposition that a “gift certificate ... does not have to have a stated value and may be for identifiable goods or services.”³⁷ Justice Hershfield’s use of the word “and” suggests that he thought that Chief Justice Garon had reached two conclusions: first, that gift certificates do not need to have a stated monetary value, and second, that Service or Good Vouchers could be gift certificates.

[162] Since a single airline reward point of the type described in *Royal Bank* did not entitle the bearer to a specific good or service, that the reward point cannot have been a Service or Good Voucher. Therefore, Justice Hershfield must have concluded that each airline reward point was a Pre-Paid Card. The only way that he could have done that is if he interpreted *Canasia* as having removed any requirement that Pre-Paid Cards have a stated monetary value. As set out above, that is not what Chief Justice Garon concluded.

[163] In his dissent in *CIBC (FCA)*, Justice Stratas stated that he was affirming “earlier decisions of the Tax Court of Canada and their supporting reasoning to the effect that reward points need not have a fixed dollar value in order to be considered

³⁶ At para. 33.

³⁷ At para. 50.

a gift certificate”.³⁸ Justice Stratas referred to the specific paragraphs of *Royal Bank* in which Justice Hershfield interpreted the paragraph from *Canasia* quoted above. It appears that it may not have been brought to Justice Stratas’ attention that Justice Hershfield had drawn something from *Canasia* that was not there.

[164] As a result, Justice Stratas viewed Justice Visser as being out of step with *Canasia*. Respectfully, this is not the case. As noted above, while Justice Visser and I disagree with Chief Justice Garon on the question of whether Service or Good Vouchers are gift certificates, we all agree that Pre-Paid Cards must have a stated monetary value.

[165] Justice Stratas questioned Justice Visser’s conclusion that a Pre-Paid Card must have a stated monetary value, noting that “[t]he requirement of a fixed dollar value does not have a foundation in the text, context or purpose of the Act.”³⁹

[166] With respect, the text prescribes certain treatment for devices that are “gift certificates”. Those words mean something. They describe a certain type of device. In holding that Pre-Paid Cards must have a stated monetary value, neither Justice Visser, Chief Justice Garon nor I am reading requirements into the Act. We are simply giving ordinary meaning to the text.

[167] The stated monetary value is part of the normal way that people describe Pre-Paid Cards: “He got a \$50 Amazon gift card for his birthday”; “Let’s give the coach a \$20 Tim Hortons card as a thank-you”. If someone simply says, “My Grandma gave me a gift card to Home Depot”, it is not because the gift card does not have a stated monetary value, but rather because they do not want to share that information.

[168] A Pre-Paid Card does more than just state its monetary value. Unless the bearer spends some of the value stored on the Pre-Paid Card, its stated monetary value does not change. In this way, Pre-Paid Cards are like money.

[169] One of the core features of money is that its stated value is fixed. The stated value of a dollar is always a dollar. Its stated value does not change depending on whether I am buying food or furniture. It does not change when I give it to someone else.

³⁸ At para. 89.

³⁹ At para. 88.

[170] There is a difference between a stated monetary value and an economic value. Because of inflation, the economic value of a dollar today is less than what it was in the past. But its stated monetary value has not changed. It remains what it always has been—one dollar.

[171] Justice Stratas reasoned that gift certificates need not have a “fixed dollar value” because “other exchange devices, such as foreign currency, whose value in Canadian dollars may change from time to time”, do not.⁴⁰ With respect, the stated value of foreign currency does not change. A US dollar is always worth exactly the amount that it is stated on its face—one US dollar. The fact that its economic value may change relative to the economic value of the Canadian dollar does not change the fact that its stated value is fixed.

[172] Similarly, the stated monetary value of Pre-Paid Cards is always fixed. When I buy a gift certificate from a movie theatre chain for \$100, its stated value does not change. It will be \$100 whether I use it tomorrow or two years from now. If the price of movies goes up, I may not be able to use it to buy as many movies, but I will still be able to use it to reduce the cost of attending those movies by \$100.

[173] In summary, of the two devices commonly described as “gift certificates”, Pre-Paid Cards always have a stated monetary value and Service and Good Vouchers do not. Since I have concluded that Service and Good Vouchers are not gift certificates, I am left with the inescapable conclusion that a gift certificate must have a stated monetary value. I see nothing in the context or purpose of section 181.2 that would require me to alter the common textual meaning of “gift certificate” to omit this characteristic. Accordingly, I find that, for a device to be a gift certificate, it must have a stated monetary value.⁴¹

[174] To be clear, I have concluded that devices without a stated monetary value cannot be gift certificates. I have not concluded that all devices with a stated monetary value are gift certificates. Devices other than gift certificates may also have a stated monetary value. For example, subsections 181(2) and (3) both refer to coupons that entitle the bearer to a price reduction of a “fixed dollar amount”.

⁴⁰ *CIBC (FCA)* at para. 88.

⁴¹ Although it is not relevant to this appeal, I would also add that the stated monetary value need not be the same as the consideration paid to acquire the device.

[175] Justice Visser qualified the stated monetary value characteristic further. He held that the stated monetary value of a gift certificate must either appear on the device's face or be retrievable electronically.⁴² I agree.

[176] This practical qualification of the stated monetary value characteristic recognizes that some devices are entirely electronic and thus may not have a face upon which the stated monetary value may appear. I am thinking, for example, of a Pre-Paid Card that exists only on an app or in an email.

[177] It also recognizes that, while some physical Pre-Paid Cards do not state their monetary value on their face, that monetary value can be retrievable electronically by, for example, reading the black strip on the back of the card or inputting a code printed on the card.

[178] In summary, I will follow Justice Visser's conclusion in *CIBC (TCC)*. I find that, to be a gift certificate, a device must have a stated monetary value. That stated monetary value must either appear on the device's face or be retrievable electronically.

Application to an Aeroplan Mile

[179] An Aeroplan Mile clearly did not have a stated monetary value.

[180] Nonetheless, TD argues that an Aeroplan Mile meets this test. TD's argument is based on the idea that an Aeroplan member could roughly calculate the value of an Aeroplan Mile by using websites that offer tools to make such calculations or by comparing the number of Aeroplan Miles needed to purchase a flight through Aeroplan against the cost of that flight on the Air Canada website. There are three problems with this reasoning.

[181] First, I do not think that Justice Visser's reference to "retrievable electronically" meant scouring the internet for data.

[182] Second, the value that TD is referring to is not the stated monetary value of an Aeroplan Mile but rather its economic value. I do not doubt that an Aeroplan Mile has economic value. That was established by this Court in *Johnson v. The Queen*⁴³

⁴² At para. 80.

⁴³ 2010 TCC 321.

and *Hope Air v. The Queen*.⁴⁴ However, the fact that an Aeroplan Mile has economic value is irrelevant. The characteristic that gift certificates must have is a stated monetary value, not simply being worth something.

[183] Third, because an Aeroplan Mile could generally not be transferred, its economic value depended on who held it and could not truly be determined until it was used to make a purchase.⁴⁵ An Aeroplan Mile had more economic value if it was used to buy a flight than if it was used to acquire other goods or services through the Aeroplan store.⁴⁶ The economic value of an Aeroplan Mile used to buy a seat on a given flight could differ significantly depending on whether the seat was a “classic grid” seat or a “market fare” seat. Because of the benefits of “Distinction” status, the number of Aeroplan Miles needed to buy a flight could vary by as much as 35% depending on how many Aeroplan Miles the member had earned in the previous year. Additionally, the Agreement actually contemplated the economic value of an Aeroplan Mile in the “classic grid” potentially being adjusted annually based on certain formulae. Finally, Aeroplan retained the right to amend its program, including adjusting redemption pricing upwards or downwards.

[184] Ultimately, a single Aeroplan Mile simply represented a promise that, if combined with enough other Aeroplan Miles, the bearer might someday be able to use them to acquire an as-yet unspecified and unascertainable good or service. A cardholder could only determine the economic value of an Aeroplan Mile once they had enough other Aeroplan Miles to be able to purchase something.

[185] In fact, in its general terms and conditions of membership, Aeroplan specifically warned its members that:⁴⁷

[t]he accumulation of Aeroplan Miles does not entitle members to any vested rights and, in accumulating Aeroplan Miles, members may not rely upon the continued availability of any award, reward, award/reward grid or level, premium, privilege program or other benefit. Changes to any of these matters may affect Aeroplan

⁴⁴ 2011 TCC 248.

⁴⁵ I acknowledge that an Aeroplan Mile could be transferred under certain limited conditions but, as set out below, doing so was so uneconomic as to effectively render that ability useless.

⁴⁶ Even within the same category of items, the value of an Aeroplan Mile varied. For example, at one point in the periods in issue, an Aeroplan Mile would have been worth \$0.008 if buying a Home Hardware gift card but \$0.007692 if buying an Esso gift card (Exhibit J-1, Tab 66, p. 13).

⁴⁷ Exhibit J-1, Tab 69, p. 21.

Miles that a member has already accumulated, as well as any future accumulation of Aeroplan Miles.

[186] On the basis of all of the foregoing, I find that an Aeroplan Mile did not have a stated monetary value. This is sufficient to find that it was not a gift certificate, but I will nonetheless describe and analyze the remaining characteristics.

C. Use for Payment

Characteristic

[187] In *CIBC (TCC)*, Justice Visser held that the bearer of a gift certificate must be entitled to have the balance of the stored monetary value applied to the purchase price of goods or services purchased from either the issuer of the gift certificate or any other person who can lawfully accept the gift certificate as payment.⁴⁸

[188] I agree. This is consistent with Chief Justice Garon's view of the characteristics of Pre-Paid Cards.⁴⁹

[189] It is important to note that Justice Visser did not simply say that it must be possible to use a gift certificate as full or partial consideration for a supply. As discussed above, that same condition applies to coupons. Instead, Justice Visser referred to the bearer being entitled to apply the balance of the device's stored monetary value. In doing so, Justice Visser indirectly articulated a key characteristic of gift certificates.

[190] Because gift certificates are a storage mechanism for money, the bearer can use part of their stated monetary value for one purchase and keep the balance of their stated monetary value for future purchases.

[191] In this way, gift certificates are very much like money. If I have a \$100 bill and I want to buy a \$30 toque, I use \$30 of the bill's value to buy the toque and receive \$70 in change that I can apply to future purchases.

[192] On the basis of the foregoing, I find that, for a device to be a gift certificate, the bearer must be entitled to apply some or all of the balance of the stored monetary

⁴⁸ At para. 82.

⁴⁹ At para. 33.

value to the purchase price of goods or services purchased from either the issuer of the device or any other person who can lawfully accept the device as payment.

Application to an Aeroplan Mile

[193] Since I have concluded that an Aeroplan Mile did not have a stated monetary value, it is not possible for it to meet a condition that requires the bearer to be able to use some or all of that stated monetary value to make a purchase.

D. Transferable Without Cost

Characteristic

[194] In *Canasia*, Chief Justice Garon found that, for a device to be a gift certificate, it must be transferrable to a third party.⁵⁰ I agree. Gift certificates are called “gift” certificates precisely because people routinely buy them for the purpose of gifting them to others.

[195] I would, however, expand on this requirement. In order to reflect the core element that a gift certificate must have attributes similar to those of money, I find that a purchaser must be able to transfer a gift certificate to a third party without additional payment to the issuer.

[196] If I want to give \$100 to my friend, I do not have to pay a fee to the Crown to do so. I may have to pay a fee to my bank for the service of transferring the money, but my bank is not the issuer of the money. Similarly, no one who buys a \$100 gift certificate from a clothing retailer would expect to be told that they would need to pay an extra \$10 if they want to give it to their friend.

[197] It is important to clarify that the fact that the bearer of a device transfers it to a third party for consideration in no way precludes the device from being a gift certificate. Chief Justice Garon observed that, despite the use of the word “gift”, a purchaser may transfer a gift certificate to a third party for free, for some consideration or for full consideration without changing the device’s status as a gift certificate.⁵¹ I agree entirely. My concern is with fees charged by the issuer of the device, not with consideration paid by someone purchasing it from the bearer.

⁵⁰ At para. 33.

⁵¹ At paras. 33 and 35.

[198] On the basis of all of the foregoing, I find that, for a device to be a gift certificate, the bearer must be able to transfer it to a third party without paying a fee to the issuer.

Application to an Aeroplan Mile

[199] An Aeroplan Mile does not have this characteristic. Aeroplan's general terms and conditions specifically prohibit the transfer of Aeroplan Miles.⁵²

[200] Mr. Hall testified that it was possible to transfer an Aeroplan Mile to a friend or family member but not without paying Aeroplan a fee of \$0.03 to \$0.035 per Aeroplan Mile. While this fee is expressed in cents, it is anything but inconsequential. In fact, it is [REDACTED] the price that TD paid to buy an Aeroplan Mile from Aeroplan. At these prices, transferring your brother enough points to buy a round trip from Toronto to Vancouver on the "classic grid" would have cost you between \$750 and \$875.⁵³ You would most likely have been better off just giving him the cash.

E. Limited Conditions

Characteristic

[201] Justice Visser held that a device can have terms and conditions regarding its use and still be a gift certificate, but those terms and conditions must not detract from the essential attribute of a gift certificate that it must have attributes similar to those of money.⁵⁴ I agree.

[202] In *Canasia*, Chief Justice Garon held that the voucher for a free flight before him was not a gift certificate because it could only be used if the bearer agreed to pay for a week's worth of hotel accommodation at a select list of hotels.

[203] Similarly, in *Royal Bank*, Justice Hershfield found that the airline reward points before him were not gift certificates because there were too many conditions on their use.

⁵² Exhibit J-1, Tab 66, p. 21.

⁵³ Exhibit J-1, Tab 18, p. 6 shows that that flight would have cost 25,000 Aeroplan Miles.

⁵⁴ *CIBC (TCC)* at para. 82.

[204] An Aeroplan Mile had many terms and conditions restricting its use. I will examine the key ones.⁵⁵

Need to Accumulate More

[205] A single Aeroplan Mile could not be used without first spending a significant amount of additional money to either accumulate or buy more Aeroplan Miles.⁵⁶

[206] For example, if a cardholder who was using the TD Aeroplan credit card with the best return of Aeroplan Miles for each dollar spent had a single Aeroplan Mile and wanted to buy a 25,000 Aeroplan Mile flight, they would have to have spent an additional \$19,999 on their credit card to accumulate the additional 24,999 Aeroplan Miles they needed.⁵⁷ This is in addition to the \$399 annual fee that the cardholder would have to pay to keep earning Aeroplan Miles on their card.⁵⁸

[207] TD argues that conditions regarding the accumulation of Aeroplan Miles have nothing to do with their use and are thus irrelevant. This is a distinction without a difference. I have to determine whether a single Aeroplan Mile is a gift certificate. A single Aeroplan Mile cannot be used without accumulating or buying many other Aeroplan Miles. The fact that the bearer spends the money to acquire the additional Aeroplan Miles does not change the fact that they must do so if they want to use the single Aeroplan Mile that they have.

[208] In this way, an Aeroplan Mile is very unlike a Pre-Paid Card. While a Pre-Paid Card with a small stated monetary value might not buy much, there is no condition on its use that requires the bearer to acquire more Pre-Paid Cards to use it.

[209] I find this to be a very significant condition that strongly supports the idea that an Aeroplan Mile is not a gift certificate.

Expiration of Aeroplan Miles

⁵⁵ I found Mr. Rhodes to be somewhat evasive when testifying regarding the other terms and conditions that Aeroplan placed on its, and by extension TD's, customers. I place no weight on his testimony on these points.

⁵⁶ Mr. Hall testified that it was possible for an Aeroplan member to "top-up" their Aeroplan Miles by buying more. Oddly, he was not asked what the cost per Aeroplan Mile was.

⁵⁷ Calculated using the ratio of 1.25 Aeroplan Miles per \$1.00 spent on TD's top-tier card (Exhibit J-1, Tab 4, p. 133).

⁵⁸ Exhibit J-1, Tab 4, p. 133.

[210] As described above, an Aeroplan member's Aeroplan Miles would automatically expire if the member did not earn or redeem any Aeroplan Miles in a 12-month period. TD made arrangements with Aeroplan so that this would not happen to its customers. However, that did not change the nature of an Aeroplan Mile itself. The same expiry conditions existed. It was just that TD made sure that the conditions were not met as long as the member remained a cardholder. If the member ceased to be a cardholder, the Aeroplan Mile would expire as usual.

[211] Justice Visser specifically found that a reasonable expiry date would not, in itself, prevent an Aeroplan Mile from being a gift certificate.⁵⁹ Justice Stratas took a similar approach.⁶⁰ I agree.

[212] While my understanding is that provincial legislation generally prevents gift certificates from expiring or limits the conditions under which they can expire,⁶¹ that does not mean that a device that may expire cannot be a gift certificate. On the contrary, it is a reminder that, prior to such legislation being introduced, it was possible for gift certificates to expire.

[213] In summary, while the potential for an Aeroplan Mile to expire is one way in which it is not like money, I put little weight on this condition.

Cancellation of the Program

[214] An Aeroplan Mile could be cancelled if Aeroplan went into default or shut down the program. This was not just a theoretical risk. Mr. Rasmussen testified that there were periods when TD worried about this possibility, particularly when Aeroplan's contract with Air Canada came up for renewal.

[215] That said, I do not consider this to be a significant condition. The risk that the issuer will fail is present with any type of device.

Revocation of Membership

⁵⁹ *CIBC (TCC)* at para. 82.

⁶⁰ *CIBC (FCA)* at para. 89.

⁶¹ See, for example, *Consumer Protection Act* (Ontario), 2002, S.O. 2002, c. 30, Sched. A and *Business Practices and Consumer Protection Act* (BC), SBC 2004, c.2.

[216] Aeroplan could also revoke a member's membership for fraudulent activities. This condition is unrelated to the nature of an Aeroplan Mile.

Return of Aeroplan Miles

[217] There were limited circumstances in which an Aeroplan Mile that had already been awarded would have to be returned. TD would require a customer to return an Aeroplan Mile if it had been obtained through fraud or had been awarded through a processing error.

[218] Failure to make payments on an outstanding credit card balance would prevent a customer from earning additional Aeroplan Miles because their card would be frozen, but this would not result in a previously awarded Aeroplan Mile having to be returned.

[219] If the purchase that had given rise to the award of Aeroplan Miles was later refunded by a merchant, the original award did not typically have to be returned. The refund would simply reduce the number of Aeroplan Miles awarded to the customer in the credit card period in which the refund occurred.

[220] Overall, I do not find these conditions to be significant. They are simply designed to protect Aeroplan from its members abusing the program.

Summary

[221] In summary, most of the conditions attached to an Aeroplan Mile involve standard or relatively limited risks. They would not prevent an Aeroplan Mile from being a gift certificate.

[222] However, the need to accumulate more Aeroplan Miles is a significant condition that makes an Aeroplan Mile very unlike a Pre-Paid Card. I find that it is one more reason why an Aeroplan Mile is not a gift certificate.

F. Non-Characteristics

[223] I would like to briefly discuss three things that I do not consider to be characteristics of a gift certificate.

Consideration

[224] In ordinary usage, the term “gift certificate” would describe a device that was issued for consideration. However, a contextual analysis shows that that is not what Parliament intended.

[225] Section 181.2 states that “the issuance or sale of a gift certificate for consideration shall be deemed not to be a supply”. In *CIBC (TCC)*, Justice Visser interpreted these words as meaning that a device did not have to be issued or sold for consideration in order for it to be a gift certificate.⁶² I agree.

[226] There would have been no reason to include the words “for consideration” in section 181.2 unless Parliament thought that gift certificates could be issued or sold without consideration. Section 181.2 denies its beneficial tax treatment to a device if the device is not issued for consideration, but it does not require a device to have been issued for consideration for it to be a gift certificate.

[227] In addition, section 181.2 only says that there has to be consideration. It does not specify the amount of consideration. Thus, a gift card with a \$100 stated monetary value could still enjoy the benefits of section 181.2 even though it was issued for \$1.

[228] On the basis of the foregoing, since consideration is not necessary for a device to be a gift certificate, it cannot be a characteristic of a gift certificate.

A Substitute for Currency

[229] TD submits that an Aeroplan Mile is a gift certificate because it is a substitute for currency. I disagree.

[230] I have emphasized above that gift certificates should have attributes similar to those of money. But that is very different from saying that any device that can be used like money must be a gift certificate.

[231] In essence, TD argues that gift certificates can be used like money, that an Aeroplan Mile can be used like money and therefore that an Aeroplan Mile must be a gift certificate. The flaw in this logic is self-evident.

[232] The reality is that the only way that an Aeroplan Mile is like money is that it can be used to pay for goods and services. So can coupons, barter units,

⁶² At paras. 62 and 63.

cryptocurrency and gift certificates. The ability to use a device like money does not help me to distinguish among these devices.

[233] In his testimony, Mr. Rhodes frequently referred to Aeroplan Miles being “currency”. He appeared to believe that it was important to use this term whenever possible. The fact that the term did not come up in either Mr. Ahmed’s or Mr. Rasmussen’s testimony suggests to me that it is not a common term either at TD or in the industry. I place no weight or significance on Mr. Rhodes’ use of that term.

Revenue Recognition

[234] TD called Patricia O’Malley as an expert witness in international financial reporting standards. Ms. O’Malley testified that companies that sell gift certificates and companies that issue or sell rewards points are supposed to account for their revenue in the same way. In simple terms, the revenue is deferred and then recognized when the gift certificate or rewards points are redeemed.

[235] Ms. O’Malley’s evidence does not assist me in interpreting the meaning of the term “gift certificate”. The accounting standards that she described are focused on the timing and method of revenue recognition. The Act taxes consumption, not revenue.

[236] In addition, the accounting standards that Ms. O’Malley described would apply equally to pre-payments and deposits and to the sale of other goods and services that are nothing like gift certificates.

[237] On the basis of the foregoing, I find that revenue recognition is not a characteristic of a gift certificate.

G. Conclusion

[238] On the basis of all of the foregoing, I find that, for a device to be a gift certificate, it must have the following key characteristics:

- (a) The device must have a stated monetary value that either appears on the device’s face or is retrievable electronically.
- (b) It must be possible to transfer the device to a third party without additional payment to the issuer.

- (c) The bearer must be entitled to apply some or all of the balance of the stored monetary value to the purchase price of goods or services purchased from either the issuer of the device or any other person who can lawfully accept the device as payment.
- (d) The device may have some conditions, but any such conditions must not detract from the essential attribute of a gift certificate that it must have attributes similar to those of money.

[239] An Aeroplan Mile had none of these characteristics. It did not have a stated monetary value and thus that value could not be applied towards a purchase. It was not transferrable without paying a fee to Aeroplan. Finally, the need to accumulate more Aeroplan Miles in order to use a single Aeroplan Mile was a significant condition on the device's use.

[240] The meaning of "gift certificate" may encompass a variety of devices, but I cannot conceive of any interpretation that could be so broad as to capture an Aeroplan Mile.

H. TD's Policy Arguments

[241] Before turning to the remaining issue, I need to address TD's policy arguments.

[242] TD points to potential risks of double taxation, double non-taxation, tax being charged at the wrong rate, tax on phantom supplies, and an incentive for consumers to pay using Aeroplan Miles instead of cash as reasons why I should find that Aeroplan Miles are gift certificates. TD argues that treating Aeroplan Miles as gift certificates would avoid all of these problems. This may be the case, but it is not my role to fix problems with the Act.

[243] If TD had been able to point me to any commonly understood meaning of "gift certificate" that would capture anything like an Aeroplan Mile, I could have considered its policy arguments through a purposive analysis of section 181.2.

[244] A purposive analysis can either help the Court to choose between competing textual interpretations or reveal unexpected textual ambiguity. It cannot, however, form the basis for imposing a meaning that is not supported by the text in order to achieve a certain policy objective.

[245] If a statute prevents residents of a certain city from keeping horses in their yards, one could turn to a purposive analysis to help determine whether the term “horses” includes donkeys and mules. One could not, however, decide that “horses” must include bears and moose simply because the presence of these animals is potentially harmful to residents.

[246] As the Supreme Court of Canada stated in *TELUS Communications Inc. v. Wellman*:⁶³

... [Policy considerations] cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not. While policy analysis has a legitimate role in the interpretative process ..., the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this Court to rewrite the legislation.

[247] The ordinary textual meaning of “gift certificate” includes both Pre-Paid Cards and Service or Good Vouchers. The context and purpose of section 181.2 and subsection 181(4) helped me to determine that Parliament only intended to capture Pre-Paid Cards. However, there is no ordinary textual meaning of “gift certificate” that would include a device like Aeroplan Miles. An Aeroplan Mile has none of the characteristics of a gift certificate. No one (other than various banks seeking GST relief) ever uses the term “gift certificate” to describe a reward point. As a result, no matter how compelling TD’s policy arguments are, there is no basis upon which I can interpret “gift certificate” to give effect to them.

[248] While I accept that the coupon and gift certificate provisions in the Act are arguably ill equipped to deal with reward points, there are competing interests at stake. To put it bluntly, TD wants to shift the GST burden on Aeroplan Miles from itself to its cardholders. TD would not describe it that way, but that is the logical outcome of the interpretation that it is seeking. If Aeroplan or its members were before me, I imagine that they would be arguing for quite a different policy outcome.

[249] The Retail Council of Canada (“RCC”) sought leave to intervene in this appeal on behalf of its members who participate in rewards programs.⁶⁴ Many of those retailers treat rewards points as coupons rather than as gift certificates. They

⁶³ 2019 SCC 19 at para. 79.

⁶⁴ 2023 TCC 154.

were concerned that I might interpret “gift certificate” in a manner that could upend the basis of those programs.

[250] Justice Sommerfeldt dismissed the RCC’s motion for a number of reasons. One was that:⁶⁵

... RCC’s intervention would become a policy-based argument focusing on loyalty programs in general, rather than assisting the Court in its interpretation of the provisions of the [Act] that are relevant to this specific Appeal, and in its determination of whether the issuance of Aeroplan Miles was the supply of gift certificates. ...

[251] In other words, Justice Sommerfeldt was concerned that the RCC would make exactly the type of policy-based argument that TD is now trying to make. The RCC wanted to argue that treating rewards points as gift certificates instead of as coupons is bad policy. TD is arguing that treating Aeroplan Miles as coupons instead of as gift certificates is bad policy.

[252] Ultimately, it is not my role to weigh the needs of different groups against each other and against the needs of the fisc. That job belongs to Parliament. Parliament is surely aware of the problems that TD has identified. It may also be aware of other problems that would arise for other reward programs if I expanded the meaning of “gift certificates” in the way that TD wants. If TD wants legislative change, Parliament is where it should seek it.

IX. Payments to CIBC

[253] As set out above, when TD replaced CIBC as the exclusive Aeroplan Visa provider, TD acquired a significant number of CIBC’s cardholders. TD paid CIBC to purchase those cardholders’ credit card balances. This payment is not in issue.

[254] TD could not simply take over the cardholders’ accounts immediately. Both CIBC and TD needed time to transition the cardholders from one institution to the other. As a result, the parties entered into an Interim Services Agreement pursuant to which CIBC continued to manage these cardholders’ accounts during a transition period.

[255] During that transition period, the cardholders still earned Aeroplan Miles on their purchases. Aeroplan invoiced CIBC for those Aeroplan Miles. CIBC, in turn,

⁶⁵ At para. 90.

invoiced TD. Those invoices included GST. TD paid the invoices (the “CIBC Payments”) and is now seeking a rebate of that GST.

[256] TD takes the position that the CIBC Payments were supplies of Aeroplan Miles. The Respondent disagrees. It also raised two preliminary objections in respect of this issue.

Specified Person Objection

[257] The Respondent again argues that TD failed to raise this issue in its notice of objection and is thus precluded by subsection 306.1(1) from arguing it on appeal. While TD included the GST paid to CIBC in the relief that it sought, TD indicated that all of the amounts for which it sought rebates had been paid to Aeroplan. Its notice of objection did not mention CIBC. TD gave the auditor invoices from CIBC, but not a copy of the Interim Services Agreement.

[258] However, the audit report (known as a “rebate report”) indicates that the auditor was aware that some of the rebate claim covered specific payments to CIBC. The auditor chose to treat those payments the same way as the payments to Aeroplan were treated. In *Ford Motor Company of Canada, Limited v. The Queen*⁶⁶, Justice Boyle held that the Minister cannot claim to have been unaware of an issue that was clearly before the auditor.

[259] In addition, the Report on Objection clearly acknowledges that the CIBC Payments were part of the amount in dispute.

[260] On the basis of all of the foregoing, while TD’s notice of objection did not set out the facts and reasons necessary to support its rebate claim for the CIBC Payments, I accept that the issue itself and the related relief were sufficiently identified and therefore that TD is not precluded by subsection 306.1(1) from arguing the issue.

Pleadings

[261] In the alternative, the Respondent submits that TD failed to raise any issue in its Notice of Appeal relating to the CIBC Payments, has not amended its Notice of Appeal to do so and thus is precluded from raising that issue at trial.

⁶⁶ 2015 TCC 39.

[262] I do not accept that the Respondent was caught off guard by TD's failure to specifically identify the CIBC Payments in its Notice of Appeal. Appendix "A" to the Reply specifically identified the exact amount of the GST charged on the CIBC Payments.

[263] At audit, the Minister took the overall position that TD was buying Aeroplan Miles and that those Aeroplan Miles were not gift certificates. That position would have applied equally to the CIBC Payments. Since TD appealed to the Court before the Minister could consider its objection, that position did not change. It was the position reflected in the original Reply.

[264] The specific treatment of the CIBC Payments only arose indirectly when, in response to *CIBC (FCA)*, the Respondent changed his position on the predominant element issue to argue that Aeroplan was supplying marketing services. This occurred well after pleadings had closed. The Notice of Appeal does not address this issue because it was not an issue until the Respondent changed his position.

Merits

[265] The Respondent does not have any real basis for disputing that the payments to CIBC were for Aeroplan Miles. The invoices issued to TD by CIBC show that TD was being charged for the number of Aeroplan Miles provided to its cardholders. The price per Aeroplan Mile was identical to the price that TD paid to Aeroplan.

[266] I do not have to decide whether CIBC was acting as TD's agent in acquiring Aeroplan Miles from Aeroplan or whether CIBC was simply re-supplying Aeroplan Miles that it had acquired from Aeroplan. Either way, I am satisfied that the CIBC Payments were for Aeroplan Miles.

[267] That said, given my conclusion on the gift certificate issue, TD would still not be entitled to a rebate in respect of these amounts.

X. Conclusion

[268] On the basis of all of the foregoing, the appeals are dismissed.

Signed at Fredericton, New Brunswick, this 30th day of April 2024.

“David E. Graham”

Graham J.

CITATION: 2024 TCC 50

COURT FILE NO.: 2018-4823(GST)G

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HIS MAJESTY THE KING

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