Federal Court of Appeal | Cour d'appel fédérale

Date: 20230412

Docket: A-117-21

Citation: 2023 FCA 76

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

DR. KEVIN L. DAVIS DENTISTRY PROFESSIONAL CORPORATION

Respondent

Heard at Toronto, Ontario, on November 1, 2022.

Judgment delivered at Ottawa, Ontario, on April 12, 2023.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

I. Introduction

[1] The Crown appeals from a decision of the Tax Court of Canada (*per* Wong J.), *Dr. Kevin L. Davis Dentistry Professional Corporation v. The Queen*, 2021 TCC 25, which allowed an appeal from reassessments under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA). The Tax Court

determined that the respondent (Davis Dentistry) is entitled to deduct input tax credits (ITCs) that were incurred with respect to orthodontic appliances provided to patients. The amount of tax at issue is $56,701.58.

[2] It is undisputed that Davis Dentistry is entitled to the ITCs if the provision of orthodontic appliances is a separate supply for purposes of the ETA and not a component of the supply of orthodontic services. The Crown submits that the appliances and services are a single supply of orthodontic services, just as the Tax Court (*per* Campbell J.) had determined previously in *Dr. Brian Hurd Dentistry Professional Corporation v. The Queen*, 2017 TCC 142 (*Hurd*).

[3] In *Hurd*, Justice Campbell concluded that the orthodontic appliances and services that were at issue were sufficiently intertwined to be a single supply for purposes of the ETA pursuant to the test set out in *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40 (T.C.C.) (*O.A. Brown*).

[4] Justice Wong in the Court below did not adopt this line of reasoning. Instead, she undertook a textual, contextual and purposive interpretation of the relevant provisions of the ETA and concluded that orthodontic appliances and orthodontic services were clearly intended by Parliament to be separate supplies. Accordingly, she determined that it was not necessary to consider the test from *O.A. Brown*. This line of reasoning was not discussed in *Hurd*.

[5] For the reasons below, I conclude that the Tax Court did not err.

II. Background

[6] The relevant facts are set out in the Tax Court's reasons (Reasons) at paragraphs 21-26. They are summarized below.

[7] Davis Dentistry operates a group of orthodontic practices, which includes Red Hill Orthodontics. Red Hill was acquired by Davis Dentistry in 2015 and was reassessed for the period from October 1, 2015 to March 31, 2016 to disallow the ITCs at issue.

[8] In the relevant period, the Red Hill clinic had three orthodontists, including Dr. Davis, and a care team consisting of hygienists, dental assistants, administrative assistants and treatment coordinators.

[9] Dr. Davis testified that he specializes in straightening teeth and jaws. He described that orthodontists use orthodontic appliances as tools: "[T]he appliances achieve the necessary movements while he determines what the movements will be." (Reasons at para. 24).

[10] Dr. Davis further explained that the appliances generally consist of: "(1) braces which are glued on and prescribed for each tooth; (2) a series of clear, removable aligners called Invisalign which he customizes using software and a three-dimensional mould/scan of the patient's teeth; (3) retainers or bite plates which are used to either move the teeth/jaws of younger children or to hold the teeth in place at the very end of treatment; and (4) growth modifiers which are used on growing children to make their jaws move into different positions." (Reasons at para. 24).

III. Procedural History

[11] Under an administrative arrangement agreed to by the Minister of National Revenue (the Minister) and the Canadian Dental Association, dentists are allowed to claim ITCs with respect to orthodontic appliances, subject to certain conditions. The details of the arrangement are not relevant to this appeal and are described in the Reasons at paragraphs 19-20. The arrangement only permits ITCs with respect to appliances, not orthodontic services.

[12] In the period at issue, Davis Dentistry claimed ITCs with respect to the Red Hill clinic pursuant to this arrangement.

[13] The Minister reassessed to disallow the claim on the basis that Davis Dentistry did not comply with the requirements of the administrative arrangement because the consideration for the orthodontic appliances was not identified separately on the patient invoices (Reasons at para. 43).

[14] Davis Dentistry instituted an appeal in the Tax Court. In its reply to the notice of appeal, the Crown for the first time raised an argument that the appliances and services are intertwined and are a single supply of an orthodontic service. Davis Dentistry argued that this position is contrary to the arrangement described above.

[15] The Tax Court disagreed with the Crown on both issues. Concerning the adequacy of the patient invoices, the trial judge determined that the Tax Court did not have the jurisdiction to

determine the “appeal in terms of the administrative arrangement” (Reasons at para. 44). However, she concluded that the consideration was sufficiently identified because it complied with the applicable Regulations (Reasons at paras. 45-48). On the single supply issue, the trial judge determined that orthodontic appliances and orthodontic services were separate supplies. Accordingly, the claim for ITCs was allowed.

[16] In her Reasons, the trial judge considered in detail the applicable statutory provisions and relevant legislative history. She concluded at paragraph 41 that the clear legislative language eliminated the need for the common law *O.A. Brown* test:

> [41] The statute makes it clear (and Parliamentary intent confirms) that a conventional orthodontic practice consists of exempt supplies of services and zero-rated supplies of appliances. It is unnecessary to use the common law test for determining single versus multiple supplies or to consider whether the supply of an appliance is incidental to the supply of orthodontic treatment because the statute has directly addressed the tax status of both. [Emphasis added]

[17] The Crown has appealed to this Court on the sole issue of the applicability of the *O.A. Brown* test. It does not challenge the finding that the consideration for the orthodontic appliances was adequately identified.

IV. Analysis

A. *Introduction*

[18] In the Tax Court, the trial judge undertook a detailed review of the applicable legislation and legislative history. She concluded that the test in *O.A. Brown* is not applicable because Parliament clearly intended that the provision of appliances and services to orthodontic patients are separate supplies. The Crown submits that this conclusion is in error.

[19] There are two issues:

(a) Did the Tax Court err in concluding that the test from *O.A. Brown* is not applicable?

(b) If *O.A. Brown* is applicable, did the Red Hill clinic provide separate supplies of orthodontic appliances and services?

[20] As explained below, I have concluded that the Tax Court did not err in finding that the *O.A. Brown* test was not applicable in this case. This is dispositive of the appeal and it is not necessary to consider the second issue.

[21] The first issue raises a question of law for which the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

B. *Applicable legislative framework*

[22] It is useful to reproduce the statutory definition of "supply" in s. 123(1) of the ETA. This definition provides that, subject to exceptions that are irrelevant, a supply includes the provision of property or a service.

123 (1) In section 121, this Part and Schedules V to X,	**123 (1)** Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X.
[…]	[…]
supply means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;	***fourniture*** Sous réserve des articles 133 et 134, livraison de biens ou prestation de services, notamment par vente, transfert, troc, échange, louage, licence, donation ou aliénation.

[23] The ETA and its Schedules provide for different tax treatment of supplies of orthodontic appliances and orthodontic services.

[24] A supply of an orthodontic appliance is listed in Schedule VI to the ETA. This qualifies the supply for zero-rating by virtue of the definition of "zero-rated supply" in s. 123(1) of the ETA. The specific reference to an orthodontic appliance is in s. 11.1 of Part II of Schedule VI:

11.1 A supply of an orthodontic appliance.	**11.1** La fourniture d'un appareil orthodontique.

[25] A supply of an orthodontic service is included in Schedule V to the ETA. This qualifies the supply as exempt under the definition of "exempt supply" in s. 123(1) of the ETA. The supply of an orthodontic service qualifies as a supply of a health care service under s. 5 of Part II of Schedule V:

5 A supply of a consultative, diagnostic, treatment or other health care service that is rendered by a medical practitioner to an individual.	**5** La fourniture de services de consultation, de diagnostic ou de traitement ou d'autres services de santé, rendus par un médecin à un particulier.

[26] Categorizing a supply as zero-rated or exempt is significant in this case because Davis Dentistry is entitled to recover ITCs with respect to zero-rated supplies but not exempt supplies. In general, an ITC is comprised of tax on inputs, that is, GST/HST incurred by a taxpayer on inputs used in the course of commercial activities (s. 169(1) of the ETA). Subject to certain exceptions that are not relevant here, an ITC reduces the amount of "net tax" that is payable by a taxpayer (s. 225(1) and s. 228(2) of the ETA).

C. *The O.A. Brown test*

[27] It is useful to provide some background to the *O.A. Brown* test.

[28] O.A. Brown Ltd. was in the business of buying and selling livestock. It did not collect GST on its sales of livestock because these supplies were zero-rated. However, the Minister reassessed the corporation on the basis that it failed to collect GST on the provision of related

services that were charged to customers and were taxable supplies, such as branding, inoculation and transportation.

[29] O.A. Brown Ltd. appealed the reassessment and the appeal came before the Tax Court when the GST legislation was in its infancy. The issue to be decided was whether O.A. Brown Ltd. had made a single supply of zero-rated livestock or whether it made multiple supplies of livestock and related services, some of which were taxable. At that time, there was no guidance from Canadian courts as to whether a set of circumstances results in a single supply or multiple supplies. Accordingly, the trial judge (Justice Rip) adopted principles which had been developed in U.K. courts for purposes of the value added tax. The judge concluded that GST was not payable since the consideration for the related services was an integral part of the supply of livestock (*O.A. Brown* at para. 31).

[30] In 2012, the test from *O.A. Brown* was endorsed by the Supreme Court of Canada (*per* Rothstein J.) in *Calgary (City) v. Canada*, 2012 SCC 20, [2012] 1 S.C.R. 689 at para. 32 (*City of Calgary*).

[31] In *City of Calgary*, Justice Rothstein summarized the *O.A. Brown* test at paragraph 35:

> [35] *O.A. Brown* established the following test to determine whether a particular set of facts revealed single or multiple supplies for the purposes of the *ETA*:
>
> The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transaction to determine the tax consequences. [p. 40-6]

[32] The *City of Calgary* decision also clarifies (at paragraph 44) that the *O.A. Brown* test, as developed over time, does not apply unless there are distinct elements or components of the supply:

> [44] Further, the single supply/multiple supplies analysis, as it has emerged, presupposes that several distinct elements or components of a supply can be identified before the analysis can be performed. In the present case, the alleged separate supplies are so interconnected that it would be difficult to identify distinct elements or components.

[33] The test in *O.A. Brown* is broad and flexible. It is intended to apply in a myriad of circumstances to which the GST/HST applies. In some cases, the test is inconsistent with a textual interpretation of the term "supply", as defined in the ETA, because the definition requires a property-by-property, or service-by-service, determination.

[34] The premise of the *O.A. Brown* test is that it corresponds with a purposive interpretation of the legislation because this is required to have a practical, workable tax regime. Justice Rip alludes to this in *O.A. Brown* (at paragraph 23) where he cites from the U.K. decision in *Mercantile Contracts Ltd. v. Customs & Excise Commissioners*, File No. LON/88/786, U.K. (unreported):

> 23 One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply. This is not conclusive but is a factor that assists in determining the substance of the transaction. The position has been framed in the following terms:
>
> > What should constitute a single supply of services as opposed to two separate supplies, is not laid down in express terms by the value added tax enactments. It would therefore be wrong to attempt to propound a rigid and precise definition lacking statutory authority. One must, it seems to us,

> merely apply the statutory language, interpreting its terminology, so far as the ordinary meaning of the words allows, with the aim of making the statutory system of value added tax a practical workable system. For this purpose one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole. Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered, but for the reasons given above are not conclusive. Taking the nature, content and method of execution of the services, and all the circumstances, into consideration against the background of the value added tax system, particularly its methods of accounting for and payment of tax, if the services are found to be so interdependent and intertwined, so much integral parts or mere components or items of a composite whole, that they cannot sensibly be separated for value added tax purposes into separate supplies of services, then Parliament, in enacting the value added tax system, must be taken to have intended that they should be treated as a single system, otherwise, they should be regarded a for value added tax purposes as separate supplies.

D. *The inapplicability of the O.A. Brown test*

[35] The Crown's main argument appears to be that this case is no different from other GST/HST cases in which the test in *O.A. Brown* is routinely applied. I disagree. I acknowledge that courts routinely apply *O.A. Brown*, but Parliament's intent must override *O.A. Brown* where legislative intent is clear as it is in the provisions applicable in this case.

[36] The Crown did not refer to any judicial decisions that address this issue. It was briefly discussed by this Court (*per* Sharlow J.A.) in *obiter* in *Hidden Valley Golf Resort Assn. v. Canada*, [2000] G.S.T.C. 42 at para. 20. Justice Sharlow commented that the test from *O.A. Brown* is inapplicable where the ETA dictates a different result. This comment is useful as far as

it goes, but it does not assist in determining whether Parliament has dictated a different result in a particular case. This is the central issue in this case.

[37] I do not agree with the Crown that this case is not different from others. The particular circumstances of this case clearly call into question the application of *O.A. Brown*. Importantly, the applicable legislation (s. 11.1 of Part II of Schedule VI) is narrowly framed to describe a particular property, an orthodontic appliance. Further, the property has only one use – to move teeth or jaws. It is also relevant that the appliances provided to patients are almost invariably accompanied by orthodontic services. There is a limited exception for direct sales of orthodontic appliances by mail (i.e., Smile Direct) but the Crown does not suggest that this is significant in this case.

[38] As a consequence, the listing of orthodontic appliances in Schedule VI would have very limited application if the Crown's position were correct.

[39] In the case of a supply of orthodontic appliances and orthodontic services, which are typically supplied together, the fact that one has zero-rated status and the other has exempt status strongly suggests that this was intentional and that a supply of an orthodontic appliance is intended to be zero-rated even when accompanied by orthodontic services.

[40] As mentioned earlier, the facts in *Hurd* are very similar and the decision did not discuss this issue. However, the issue, or a version of it, appears to have been raised in the Tax Court in

Hurd, but the Court did not engage with the issue and simply stated that *O.A. Brown* is to be applied (*Hurd* at paras. 12, 20).

[41] The Crown also suggests that it was Parliament's intent to zero-rate orthodontic appliances only where the appliances are sold by a manufacturer to a dentist because these sales are without accompanying orthodontic services. The trial judge rejected this interpretation on the basis that it is inconsistent with Department of Finance explanatory notes which imply that orthodontic appliances provided to patients qualify for zero-rating (Reasons at paras. 37-41). The explanatory notes read as follows:

> New section 11.1 of Part II of Schedule VI unconditionally zero-rates a supply of an orthodontic appliance. Under the existing legislation, these appliances are zero-rated unconditionally under section 23 of this Part as an orthopaedic brace.
>
> […]
>
> Amended section 23 of Part II of Schedule VI combines sections 23 and 23.1 to clarify the treatment of orthotic and orthopaedic devices. Amended section 23 unconditionally zero-rates the supply of orthotic or orthopaedic devices that are made to order for an individual. It should be noted that orthodontic appliances are unconditionally zero-rated under new section 11.1. All other orthotic and orthopaedic devices will be zero-rated only where they are purchased under a prescription issued by a medical practitioner to a consumer. Therefore, items, such as cradle arm slings, cervical collars, knee braces and obus forms, are taxable at a rate of seven per cent unless purchased on the written order of a medical practitioner.

[42] I agree with the trial judge on this point, and would also comment that the Crown's interpretation strains a reasonable interpretation of the legislation. It is highly unlikely that Parliament would explicitly provide that *any* supply of an orthodontic appliance is zero-rated if

the intention is that the supply is restricted to the wholesale level. Such imprecise drafting is not typical of taxing statutes in general or in the ETA.

[43] Finally, the Crown submits that if Parliament intends to mandate a single or multiple supply, it does so only by express language. The Crown refers to two deeming rules—s. 136(2) of the ETA (a supply of real estate that has mixed use) and s. 139 (a supply of financial services together with non-financial services).

[44] These provisions, which are reproduced in an appendix, set out detailed rules for determining whether there is a single or multiple supply in specified circumstances. They appear to address specific problem areas in the real estate and financial services industries. In my view, these deeming rules have limited effect and do not reflect an overall legislative scheme as the Crown suggests.

[45] For these reasons, I do not agree with the position taken by the Crown. The Tax Court undertook a detailed textual, contextual and purposive interpretation of the provisions at issue and concluded that Parliament intended that the provision of an orthodontic appliance is a separate zero-rated supply, thus eliminating any need to apply the *O.A. Brown* test. There is no error in this conclusion.

[46] I would dismiss the appeal with costs.

"Judith Woods"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

APPENDIX

***Excise Tax Act*, R.S.C. 1985, c. E-15, s. 136(2) and s. 139**	***Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15, art. 136(2) et art. 139**
136(2) For the purposes of this Part, where a supply of real property includes the provision of	**136(2)** Pour l'application de la présente partie, dans le cas où la fourniture d'un immeuble comprend deux catégories de biens, visées respectivement aux alinéas a) et b), les biens de chaque catégorie sont réputés être des biens distincts et être l'objet de fournitures distinctes et aucune des fournitures n'est accessoire à l'autre :
(a) real property that is	**a)** un immeuble qui est, selon le cas :
(i) a residential complex,	**(i)** un immeuble d'habitation,
(ii) land, a building or part of a building that forms or is reasonably expected to form part of a residential complex, or	**(ii)** un fonds, un bâtiment ou une partie de bâtiment qui fait partie d'un immeuble d'habitation ou dont il est raisonnable de s'attendre à ce qu'il en fasse partie,
(iii) a residential trailer park, and	**(iii)** un parc à roulottes résidentiel;
(b) other real property that is not part of the property referred to in paragraph (a),	**b)** d'autres immeubles qui ne font pas partie de l'immeuble visé à l'alinéa a).
the property referred to in paragraph (a) and the property referred to in paragraph (b) shall each be deemed to be a separate property and the provision of the property referred to in paragraph (a) shall be deemed to be a separate supply from the provision of the property referred to	

in paragraph (b), and neither supply is incidental to the other.

[…]

139 For the purposes of this Part, where

(a) one or more financial services are supplied together with one or more other services that are not financial services, or with properties that are not capital properties of the supplier, for a single consideration,

(b) the financial services are related to the other services or the properties, as the case may be,

(c) it is the usual practice of the supplier to supply those or similar services, or those or similar properties and services, together in the ordinary course of the business of the supplier, and

(d) the total of all amounts, each of which would be the consideration for a financial service so supplied if that financial service had been

[…]

139 Pour l'application de la présente partie, dans le cas où au moins un service financier est fourni avec au moins un service non financier ou un bien qui n'est pas une immobilisation du fournisseur, pour une contrepartie unique, la fourniture de chacun des services et biens est réputée être une fourniture de service financier si les conditions suivantes sont réunies :

a) le service financier est lié au service non financier ou au bien;

b) le fournisseur a l'habitude de fournir ces services ou des services semblables, ou des biens et des services semblables, ensemble dans le cours normal de son entreprise;

c) le total des montants dont chacun représenterait la contrepartie d'un service financier ainsi fourni, s'il était fourni séparément, compte pour plus de la moitié du total des montants dont chacun représenterait la contrepartie d'un service ou d'un bien ainsi fourni, s'ils étaient fournis séparément.

supplied separately, is greater than 50% of the total of all amounts, each of which would be the consideration for a service or property so supplied if that service or property had been supplied separately,

the supply of each of the services and properties shall be deemed to be a supply of a financial service.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Michael Ezri Natasha Mukhtar	FOR THE APPELLANT
Neil E. Bass Josh Kumar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE APPELLANT
Aird & Berlis LLP Toronto, Ontario	FOR THE RESPONDENT