

Dockets: 2013-123(GST)G
2014-1159(GST)G

BETWEEN:

THE GREAT-WEST LIFE
ASSURANCE COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 26, 27 and 28, 2015, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant: Martha MacDonald
Diana Yeung
Counsel for the Respondent: Marilyn Vardy
Annie Paré

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal under court file number 2013-123(GST)G from the assessment for the reporting periods between January 1, 2008 and November 30, 2009, made under the *Excise Tax Act* (the “ETA”) by notice dated November 24, 2011, is dismissed with costs to the Respondent.

In accordance with the attached Reasons for Judgment, the appeal under court file number 2014-1159(GST)G from the assessments for the reporting periods between December 1, 2009 and November 30, 2011 and between

December 1, 2011 and December 31, 2012, made under the ETA by notices dated July 18, 2012 and November 12, 2013 respectively, is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 21st day of September 2015.

“J.R. Owen”

Owen J.

Citation: 2015 TCC 225
Date: 20150921
Dockets: 2013-123(GST)G
2014-1159(GST)G

BETWEEN:

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REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] These reasons address two appeals by The Great-West Life Assurance Company (“Great-West”), court file numbers 2013-123(GST)G and 2014-1159(GST)G. The appeals were heard on common evidence.

[2] The first appeal is from an assessment under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the “ETA”) by notice of assessment dated November 24, 2011 for the reporting periods ending between January 1, 2008 and November 30, 2009 (the “First Period”). The second appeal is from two assessments under the ETA by notices of assessment dated July 18, 2012 and November 12, 2013 for the reporting periods ending between December 1, 2009 and November 30, 2011 (the “Second Period”) and December 1, 2011 and December 31, 2012 (the “Third Period”) respectively. I will refer to these three assessments as the Assessments.

[3] Great-West seeks a rebate of goods and services tax (“GST”) in the amounts of \$1,534,768.36, \$1,718,575.32 and \$992,839.64 that it says was paid in error during the reporting periods covered by the Assessments, less any input tax credits (“ITCs”) that have already been claimed by Great-West for the same reporting periods. Great-West filed two applications for the rebate of these amounts under

section 261 of the ETA. The applications were filed within the two-year time limit specified in subsection 261(3) of the ETA. Great-West takes the position that the supply in respect of which the GST in issue was collected constituted a “financial service” as defined in subsection 123(1) of the ETA and therefore that the GST was paid to the supplier in error.

[4] Mr. Michael Stephen Schwartz testified for Great-West. Mr. Schwartz is the senior vice-president of group benefits at Great-West, a position that he has held since 2006. Mr. Schwartz oversees the group claims and call centre operations at Great-West. Mr. Schwartz obtained a chartered accountant designation in 1982 and a certified management accounting designation in 1984. He has been employed in the insurance industry for 30 years and with Great-West since it acquired his previous employer, London Life, in 1997.

[5] Mr. Michael James Roszak testified for the Respondent. Mr. Roszak has been the vice-president of business development at Telus Health Solutions (“Telus Health”) since Telus acquired Emergis Inc. (“Emergis”) in 2008. Mr. Roszak was the vice-president of strategy at Emergis from 2004 to 2007. Mr. Roszak is a chartered professional accountant and holds a master’s degree in business administration.

[6] I found both witnesses to be straightforward and credible.

II. Facts

[7] The parties filed an Agreed Statement of Facts (Partial). The first paragraph states:

The Great West Life Assurance Company (“Great West”) entered into two consecutive agreements with respect to the period under appeal. The first agreement between Great West and Emergis Inc. was dated February 1, 2007. The second agreement between Great West, Telus Health Solutions and Emergis Inc. was dated February 1, 2012. Copies of the agreements and certain price lists are attached at Tabs 1, 2 and 3. The parties to the agreements acted in accordance with the agreements at all relevant times.

[8] I will refer to the two agreements together as the “Agreements” and individually as the “2007 Agreement” and the “2012 Agreement”. For ease of reference, I will refer to Emergis and Telus Health as Emergis. The parties agreed during the course of the hearing that the terms of the Agreements are essentially the same except for changes reflecting the change of ownership after the 2007

Agreement was signed. The balance of the paragraphs in the agreed statement of facts reference various documents that the parties agreed to enter into evidence.

[9] Great-West is a major Canadian insurance company that offers, among other things, group health benefits plans to employers. These plans typically include coverage for prescription drugs and dental care. An employer that enters into such a plan is called the plan sponsor and the employees who are entitled to benefits under the plan are called plan members.

[10] The plans may be insured, in which case Great-West assumes in exchange for an insurance premium the risk associated with the obligation to pay benefits under the plan, or uninsured, in which case that risk falls on the plan sponsor and Great-West charges a fee for the services provided by it under the plan. The latter are called administrative service only (ASO) plans in the insurance industry. According to Mr. Schwartz, the name is intended to distinguish the function of the insurance company under an ASO plan from its role in the risk management (i.e., insurance) side of the business.

[11] The only material distinctions between insured and ASO plans are with regard to the party bearing the risk and to the flow of funds in the background that reflects this allocation of risk. Under an insured plan, Great-West collects a premium from the plan sponsor and is required to pay the benefits under the plan to the plan members. Under an ASO plan, at the end of each day, Great-West reports to the plan sponsor the claims paid that day under the plan and the plan sponsor is required to pay Great-West the amount so paid. Great-West also charges the plan sponsor a fee for the ASO plan (an "ASO fee"). The ASO fee paid to Great-West may be a flat fee per claim or it may be a percentage of paid claims.

[12] The terms of a particular group health plan are determined by the plan sponsor. The plan sponsor may or may not consult with Great-West when establishing the terms of the plan.

[13] The terms of the prescription drug component of a plan address the benefits to be paid to plan members for prescription drugs. One key term concerns the drugs covered by the plan. An "open" plan covers all drugs that require a prescription while a "formulary" plan covers a specific list of drugs set out in a formulary. Formularies may vary from province to province. According to Mr. Schwartz, open plans are much more prevalent in the Great-West portfolio of plans.

[14] Emergis has pharmacists on staff who develop custom formularies. These formularies would be available to Great-West for use in its plans. However, it was up to the plan sponsor to decide whether to have an open plan or to use one or more formularies in its plan.

[15] The terms of the prescription drug component of a plan may also include:

1. Limits on the amount paid for a particular drug. For example, if there is a brand name and a generic version of a drug, the amount paid to the plan member may be limited to the cost of the generic version of the drug.
2. A limit on the amount paid in respect of a particular claim to what is considered “reasonable and customary”. This amount may vary from province to province because of different pricing regimes and definitions. As well, the “reasonable and customary” standard may be applied separately to the two elements of the pharmacy bill, which are the ingredient (drug) cost and the dispensing fee.
3. The fixing of deductibles, which might apply on a lifetime basis, a yearly basis or on a per-prescription basis, or some combination of these three.
4. The factoring in of co-insurance, which addresses the scenario where a plan member has prescription drug coverage under more than one plan (for example, under a Great-West plan and under a spouse’s plan).

[16] Under the 2007 Agreement, Great-West retained Emergis to perform services in relation to the determination and payment of benefits under the prescription drug and dental components of its group health benefits plans. Only the services relating to the prescription drug benefits are in issue in these appeals. The parties agreed that the services provided by Emergis to Great-West under the 2007 Agreement and under the 2012 Agreement constitute a single compound supply for the purposes of the ETA. The issue lies in how to characterize that single supply.

[17] As the Agreements are essentially the same, I will concentrate on the terms of the 2007 Agreement. However, before I recite the relevant provisions of the 2007 Agreement, it is helpful to understand the functions associated with the payment of benefits under the prescription drug component of a plan, the general conduct of Great-West and Emergis in this area and the role of the Assure Card system, all as described by the witnesses.

[18] Prior to the introduction of systems such as the Assure Card system approximately 25 years ago, a plan member would take his or her prescription to the pharmacy, pay for the prescription and then send in a paper claim form to the plan administrator to obtain the available benefit under the plan. This approach had two main downsides. First, the plan member had to fund the purchase of the drug, which could impose a material financial burden on the individual. Second, the paper-based approval process was time-consuming and costly.

[19] The Assure Card system addresses these downsides. In a typical scenario, the plan member takes his or her prescription to the pharmacy and presents the prescription and the Assure Card to the pharmacist, the pharmacist sends the claim to Emergis electronically using the pharmacy's own hardware and software, and Emergis communicates to the pharmacist how much will be paid to the pharmacist in respect of the claim. If the claim is approved the pharmacist delivers the prescription drug to the plan member and collects any balance not covered by the plan from the plan member. If the claim is rejected then no coverage is provided and the plan member must pay the full cost of the drug. A claim that is approved may subsequently be voided at the request of the pharmacy.

[20] Mr. Roszak testified that 99% of Canadian pharmacies have signed agreements with Emergis that allow them to connect to the Emergis network so that they can submit claims electronically through the Assure Card system. The exceptions are pharmacies that do not have an Internet connection. The electronic transmission by a pharmacy of the information associated with a claim is called "switching". Mr. Roszak testified that Emergis does provide stand-alone switching services to some customers. However, the services consisting in the assessment or vetting of the claim and the payment of the claim are always provided together by Emergis.

[21] Under the agreement between Emergis and the pharmacy, Emergis agrees to pay to the pharmacy the amount covered by the plan. This payment is made in accordance with the terms of the particular agreement. In Québec, the pharmacy is paid the next day while in other provinces it may be paid in 15 or 30 days. The payment covers all claims paid during the relevant period and the pharmacy is given reconciliation information so that the payment can be tied to the drugs dispensed by the pharmacy during the relevant period.

[22] Emergis is not an insurer and makes the payments to the pharmacies under Great-West plans on behalf of Great-West. Emergis communicates the transactions to Great-West daily and is reimbursed by Great-West for all amounts paid on

behalf of Great-West during the previous day. Emergis does not use any of its own funds to satisfy claims by plan members. In other words, Emergis does not take on the financial risk associated with the payment of benefits through the Assure Card system.

[23] Emergis is paid a fee for each drug transaction completed under a Great-West plan regardless of whether the claim is approved, rejected or voided. The fee is charged per drug and not per prescription. Each drug is identified by its unique drug identification number or DIN.

[24] The Assure Card itself is simply a plastic card with a string of numbers that identifies the holder of the card and the individual's employer group. More recently, to reduce costs, there has been a move away from the use of plastic cards to "cards" that can be printed at home. Mr. Schwartz testified that 83% of Great-West's plans are card-based plans. As most large plans are card plans, this percentage represents more than 83% of plan members.

[25] The process of assessing or vetting a claim for prescription drug benefits under a plan is called adjudication and involves the application to each claim of the rules specified in the plan and industry standard rules. The steps involved in the adjudication process will vary according to the terms of the particular plan. Mr. Schwartz described the main steps as follows:

1. Confirmation that the plan is in force.
2. Confirmation that the individual has a valid plan membership.
3. Confirmation that the particular drug is covered under the plan.
4. Determination of the level of payment and the deductible.
5. Determination of whether the plan member has reached any limit imposed by the plan such as an annual limit.
6. Determination of whether the amount charged by the pharmacist meets the "reasonable and customary" standard given the location of the claim.
7. Coordination of plan benefits where the plan member is covered under more than one plan; for example, the application of rules addressing which plan pays first and which plan pays any residual benefit.

[26] Mr. Roszak testified that the adjudication process conducted by Emergis also includes a drug utilization review or analysis to determine if there are any concerns associated with dispensing the drug to the plan member. For example, is the plan member taking other drugs that may interact with the drug being vetted? The results of this review are communicated to the pharmacist so that they can be taken into account before the prescription is filled.

[27] For each plan, Great-West transmits electronically to Emergis the plan terms, including the list of plan members, the coverage of the plan members, the employer of the plan members and the unique identifier assigned by Great-West to each of the plan members. In adjudicating a claim, Emergis relies on the information provided by Great-West as well as general information (e.g., industry standards and legislative requirements) and information that it has collected through the Assure Card system (e.g., the prescription history of the plan members). The adjudication is performed in real time on Emergis' dedicated computer system and the result is immediately communicated to the pharmacy computer.

[28] Emergis collects and retains information regarding each drug transaction, including whether it was approved or rejected, the amount paid and the plan member's prescription history. This last piece of information allows Emergis to perform the drug utilization review.

[29] Emergis has no independent discretion and must accept or reject a particular claim in accordance with the terms of the plan communicated to Emergis by Great-West. Mr. Roszak testified that Emergis' overall experience (not limited to Great-West) was that 85% of claims would be accepted and paid, 10% of claims would be rejected and 5% would be voided. A voided claim is a claim that has been approved by Emergis but that the pharmacy subsequently requests be voided. The amount of a voided claim may have been paid to the pharmacy before the claim was voided.

[30] Emergis provided reports to Great-West related to the adjudication and payment of benefits. As well, Emergis provided other reports to Great-West that would allow it to analyze transactions on a micro or macro level. The reports were made weekly, monthly or on an ad hoc basis, depending on the type of report.

[31] Emergis conducts random audits of pharmacies to confirm that the claims being submitted are valid. As well, an audit might be triggered by the types of

drugs being dispensed. For example, narcotics and high-cost drugs would be monitored carefully.

[32] Mr. Roszak described Emergis as a pharmacy benefit manager. In that role, it would conduct market research and provide that information to all its customers. As well, it would create specific capabilities for customers. For example, in the case of Great-West, it created an Internet-based drug look-up capability that individuals could use to obtain information about a drug, including its cost.

[33] Emergis maintains call centres for its insurance company customers as well as for the pharmacies that connect to its network. The call centres are there to address technical issues.

A. The Agreements

[34] The descriptions provided by Mr. Schwartz and Mr. Roszak of the services provided to Great-West by Emergis are consistent with the Agreements. However, as one would expect, the Agreements provide considerably more detail. Unless otherwise noted, the capitalized terms used hereunder are defined in the 2007 Agreement.

[35] The preamble to the 2007 Agreement states:

A. Great-West is engaged in the business of marketing certain extended health care benefit plans;

B. Emergis has developed and is the owner of a point-of-service network and system for health care processing, including, without limitation, drug and dental claims in association with the trade-marks ASSURE CARD and ASSURE CARTE;

C. The system enables Emergis to provide claims capture including eligibility of the claimant, transmission, adjudication, payment and other services more specifically described below; and

D. Great-West entered into an agreement dated November 1, 2002 with Emergis (formerly known as BCE Emergis Inc.), as amended, to access the system and use the services which the Parties now wish to amend and restate.

Mr. Roszak testified that he agreed with the description in each of these four paragraphs.

[36] The terms “Charges“, “Emergis Trade Marks”, “Fees”, “Provider”, “Services” and “Transaction” are defined in section 2 of the 2007 Agreement as follows:

“Charges” means all other amounts payable by Great-West to Emergis for the provision of the Services, excluding the Fees, as described in the Schedule D attached hereto.

“Emergis Trade Marks” means ASSURE CARD, ASSURE CARTE and such other trade-marks, trade names, domain names, designs and logos of Emergis which it may use in connection with the operation of the Assure System and the provision of Services hereunder.

“Fees” means the transactional price payable by Great-West to Emergis under this Agreement for provision of certain Services (processing and adjudication) in accordance with Section 7 hereof, as more specifically described in Schedule D attached hereto.

“Provider” means a licensed or otherwise accredited provider of a health benefit service, including but not limited to, a dentist, optometrist, pharmacist or medical doctor, or such other party as may be agreed upon by the Parties.

“Services” has the meaning set forth in Section 3 and Schedule A attached to this Agreement, as it may be amended from time to time.

“Transaction” means: (i) with respect to a Benefit Plan which provides drug coverage, the dispensing of one prescription item including a rejected claim and successfully voided claim; and [balance addresses dental claims].

[37] Section 3 of the 2007 Agreement, titled “Services”, states:

3.1 Emergis has agreed to perform the Services for each Benefit Plan identified by Great-West to Emergis, as applicable. Emergis shall use commercially reasonable efforts to provide and perform the Services in accordance with the Service Levels set forth in Schedule C. The description of the Services that shall apply to a Benefit Plan shall be included in the Benefit Plan Design provided by Great-West to Emergis and referred to in Section 4.2 hereof.

3.2 Great-West shall have the right, at any time and from time to time, to amend, alter, delete or enhance the application of the Services as they relate to any particular Benefit Plan, by amending the Benefit Plan Design.

3.3 Great-West may make non-fundamental changes to a Benefit Plan Design at any time during the Term of this Agreement on thirty (30) days prior written notice to Emergis. If any changes are requested by Great-West to a Benefit Plan

Design which are fundamental and require changes in the logic of the Assure System, and such changes are reasonably required, Emergis will make such changes in accordance with the Change Management Procedure set out in Schedule E.

[38] Section 4 describes the responsibilities of Great-West. Sections 4.1, 4.2, 4.4, 4.6, 4.9 and 4.10 state:

4.1 Great-West has provided, and throughout the Term of this Agreement shall continue to provide on a timely basis, Emergis with such information as Emergis may reasonably require in order to fulfill its obligations under this Agreement.

4.2 Great-West shall enter and maintain a Benefit Plan Design for each Benefit Plan on the Assure System. Great-West may provide an Exception to Emergis for exceptions applicable to the Benefit Plan Design for a particular Benefit Plan on the Assure System.

...

4.4 Great-West acknowledges that it and its Sponsors shall be responsible for providing, at its or their expense, the telecommunications equipment and Internet access that is required for it or such Sponsors to access and utilize the Services.

...

4.6 Great-West shall be solely responsible for the use and compatibility of its own equipment, software and applications and shall be liable for all Great-West costs required to troubleshoot difficulties in the Services caused by Great-West's equipment, software or applications.

...

4.9 Great-West will not reverse compile, reverse assemble, disassemble or translate any portion of the System Software of which it may at any time come into possession, except as may be permitted elsewhere in this Agreement.

4.10 Great-West shall be solely responsible for CAIL software licenses required by Great-West to access and utilize the Services.

[39] Section 5 describes the responsibilities of Emergis. Sections 5.1 to 5.8, 5.14, 5.15, 5.22 and 5.25 state:

5.1 Emergis shall maintain a sufficient number of Providers to meet the needs of the Claimants.

5.2 Emergis shall use its commercially reasonable efforts to maintain levels of service in accordance with the Service Levels set out in Schedule C and to keep the Assure System industry leading and competitive.

5.3 Emergis shall provide Great-West with the appropriate number of Assure Cards for Claimants, as requested by Great-West.

5.4 Emergis shall perform the Services in a good and professional manner, in accordance with best practices in the market, in English and French as appropriate.

5.5 Emergis shall, in accordance with Section 20 hereof, provide Great-West with access to data associated with Great-West's business at the end of each Business Day.

5.6 Emergis shall provide the standard reports referred to in Schedule A and the Service Performance Reports referred to in Schedule C in the frequency set forth in Schedule C, and such further reports as may reasonably be requested by Great-West from time to time (the "Special Reports"). The Charge, if any, for Special Reports shall be as agreed upon by Great-West from time to time.

5.7 Emergis shall carry out routine audit procedures no less frequently than quarterly and on a minimum of 200 pharmacy Providers annually, to ensure that the Assure System and the Services are free from errors and defects, including auditing specific pharmacy Provider sites. Emergis shall notify Great-West of such audits when performed. Emergis shall make any change to its audit process in accordance with the Change Management Procedure, and make the results of such audits available to Great-West in such detail as may be agreed upon by the Parties, acting reasonably, with respect to its Transactions with such pharmacy Providers.

5.8 Emergis shall provide such additional services for such Fees or Charges as may be agreed upon by Emergis and Great-West from time to time, at which time such services shall be deemed to be part of the Services, the whole in accordance with the Change Management Procedure set out in Schedule E.

...

5.14 Emergis shall be solely responsible for the use and compatibility of its own equipment, software and applications and shall be liable for all Emergis costs required to troubleshoot difficulties in the Services caused by Emergis' equipment, software or applications.

5.15 Emergis shall maintain the Assure System, the System Software and its equipment using hardware and software commonly used in the Canadian market, and its proprietary software.

...

5.22 Emergis shall provide Great-West with access to Emergis' proprietary formularies that are made generally available to Emergis' clients, as amended from time to time, and shall update such formularies no less frequently than quarterly. Emergis shall provide Great-West with no less than eighteen (18) months prior written notice of the termination of an Emergis formulary except where such termination is required by law. Emergis shall take reasonable steps to ensure that its formularies comply with law.

...

5.25 Emergis shall, upon request of Great-West, provide training to Great-West personnel authorized by Great-West to access the Assure System. Such training shall be conducted at a time and location to be reasonably designated by Great-West. Emergis shall supply all required documentation, aids and tools required for training on the Assure System. Any travel expenses incurred by Emergis in providing such training and invoiced as a Charge to Great-West shall comply with Great-West's Travel Policy set out in Schedule K.

[40] Section 7.1 of the 2007 Agreement, under the heading "Fees and Charges", states:

7.1 In consideration of performing the responsibilities set out in Section 5 hereof and the Services, Great-West shall pay Emergis the Fees and Charges for the Services as set out in Schedule D or as otherwise provided in this Agreement.

[41] The Services provided by Emergis to Great-West are described in detail in Schedule A to the 2007 Agreement. For transactions using the Assure System (described in the schedule under the heading "Pay Direct Drug"), the Services are described as follows:

(i) provide real-time, electronic pharmacy Transactions capture from the Provider's point-of-service, verification of eligibility of Claimant, adjudicate in accordance with Benefit Plan Designs provided by Great-West and confirm Transaction payment status to the Providers.

(ii) maintain the Provider network to allow electronic submission of drug Transactions.

(iii) assist in the development of standards for electronic transactions processing and keep Great-West informed of developments.

(iv) operate a support desk (English and French) for Providers to answer questions and assist in problem resolution.

- (v) maintain relations with major software vendors and support regarding their provider software management packages relating to the processing of drug Transactions, changes required to support new products and validation of vendor software.
- (vi) ensure the adjudication software will adhere to legislative requirements, when possible with the information provided, the whole in accordance with the Change Management Procedure in Schedule E when appropriate.
- (vii) maintain DIN price and formulary files for use in the adjudication process.
- (viii) maintain DUR files for use in the adjudication process.
- (ix) maintain the appropriate version of the Transaction submission message.
- (x) provide real-time monitoring of Transactions processing and ensure continuity of service.
- (xi) maintain the Provider files for use in the adjudication process.
- (xii) create end of day Transaction Log Files that includes [*sic*] all Transactions submitted by the Provider for Great-West, including same day voids, prior day voids, and rejected Transactions. (This information is contained within the ELOG and VLOG).
- (xiii) check to ensure no other payment has been issued for the same Transaction by Emergis.
- (xiv) Emergis will keep on-line drug adjudication Transactions for a period of ninety (90) days.

[42] Schedule A also describes the services provided by Emergis in respect of Deferred Payment and Paper Reimbursement transactions. As the services are similar and the vast majority of transactions in issue involve Pay Direct Drug services, I will refer only to the Pay Direct Drug services. I note that neither party sought to distinguish the various service categories.

[43] Schedule D sets out the price list in detail. Heading A of Schedule D is “PAY DIRECT DRUG (PDD)”. Paragraph A(i) indicates that in exchange for the Pay Direct Drug services described in paragraph (i) of section II-A of Schedule A, Emergis is paid a fixed amount for each Transaction, which is referred to as the Transaction Fee. The description in Schedule D of the Fee for the services described in paragraphs (ii) through (xiv) of section II-A of Schedule A states: “No additional charge – included in Transaction Fee”.

[44] If the number of Transactions in a year exceeds a specified threshold, the Transaction Fee for Transactions above that threshold is reduced. Under section 7.4 of the 2007 Agreement, the Fees are invoiced using a blended rate that is based on the projected number of Transactions for the year, and an adjustment for the actual number of Transactions is made at the end of the year.

[45] Section 8 of the 2007 Agreement describes the payment procedure. Emergis is required, under section 8.1, to provide Great-West with the daily Transaction Log Files and, under section 8.2, to e-mail to Great-West an invoice for the previous day's Transactions. Great-West is required to pay the invoices by an electronic transfer of funds into a trust account named the "Emergis Inc. Trust Account for The Great-West Life Assurance Company". The payment is to take place no later than the end of the business day following receipt of the Transaction Log Files. The funds so transferred are to be used by Emergis exclusively for the purpose of paying Providers in settlement of each Transaction processed by Emergis for Great-West. Any interest earned on the funds in the account belongs to Emergis.

[46] Under section 8.9, Emergis is required to provide Great-West with an itemized statement of Charges within 30 days after the end of each month. Great-West is required to pay Emergis the amount indicated on the statement within 30 days of receipt of the statement. Charges are all amounts payable for services under the agreement, other than Fees.

[47] Section 10 of the 2007 Agreement describes operations and marketing. Under section 10.1, Emergis is required to establish and maintain a users group to discuss the needs of the users and market requirements in order to keep the Assure System and the Services competitive, current and on the leading edge. Under section 10.2, in June of each year, Emergis is required to provide to Great-West a preliminary business plan setting out the activities planned in regard to the Services for the following year. The plan is to be based on the feedback obtained from the users group.

[48] Section 12 addresses Assure Cards, Identification Cards and indemnification by Great-West. Under section 12.1, Great-West is responsible for the accuracy of the Benefit Plan Design and Claimant Information it provides to Emergis, and Emergis is responsible for the accuracy of the application of the Benefit Plan

Design and data to the Identification Cards¹ and the Assure Cards. Emergis is responsible for any costs incurred because of an omission or error in the application of the Benefit Plan Design and data to the Identification Cards and the Assure Cards. Under section 12.2, Great-West is to indemnify Emergis for any loss resulting from the fraudulent use of an Identification Card, or an Assure Card except where the use is by an employee or agent of Emergis or results from a negligent or willful act or omission by Emergis.

[49] Section 13 addresses intellectual property rights. Sections 13.1 to 13.3 state:

13.1 Except as expressly provided in Section 13.5 and 21.3 hereof, Great-West acknowledges that all rights in the Assure System are proprietary to Emergis and all Intellectual Property Rights developed, collected, created by or for Emergis otherwise resulting from the Services shall belong solely to Emergis.

13.2 Emergis represents and warrants that it is the owner of the Emergis Trade Marks and has the right to grant to Great-West the right to use same in a manner approved by Emergis from time to time. On this basis, Great-West acknowledges that Emergis is the exclusive owner of the Emergis Trade Marks and, except as expressly provided in this Agreement, Great-West acquires no right, title or interest in the Emergis Trade Marks. Great-West shall only use the Emergis Trade Marks in a manner approved by Emergis from time to time.

13.3 Emergis represents and warrants that it is the owner or the authorized licensee of all elements of the Assure System and any third party software that Emergis provides to access or use the Assure System and has the right to provide the Services to Great-West as provided for herein. On this basis, Great-West acknowledges that Emergis is the exclusive owner or authorized licensee of the Assure System and the Assure Card and, except as expressly provided in this Agreement, Great-West acquires no right, title or interest in the Assure Card or the Assure System. Great-West shall only use and authorize the use of the Assure Card in a manner approved by Emergis from time to time.

[50] Section 14 addresses confidentiality and confidential information.

[51] Section 16 addresses the indemnity to be provided by Emergis and the limits of Emergis' liability. Sections 16.1 to 16.3 state:

16.1 Emergis' liability for all damages to Great-West arising out of this Agreement for all claims, demands or causes of action whatsoever, and regardless

¹ An Identification Card is a certificate or other confirmation issued by Great-West identifying an individual as eligible under a Benefit plan. I assume this definition is addressing the replacement of Assure Cards with printable cards.

of the form of action, whether in contract or in tort, including negligence, for any year shall be limited to one half (1/2) the estimated amount of Fees for the immediately preceding year to which a claim relates. Excluded from this limitation are claims under Section 14 [the confidentiality provisions], Section 16.2 and Section 16.3 hereof.

16.2 Emergis shall indemnify and hold Great-West harmless from any claim from a third party that any item or any part of the Services furnished hereunder constitute an infringement of any copyright, trade secret or other intellectual property right excluding patent, and Emergis shall pay all damages and costs incurred by Great-West, including without limitation all legal fees and all settlement costs.

16.3 Emergis shall indemnify and hold Great-West harmless from any claim that the license of the Assure System as set out in Section 21.3 hereof, constitutes an infringement of any copyright, trade secret or other intellectual property right excluding patent, and Emergis shall be liable to pay all damages and costs incurred by Great-West, including without limitation all legal fees and all settlement costs.

[52] Section 20 addresses information and data. Sections 20.1 and 20.3 state:

20.1 It is understood and agreed that Great-West owns the data provided by Great-West to Emergis in order to provide the Services and is entitled to all information in the records of Emergis pertaining to such data. The Provider is entitled to review and obtain a copy of all information in the records of Emergis which the Provider originally submitted and any other information required by a Benefit Plan Design, as permitted by law. Except for information which may identify an individual, Emergis owns the information generated by Emergis through the provision of the Services and will be free to use it in providing statistical data to (without limitation) drug manufacturers, pharmacies, government agencies, carriers and third party statistical information providers. In no event will Emergis identify Great-West, the Sponsor or an individual Claimant without the express written consent of Great-West, Sponsor and/or the Claimant as the case may be.

...

20.3 Emergis represents and warrants that the Assure System and the System Software and any component thereof (including customizations, corrections and enhancements) developed by Emergis or for Emergis, will be free of any disabling codes or instructions, any virus or other contaminant, or any passwords that may, or may be used to, access, modify, delete, damage or disable Great-West's computer systems or any component thereof or that may result in damage thereto.

[53] Section 21 addresses the termination of Emergis' business and the placing in escrow of the assets used in the Assure System. If there is a Release Event then Emergis grants to Great-West a non-exclusive limited licence to use the proprietary components of the Assure System. A Release Event includes such things as the cessation of Emergis' business, the bankruptcy, insolvency, dissolution or winding up of Emergis, or the seizing of the Assure System by any legal process.

B. The Position of the Appellant

[54] The position of Great-West is that the Transaction Fee paid by Great-West to Emergis was consideration for making a supply of a "financial service" (as defined in subsection 123(1) of the ETA) to Great-West. Great-West argues that this follows from the fact that the essential service for which Great-West paid the Transaction Fee to Emergis was the effecting of the payment of drug benefits in accordance with the terms of the benefit plans.

[55] Great-West submits that Emergis played an indispensable and integral role in the payment of drug benefits to plan members. Specifically, plan members who used the Assure Card enjoyed the benefit of their drug coverage at the pharmacy counter and pharmacies received actual payment of the drug benefits by means of a disbursement from the trust account. As a result of the involvement of Emergis in the process, Great-West was able to satisfy its obligations under the benefit plans by making a single payment each day into the trust account.

[56] Great-West submits that, before a drug benefit could be paid to a plan member, the claim had to be adjudicated against the applicable Benefit Plan. The process of adjudication was complex, but Emergis was capable of handling the complexity. Emergis provided the payment and adjudication services as a single package to Great-West and its competitors. Great-West's overarching business objective in engaging the services of Emergis was the payment of drug benefits in accordance with benefit plans as agreed with plan sponsors.

[57] Great-West reiterates that the parties agree that the Services provided to Great-West by Emergis pursuant to the terms of the Agreements constitute a single supply under the ETA. This single supply contained all of the elements of service and property, if any, that Emergis provided to Great-West in consideration of the Transaction Fee. The appropriate analysis to apply to the supply is as follows: first, determine the essence or overall character of the supply in view of its "raison d'être" or main purpose; second, determine whether the essence of the single compound supply is captured in the inclusionary paragraphs of the definition of

“financial service”; and, third, if the supply fits within the inclusionary paragraphs, determine whether any of the exclusionary paragraphs capture the essence or overall character of the supply.

[58] Great-West submits that, on such an analysis, the single compound supply in this case is a “financial service” as defined in subsection 123(1) of the ETA. Specifically, the essence or overall character of the supply is described in paragraphs (a), (f), (f.1) and/or (l) of the definition and the supply is not excluded by any of paragraphs (n) to (t) of the definition. Consequently, the supply is an “exempt supply” for the purposes of the ETA, and GST does not apply to the consideration paid by Great-West for this exempt supply.

C. The Position of the Respondent

[59] The position of the Respondent is that each case turns on its particular facts and that as a result one cannot simply apply a result in a different case that involved different facts. The Respondent submits that careful consideration must be given to the specific terms of the Agreements pursuant to which the compound supply in this case is provided by Emergis to Great-West.

[60] The Respondent submits that the Agreements describe a wide range of services that are provided by Emergis to Great-West. This is evident from the many services described in Schedules A and D. The Respondent observes that A(i) of Schedule D, which describes the Transaction Fee, does not even mention actual payment of the plan benefits. Instead, it describes the capture of information from the pharmacy, the verification of eligibility, the adjudication of the claim in accordance with the terms of the Benefit Plan and the transmission of payment status to the pharmacy. The Respondent says that these services are best described as pharmacy benefits management rather than the payment of benefits. Payment is but one small part of the compound supply, which happens separately under the terms of the agreements between Emergis and the pharmacies

[61] The Respondent submits that the term “financial service” is merely a label which encompasses the descriptions in paragraphs (a) to (m) of the definition and excludes the descriptions in paragraphs (n) to (t) of the definition. The definition uses the word “means”, so it is an exhaustive definition of the phrase “financial service”. The compound supply in this case is not described in any of the inclusionary provisions of the definition and, even if it was, it is excluded by paragraphs (r.4), (r.5) and/or (t) of the definition.

III. The Statutory and Regulatory Provisions

[62] The parties agree that the amendments to the definition of “financial service” introduced by S.C. 2010, c. 12, section 55 apply to the reporting periods in issue in these appeals. These amendments were deemed to come into force on December 17, 1990. With this in mind, the relevant provisions of the ETA and the regulations to the ETA are set out in Appendix A to this judgment.

IV. Analysis

[63] The ETA provides that the supply of a financial service to a resident of Canada is an exempt supply and therefore not subject to GST. The corollary to this is that the supplier of the financial service is not entitled to input tax credits for property or services acquired (or imported) in order to supply the financial service. The issue in this case is whether the Services provided by Emergis to Great-West under the Agreements constituted the supply of a financial service.

[64] The parties agree that the supply in this case is a single compound supply.² The Supreme Court of Canada discussed the distinction between a single supply and multiple supplies in *Calgary (City) v. Canada*, 2012 SCC 20, [2012] 1 S.C.R. 689:

[32] In determining whether a supplier has made a single supply or multiple supplies, the relevant principles were summarized by Justice Rip (as he then was) in *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40 (T.C.C.). His approach was confirmed by the Federal Court of Appeal in *Hidden Valley Golf Resort Assn. v. R.*, [2000] G.S.T.C. 42.

...

[34] Justice Rip found that the *Value Added Tax* statute in the United Kingdom contained many provisions similar to our GST (*Value Added Tax Act* (UK), 1983,

² The concept of a single compound supply is drawn from the case law addressing the UK value added tax (VAT). I note that while the ETA defines supply as the provision of property or a service, the UK VAT legislation consistently refers to the supply of goods or services. In particular, under paragraph 3(2)(b) of the *Value Added Tax Act 1983* and paragraph 5(2)(b) of the *Value Added Tax Act 1994* “anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services” (see, also, section 31 of the 1994 Act and section 17 of the 1983 Act). The use of the plural “services” throughout the UK VAT legislation required an interpretive approach to address supplies involving multiple services. Sections 138 and 139 of the ETA address multiple services for a single consideration. The position of the parties is that these provisions do not apply to a compound supply, in light of *O.A. Brown Ltd. v. Canada.*, [1995] G.S.T.C. 40 (T.C.C.) and subsequent cases, but that, if they did, the result would be the same as under the compound supply analysis.

c. 55). In the English cases the issue had been defined as whether the supply in question comprises a compound supply or a multiple supply. A compound supply is a single supply with a number of constituent elements which, if supplied separately, some would have been taxed and some not. Multiple supplies are made and taxed separately.

[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]

[36] When reaching his decision, Justice Rip made the following observation:

. . . 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. [p. 40-6]

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

[37] Justice Rip also noted the importance of common sense when the determination is made. McArthur T.C.J. made a similar observation in *Gin Max Enterprises Inc. v. R.*, 2007 TCC 223, [2007] G.S.T.C. 56, at para. 18:

From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense.

[65] In this case, common sense does suggest that the various services provided by Emergis to Great-West under the Agreements are intertwined, interdependent and integral to one another. While it is true that Mr. Roszak testified that Emergis provided stand-alone switching services to some clients, the fact that switching can stand alone does not alter the reality in this case that the Services provided under the Agreements were all intertwined and interconnected to such a degree as to be properly considered a single compound supply.

[66] As noted by the Supreme Court in *Calgary (City)*, a compound supply is by its nature a supply with a number of constituent elements.³ If these elements had been supplied separately some would have been taxed and some not. In this case, the constituent elements of the single supply made by Emergis to Great-West were not provided separately but as an intertwined, interrelated and integral whole and the incidence of GST on the consideration charged for this single supply must be determined on that basis.

[67] The test to apply to determine whether a single supply constitutes a “financial service” is succinctly described by the Federal Court of Appeal in *Global Cash Access (Canada) Inc. v. The Queen*, 2013 FCA 269 as follows:

[26] To determine whether that single supply falls within the statutory definition of “financial service”, the questions to be asked are these: (1) Based on an interpretation of the contracts between the Casinos and Global, what did the Casinos provide to Global to earn the commissions payable by Global? (2) Does that service fall within the statutory definition of “financial service”?

[68] I interpret the references to what is being provided in the first question and to service in the second question to be references to the essential or predominant character of the supply or, stated another way, the substance of the supply. This follows from the fact that it is the single supply that is being characterized and not the constituent elements of the supply individually. As stated by Judge Rip (as he then was) in *O.A. Brown* (pp. 40-5 and 40-6)⁴:

. . . A compound supply is a supply where there are a number of constituent elements which, if supplied separately, some would have been taxed and some not. With respect to these types of supplies, it is necessary to determine the quality of the final compound supply for tax purposes regardless of its constituent elements. . . .

[69] Accordingly, basing my analysis on an interpretation of the Agreements, I must first determine the essential character, or substance, of what Emergis is supplying to earn the Fee and then assess whether this supply constitutes a “financial service” as defined in subsection 123(1) of the ETA. With respect to the second step, the essential character or substance of the supply will determine not only whether the supply is one described in the inclusionary paragraphs of the definition but also whether the supply is one described in the exclusionary paragraphs of the definition. In other words, the fact that one or more of the

³ *Supra*, paragraph 34.

⁴ At paragraph 21 of the judgment.

constituent elements of the supply may fall within the inclusionary or exclusionary paragraphs is not determinative. It is the essential character or substance of the supply that determines whether the supply is a financial service.

[70] The Services provided by Emergis to Great-West are described in section II-A of Schedule A to the 2007 Agreement as follows:

- (i) provide real-time, electronic pharmacy Transactions capture from the Provider's point-of-service, verification of eligibility of Claimant, adjudicate in accordance with Benefit Plan Designs provided by Great-West and confirm Transaction payment status to the Providers.
- (ii) maintain the Provider network to allow electronic submission of drug Transactions.
- (iii) assist in the development of standards for electronic transactions processing and keep Great-West informed of developments.
- (iv) operate a support desk (English and French) for Providers to answer questions and assist in problem resolution.
- (v) maintain relations with major software vendors and support regarding their provider software management packages relating to the processing of drug Transactions, changes required to support new products and validation of vendor software.
- (vi) ensure the adjudication software will adhere to legislative requirements, when possible with the information provided, the whole in accordance with the Change Management Procedure in Schedule E when appropriate.
- (vii) maintain DIN price and formulary files for use in the adjudication process.
- (viii) maintain DUR files for use in the adjudication process.
- (ix) maintain the appropriate version of the Transaction submission message.
- (x) provide real-time monitoring of Transactions processing and ensure continuity of service.
- (xi) maintain the Provider files for use in the adjudication process.
- (xii) create end of day Transaction Log Files that includes [*sic*] all Transactions submitted by the Provider for Great-West, including same day voids, prior day voids, and rejected Transactions. (This information is contained within the ELOG and VLOG).

(xiii) check to ensure no other payment has been issued for the same Transaction by Emergis.

(xiv) Emergis will keep on-line drug adjudication Transactions for a period of ninety (90) days.

[71] In addition, under section 5 of the 2007 Agreement, Emergis is charged with other responsibilities, including the maintenance of a sufficient number of Providers (pharmacies) to meet the needs of Claimants (plan members), the provision to Great-West of an appropriate number of Assure Cards, the provision to Great-West, at the end of each day, of access to data associated with its business, the provision to Great-West of standard reports, the conduct of routine audit procedures no less frequently than quarterly on a minimum of 200 pharmacies, and the on-request training of Great-West personnel authorized to access the Assure System.

[72] Schedule D to the 2007 Agreement indicates that the Transaction Fee is for the Pay Direct Drug services described in paragraph (i) of section II-A of Schedule A and that the fee for the balance of the services is included in the Transaction Fee. As well, section 7.1 of the 2007 Agreement indicates that, unless a separate Charge is agreed to or specified, the Fee also covers the services provided by Emergis under section 5 of the 2007 Agreement.

[73] It is clear from the description of the various services in the 2007 Agreement and from the evidence of Mr. Schwartz and Mr. Roszak that the substance of the supply is described under the heading Pay Direct Drug services in paragraph (i) of section II-A of Schedule A and that the other services may be considered ancillary or incidental to, or consequent upon, these services. Specifically, paragraphs (ii) to (vi) and (ix) to (xiv) of section II-A of Schedule A describe what is necessary to properly and efficiently carry out the services described in paragraph (i). For example, paragraph (ii) requires Emergis to maintain the Provider network, paragraph (iii) requires Emergis to assist in the development of electronic transaction processing standards and paragraph (iv) requires Emergis to operate a support desk. All of these actions are required in order to perform in an effective and efficient manner the services described in paragraph (i). The same can be said for the actions described in paragraphs (v), (vi) and (ix) to (xiv). The services described in section 5 are also ancillary or incidental to, or consequent upon, the services described in paragraph (i) of section II-A of Schedule A and do not represent the essential character of the supply.

[74] Paragraphs (vii) and (viii) of section II-A of Schedule A may be considered to describe two value-added services related to the adjudication process. However, the maintenance of DIN price and formulary files and DUR files for use in the adjudication process cannot be considered to define the essential character of the supply provided by Emergis to Great-West. Rather, these services represent bells and whistles added by Emergis to the adjudication component of the package of services. The adjudication component itself is provided for in paragraph (i).

[75] The question then is what is the essential character of the supply described in paragraph (i) of section II-A of Schedule A? The Appellant argues that the essential character of the supply described in paragraph (i) is the payment of the claim made by a plan member, while the Respondent argues that paragraph (i) describes the communication, adjudication and processing of a claim but not the payment of a claim. Payment, the Respondent says, is merely one small part of the compound supply, which happens separately under the terms of the agreements between Emergis and the pharmacies.

[76] To answer the question as to which view is correct, it is helpful to consider why the Pay Direct Drug services described in paragraph (i) of section II-A of Schedule A are being provided by Emergis to Great-West. Before the advent of real-time benefit administration systems such as the Assure Card system, a plan member would attend the pharmacy, present his or her prescription and pay for the prescribed drug(s) personally. The plan member would then submit a claim form to Great-West to obtain reimbursement of all or part of the amount paid. Great-West would adjudicate the claim and, if the plan member was eligible for plan benefits, mail a cheque to the plan member for the amount covered by the plan. In the meantime, the plan member was out of pocket for the full amount paid to the pharmacy for the drug(s) notwithstanding that the plan member had drug coverage under a group health benefits plan.

[77] The Assure Card system converted this process into a real-time adjudication and payment regime. The plan member now attends the pharmacy, presents his or her prescription and Assure Card (or Identification Card) and is advised on the spot how much coverage he or she has under the applicable group health benefits plan. The plan member is thereby relieved of paying to the pharmacy the amount covered by the plan.

[78] Seen in this light, it is clear that the essence of the service is the payment of the plan benefit to the plan member. Specifically, the services provided by Emergis effect the payment of the drug benefit to the plan member in accordance with the

terms of the applicable Benefit Plan. All of the other services simply support this objective.

[79] The mechanics of how the pharmacy is paid are a red herring in the sense that the plan member is constructively paid the plan benefit when he or she is relieved of the obligation to pay at the pharmacy counter the amount covered by the plan. The mechanics under the Assure Card system to address this constructive payment consistent in the reimbursement of the pharmacy for agreeing to forgo payment by the plan member at the point of sale. The pharmacy has no entitlement to the benefit under the terms of the applicable group health benefits plan but does have a right to be reimbursed under its agreement with Emergis. The reimbursement is simply an aspect of the Assure Card system that allows Emergis to effect payment of the drug benefit to the plan member in an efficient manner.

[80] The next question is whether this supply falls within the definition of financial service. Before addressing that question, I note that the Respondent did not at any time suggest that any of the group health benefits plans under which Great-West was the insurer or which Great-West administered did not constitute an “insurance policy” as defined in subsection 123(1) of the ETA. Accordingly, I will proceed on the basis that each of the group health benefits plans in issue is an “insurance policy” and a “financial instrument” as defined in subsection 123(1) of the ETA.

[81] Paragraph (f.1) of the definition of “financial service” includes “the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy”. As already stated, the essential character of the supply provided by Emergis to Great-West is the payment to the plan member of the drug benefit claimed by the plan member under a group health benefits plan. The payment of the amount is effected through the agreement of the pharmacy to forgo the collection of the full price of the drug at the point of sale. In my view, the words of the provision are sufficiently broad to capture this method of payment.

[82] In the past, the entitlement to the benefit would have been satisfied by the issuance of a cheque to the plan member. Under the Assure Card system, the entitlement is satisfied by relieving the plan member of the obligation to pay the amount of the benefit to the pharmacy at the point of sale. The result is the same. The plan member constructively receives at the pharmacy counter the benefit payable to him or her under the terms of the group health benefits plan. The fact that a payment is subsequently made by Emergis to the pharmacy does not alter the substance of what has transpired at the point of sale. As already stated, the

subsequent payment to the pharmacy is simply a means to give effect to the payment of the drug benefit to the plan member under the Assure Card system.

[83] In my view, the substance of the supply provided by Emergis to Great-West under the Agreements is described in paragraph (*f.1*) of the definition of “financial service”. In light of this finding, I do not need to consider whether the supply is described in paragraph (*a*) or (*f*) of the definition of financial service.

[84] The Appellant also argued that paragraph (*l*) describes the substance of the supply. Emergis did agree to provide a group of services that in substance effect the action described in paragraph (*f.1*). However, the agreement to provide the Services is not the substance of the supply. The actual provision of the Services is the substance of the supply. Accordingly, paragraph (*l*) does not apply to the supply in this particular case.

[85] The next question is whether the supply described in paragraph (*f.1*) of the definition of financial service is nevertheless excluded by any of paragraphs (*n*) to (*t*) of the definition. The Respondent argued that the supply is excluded by one or more of paragraphs (*r.4*), (*r.5*) and (*t*) of the definition.

[86] I will first address paragraph (*r.5*). The Respondent argued that Emergis delivered or made available property to Great-West. While it is true that Great-West had the right to acquire certain property if there was a Release Event, such an event did not occur during the reporting periods in issue. Apart from that right, section 13 of the 2007 Agreement acknowledges that Great-West had the right to use the Emergis trademarks and the Assure Card system, but only in the manner approved by Emergis. The section also makes clear that Great-West did not acquire any ownership of the intellectual or other property of Emergis.

[87] Great-West is given limited rights to use the Emergis trademarks and the Assure Cards so that Great-West can link the use of the Assure Card services to its group health benefits plans. The use of the property of Emergis in this manner is not the essential character of the supply provided by Emergis to Great-West but an incidental aspect of retaining Emergis to provide the Services described in the Agreements. Accordingly, paragraph (*r.5*) does not describe the essential character of the supply.

[88] Paragraph (*r.4*) of the definition of financial service states:

(r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is

(i) a service of collecting, collating or providing information, or

(ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service.

[89] As already stated, the taxability of a compound supply under the ETA is based on the essential character or substance of the supply and not the constituent elements of the supply. Accordingly, the fact that the constituent elements of the supply may include services described in paragraph (r.4) is not a basis for excluding the supply from the definition unless the essential character or substance of the supply is described by those services. This was confirmed by the Federal Court of Appeal in *Global Cash Access*:

[37] I turn now to the portion of the statutory definition of “financial service” that lists the exceptions. The Crown argues that paragraphs (r.4) and (r.5) of the statutory definition apply because under the agreement with Global, the Casinos are providing, respectively, clerical services that include the collection of identifying information about patrons, and access to the physical premises of the Casinos for Global’s terminals and kiosks. *Since the Crown is also arguing that there is a single supply, that argument assumes that those are the predominant elements of the supply.* [Emphasis added.]

[90] Here, the group of services that constitutes the compound supply does include some of the services described in paragraph (r.4). For example, Emergis does provide services to Great-West that involve collecting, collating or providing information. However, those services do not represent the essential character or substance of the supply, which is paying drug benefits to plan members. Accordingly, paragraph (r.4) does not apply to exclude the supply from the definition.

[91] Paragraph (t) of the definition of “financial service” excludes a prescribed service. Subsections 4(1), 4(2) and 4(3) of the *Financial Services and Financial Institutions (GST/HST) Regulations* (these subsections are hereinafter collectively referred to as the “Regulation”) state:

4. (1) In this section,

“instrument” means money, an account, a credit card voucher, a charge card voucher or a financial instrument;

“person at risk”, in respect of an instrument in relation to which a service referred to in subsection (2) is provided, means a person who is financially at risk by virtue of the acquisition, ownership or issuance by that person of the instrument or by virtue of a guarantee, an acceptance or an indemnity in respect of the instrument, but does not include a person who becomes so at risk in the course of, and only by virtue of, authorizing a transaction, or supplying a clearing or settlement service, in respect of the instrument.

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

(a) the transfer, collection or processing of information, and

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

(3) A service referred to in subsection (2) is not a prescribed service for the purposes of paragraph (t) of the definition “financial service” in subsection 123(1) of the Act where the service is supplied with respect to an instrument by

(a) a person at risk,

(b) a person that is a member of the same closely related group as a person at risk, if the recipient of the service is not the person at risk or another person that is a member of the same closely related group as the person at risk, or

(c) an agent, salesperson or broker who arranges for the issuance, renewal or variation, or the transfer of ownership, of the instrument for a person at risk or a person that is a member of the same closely related group as the person at risk.

[92] The Appellant did not pursue the position that Emergis is a person at risk as defined in subsection 4(3) of the Regulation. In cross-examination, Mr. Schwartz confirmed that Emergis did not assume any risk in connection with the issuing of insurance policies by Great-West or in connection with insurance policies administered by Great-West.⁵ It is also clear that Emergis did not use its own funds

⁵ Lines 1 to 9 of page 143 of the Transcript of Proceedings.

to pay the pharmacies, only those funds provided by Great-West under section 8.3 of the Agreements. Accordingly, subsection 4(3) does not apply to exempt the services in issue from being prescribed services. However, the existence of the exception in subsection 4(3) is an important part of the context in which the inclusionary rule in subsection regulation 4(2) of the Regulation is found.

[93] I will start by noting that the fact that what constitutes a “prescribed service” is set out in a regulation in no way diminishes the scope or force of the exclusion. The exclusion itself is in paragraph (t) of the definition of “financial service”, which is as much a statutory provision as the exclusions in paragraphs (n) through (s) of the definition. The fact that the statutory provision references a regulation to define its scope does not place paragraph (t) in a subordinate position relative to the other exclusionary paragraphs in the definition of financial service, nor does it transform the statutory exclusion in paragraph (t) into a regulatory exclusion.

[94] Even if the Regulation is considered subordinate, this is only an issue if there is a conflicting statutory provision. The Regulation does not conflict with the ETA in general or the definition of financial service in particular. Rather, it is a component of the definition of financial service. Even if the Regulation did conflict, the court should prefer a construction of the Regulation that reconciles it with the conflicting statutory provision.⁶

[95] The text of subsection 4(2) refers to the “transfer, collection or processing of information” as well as to “any administrative service”. The phrase “any administrative service” is qualified by including within the scope of that phrase an administrative service in relation to the payment or receipt of benefits, other than solely the making of the payment or the taking of the receipt.

[96] The text of subsection 4(2) is broad. The word “administrative” connotes anything concerning or relating to the management of affairs⁷ and the phrase “any administrative service” therefore encompasses any service concerning or relating to the management of affairs. Further, the qualification in paragraph 4(2)(b) ensures that the phrase extends to an administrative service concerning the payment or receipt of benefits. On the other hand, the concluding language of paragraph 4(2)(b) ensures that an administrative service that is solely the making

⁶ See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at page 38 and pages 48 to 49.

⁷ The *Oxford English Dictionary* (2nd ed.) defines “administrative” as “1 Pertaining to, or dealing with, the conduct or management of affairs; executive.”

of the payment of the benefit or the taking receipt of the benefit is not a prescribed service.

[97] The context of subsection 4(2) is that it is part of the regulation that defines “prescribed service” for the purposes of the exclusionary provision in paragraph (t) of the definition of financial service. As such, it must be read in conjunction with the balance of the Regulation, the key components of which are subsection 4(3) of the Regulation and the definitions of “instrument” and “person at risk” in subsection 4(1) of the Regulation.

[98] Paragraph (t) is one of a number of disparate exclusions in the definition of financial service. There is nothing in the text of the definition of financial service to suggest that paragraph (t) and the Regulation must be read to conform with the exclusions in paragraphs (n) to (s). Quite the contrary, the structure of the definition is that each inclusionary paragraph must be considered to determine if the supply falls within the definition and then each exclusionary paragraph must be considered to determine if the supply is nevertheless taken out of the definition.

[99] The text of subsection 4(3) of the Regulation and the definitions in subsection 4(1) of the Regulation indicate that the existence of a prescribed service is limited by the identity of the person providing the service with respect to an instrument.⁸ If that person is described in subsection 4(3), then services described in subsection 4(2) that would otherwise be prescribed are not prescribed services. Accordingly, the text and context of subsection 4(2) suggest that the subsection is intended to have a broad scope that is limited only by the concluding words of paragraph 4(2)(b) and the identity of the service provider.

[100] In view of the foregoing, the apparent purpose of paragraph (t) of the definition of financial service is to ensure that the consideration payable to a person who provides the services described in subsection 4(2) with respect to an instrument is subject to GST unless the person is financially at risk in relation to the instrument. This purpose is confirmed by the background to the Regulation, issued by the Department of Finance in 1990, which was reproduced in part in *President’s Choice Bank v. The Queen*, 2009 TCC 170 at paragraph 59:

59 Department of Finance News Release 90-103 (August 20, 1990), referred to by counsel for the appellant in paragraph 106 of the appellant’s memorandum

⁸ The instrument in this case is each of the group health benefits plans of Great-West in respect of which Emergis provides services to Great-West under the Agreements.

of fact and law, provided the following background information regarding the *Financial Services (GST/HST) Regulations*:

106. . . .

The Definition of a Financial Service

. . . Bill C-62 contains provisions for prescribing services as either financial services or as excluded from the financial service definition. These provisions provide the flexibility to address any necessary technical refinement to the definition of a financial service contained in the Bill. The prescribed services will be defined by regulations to be released over the coming weeks. This note outlines the intention and effect of these regulations.

. . .

B. Third Party Administrative Services

. . .

However, financial institutions sometimes provide data processing or administrative services in respect of financial services or instruments, but do not provide the underlying financial instrument — the services are provided on a third-party basis by the financial institutions. Examples include debt collection services and administrative-services-only (ASO) provided in respect of health insurance services. Under a broad based sales tax, these types of services should be taxable.

As a result, services which are purely administrative and provided on a third-party basis will be excluded from the definition of a financial service as a result of a regulation to be issued under paragraph (t) of the definition of a financial service. This regulation will provide that these services be taxable and will thereby further clarify the application of the tax in this area.

It is worth noting that this regulation will affect only services that would otherwise be considered to be financial services under paragraphs (a) to (m) of the definition under subsection 123(1). Therefore, this regulation will not affect services that are not captured by these paragraphs and, as a result, would not be financial services in the absence of this regulation.

Services that will be prescribed under paragraph (t) as excluded from the definition of a financial service will, in broad terms, be described as follows:

- (a) the service of transferring, collecting or processing information,

- (b) an administrative service involving the payment or receipt of dividends, interest, principal, claims, benefits, or any other amount, (other than a service that is solely the transfer of money from one person to another) or,
- (c) any other service of an administrative nature.

[101] The background to the Regulation confirms that the exclusion in paragraph (t) is aimed at purely administrative services provided on a third party basis that are otherwise caught by paragraphs (a) through (m) of the definition of financial service. The latter point may be stating the obvious as the exclusion in paragraph (t) would not be relevant if there was not already an inclusion under paragraphs (a) to (m). However, it further confirms what the text and context already tell us: that the exclusion is intended to apply according to its terms even if the services are otherwise included in the definition by one or more of paragraphs (a) to (m). I can see nothing in the text, context or purpose of paragraph (t) and the Regulation to suggest that the exclusion should not be applied in that manner.

[102] The issue then is whether the services provided by Emergis to Great-West, the essential character of which is captured by paragraph (f.1) of the definition of financial service, are excluded from the definition by paragraph (t). For the reasons that follow, I conclude that the services making up the group of services provided by Emergis to Great-West under the Agreements are prescribed services by virtue of paragraph 4(2)(b) of the Regulation and that therefore the single compound supply provided by Emergis to Great-West is not a financial service.

[103] Paragraph 4(2)(a) of the Regulation includes as prescribed services the services of transferring, collecting or processing information. There is no doubt that Emergis provides such services to Great-West under the Agreements. Emergis collects information from Great-West and the pharmacies (among others), processes the information collected from the various sources, and transmits information to Great-West and the pharmacies. However, those services do not describe the essential character or substance of what Emergis is doing for Great-West, which, as already stated, is the payment of drug benefits to the plan members. Accordingly, paragraph 4(2)(a) of the Regulation does not cause the services provided by Emergis to Great-West under the Agreements to be prescribed services.

[104] Paragraph 4(2)(b) of the Regulation includes as prescribed services any administrative service, including the provision of an administrative service in

relation to (i.e., concerning) the payment or receipt of benefits, but excluding a service that is solely the payment or receipt of benefits.

[105] With respect to the exclusion in paragraph 4(2)(b), no one service provided by Emergis to Great-West can be described as being solely the effecting of the payment or the taking receipt of benefits. Rather, the payment to, and receipt by, plan members of drug benefits result from the overall effect of the group of services described in paragraph (i) of section II-A of Schedule A to the 2007 Agreement. In particular, the services of switching (i.e., the transmission of the claim by the pharmacy to Emergis), adjudication, communication of the result and payment to the pharmacies are all required in order to effect payment of the benefits to plan members. As a result of these services, Great-West is relieved of making individual drug benefit payments to plan members and instead need only make one daily payment to Emergis. Notwithstanding the multi-step procedure used to effect payment, from the point of view of the plan member the drug benefit is paid and received at the point of sale.

[106] With respect to the inclusionary language in paragraph 4(2)(b), the group of services provided by Emergis to Great-West can be accurately described as a group of administrative services in relation to the payment or receipt of benefits. Specifically, the essential character of the group of services constituting the single supply is the payment of benefits to plan members, and the services composing that same group of services are administrative services in relation to the payment of those benefits. There is no conflict between these two characterizations. The essential character of the supply and the objective of the administrative services are the same.

[107] The group of services making up the single supply by Emergis can be described as administrative services for two principal reasons.

[108] First, the services provided by Emergis to Great-West do not involve any independent decision making by Emergis. The basis for any decision regarding a claim is found in the plan communicated by Great-West to Emergis. Under sections 4.2 and 12.1 of the Agreements, Great-West is solely responsible for each Benefit Plan Design and for the accuracy of the Benefit Plan Design and Claimant Information it provides to Emergis. Under section 12.1, Emergis is responsible for the accuracy of the application of the Benefit Plan Design and data to the Identification Cards and the Assure Cards. In essence, Emergis provides a computer system that allows the decision regarding a drug benefit claim to be

made in real time, but the decision itself stems from the terms of the group health benefits plan and not from Emergis.

[109] Second, the services provided by Emergis are quintessentially administrative in nature. Specifically, each drug benefit claim is electronically submitted by the pharmacist to Emergis, the dedicated computer system of Emergis adjudicates the claim in real time by applying the terms of the plan provided by Great-West, and that same system then communicates the result of the adjudication to the pharmacy, resulting in the constructive payment of any drug benefit available to the plan member. Emergis may also provide some additional information to Great-West (such as formularies) and to the pharmacies (such as the results of drug utilization reviews). However, the provision of this information is simply an aspect of Emergis' role as administrator of the drug benefit payments. The Assure Card system employed by Emergis adds value for Great-West by simplifying and reducing the cost of the benefits payment procedure, but the system does not alter the substance of what is being done, which is established by the terms of the drug benefit plans provided by Great-West to Emergis. As stated by Mr. Roszak, Emergis is a pharmacy benefits manager and nothing more.

[110] For these reasons, I find that the services provided by Emergis to Great-West under the Agreements are prescribed services by virtue of paragraph 4(2)(b) of the Regulation and are therefore excluded from the definition of "financial service" by paragraph (t) of the definition of "financial service" in subsection 123(1) of the ETA. As the services constituting the single compound supply in issue are excluded from the definition of financial service by paragraph (t) of that definition, the supply itself is also excluded. Accordingly, the appeals of Great-West are dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 21st day of September 2015.

"J.R. Owen"

Owen J.

Appendix A

Excise Tax Act, Part IX

123.(1) Definitions . . .

. . .

“commercial activity” of a person means

(a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

(b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;

“commercial service”, in respect of tangible personal property, means any service in respect of the property other than

(a) a service of shipping the property supplied by a carrier, and

(b) a financial service;

. . .

“exempt supply” means a supply included in Schedule V;

...

“financial instrument” means

...

(c) an insurance policy,

...

“financial service” means

(a) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,

(b) the operation or maintenance of a savings, chequing, deposit, loan, charge or other account,

(c) the lending or borrowing of a financial instrument,

(d) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,

(e) the provision, variation, release or receipt of a guarantee, an acceptance or an indemnity in respect of a financial instrument,

(f) the payment or receipt of money as dividends (other than patronage dividends), interest, principal, benefits or any similar payment or receipt of money in respect of a financial instrument,

(f.1) the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy,

(g) the making of any advance, the granting of any credit or the lending of money,

(h) the underwriting of a financial instrument,

(i) any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued,

(j) the service of investigating and recommending the compensation in satisfaction of a claim where

(i) the claim is made under a marine insurance policy, or

(ii) the claim is made under an insurance policy that is not in the nature of accident and sickness or life insurance and

(A) the service is supplied by an insurer or by a person who is licensed under the laws of a province to provide such a service, or

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

(j.1) the service of providing an insurer or a person who supplies a service referred to in paragraph (j) with an appraisal of the damage caused to property, or in the case of a loss of property, the value of the property, where the supplier of the appraisal inspects the property, or in the case of a loss of the property, the last-known place where the property was situated before the loss,

(k) any supply deemed by subsection 150(1) or section 158 to be a supply of a financial service,

(l) the agreeing to provide, or the arranging for, a service that is

(i) referred to in any of paragraphs (a) to (i), and

(ii) not referred to in any of paragraphs (n) to (t), or

(m) a prescribed service,

but does not include

(n) the payment or receipt of money as consideration for the supply of property other than a financial instrument or of a service other than a financial service,

(o) the payment or receipt of money in settlement of a claim (other than a claim under an insurance policy) under a warranty, guarantee or similar arrangement in respect of property other than a financial instrument or a service other than a financial service,

(p) the service of providing advice, other than a service included in this definition because of paragraph (j) or (j.1),

(q) the provision, to an investment plan (as defined in subsection 149(5)) or any corporation, partnership or trust whose principal activity is the investing of funds, of

(i) a management or administrative service, or

(ii) any other service (other than a prescribed service),

if the supplier is a person who provides management or administrative services to the investment plan, corporation, partnership or trust,

(q.1) an asset management service,

(r) a professional service provided by an accountant, actuary, lawyer or notary in the course of a professional practice,

(r.1) the arranging for the transfer of ownership of shares of a cooperative housing corporation,

(r.2) a debt collection service, rendered under an agreement between a person agreeing to provide, or arranging for, the service and a particular person other than the debtor, in respect of all or part of a debt, including a service of attempting to collect, arranging for the collection of, negotiating the payment of, or realizing or attempting to realize on any security given for, the debt, but does not include a service that consists solely of accepting from a person (other than the particular person) a payment of all or part of an account unless

(i) under the terms of the agreement the person rendering the service may attempt to collect all or part of the account or may realize or attempt to realize on any security given for the account, or

(ii) the principal business of the person rendering the service is the collection of debt,

(r.3) a service (other than a prescribed service) of managing credit that is in respect of credit cards, charge cards, credit accounts, charge accounts, loan accounts or accounts in respect of any advance and is provided to a person granting, or potentially granting, credit in respect of those cards or accounts, including a service provided to the person of

(i) checking, evaluating or authorizing credit,

(ii) making decisions on behalf of the person in relation to a grant, or an application for a grant, of credit,

(iii) creating or maintaining records for the person in relation to a grant, or an application for a grant, of credit or in relation to the cards or accounts, or

(iv) monitoring another person's payment record or dealing with payments made, or to be made, by the other person,

(r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is

(i) a service of collecting, collating or providing information, or

(ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,

(r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to in any of paragraphs (a) to (i) and (l),

(s) any service the supply of which is deemed under this Part to be a taxable supply, or

(t) a prescribed service;

...

“insurance policy” means

(a) a policy or contract of insurance . . . that is issued by an insurer . . .

(b) a policy or contract in the nature of accident and sickness insurance, whether the policy is issued, or the contract is entered into, by an insurer, and

(c) a bid, performance, maintenance or payment bond issued in respect of a construction contract;

“insurer” means a person who is licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada an insurance business or under the laws of another jurisdiction to carry on in that other jurisdiction an insurance business;

...

“recipient” of a supply of property or a service means

(a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,

(b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and

(c) where no consideration is payable for the supply,

(i) in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,

(ii) in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and

(iii) in the case of a supply of a service, the person to whom the service is rendered,

and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

...

“supplier”, in respect of a supply, means the person making the supply;

“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;

...

“taxable supply” means a supply that is made in the course of a commercial activity;

...

“zero-rated supply” means a supply included in Schedule VI.

133. Agreement as supply — For the purposes of this Part, where an agreement is entered into to provide property or a service,

(a) the entering into of the agreement shall be deemed to be a supply of the property or service made at the time the agreement is entered into; and

(b) the provision, if any, of property or a service under the agreement shall be deemed to be part of the supply referred to in paragraph (a) and not a separate supply.

138. Incidental supplies — For the purposes of this Part, where

(a) a particular property or service is supplied together with any other property or service for a single consideration, and

(b) it may reasonably be regarded that the provision of the other property or service is incidental to the provision of the particular property or service,

the other property or service shall be deemed to form part of the particular property or service so supplied.

139. Financial services in mixed supply — 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 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.

165. (1) Imposition of goods and services tax — Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

261. (1) Rebate of payment made in error — Where a person has paid an amount

(a) as or on account of, or

(b) that was taken into account as,

tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.

(2) Restriction — A rebate in respect of an amount shall not be paid under subsection (1) to a person to the extent that

(a) the amount was taken into account as tax or net tax for a reporting period of the person and the Minister has assessed the person for the period under section 296;

(b) the amount paid was tax, net tax, penalty, interest or any other amount assessed under section 296; or

(c) a rebate of the amount is payable under subsection 215.1(1) or (2) or 216(6) or a refund of the amount is payable under section 69, 73, 74 or 76 of the *Customs Act* because of subsection 215.1(3) or 216(7).

(3) Application for rebate — A rebate in respect of an amount shall not be paid under subsection (1) to a person unless the person files an application for the rebate within two years after the day the amount was paid or remitted by the person.

Schedule V – Exempt Supplies

Part VII — Financial Services

1. A supply of a financial service that is not included in Part IX of Schedule VI.

Schedule VI – Zero-Rated Supplies

Part IX – Financial Services

1. [Exported financial service] — A supply of a financial service (other than a supply that is included in section 2) made by a financial institution to a non-resident person, except where the service relates to

(a) a debt that arises from

(i) the deposit of funds in Canada, where the instrument issued as evidence of the deposit is a negotiable instrument, or

(ii) the lending of money that is primarily for use in Canada;

(b) a debt for all or part of the consideration for a supply of real property that is situated in Canada;

(c) a debt for all or part of the consideration for a supply of personal property that is for use primarily in Canada;

(d) a debt for all or part of the consideration for a supply of a service that is to be performed primarily in Canada; or

(e) a financial instrument (other than an insurance policy or a precious metal) acquired, otherwise than directly from a non-resident issuer, by the financial institution acting as a principal.

2. [Insurance] — A supply made by a financial institution of a financial service that relates to an insurance policy issued by the institution (other than a service that relates to investments made by the institution), to the extent that

(a) where the policy is a life or accident and sickness insurance policy (other than a group policy), it is issued in respect of an individual who at the time the policy becomes effective, is a non-resident individual;

(b) where the policy is a group life or accident and sickness insurance policy, it relates to non-resident individuals who are insured under the policy;

(c) where the policy is a policy in respect of real property, it relates to property situated outside Canada; and

(d) where the policy is a policy of any other kind, it relates to risks that are ordinarily situated outside Canada.

3. [Precious metals] — A supply of a financial service that is the supply of precious metals where the supply is made by the refiner thereof or by the person on whose behalf the precious metals were refined.

Financial Services and Financial Institutions (GST/HST) Regulations

2. In these Regulations, “Act” means the *Excise Tax Act*.

4. (1) In this section,

“instrument” means money, an account, a credit card voucher, a charge card voucher or a financial instrument;

“person at risk”, in respect of an instrument in relation to which a service referred to in subsection (2) is provided, means a person who is financially at risk by virtue of the acquisition, ownership or issuance by that person of the instrument or by virtue of a guarantee, an acceptance or an indemnity in respect of the instrument, but does not include a person who becomes so at risk in the course of, and only by virtue of, authorizing a transaction, or supplying a clearing or settlement service, in respect of the instrument.

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

(a) the transfer, collection or processing of information, and

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

(3) A service referred to in subsection (2) is not a prescribed service for the purposes of paragraph (t) of the definition “financial service” in subsection 123(1) of the Act where the service is supplied with respect to an instrument by

(a) a person at risk,

(b) a person that is a member of the same closely related group as a person at risk, if the recipient of the service is not the person at risk or another person that is a member of the same closely related group as the person at risk, or

(c) an agent, salesperson or broker who arranges for the issuance, renewal or variation, or the transfer of ownership, of the instrument for a person at risk or a person that is a member of the same closely related group as the person at risk.

CITATION: 2015 TCC 225

COURT FILE NOS.: 2013-123(GST)G and 2014-1159(GST)G

STYLE OF CAUSE: THE GREAT-WEST LIFE ASSURANCE
COMPANY v. HER MAJESTY THE
QUEEN

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: May 26, 27 and 28, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice John R. Owen

DATE OF JUDGMENT: September 21, 2015

APPEARANCES:

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 Diana Yeung

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