Docket: 2014-2259(GST)G

BETWEEN:

NESTLÉ CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 26, 2016, at Toronto, Ontario.

Before: The Honourable Lucie Lamarre, Associate Chief Justice

Appearances:

Counsel for the Appellant:	Chia-yi Chua Wendy Brousseau
Counsel for the Respondent:	Charles Camirand

JUDGMENT

The appeal from the reassessment made under Part IX of the *Excise Tax Act* with respect to the period from November 1, 2008 to November 30, 2008, notice of which is dated March 31, 2014, is dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 17th day of March 2017.

"Lucie Lamarre"

Lamarre A.C.J.

Citation: 2017 TCC 33
Date: 20170317
Docket: 2014-2259(GST)G

BETWEEN:

NESTLÉ CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre A.C.J.

[1] This is an appeal against a reassessment, notice of which is dated March 31, 2014, made by the Minister of National Revenue (**Minister**) under the *Excise Tax Act* (**ETA**) with respect to the period from November 1, 2008 to November 30, 2008. In determining the Appellant's net tax, the Minister denied input tax credits (**ITCs**) totalling $109,970.17.

[2] The Appellant had claimed these ITCs on the payment of the value of "instant rebate coupons" (**IRCs**) on different Nestlé products sold to consumers at a discount through Costco Wholesale Canada Ltd. (**Costco**).

[3] The Appellant submitted that it is entitled to ITCs on the IRCs pursuant to subsection 181(5) of the ETA on the basis that the IRCs are coupons within the meaning of subsection 181(2) of the ETA.

[4] The Minister is of the view that the IRCs are not coupons but are promotional allowances under section 232.1 of the ETA paid by Nestlé to Costco.

Hence, the Minister submits that the ITCs claimed in respect of the IRCs were properly denied under subsection 181(5) of the ETA.[1]

[5] Both parties acknowledge that, if the IRCs are determined to be coupons instead of promotional allowances, subsection 181(5) of the ETA allows the Appellant to claim the tax fraction of the amounts it reimbursed to Costco in respect of the IRCs (i.e., the ITC amount claimed that is at issue before the Court).

Issue

[6] The issue therefore boils down to whether the IRCs are coupons within the meaning of subsections 181(1), 181(2) and 181(5) of the ETA or promotional allowances pursuant to section 232.1 of the ETA.

Relevant provisions

[7] The relevant provisions of the ETA read as follows:

> **Coupons and Rebates**
>
> 181. (1) **Definitions** — The definitions in this subsection apply in this section.
>
> "**coupon**" includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit (within the meaning of section 181.3).
>
> "**tax fraction**" of a coupon value or of the discount or exchange value of a coupon means
>
> (*a*) where the coupon is accepted in full or partial consideration for a supply made in a participating province, the fraction
>
> A/B
>
> where
>
> A is the total of the rate set out in subsection 165(1) and the tax rate for that participating province, and

1 Since the Appellant did not give Costco a credit or refund for the GST/HST that was collected on the amount by which the consideration was reduced by the promotional allowances, it would appear that, by virtue of paragraph 232(3)(*b*) of the ETA, the Appellant is not entitled to claim a deduction from net tax, but that is not the issue before me.

B is the total of 100% and the percentage determined for A; and

(*b*) in any other case, the fraction

$$C/D$$

where

C is the rate set out in subsection 165(1), and

D is the total of 100% and the percentage determined for C.

(2) **Acceptance of reimbursable coupon** — For the purposes of this Part, other than subsection 223(1), where at any time a registrant accepts, in full or partial consideration for a taxable supply of property or a service (other than a zero-rated supply), a coupon that entitles the recipient of the supply to a reduction of the price of the property or service equal to a fixed dollar amount specified in the coupon (in this subsection referred to as the “coupon value”) and the registrant can reasonably expect to be paid an amount for the redemption of the coupon by another person, the following rules apply:

(*a*) the tax collectible by the registrant in respect of the supply shall be deemed to be the tax that would be collectible if the coupon were not accepted;

(*b*) the registrant shall be deemed to have collected, at that time, a portion of the tax collectible equal to the tax fraction of the coupon value; and

(*c*) the tax payable by the recipient in respect of the supply shall be deemed to be the amount determined by the formula

$$A - B$$

where

A is the tax collectible by the registrant in respect of the supply, and

B is the tax fraction of the coupon value.

(5) **Redemption of coupon** — For the purposes of this Part, where, in full or partial consideration for a taxable supply of property or a service, a supplier who is a registrant accepts a coupon that may be exchanged for the property or service or that entitles the recipient of the supply to a reduction of, or a discount on, the price of the property or service and a particular person at any time pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon, the following rules apply:

(*a*) the amount shall be deemed not to be consideration for a supply;

(*b*) the payment and receipt of the amount shall be deemed not to be a financial service; and

(*c*) if the supply is not a zero-rated supply and the coupon entitled the recipient to a reduction of the price of the property or service equal to a fixed dollar amount specified in the coupon (in this paragraph referred to as the "coupon value"), the particular person, if a registrant (other than a registrant who is a prescribed registrant for the purposes of subsection 188(5)) at that time, may claim an input tax credit for the reporting period of the particular person that includes that time equal to the tax fraction of the coupon value, unless all or part of that coupon value is an amount of an adjustment, refund or credit to which subsection 232(3) applies.

232.1 **Promotional allowances** — For the purposes of this Part, if

(*a*) a particular registrant acquires particular tangible personal property exclusively for supply by way of sale for a price in money in the course of commercial activities of the particular registrant, and

(*b*) another registrant, who has made taxable supplies of the particular property by way of sale, whether to the particular registrant or another person,

(i) pays to or credits in favour of the particular registrant, or

(ii) allows as a discount on or credit against the price of any property or service (in this section referred to as the "discounted property or service") supplied by the other registrant to the particular registrant,

an amount in return for the promotion of the particular property by the particular registrant,

the following rules apply:

(*c*) the amount is deemed not to be consideration for a supply by the particular registrant to the other registrant,

(*d*) where the amount is allowed as a discount on or credit against the price of the discounted property or service,

(i) if the other registrant has previously charged to or collected from the particular registrant tax under Division II calculated on the consideration or part of it for the supply of the discounted property or service, the amount of the discount or credit is deemed to be a reduction in the consideration for that supply for the purposes of subsection 232(2), and

(ii) in any other case, the value of the consideration for the supply of the discounted property or service is deemed to be the amount, if any, by which the value of the consideration as otherwise determined for the purposes of this Part exceeds the amount of the discount or credit, and

(*e*) if the amount is not allowed as a discount on or credit against the price of any discounted property or service supplied to the particular registrant, the amount is deemed to be a rebate in respect of the particular property for the purposes of section 181.1.

Amended Agreed Statement of Facts

[8] The parties filed an Amended Agreed Statement of Facts, which is reproduced below (the Exhibits are omitted):

1. Nestlé Canada Inc. (the "Appellant") is a corporation resident in Canada. Its principal place of business is 25 Sheppard Avenue West, 19th Floor, Toronto Ontario, M2N 6S8.

2. The Notice of Assessment under appeal is dated December 24, 2010, and covers the reporting period November 1 to November 30, 2008, and was issued under the *Excise Tax Act* (Canada) (the "ETA").

3. The Appellant carries on the business of manufacturing, distributing and selling food and beverages, throughout Canada. The Appellant is organized into key divisions including Chocolate and Confectionary, Coffee and Beverages, Nestlé Wafers and Ice Cream, each of which is involved in developing and marketing some of the country's best-known brands. The Appellant's products at issue in this appeal are from its Chocolate and Confectionary division (the "Nestlé Products") and are sold through various retailers in Canada including, Costco Wholesale Canada Ltd. ("Costco"). True copies of sample Nestlé Product packaging are attached as Exhibit "A". This appeal relates to sales of the Nestlé Products made at Costco.

4. The Appellant is registered for GST/HST as a monthly filer.

5. Costco is a private member wholesale retailer. In order for customers to purchase goods at a Costco warehouse, they are required to purchase a membership, which is evidenced by a membership card (the "Membership Card"). The membership (and Membership Card) grant access to Costco's products, which are typically offered at wholesale quantities. Membership is controlled by the Membership Card, which must be presented by all customers to gain entrance to the Costco warehouse as well as at the check-out.

6. In carrying on its business during the period May 2006 to October 2008 (the "relevant period"), the Appellant offered paper coupons (the "Paper Coupons") that provided consumers with a fixed dollar discount on the purchase price of Nestlé Products, when the coupons are accepted by a retailer. The Paper Coupons could be: (a) mailed directly to consumers, (b) placed on the product shelf for all customers purchasing the products to pick up, (c) provided to customers at the entrance of a Costco warehouse or, (d) kept at the store cashier. In the latter case, at the time of check-out, the cashier would either clip the coupon for the purchaser or scan the barcode on the Paper Coupon.

7. During the relevant period, the Appellant also offered another type of fixed dollar discount in respect of the Nestlé Products sold at Costco for which a Paper Coupon was neither: (a) mailed directly to consumers, (b) placed on the product shelf for all customers purchasing the products to pick up, (c) kept at the store cashier. This type of promotion was named "IRC" which stood for "instant rebate coupons" in Nestlé's contracts with Costco (the "IRC"). The acronym "IRC" and the terms "promotion" and "instant rebate coupons" are used neutrally in this partial agreed statement of fact without admissions by either party as to whether the transaction is a "coupon", "promotional allowance" or a "rebate".

8. The IRCs provided purchasers with a fixed dollar discount on the purchase price of taxable Nestlé Products.

9. In the Costco warehouse, on the product shelf to which the IRC applied, an 8 ½" x 14" on-the-shelf sign card clearly indicated the purchase price of the Nestlé Product, the product's and/or Costco's barcode for the Nestlé Product, the amount of the fixed dollar discount provided for by the IRC, the amount the purchaser would have to pay at the register after application of the discount and a notification that the applicable taxes would be applied before the amount of the discount was applied. When an IRC program is run, sales of the associated Nestlé Products significantly increased.

10. A list of all the IRCs offered, during the relevant period, is attached with true copies, hereto as Exhibit "B". In addition, Exhibit "B" lists the Paper Coupons identified in handwriting with "-P" as well as Halloween promotions identified in hand writing with "WC HALLOWEEN" that were offered during the relevant period.

11. Costco's computer system linked the IRCs to the applicable Nestlé Product such that when the barcode on the Nestlé Products being purchased was scanned at the cash register, the fixed dollar value of the IRC was accessed from Costco's central database and was automatically applied; whether the customer requested the discount or not.

12. The Costco Membership Card itself did not contain any information about the specific IRC physically, electronically or otherwise.

13. The cash register receipt issued to the Costco customer clearly indicated the purchase price of the Nestlé Product, the amount of the IRC and the GST/HST (applied to the gross purchase price of the Nestlé Products before the discount was applied). The amount of the IRC applied was specifically identified on the cash register receipts as CPN and "Coupons Tendered". A sample true copy of such a cash register receipt is attached hereto as Exhibit "C". The sample receipt pertains to a similar discount on beach towels (not a Nestlé Product) but for the purpose of this litigation, the parties agree that the cash receipt would not be materially different.

    The receipt as Exhibit "~~B~~" "C" evidences a purchase of 8 towels totaling $111.92. A $24 discount (8 times a $3 discount similar to the IRC program) was allowed by Costco. The taxable items purchased totaled $236 ($100 + $6.59 + $111.92 + $17.49). The GST was calculated on the $236 without taking into account the $24 discount.

14. Other than as indicated above, a customer did not have to do anything else, in order to obtain the IRC.

15. As between the Appellant and Costco, each IRC was distributed and documented pursuant to the terms of an individual contract named "CN Coupon Contract" which was subject to the Costco Standard Terms (the "Contracts"). The same Contracts were also used when the Appellant and Costco entered into Paper Coupon arrangements, with the sole difference that the box "Paper" under the heading "coupon" of the CN Coupon Contract would then be checked. True copies of some of the individual contracts for the IRCs for the relevant period are attached hereto as Exhibit "D" and of the Costco Standard Terms are attached as Exhibit "E". The Contracts governed both the IRC and the Paper Coupon arrangements between the Appellant and Costco. The sample Contracts at Exhibit "D" had not been executed by Costco but for purposes of this litigation, the parties agree that the Contracts were executed and that when executed by Costco, Costco assigned a value for "Contract #" and a "Coupon #" for its own records.

16. The Contract identifies the Nestlé Products for which the IRCs are issued and includes the IRC value, the time period during which it was distributed (i.e., start and end date), the Costco warehouse locations at which the IRC was accepted and the amount of the fixed dollar discount and the reimbursement. During the relevant period, Costco used the same form of contract for the IRCs as for the Paper Coupons.

17. The Contracts did not mention that any part of the reimbursements paid by the Appellant to Costco were on account of tax.

18. For both the IRCs and the Paper Coupons, Nestlé had a contractual obligation to reimburse Costco for 100% of the IRC value or the Paper Coupon value accepted by Costco.

19. When it sold its Nestlé Product to Costco:

    a) the Appellant collected GST/HST on the full price without taking into consideration the IRCs; and

    b) the Appellant did not credit or refund Costco for the GST/HST that was collected on the part of the consideration that was eventually reduced by the IRCs.

20. Costco invoiced the Appellant for the value of the IRCs via a Billing Detail debit memorandum, which set out the "Coupon #" (the number assigned by Costco for each CN coupon contract), type (i.e., the IRCs referred to as "I-coupon" or Paper Coupons referred to as "P-CPN", "WC-Nestlé Halloween promotion" or "WC-Halloween $2.00 off promo"), the amount of the IRC or Paper Coupon value as well as the effective date. A list of all the debit memorandums pertaining to the IRCs for the relevant period (as well as the Paper Coupons and WC-Nestlé Halloween promotions), are attached with true copies hereto as Exhibit "F".

21. The payments or credits of the IRC by the Appellant to Costco were not accompanied by a written indication that any portion of the payment was on account of tax.

22. During the relevant period, Costco charged customers GST/HST on the full purchase price of the Nestlé Products, before application of the IRC (e.g., Costco charged GST/HST as if the IRCs were coupons). Costco did the same for the Paper Coupons. A representative sample of the invoice of such a transaction is attached hereto as Exhibit "C".

23. Both parties acknowledge that if this Court finds that the IRCs are "coupons", subsection 181(2) of the ETA would apply and the GST/HST would have applied as Costco calculated it.

24. In calculating its net tax during the relevant period, the Appellant claimed input tax credits ("ITCs") by treating the IRCs as coupons.

25. Both parties acknowledge that if this Court finds that the IRCs are "coupons", subsection 181(5) of the ETA would apply to allow the

Appellant to claim the tax fraction of the amounts it reimbursed Costco in respect of the IRCs (the "ITCs claimed").

26. By Notice of (Re)Assessment dated December 24, 2010 (the "Assessment"), the Minister assessed the Appellant in respect of the relevant period, to deny the ITCs Claimed in respect of . . . all [the] IRCs it reimbursed to Costco except for the ITCs related to the Paper Coupons. The net tax denied by the Assessment totaled $109,970.17.

27. During the relevant period, the ITCs claimed in respect of Paper Coupons totaling $11,812.33 were allowed by the Minister. This amount is not in dispute in these proceedings.

28. Nestlé objected to the Assessment and by letter dated March 31, 2014, a true copy of which is attached as Exhibit "G", and Notice of (Re)Assessment dated March 31, 2014, the Canada Revenue Agency disallowed the objection.

<u>Appellant's submissions</u>

[9] In the Appellant's view, the IRCs are no different than the paper coupons, for which the Minister did not deny the ITCs. According to the Appellant, the IRCs are electronic versions of paper coupons, as they provide purchasers with a fixed dollar discount on the purchase price of taxable Nestlé products. The IRCs were electronically linked to the corresponding Nestlé product through Costco's computer system when the product barcode was presented and scanned at the cash register. Through the barcode, the linked coupon was accessed from Costco's central database and the discount provided by the coupon was approved.

[10] For both paper coupons and IRCs, Nestlé had a contractual obligation to reimburse Costco 100% of the coupon value accepted by Costco.

[11] The Appellant submits that the IRCs fit within the definition of coupon in subsection 181(1) of the ETA as being an "other device". The Appellant referred to the Tax Court of Canada (**TCC**) decision in *Tele-Mobile Company Partnership v. The Queen*, 2012 TCC 256 (affirmed 2013 FCA 149), in which the Court analyzed the use of the word "device" as follows (although, in that case, the taxpayer's discount did not fit within the definition of "coupon"):

> [27] The generic term "device" defined in Webster's On-line Dictionary as "a mechanism designed to serve a special purpose or perform a special function . . . an electronic device" broadens considerably any notion that "coupon" must be limited to any traditional view. The use of device suggests that the legislators

> acknowledged commerce has entered a technological age where paper may indeed become completely outdated. As the Appellant suggested, the standard commercial practice has evolved with the advent of e-commerce and instead of issuing a paper coupon, a customer's entitlement to a reduction in purchase price can be effected electronically. I do not see how this approach, however, helps the Appellant, as it has pointed to nothing held by the customer, electronically or otherwise, entitling the customer to the credit. The customer simply gets it.

[12] With respect to the fixed dollar amount coupon requirement set out in subsection 181(2) and with regard to what constitutes a coupon, the TCC stated at paragraph 35:

> . . . I do not read the requirement so narrowly as to require that only if TELUS is presented with a written coupon with a fixed dollar amount on it is the requirement met. In this day and age of electronic commerce and the use of purchase and sale devices not contemplated 20 years ago, I am of the view that where the fixed amount is clearly known to both sides, and is evidenced in writing, as hard copy or electronically, that can be offered by a customer as partial consideration, the requirement has been met. . . .
>
> [Emphasis added.]

This interpretation was accepted by the Federal Court of Appeal (**FCA**) at paragraph 11 of its reasons.

[13] The Appellant submits that the IRCs meet all the requirements for being considered as coupons. As long as the fixed amount of the coupon value is clearly known to both sides (which is the case here through the on-the-shelf sign card and through the cash register receipt given to customers) and evidenced in writing, as hard copy or electronically, there is a "coupon system".

[14] The Appellant asserted that there is no express requirement in the language of section 181 that the purchaser of goods be in physical possession of a tangible coupon that is physically separate from the product being supplied, or that the purchaser must present any such separate coupon to a retailer, in order for that provision to apply.

[15] In the Appellant's view, commercially and economically, the electronic coupon is the modern equivalent of (a) placing paper coupons on the product shelf for all customers who purchase the Nestlé products to pick up and bring with them to the cashier, or (b) keeping paper coupons at the checkout such that the cashier

can clip the coupon for the purchaser or scan the barcode on the coupon at the point of sale (Appellant's submissions, at para. 72).

[16] The Appellant concluded that the IRCs have the characteristics of paper coupons: they were offered pursuant to the same contract between Costco and Nestlé; for GST/HST purposes, they were treated the same by Costco; the customer was alerted to the e-coupons and the fixed dollar discount by the on-the-shelf sign – the only difference was that the customer did not have to hand over a piece of paper in addition to the Nestlé product and the membership card (Appellant's submissions, at para. 84).

Respondent's submissions

[17] The Respondent argued that the IRCs are not coupons but promotional allowances pursuant to section 232.1 of the ETA. The Respondent relies on the fact that, in the case of the IRCs, the purchaser did not tender a coupon for acceptance in order to get the reduction on the price of a taxable Nestlé product. The customer did not hold anything, electronic or otherwise, in his hand that entitled him to the reduction. The customer simply received it. Referring to *Tele-Mobile*, *supra*, at paragraph 32, the Crown argued that the thing entitling the customer to the reduction was not a coupon but the mere existence of that reduction. The discount shown on the shelf was nothing more than the advertisement of a promotion.

[18] Under section 181, a coupon must be a physical or an electronic device which the purchaser can submit for acceptance as full or partial consideration for a taxable supply of property and which entitles the purchaser to a reduction of the price of the property equal to the fixed dollar amount specified on the physical or electronic device. In the Respondent's view, an advertised discount, without more, does not meet the statutory requirements.

[19] Neither the barcode on the Nestlé product nor the Costco membership card contained any reference to a fixed dollar amount discount, which is a requirement under section 181 in order for there to be a coupon. The cash register receipt and the advertising on the shelf showing the discount are not coupons because they are not tendered by the customer for acceptance. They only show the discount given to the purchaser. Finally, the coupon contract between Costco and Nestlé (paragraph 15 of the Amended Agreed Statement of Facts) was entered into without the knowledge of the customer and obviously could not be tendered by him for acceptance.

Analysis

[20] As I mentioned previously, this case boils down to determining whether Nestlé's discount offered on its products to Costco's customers through the IRCs fits within the requirements for a coupon set out in section 181 of the ETA, or whether it should be characterized as a promotional allowance under section 232.1 of the ETA. In the latter case, Nestlé will be denied input tax credits because it did not structure its transactions in a way that conforms with the promotional allowance framework. On the other hand, if the IRCs qualify as coupons pursuant to section 181 of the ETA, Nestlé would be entitled to its ITCs for any excess GST/HST paid by the consumer when that consumer purchased a Nestlé product at Costco.

Statutory interpretation

[21] Driedger's modern rule of statutory interpretation states that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[2] To the extent that not requiring the customer to tender a coupon for acceptance would allow almost any advertised discount to be a coupon, as stated by the FCA in *Tele-Mobile*, at paragraph 11, it would make the promotional allowance regime set out in section 232.1 redundant. An interpretation that makes legislative provisions redundant would seem to run counter to the intentions of Parliament and accordingly would normally be incorrect:[3]

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; it does not use words solely for rhetorical or aesthetic effect; it does not make the same point twice. This is what is meant when it is said that the legislature "does not speak in vain."

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[2] Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87. The modern rule has been restated for tax purposes in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10 ("The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole."), and its wide application in tax matters has been affirmed by *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, and *Imperial Oil Ltd v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447.

[3] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at 43; see also *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87.

<u>Section 181: coupons</u>

[22] The term "coupon" is defined in subsection 181(1) to include a "voucher", "receipt" or "other device". It does not include a "gift certificate" or a "barter unit".

[23] The Appellant argues that the IRCs fall within the definition of "coupon" as being included in the expression "other device".

[24] In *Tele-Mobile*, C. Miller J. (TCC) noted that the use of the word "device" suggests that the legislators have acknowledged that commerce has entered a technological age where paper may indeed become completely outdated (para. 27).

[25] This position is also supported by the Supreme Court of Canada, which noted that, generally, statutory categories are "held to include things unknown when the statute was enacted" (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at 265).

[26] Further, the definition of "coupon" is said to <u>include</u>, among other things, an "other device". Parliament's use of the term "includes" suggests that the definition is meant to be expansive (*The Queen v. Mansour*, [1979] 2 S.C.R. 916, at 920).

[27] However, in *Tele-Mobile*, the TCC and the FCA held that a "coupon" must be a physical or an electronic device which the purchaser can submit for acceptance. Let us now apply this interpretation to the present situation: for the redemptor of the coupon (Nestlé) to obtain the benefit of an ITC for the GST/HST paid over and above the amount applicable to the discounted sale price, it would be required that the recipient of the supply (a Costco customer) tender a coupon. This is a requirement that distinguishes the coupon regime found in section 181 from the promotional allowance regime found in section 232.1. As I mentioned previously, the FCA, in *Tele-Mobile*, held that not requiring that the customer tender a coupon would "allow just about any advertised discount to be considered as a 'coupon' for the purposes of section 181 of the [ETA]" (FCA decision, para. 11).

[28] What makes matters confusing in the present situation is that, during the relevant period, Nestlé made available to Costco customers paper coupons (which were handed out to customers when they entered the Costco warehouses, as stated in the Appellant's written submissions at para. 12), and it is not disputed that the IRCs were considered by Nestlé as having the same characteristics as the paper coupons. This is reflected by the fact that the GST/HST charged to the Costco customers who benefited from IRCs was charged on the pre-discount price, as is

required by subsection 181(2) when a registrant accepts as consideration for a taxable supply a coupon that entitles the recipient of the supply to a reduction of the price equal to a fixed dollar amount specified on the coupon. Furthermore, the Nestlé-Costco transaction seemed to imply a coupon arrangement for both the paper coupons and the IRCs, as they were governed by the terms of the same contract between Nestlé and Costco.

[29] But even though Nestlé and Costco treated the IRCs as coupons, this is not sufficient for them to be characterized as such. For them to be so characterized, the terms of section 181 must be met. The FCA, in *Tele-Mobile*, made it clear that there cannot be a coupon unless something is submitted by the purchaser for acceptance as full or partial consideration for the taxable supply, and the coupon thus tendered, whether physical or electronic, must entitle the purchaser to a reduction of the price equal to a fixed dollar amount specified on the physical or electronic device.

[30] In the present case, when the Nestlé product was purchased by the customer, the customer did not tender any coupon (physical or electronic) to the cashier. The Costco membership card, although it granted access to Costco products, did not contain any specific information about the IRCs, as no fixed dollar amount reduction for the particular Nestlé product was specified on that card.

[31] In *Tele-Mobile*, C. Miller J. held that where the fixed dollar amount is clearly known to both sides and evidenced in writing by either a hard or an electronic copy that can be offered by a customer as partial consideration, the requirement has been met (para. 35). It is true that here there was an 8 1/2" x 14" on-the-shelf sign and a purchase receipt that indicated the purchase price and the amount of the fixed dollar discount provided by the IRC on the Nestlé product.

[32] However, to paraphrase what C. Miller J. said in *Tele-Mobile* at paragraph 39, this represents what Nestlé was offering to the customer; it was not something the customer was offering to the supplier of the Nestlé product. I also find it difficult to say that the above-mentioned information combined with the membership card must be viewed as the equivalent of a coupon (otherwise, paper coupons would be completely useless). In my view, Costco was merely advertising the discount. I am not prepared to accept the Appellant's submission that the combination of those two ingredients fits within the definition of "coupon" in that they constitute an "other device".

Section 232.1: promotional allowances

[33] While one important requirement in order for there to be a coupon under section 181 is missing, namely, the existence of a physical or an electronic device which the purchaser can submit to Costco for acceptance, the wording found in section 232.1 with respect to promotional allowances seems to apply perfectly to the facts here.

[34] Indeed, paragraph 232.1(*a*) applies when "a particular registrant (Costco) acquires particular tangible personal property (Nestlé products) exclusively for supply by way of sale for a price in money in the course of commercial activities of the particular registrant (Costco)". This requirement has been met. Paragraph 232.1(*b*) additionally requires that "another registrant (Nestlé), who has made taxable supplies of the particular property (Nestlé products) by way of sale, whether to the particular registrant (Costco) or another person", have either "(i) [paid] to or [credited] in favour of the particular registrant (Costco)", or "(ii) [allowed] as a discount on or a credit against the price of any property or service" supplied by the other registrant (Nestlé), an amount in return for the promotion of the particular property (Nestlé products) by the particular registrant (Costco).

[35] Here, Nestlé did not contest the Minister's assertion that Nestlé's repayments of the IRCs were credited against future Nestlé product purchases by Costco (Transcript at pp. 36-37, and Billing Detail documents submitted in evidence with the Amended Agreed Statement of Facts, at Tab F). So the requirements under subsection 232.1(*b*) are also met.

[36] I note here that, while section 232.1 permits credits on future purchases, a legalistic reading of section 181 would seem to prohibit Nestlé's giving credit to Costco for future Nestlé product purchases (as subsection 181(2) states that "the registrant (Costco) can reasonably expect to be paid an amount for the redemption of the coupon by another person (Nestlé)".

[37] The conclusion that the IRCs fit better within the definition of a promotional allowance than of a coupon also makes sense as a matter of policy.

[38] Under subsection 181(2), Costco is required to collect GST/HST on the pre-discount price of the Nestlé products.

[39] Subsection 181(2) thus requires the customer to overpay GST/HST on the Nestlé products and then deems the customer to have paid only the GST/HST

attributable to the post-discount price. The reason for implementing this practice was explained by counsel for the Respondent in his oral submissions, in which he referred the Court to the policy underlying the treatment of discount coupons. The object of the practice was to simplify the treatment of coupons for small grocers, who, in the 1990s, did not have easy access to cash registers that, for the purpose of the application of the GST/HST, could distinguish between coupons for taxable supplies and coupons for non-taxable (or zero-rated) supplies.[4]

[40] This excess GST/HST does not go to the government however. Instead, subsection 181(5) allows the provider of the coupon, here Nestlé, to obtain an input tax credit for the excess GST/HST paid by the Costco customer.

[41] The benefit represented by this additional input tax credit, received at the customer's expense, is why Nestlé is claiming that its transactions fit within the section 181 coupon regime, instead of the section 232.1 promotional allowance regime. By contrast, under the section 232.1 promotional allowance regime, the customer pays GST/HST on the reduced price of the supply.[5]

[42] In the present case, Nestlé and Costco treated the discount as falling under the coupon regime at the customer's expense.

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4 See Joint Book of Authorities, Tab 22 at 480, Department of Finance News Releases, TM1289, "December 1989 Technical Modifications" ("A number of industry groups in the course of consultations on the operation of the GST indicated that the proposed treatment of reimbursements for manufacturer's and money coupons would be quite cumbersome in practice. The system would be particularly difficult for small grocery stores which would be forced to segregate zero-rated coupons (i.e., for basic groceries) from taxable coupons, for no net revenue gain to the federal treasury. Paralleling the treatment of cash discounts, it was suggested that a simpler approach would be to ignore coupon reimbursements altogether in the context of GST."); Joint Book of Authorities, Tab 24 at 486, Department of Finance News Releases, 90-133. "Further Details on the GST Announced" (". . . the government has undertaken extensive consultation with business, particularly the grocery sector, to ensure that the operation of the tax would be as simple and straightforward as possible for consumers, retailers and coupon issuers.

A specific goal in refining the application of the GST in this area was to avoid creating situations where cashiers in retail outlets would have to face the additional complexity of having to separate coupons for taxable items from those for tax-free items at the checkout counter.").

5 That the customer pays GST/HST on the after-discount amount only can be inferred from the fact that section 232.1, unlike section 181, makes no mention of the customer paying GST/HST on the pre-discount amount. See also, Transcript, p. 71.

[43] The Federal Court of Appeal, in *Tele-Mobile*, was concerned that a relaxation of the tendering requirement would allow any discount arrangement to be considered a coupon,[6] which in turn would require the customer to overpay GST/HST and result in the provider of the coupon obtaining the benefit of this excess payment through an input tax credit. Such an interpretation would diminish the significance of the – arguably token – formality of the tendering requirement that must be met in order for the supplier to obtain the input tax credit. Thus, customers would always pay too much GST/HST and coupon providers would always get the benefit of an input tax credit, which, from a certain perspective, is like the government providing a quasi-subsidy to coupon providers through the GST/HST regime. Such an interpretation of the legislation would also render one provision, here section 232.1, virtually meaningless and would thus be contrary to the statutory interpretation guidelines established by the Supreme Court of Canada (See *Canada (Attorney General) v. JTI-Macdonald Corp*., *supra*).

[44] According to the interpretation of section 181 set out in the *Tele-Mobile* case, Parliament requires the customer to tender some kind of coupon as a bright-line condition that must be met before the provider of the coupon can obtain the benefit of an input tax credit for the excess GST/HST paid by the customer. If this requirement is not met, the transaction will fall under the promotional allowances regime, which constitutes a residual category.

[45] I accordingly conclude that the IRCs were promotional allowances, not coupons. Nestlé will therefore not be able to claim ITCs on the IRCs and the customer will not recover the tax overpaid. In a promotional allowance context, GST/HST should have been collected only on the post-discount price. In that context, I realize that the Minister has received a windfall. C. Miller J. of the Tax Court addressed that issue in *Tele-Mobile*, stating (at para. 30) that, although he was troubled by the windfall, it did not justify "torturing the language" of the statute:

> . . . I am troubled by the result that the Government may have got a windfall in this situation. But the purpose is not met by torturing the language to, as one of my favourite expressions puts it, fit a round peg into a square hole: TELUS cannot make the square hole big enough. S.181 of the ETA is a recognition that while tax is collectible on the price charged by a vendor for a service or supply, if that price is partially covered by the vendor, it would be unreasonable to consider that portion as part of the value of the consideration from the recipient for the

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6 *Tele-Mobile*, FCA, at para. 11.

> supply: but only if the Registrant plays by the rules and can point to a coupon or device. I suggest the Registrant, in this case, is attempting to bend the rules to overcome a result brought on by itself by establishing a program without due consideration of GST ramifications.[7]

[46] I conclude that the IRCs were not coupons pursuant to section 181 of the ETA and consequently the Appellant is not entitled to ITCs on the IRCs.

[47] The appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 17th day of March 2017.

"Lucie Lamarre"

Lamarre A.C.J.

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[7] *Tele-Mobile*, TCC at para. 30.

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