Docket: 2009-2677(GST)G

BETWEEN:

MAC'S CONVENIENCE STORES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 4 and 5, 2012, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	D'Arcy Schieman Martha K. MacDonald Al Meghji
Counsel for the Respondent:	Michael Ezri Darren Prevost

JUDGMENT

The appeals from the assessments made under the *Excise Tax Act* for the period from April 29, 2002 to April 24, 2005, are allowed without costs and the matter is referred back to the Minister for reconsideration and reassessment in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 13th day of November 2012.

"Robert J. Hogan"

Hogan J.

Citation: 2012 TCC 393
Date: 20121113
Docket: 2009-2677(GST)G

BETWEEN:

MAC'S CONVENIENCE STORES INC.,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] The assessments under appeal were made pursuant to the *Excise Tax Act* (the "ETA") for the period from April 29, 2002 to April 24, 2005. The appellant, Mac's Convenience Stores Inc. ("Mac's"), is a division of Alimentation Couche-Tard Inc., a major operator of convenience stores in North America.

[2] The appeal focuses on the provision of automated banking machine (ABM) services in the appellant's convenience stores. The ABM services were provided in two ways: through ABMs owned or leased by the Canadian Imperial Bank of Commerce or its wholly-owned subsidiary, Amicus Corporation, (together or separately hereinafter referred to as the "CIBC") and through ABMs owned by the appellant.

[3] Customers used the ABMs to withdraw cash from their bank accounts and paid a $1.50 service charge for each transaction.

[4] CIBC collected the service charge for the ABMs that it owned and leased and that it placed in the appellant's stores under various licence agreements. CIBC paid a portion of the service charges collected from non-CIBC clients to the appellant. The issue is whether the revenue share paid to the appellant by CIBC is consideration for an exempt supply of financial services, which is the appellant's position, or consideration for a taxable supply of real property, which is the respondent's position.

[5] With regard to the ABMs that the appellant owned, which were operated without the involvement of CIBC, the issue is whether the appellant is entitled to claim input tax credits (ITCs) in respect of the GST it paid on the purchase of the ABMs.

[6] Finally, the appellant challenges the penalties levied against it and does so on the grounds that it exercised due diligence in complying with its obligations under the ETA.

II. Factual summary

[7] In November of 2001, the appellant and Amicus Corporation, a wholly-owned subsidiary of CIBC, entered into an agreement which granted CIBC the right to place ABMs owned or leased by CIBC in certain of the appellant's stores.

[8] Initially, the arrangement was governed by two contracts: one between the appellant's Ontario Division and CIBC, and the other between the appellant's Western Division and CIBC (the "2001 Agreements"). The terms of these contracts are essentially the same.

[9] Non-CIBC customers using the ABMs were charged a $1.50 service fee. The appellant's share of this service fee could fluctuate monthly between 10% and 55% depending on the overall usage of the ABM network. The 2001 Agreements provided that either party could change the service fee charged to non-CIBC clients, with the consent of the other party.

[10] Under the 2001 Agreements, the appellant agreed not to have other banks' ABMs in its stores, except for those already in place.

[11] In 2004, the appellant and CIBC agreed to a new contract (the "2004 Agreement"). This agreement made several changes to the arrangement between the parties. Under the 2004 Agreement, only CIBC could change the service fee. Also, the 2004 Agreement allowed Mac's to place its own ABMs in its stores.

[12] Under the 2004 Agreement, the appellant provided shared communication lines which were used to transmit data required to complete the cash withdrawal transactions processed through ABMs owned or leased by CIBC. At trial, the parties acknowledged that the appellant collected and remitted GST in respect of payments for the shared communication lines during the currency of the 2004 Agreement.

III. ABMs owned or leased by the CIBC

[13] As noted earlier, the appellant argues that the revenue share it received from CIBC was consideration for an exempt supply of financial services. The appellant relies on the definition of "financial service" in subsection 123(1) of the ETA. The definition is based on a "catch and release" concept. It first includes a variety of activities under the heading of financial services through paragraphs (*a*) to (*m*) of the definition, then items otherwise included by those paragraphs are excluded by paragraphs (*n*) to (*t*). The relevant portions of the definition read as follows:

> "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,
>
> . . .
>
> (*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
>
> . . .
>
> but does not include
>
> . . .

> (*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*),

[14] Paragraphs (*r.4*) and (*r.5*) are deemed to have come into force on December 17, 1990. However, they do not apply in respect of a service rendered under an agreement, evidenced in writing, for a supply if:

> (*a*) all of the consideration for the supply became due or was paid on or before December 14, 2009;
>
> (*b*) the supplier did not, on or before December 14, 2009, charge, collect or remit any amount as or on account of tax under Part IX of the Act in respect of the supply; and
>
> (*c*) the supplier did not, on or before December 14, 2009, charge, collect or remit any amount as or on account of tax under Part IX of the Act in respect of any other supply that is made under the agreement and that includes the provision of a service referred to in any of paragraphs (*q*), (*q.1*) and (*r.3*) to (*r.5*) of the definition "financial service" in subsection 123(1) of the Act, as amended by subsections (1) to (4) [of S.C. 2010, c. 12].[1]
>
> [Emphasis added.]

[15] The appellant states that the supplies it made to CIBC under the 2001 and 2004 Agreements amounted to arranging for a financial service. According to the appellant, these activities fall within paragraph (*l*) of the definition. It describes itself as the "link" joining CIBC with the appellant's customers using the ABMs.[2] It is the

[1] S.C. 2010, c. 12, s. 55(5).
[2] Appellant's Written Submissions, at para. 78.

appellant's submission that it "planned or provided for the ABMs, caused the ABM transactions to occur, and made preparation for ABM transactions."[3]

[16] The appellant contests the Crown's view that the supply made to CIBC was in essence a supply of property by way of a licence. Rather, it states, it supplied CIBC with access to Mac's customers.[4] As evidence to support this conclusion, the appellant points to:

a. the revenue-share arrangement under which the appellant was paid, which included no provision for guaranteed income;

b. the appellant's right under the 2001 Agreements to change the service fee rate charged to ABM customers;

c. a letter from Amicus to the appellant's store managers emphasizing that the ABMs would "benefit our partnership", "help increase store traffic" and "increase revenue opportunities for your business"; and

d. the provision of information by CIBC to the appellant.[5]

[17] The appellant argues that the fact that its employees were not generally actively involved in the provision of ABM services to customers is not determinative because of the automated nature of the services provided through the machines.[6]

[18] For its part, the respondent argues that the appellant did not make a supply consisting of arranging for a financial service. The respondent argues that the dominant element of the supply made to CIBC was real property.[7] The appellant had no role in providing a financial service to ABM customers; that is, it was not an intermediary in ABM transactions.[8] The respondent describes the appellant's conduct as "akin to the role that any landlord would play when providing space for an ABM".[9]

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[3] *Ibid*.
[4] *Ibid*., at para. 80.
[5] *Ibid*., at para. 85.
[6] *Ibid*., at para. 86.
[7] Respondent's Written Submissions, at para. 85.
[8] *Ibid*., at paras. 88-89.
[9] *Ibid*., at para. 93.

[19] The respondent argues that the retroactive amendments do apply in this case because the appellant charged GST with respect to the shared communication lines it provided under the 2004 Agreement.[10] The shared communication lines were integral to the overall supply because the ABMs could not function without them and the services provided to CIBC through the lines would have had no value except as part of an overall supply of space and facilities for the ABMs.[11]

[20] The respondent submits that the retroactive amendments, particularly paragraphs (*r.4*) and (*r.5*), "eliminate any possibility that Mac's customer services, promotional work or real property could form the basis of an arranging for service."[12]

[21] Paragraph (*l*) of the definition of "financial service" in subsection 123(1) includes as 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*).

[22] It is not disputed that customers using the ABMs received a financial service. A "financial service" includes "the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise."[13] The question is whether the appellant arranged for the provision of such a service to ABM customers using ABMs owned or leased by CIBC.

[23] Prior to the 2010 amendments, which added paragraphs (*r.4*) and (*r.5*), the Canada Revenue Agency (CRA) had issued a policy statement entitled "Meaning of the term "arranging for" as provided in the definition of 'financial service'".[14] As a consequence of the 2010 amendments, this policy statement has been classified as "obsolete". However, it was referenced by several judges in considering the scope of the words "arranging for" in the case law considered below.

[24] The policy statement informs readers that:

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[10] *Ibid*., at para. 97.
[11] *Ibid*.
[12] *Ibid*., at para. 96.
[13] ETA, s. 123(1), definition of "financial service", para. (*a*).
[14] Canada Revenue Agency, Policy Statement P-239, "Meaning of the term 'arranging for' as provided in the definition of 'financial service'", December 14, 2009.

> To qualify as a service of "*arranging for*" the supply of a financial service, each of the following elements should be present:
>
> - the intermediary will help either the supplier or the recipient or both, in the supply of a financial service,
>
> - the supplier and/or the recipient count on one or more intermediaries for assistance in the course of a supply of a financial service, and
>
> - the intermediary is directly involved in the process of the provision of a financial service and will therefore, expend the time and effort necessary with the intent to effect a supply of a service described in paragraphs (*a*) to (*i*) of the definition of financial service.

Therefore, in determining if an intermediary's service qualifies as an "arranging for" service, one must consider all the facts surrounding the transaction, including the degree of involvement of the intermediary in the supply of the financial service and, where applicable, the normal activities of an intermediary in a given industry.[15]

[25] The case law considering the words "arranging for" in paragraph (*l*) indicates that the scope of the provision is rather broad. Bowie J. considered the scope of paragraph (*l*) in *Royal Bank of Canada v. The Queen*.[16] At issue was whether "branch services" provided by the appellant bank to a subsidiary mutual fund company (RMFI) were financial services and thus exempt supplies. As part of these branch services, certain Royal Bank employees at the bank's branches provided customer service and sold mutual fund units on behalf of RMFI.[17]

[26] Bowie J. looked at a dictionary definition of the verb "to arrange" which gave as its meaning: to "plan or provide for; cause to occur".[18] He held that the bank was not merely providing personnel services and the use of bank office space to the mutual fund company. The employees were at all times employees of the bank, not of the mutual fund company, and the bank did grant a right for the mutual fund company any right to occupy the bank's premises.[19] Rather, he held, the service the bank provided was "arranging for the distribution of mutual funds, together with

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[15] *Ibid*.
[16] *Royal Bank of Canada v. The Queen*, 2005 TCC 802, [2005] G.S.T.C. 198 (*Royal Bank*), *2005*.
[17] *Ibid*., at para. 8.
[18] *Ibid*., at para. 15.
[19] *Ibid*.

providing ongoing customer service".[20] He found that arranging for the distribution of mutual funds was the "dominant element" of the supply made by the bank.[21] The Federal Court of Appeal upheld Bowie J.'s decision.[22]

[27] In *Canadian Medical Protective Association* v. *Canada*, Bowman C.J., as he then was, found that investment managers paid by the CMPA provided a financial service in that they arranged for the transfer of ownership of financial instruments.[23] Bowman C.J.'s approach to the issue of whether the investment managers provided a financial service to the CMPA consisted of two questions. First, what service did the investment managers provide in return for the fees paid to them? This involves a factual determination. Second, does that activity fall within the definition of financial service in subsection 123(1)?[24] He held that the investment managers' services were financial services under paragraphs (*d*) and (*l*) in that they constituted "the arranging for . . . the transfer of ownership . . . of a financial instrument".[25]

[28] The Federal Court of Appeal upheld Bowman C.J.'s decision on the basis that the effect of the investment managers' services was to "cause to occur a transfer of ownership … of a financial instrument."[26] Desjardins J.A. also found that "give instructions", "make preparations for", and "*prendre les dispositions pour*" were all acceptable definitions of "arrange for".[27]

[29] The cases most on point given the facts in this appeal are *President's Choice Bank v. The Queen*[28] and *Global Cash Access (Canada) Inc v. The Queen*.[29]

[30] *PC Bank* concerned, in part, an agreement between CIBC and Loblaw Companies Limited (Loblaws) whereby CIBC provided retail banking services under Loblaws' President's Choice trademark (labelled "President's Choice Financial"). Under this agreement, CIBC paid to Loblaws (and later PC Bank, a subsidiary of Loblaws) a fee calculated with reference to new accounts opened and the average

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[20] *Ibid*.
[21] *Ibid*.
[22] 2007 FCA 72, [2007] G.S.T.C. 18; leave to appeal refused [2007] SCCA No. 193 (QL).
[23] *Canadian Medical Protective Assn. v. The Queen*, 2008 TCC 33, [2008] G.S.T.C. 88.
[24] *Ibid*., at para. 42.
[25] *Ibid*., at para. 48.
[26] *Canadian Medical Protective Assn. v. The Queen*, 2009 FCA 115, [2010] 2 F.C.R. 368, [2009] G.S.T.C. 65, at para. 64.
[27] *Ibid*., at para. 61.
[28] *President's Choice Bank v. The Queen*, 2009 TCC 170, [2009] G.S.T.C. 60 (*PC Bank)*.
[29] *Global Cash Access (Canada) Inc v. The Queen*, 2012 TCC 173 (*Global Cash*).

funds and assets under management through President's Choice Financial.[30] The parties also established a points-based loyalty program under a separate agreement.

[31] There were several issues in the case, but one was whether the fees paid by CIBC to Loblaws and later to PC Bank were consideration for arranging a financial service. PC Bank argued that they were. The Crown argued that the fees were paid for "a supply of facilities, trademarks, advertising and other non-financial services".[31]

[32] Lamarre J. held that PC Bank's supplies to CIBC consisted of arranging for financial services. The fees paid by CIBC were not consideration for the issuance of points under the loyalty program.[32] Neither were the fees consideration for exclusive use of the President's Choice trademark.[33] Rather, the financial service agreement between the parties reflected "Loblaw/PC Bank's desire to promote the no-fee bank account or the low-interest mortgages offered to its customers, just to give examples."[34] CIBC paid PC Bank "for its major role in selling attractive financial products to its [customers]."[35] In support of this conclusion, Lamarre J. noted the following:

- The fees CIBC paid to PC Bank were calculated with reference to new accounts opened and to the average funds and assets under management.[36]

- Loblaws used its leverage to ensure that the financial products and services offered by CIBC through the President's Choice Financial brand were more attractive than what would otherwise be available to consumers.[37]

- A steering committee with equal representation from both parties was constituted to ensure that CIBC would meet Loblaws/PC Bank's requirements.[38] The steering committee could re-evaluate the program or terminate the financial services agreement if certain thresholds (minimum required funds under management each year) were not met.[39]

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[30] *PC Bank*, *supra* note 27, at para. 3.
[31] *Ibid*., at para. 30.
[32] *Ibid*., at para. 34.
[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid*., at para. 35.
[38] *Ibid*.
[39] *Ibid*.

- Loblaws/PC Bank had 10-15 employees working with CIBC to determine the terms to be offered on the financial products.[40]

- During the years at issue, PC Bank had full banking powers under the *Bank Act*.[41]

[33] Some of the factors relied on by Lamarre J. exist in the present case. Mr. Todd Hayman, formerly a director of merchandising with the appellant, testified that meetings took place between the appellant's category managers and CIBC representatives on a monthly basis.[42] Additionally, Mr. Hayman testified that he met with CIBC representatives to discuss the arrangement with the bank several times a year.[43]

[34] However, there is no evidence that the appellant intended to or did utilize its leverage to secure a better-than-market ABM transaction fee rate for its customers. Under cross-examination, Mr. Hayman stated that Mac's had no such goal.[44] Further, $1.50 was the industry standard transaction fee during the period in question.[45] The 2001 Agreements included a stipulation that either party could change the ABM service fee with the consent of the other party.[46] The 2004 Agreement provided only that CIBC could change the fee rate upon providing notice to the appellant.[47] The rate was not changed during the years in question.[48]

[35] The agreements between the appellant and CIBC provided termination mechanisms whereby either party could either remove individual stores from the agreements or end the agreements themselves. However, the parties did not establish a steering committee or similar body of the kind that existed in *PC Bank*. Neither is there evidence to suggest that employees of the appellant were assigned to help design the financial service products to be offered through the ABMs.

[36] The appellant did not help, assist and become directly involved in the provision of financial services by CIBC to ABM customers. Its role in the provision of such services was considerably more passive. The core element of its supply to

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[40] *Ibid*., at para. 38.
[41] *Ibid*.
[42] Transcript, at p. 61.
[43] *Ibid*., at p. 63.
[44] *Ibid*., at p. 95.
[45] *Ibid*., at p. 94.
[46] 2001 Agreements, Exhibits A-1 and A-2, at s. 4.5(*a*).
[47] 2004 Agreement, Exhibit A-3, at s. 4.4(*d*).
[48] Respondent's Read-Ins, Tab 1, excerpt from transcript of discovery of Ziyad Mansour, July 8, 2010, at pp. 55-56; Respondent's Read-Ins, Tab 2, appellant's undertaking letter dated December 17, 2010, at p. 8.

CIBC was the provision of space in its stores. This is reflected in the terms of both the 2001 and 2004 Agreements.

[37] In *Global Cash*, Woods J. considered whether a fee paid by a provider of cash access services to Canadian casinos was consideration for arranging a financial service. Woods J. identified three separate supplies made by the casinos to Global Cash:

1. allowing kiosks on the premises;
2. providing support services at the cashier cages such as transaction procedures and initiating transactions on behalf of patrons; and
3. cashing Global's cheques.[49]

[38] Woods J. determined that the first two of these supplies, that is, allowing kiosks on the premises and providing support services at the cashier cages, constituted "arranging for" the issuance of cheques by Global Cash.[50] She described the casinos as being "directly involved in the issuance of cheques" and "actively engaged in doing so, since they allow kiosks on the premises and provide support services such as transaction procedures and initiating transactions on behalf of patrons".[51] She based this conclusion on the interpretation of "arrange for" as meaning to "plan or provide for; cause to occur" that Bowie J. adopted in *Royal Bank, 2005*.[52] Additionally, she relied on Policy Statement P-239.[53] It is not clear whether Woods J. would have considered that the operation of the kiosks in the casinos constituted the arranging for a financial service absent the support services provided at the cashier cages. She appears to have considered the two activities together.

[39] In the case at bar, the causal event for the service is the customer's choice to use the machine. Moreover, the appellant cannot be said to have given instructions regarding the transactions. The appellant might be said to have made preparations for the services, but only in the general sense of providing space in its stores for the ABM transactions to occur. It did not make preparations for individual transactions, which were strictly between CIBC (the operator of the ABMs) and the ABM customer.

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[49] *Global Cash*, *supra* note 29, at para. 63.
[50] *Ibid*., at para. 72.
[51] *Ibid*.
[52] *Ibid*., at para. 70.
[53] *Ibid*., at para. 71.

[40] The appellant was not acting as an intermediary with regard to the ABM transactions. It does not stock the CIBC-owned ABMs with cash. It is not involved with debiting the accounts of ABM customers. Its employees do not offer assistance to ABM customers beyond providing them with a phone number to contact CIBC. It is largely a bystander with respect to ABM transactions.

[41] For the reasons outlined above, the appellant's supply to CIBC is best viewed as a supply of real property (space in the stores), rather than a supply of arranging for a financial service.

[42] I do not have to consider the parties' submissions on the scope of the exclusions provided for in new paragraphs (*r.4*) and (*r.5*) because I have concluded that the appellant did not supply a financial service to CIBC as defined in paragraphs (*a*) to (*m*) of the definition.

IV. Appellant's ABMs

[43] The parties acknowledge that the appellant provided financial services to its customers through the operation of the ABMs that it owned. However, the respondent denies that the appellant is entitled to claim ITCs on the GST paid for the purchase of the ABMs that it placed in its stores.

[44] Generally speaking, ITCs cannot be claimed for GST paid or payable on goods or services used or consumed by the recipient of the supply in connection with the supply of commercial services. Subsection 185(1) of the ETA operates as an exception to this general rule. That provision reads as follows:

> Financial services – input tax credits
>
> 185. (1) Where tax in respect of property or a service acquired, imported or brought into a participating province by a registrant becomes payable by the registrant at a time when the registrant is neither a listed financial institution nor a person who is a financial institution because of paragraph 149(1)(*b*), for the purpose of determining an input tax credit of the registrant in respect of the property or service and for the purposes of Subdivision d, to the extent (determined in accordance with subsection 141.01(2)) that the property or service was acquired, imported or brought into the province, as the case may be, for consumption, use or supply in the course of making supplies of financial services that ***relate to*** commercial activities of the registrant,
>
> (*a*) where the registrant is a financial institution because of paragraph 149(1)(*c*), the property or service is deemed, notwithstanding subsection 141.01(2), to have been so acquired, imported or brought into the province for consumption, use or

> supply in the course of those commercial activities except to the extent that the property or service was so acquired, imported or brought into the province for consumption, use or supply in the course of activities of the registrant that relate to
>
> (i) credit cards or charge cards issued by the registrant, or
>
> (ii) the making of any advance, the lending of money or the granting of any credit; and
>
> (*b*) in any other case, the property or service is deemed, notwithstanding subsection 141.01(2), to have been so acquired, imported or brought into the province for consumption, use or supply in the course of those commercial activities.
>
> [Emphasis added.]

[45] This provision allows a registrant that "is neither a listed financial institution nor a person who is a financial institution because of paragraph 149(1)(*b*)" (the appellant is neither of the foregoing) to claim ITCs for property or services consumed or used by it "in the course of making supplies of financial services that relate to commercial activities of the registrant". This result is achieved because the property or service used to effect the supply of a "financial service" is deemed to have been acquired for use in the course of commercial activities for which ITCs may be claimed. In order for a registrant to benefit from the favourable treatment provided for in subsection 185(1), the supply of financial services must "relate to" the commercial activities of the registrant.

[46] The respondent argues that the words "relate to" require me to determine whether the appellant placed the ABMs in its business to facilitate its primary business operations. According to the respondent, a financial service must be incidental or ancillary to a registrant's primary business operations in order to qualify for the favourable treatment offered by subsection 185(1). The respondent contends that the appellant did not have to offer cash withdrawal services to its customers because it accepted payment by credit card and bank debit card. The ABM service was a separate profit centre for the appellant. For these reasons, the respondent argues that the appellant's ABM operations were unrelated to its other business activities.

[47] I disagree with the respondent's interpretation. The test proposed by the respondent does not conform to the ordinary meaning of the words "relate to" and fails to take into account the context and purpose of subsection 185(1).

[48] In *Canada Trustco Mortgage*,[54] the Supreme Court of Canada ("SCC") stated that where a provision contains words with unequivocal meaning, the ordinary meaning of those words plays a dominant role, and that where, on the other hand, the words may support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role and the focus shifts towards the Act's harmonious whole:

> 10 . . . When the words of a provision are precise and unequivocal, the ordinary meaning of the words play [*sic*] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [55]

[49] The ordinary meaning of the word "relate" favours the appellant's position. For example, *The Canadian Oxford Dictionary* defines the word "relate" as follows:

> Relate, verb
>
> 3. (usu. foll. by *to*, *with*) bring into relation with (with one another); establish a connection between (*cannot relate your opinion to my own experience*).[56]

[50] In *Nowegijick v. The Queen*,[57] the SCC held that the phrase "in respect of" has the widest possible scope. Interestingly, in coming to this conclusion the SCC stated (at page 39) that the words import such meanings as "in relation to", "with reference to" or "in connection with". The SCC, in *Slattery*,[58] discussed the definition of "in respect of" and "relating to" in the context of subsection 241(3) of the *Income Tax Act* ("ITA"). The SCC held that the comments in *Nowegijick* on "in respect of" are equally applicable to the phrase "relating to":

> In my view, these comments are equally applicable to the phrase "relating to". *The Pocket Oxford Dictionary* (1984) defines the word "relation" as follows:
>
> > …what one person or thing has to with another, way in which one stands or is related to another, kind of connection or correspondence or contrast or feeling that prevails between persons or things. . . .

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[54] *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.
[55] *Ibid*.
[56] *The Canadian Oxford Dictionary*, 2nd ed.
[57] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.
[58] *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430, at pp. 445-46, [1993] 2 C.T.C. 243, at pp. 248-49, 93 D.T.C. 5443, at p. 5447.

> So, both the connecting phrases of s. 241(3) suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*.[59]
>
> [Emphasis added.]

In light of those cases, a registrant needs only to establish that there is some connection between the making of a supply of a financial service in respect of which ITCs are claimed and the registrant's other commercial activities. The financial services do not have to be found to be ancillary or incidental to the appellant's other activities in order to qualify for the favourable treatment provided for in subsection 185(1). The threshold is much lower than that suggested by the respondent.

[51] The respondent points out that, if I favour the appellant's position, the appellant will enjoy an unfair tax advantage, in that it will receive a full credit for the GST paid in respect of the purchase and operation of its ABMs while the cash withdrawal services offered by it will remain an exempt financial service for GST purposes. This will lead to an unlevel playing field because banks pay GST on the costs of similar service offerings.

[52] Subsection 185(1) is a simplification measure. The provision is aimed at reducing controversy by relieving registrants of the difficult task of apportioning GST paid between activities that give rise to a credit and those that do not. A registrant can claim ITCs in respect of financial services contemplated by subsection 185(1) because the legislator chose to deem inputs for the purpose of financial service transactions to be inputs for the purpose of commercial activities. The revenue earned from such transactions escapes GST because the activity remains an exempt supply for GST purposes. Contrary to the respondent's contention, Parliament was undoubtedly aware of this result and favoured simplicity over tax neutrality concerns when it used broad language to define eligibility under subsection 185(1).

[53] Weighing the evidence as a whole, I can find no difference between the appellant's ABMs and its other goods and services offerings. The evidence shows that all of the appellant's product and service offerings were managed in such a manner as to improve gross sales and net profits. The appellant's ABMs also

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[59] *Ibid*., at pp. 445-46 SCR, p. 249 C.T.C, p. 5447 DTC. The definition of "relation", as quoted from *The Pocket Oxford Dictionary*, is included in the definition of "in relation to" in *Canada Tax Words, Phrases and Rules*, Marc Jolin, Vol. 1 (Toronto: Carswell, 2009), Loose-leaf.

afforded its customers the same convenience as its other service and product offerings.

[54] The appellant placed ABMs in its stores to maximize customer visits. The ABMs were strategically placed to encourage maximum browsing. The ABM services allowed clients to gain access to their bank accounts while facilitating the purchase of the appellant's other goods and services. The evidence shows that ABM users often made impulse purchases following a withdrawal of money from their bank accounts. The appellant profited from both transactions. In my opinion, this is a sufficient link or connection to justify a finding that the appellant's ABM operations "relate to" its other convenience store activities.

V. Due diligence defence

[55] The Minister assessed penalties against the appellant under section 280 of the ETA in connection with the appellant's failure to collect GST on the payments it received from CIBC under the 2001 and 2004 Agreements. The appellant argues that it exercised due diligence in determining that it did not have to collect GST from CIBC and that the penalties ought to be cancelled for that reason. It is well established that a due diligence defence can only be established in one of two circumstances: where there is a reasonable mistake of fact or where the taxpayer has taken all reasonable precautions to comply with the ETA. The appellant did not lead any evidence to show how and why it concluded that the payments from CIBC were not subject to GST. Therefore, I conclude that the appellant made an error relating to the interpretation and application of the law. A mistake of law of that type is not a valid defence against a section 280 penalty. Therefore, the penalty under that section should be maintained.

[56] No costs are awarded because the results in this matter are mixed.

Signed at Ottawa, Canada, this 13th day of November 2012.

"Robert J. Hogan"

Hogan J.

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