

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161216

Docket: A-454-15

Citation: 2016 FCA 316

**CORAM: DAWSON J.A.
WEBB J.A.
WOODS J.A.**

BETWEEN:

**THE GREAT-WEST LIFE ASSURANCE
COMPANY**

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on September 29, 2016.

Judgment delivered at Ottawa, Ontario, on December 16, 2016.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**DAWSON J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The Great-West Life Assurance Company (Great-West) was assessed goods and services tax (GST) under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (Act) on fees for services provided in connection with group health benefit plans it offers to employers.

[2] Great-West appealed the assessments to the Tax Court of Canada on the basis that the fees were paid for a financial service, which would be an exempt supply.

[3] In the Tax Court (2015 TCC 225), Justice Owen (judge) concluded that the fees were subject to tax because they were paid for an administrative service which generally falls outside the definition of “financial service.” Great-West appeals from this decision.

[4] The relevant reporting periods are from January 1, 2008 to December 31, 2012.

I. Factual background

[5] The relevant facts were helpfully set out in detail by the judge. I will just provide a brief overview.

[6] Great-West, a Canadian insurance company, offers group health benefit plans to employers. The plans typically include coverage for prescription drugs and dental care for employees and their families.

[7] With respect to the prescription drug component, in some plans Great-West assumes the risk in providing benefits in exchange for an insurance premium. In others, the employer assumes the risk and Great-West earns a service fee.

[8] In the relevant period, Great-West had agreements with Emergis Inc. and Telus Health Solutions (together, Emergis) under which Emergis provided services in relation to the plans, including the prescription drug and dental components. In his reasons, the judge stated that only the prescription drug component of the plans was at issue and his findings of fact were limited to this component.

[9] The services provided by Emergis relating to the drug component generally involved receiving and adjudicating benefits claims from employees, and arranging for the benefits to be received on a real-time basis. The services were predominantly effected electronically, through the use of a program known as the Assure Card system. This system enabled claims to be adjudicated quickly so that prescriptions could be filled at the pharmacy without the employee having to pay, or at least without the employee having to pay the full amount.

[10] Emergis was able to provide this service by making agreements with pharmacies under which they agreed to fill prescriptions on the understanding that payment would follow. After prescriptions were filled, Emergis paid the pharmacies on behalf of Great-West, using Great-West's funds.

[11] Under its agreements with Great-West, Emergis earned a fee for each drug transaction completed, whether or not the claim was approved.

[12] The determination of whether a particular claim should be approved did not involve independent discretion on the part of Emergis. Emergis was required to apply the rules of the particular plan and industry standard rules.

[13] As part of these arrangements, Emergis provided other miscellaneous services to Great-West, such as the provision of a call centre for the use of employers and the pharmacies.

II. Statutory framework

[14] Under the relevant statutory scheme, generally a supply of a “financial service,” as that term is defined in subsection 123(1) of the Act, is an exempt supply.

[15] The definition of “financial service” lists a number of activities that are included, which is subject to a further list of activities that are excluded. In this appeal, the central provisions are paragraph (*f.1*) (an included activity) and paragraph (*t*) (an excluded activity) below.

<i>financial service</i> means	<i>service financier</i>
...	[...]
(<i>f.1</i>) the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy,	<i>f.1</i>) le paiement ou la réception d'un montant en règlement total ou partiel d'une réclamation découlant d'une police d'assurance;
...	[...]
but does not include	La présente définition exclut:
...	[...]
(<i>t</i>) a prescribed service	<i>t</i>) les services visés par règlement.

[16] Section 4 of the *Financial Services and Financial Institutions (GST/HST) Regulations*, SOR/91-26 (Regulations) prescribes services that are excluded as a “prescribed service” for purposes of paragraph (t) above. The relevant part of this provision reads:

4 (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,

...

[Emphasis added]

4 (2) Sous réserve du paragraphe (3), pour l’application de l’alinéa t) de la définition de *service financier*, au paragraphe 123(1) de la Loi, sont visés les services suivants, sauf ceux mentionnés à l’article 3 :

a) la communication, la collecte ou le traitement de renseignements;

b) les services administratifs, y compris ceux reliés au paiement ou au recouvrement de dividendes, d’intérêts, de capital, de créances, d’avantages ou d’autres montants, à l’exclusion des services ne portant que sur le paiement ou le recouvrement.

(3) Pour l’application de l’alinéa t) de la définition de *service financier*, au paragraphe 123(1) de la Loi, ne sont pas visés les services mentionnés au paragraphe (2) et fournis relativement à un effet par :

a) la personne à risque;

[...]

[soulignement ajouté]

III. The decision of the Tax Court

[17] In concluding that the services provided by Emergis were not an exempt supply, the Tax Court undertook the following analysis.

[18] First, the judge agreed with the parties that the services provided under the agreements between Emergis and Great-West constitute a single compound supply rather than multiple supplies (reasons, paragraph 65).

[19] Second, the judge determined that the substance of the supply is captured by the following provision in the agreements (reasons, paragraph 73):

(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.

[20] Third, the judge determined that the essential character of the supply described in the above provision is the payment of the drug benefit to the employee (*i.e.*, arranging for the prescription to be filled without full payment) (reasons, paragraphs 75 to 78).

[21] Fourth, the judge found that the substance of the supply falls within the inclusions in the "financial service" definition since it constitutes the payment of a claim under an insurance policy, which is described in paragraph (*f.1*) (reasons, paragraphs 81 to 83).

[22] Fifth, the judge concluded that the supply does not fall within the exclusions in paragraphs (r.4) and (r.5) of this definition but that it does fall within the exclusion in paragraph (t) which refers to a “prescribed service” (reasons, paragraphs 87, 90 and 110).

[23] In particular, the judge found that the supply is a prescribed service since it is an administrative service described in paragraph 4(2)(b) of the Regulations. In reaching this conclusion, he determined that: (1) the supply is an administrative service, (2) the service provided by Emergis is not solely the making of the payment, and (3) Emergis is not a person at risk within the meaning of paragraph 4(3)(a) of the Regulations (reasons, paragraphs 91 to 110).

[24] On this basis, the trial judge concluded that the supply by Emergis to Great-West under the agreements is not a financial service.

IV. Positions of the parties

[25] In this Court, both parties submit that the judge erred in interpreting the definition of “financial service.”

[26] The Crown submits that the judge interpreted paragraph (f.1) too broadly and that its ordinary meaning should be narrowed to take into account the exclusion in paragraph 4(2)(b) of the Regulations.

[27] Great-West submits that paragraph 4(2)(b) of the Regulations does not apply to a supply that is a payment of an insurance claim as this type of supply is specifically included in paragraph (f.1), which should take precedence over the Regulations.

V. Did the judge err in the application of the Regulations?

[28] I begin the analysis with the argument of the appellant, Great-West.

[29] Great-West submits that the judge's interpretation and application of the exclusion in paragraph 4(2)(b) of the Regulations conflicts with the statutory inclusion in paragraph (f.1) of the Act. It submits that the statutory provision should take precedence because the Regulations are subordinate legislation. This issue involves an interpretation of the relevant provisions and should be reviewed on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[30] The applicable law is reproduced above but for ease of reference it is repeated here.

Paragraphs (f.1) and (t) of “*financial service*” definition

financial service means

...

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

...

service financier

[...]

f.1) le paiement ou la réception d'un montant en règlement total ou partiel d'une réclamation découlant d'une police d'assurance;

[...]

but does not include

La présente définition exclut:

...

[...]

(t) a prescribed service

t) les services visés par règlement.

Paragraph 4(2)(b) and (3)(a) of the Regulations

4 (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:

4 (2) Sous réserve du paragraphe (3), pour l'application de l'alinéa t) de la définition de *service financier*, au paragraphe 123(1) de la Loi, sont visés les services suivants, sauf ceux mentionnés à l'article 3 :

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

a) la communication, la collecte ou le traitement de renseignements;

(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.

b) les services administratifs, y compris ceux reliés au paiement ou au recouvrement de dividendes, d'intérêts, de capital, de créances, d'avantages ou d'autres montants, à l'exclusion des services ne portant que sur le paiement ou le recouvrement.

(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

(3) Pour l'application de l'alinéa t) de la définition de *service financier*, au paragraphe 123(1) de la Loi, ne sont pas visés les services mentionnés au paragraphe (2) et fournis relativement à un effet par :

(a) a person at risk,

a) la personne à risque;

...

[...]

[Emphasis added]

[soulignement ajouté]

[31] The essential question is whether there is a conflict between paragraph (*f.1*) and the Regulations. Despite the able submissions of Great-West's counsel, I do not agree that there is any conflict.

[32] It is necessary to interpret these provisions textually, contextually and purposively. In my view, this approach suggests that the payment of insurance claims, which otherwise would be an exempt "financial service," is not a "financial service" if it is an administrative service that is not comprised solely of the payment, and the payor is not a person at risk. In other cases, the payment of insurance claims may qualify as an exempt "financial service."

[33] There is no conflict in applying the Regulations textually to limit the application of paragraph (*f.1*) of the "financial service" definition. Although there is an overlap between the inclusion in paragraph (*f.1*) and the exclusion in paragraph 4(2)(*b*), this is intended and there is no reason to give the exclusion an interpretation different from its ordinary meaning in this case.

[34] Great-West has referred to two GST decisions in support of its position: *The Canadian Medical Protective Assn. v. The Queen*, 2008 TCC 33, [2008] G.S.T.C. 88, affirmed by 2009 FCA 115, [2010] 2 F.C.R. 368 (*CMPA*); and *Royal Bank of Canada v. The Queen*, 2005 TCC 802, [2005] G.S.T.C. 198, affirmed by 2007 FCA 72, [2007] G.S.T.C. 18 (*Royal Bank*).

[35] In my view, these decisions do not assist Great-West in this appeal.

[36] In the decision of the Tax Court in *CMPA*, Chief Justice Bowman (as he then was) determined that since the Regulations are subordinate legislation, paragraph 4(2)(b) of the Regulations cannot take precedence over a specific conflicting statutory limitation in the Act. The effect would be to eradicate limitations imposed by statute (*CMPA*, paragraph 56).

[37] The decision of the Tax Court in *Royal Bank* is similar. In that case, Justice Bowie concluded that the meaning of the term “administrative service” was not clear and that the provision should not be interpreted so broadly as to exclude an activity that was specifically enumerated in the inclusions to the definition of “financial service” (*Royal Bank*, paragraph 18).

[38] In both *CMPA* and *Royal Bank*, the courts rejected an application of the administrative service exclusion in the Regulations in circumstances where the application would be incompatible with a statutory provision.

[39] However, it is clear that paragraph (t) of the Act and paragraph 4(2)(b) of the Regulations are intended to limit the breadth of the inclusions in the statute. The question is whether in a particular case the proposed interpretation or application of the Regulations limits the statute in a way that Parliament did not intend.

[40] In this appeal, a textual, contextual and purposive interpretation of the relevant provisions leads to the conclusion that the supply by Emergis is excluded by paragraph 4(2)(b) of the Regulations. Parliament did not intend otherwise.

[41] In light of this conclusion it is not necessary to discuss the submissions of the Crown concerning the interpretation of paragraph (f.1) of the “financial service” definition.

VI. Did the judge err in the application of the analytical framework?

[42] I would briefly comment on an issue that was raised by the Court. Prior to the hearing, the parties received a request from the Court to address the potential application to this appeal of paragraphs 25, 37 and 38 of *Global Cash Access (Canada) Inc. v. The Queen*, 2013 FCA 269, 2013 G.S.T.C. 141 (*Global Cash*).

[43] In *Global Cash*, this Court held that the inclusions and exclusions in the “financial service” definition should be determined by the predominant elements of the supply. This principle is important because it would be an error to interpret the inclusions and the exclusions by having regard to services that are not predominant elements.

[44] The question is whether this principle was properly applied by the judge or whether he took into account non-predominant elements in the determination (appellant’s memorandum, paragraph 39). For the reasons below, I conclude that the judge did not err in the application of this principle.

[45] It is useful to first review the analytic framework applied in *Global Cash*.

[46] In determining whether a supply is a “financial service,” there are two questions to be answered (*Global Cash*, paragraph 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”?

[47] The first question is simply to determine what services were provided for the consideration received. At this stage, the services should include all services and not just the predominant elements. This is clear in *Global Cash* in which the first step included some services that were not predominant elements (*i.e.* clerical services and access to premises) (*Global Cash*, paragraphs 27, 37 and 38).

[48] The difficult part of the analysis comes at the second step. It requires a determination as to whether the supply is included in the definition of “financial service.” As part of this exercise, it is necessary to determine the predominant elements of the supply if it is a single compound supply. It is only the predominant elements that are taken into account in applying the inclusions and exclusions in the “financial service” definition.

[49] In this case, a question arises as to what elements the judge considered to be the predominant elements. The judge determined the “substance” of the supply and then the “essential character” of the supply (reasons, paragraphs 73 to 78). In parts of the analysis he refers to the substance and in others he refers to the essential character. It is not clear which of these the judge considered as the predominant elements.

[50] When there is an ambiguity in reasons, the meaning that is to be preferred is the one that is harmonious with the reasons as a whole. In this case, the entirety of the reasons suggests that the judge determined that the predominant elements of the supply were the parts of the service that resulted in the payment of the benefits. The judge described this as the “substance” in paragraph 73 of the reasons. These elements are:

(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.

[51] It follows from this that the judge did not improperly take into account non-predominant elements in his analysis. The judge also did not err in concluding that the supply is not a “financial service” since these elements are properly characterized as a payment of an insurance claim for purposes of the inclusion in paragraph (*f.1*) and as an administrative service for the purpose of the exclusion in paragraph 4(2)(*b*) of the Regulations.

VII. Conclusion

[52] I would dismiss the appeal with costs.

"Judith M. Woods"

J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-454-15

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE OWEN
DATED SEPTEMBER 21, 2015 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

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REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: DAWSON J.A.
WEBB J.A.

DATED: DECEMBER 16, 2016

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