Federal Court of Appeal | Cour d'appel fédérale

Date: 20120530

Docket: A-493-10

Citation: 2012 FCA 160

CORAM: **EVANS J.A.**
SHARLOW J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

COSTCO WHOLESALE CANADA LTD.

Respondent

Heard at Toronto, Ontario, on January 23, 2012.

Judgment delivered at Ottawa, Ontario, on May 30, 2012.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: EVANS J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The respondent Costco Wholesale Canada Ltd. ("Costco") has been assessed for federal goods and services tax (GST) on payments it received from Amex Bank of Canada ("Amex") between September 3, 2001 and August 29, 2004. Costco appealed the assessments to the Tax Court of Canada. The appeal was allowed. The assessments were vacated on the basis that the payments in issue were not consideration for a taxable supply, but a reduction or partial refund of a fee payable by Costco to Amex for an exempt supply (2009 TCC 134). The Crown appealed that decision to this Court, which ordered a rehearing (2010 FCA 9). After the rehearing, the judge confirmed his

original decision and rendered judgment accordingly (2010 TCC 609). The Crown appeals again to this Court. For the reasons that follow, I have concluded that the Crown's second appeal should be dismissed.

Statutory framework

[2] GST is imposed by Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15. The charging provision is subsection 165(1), which reads as follows:

165. (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.	**165.** (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5 % sur la valeur de la contrepartie de la fourniture.

During the period relevant to this case, the rate of GST was 7%. No issue arises with respect to the GST rate.

[3] Subsection 165(1) uses several terms defined in subsection 123(1) of the *Excise Tax Act*, and the definitions of those terms use other defined terms – "recipient", "consideration", "supply", "taxable supply", "exempt supply", "property", "service", "commercial activity", "business", "financial service".

[4] However, it is not necessary to consider these statutory definitions in detail. It is common ground that a person who pays consideration for a taxable supply made in the course of a business activity is required to pay GST at the rate of 5% (formerly 7%) of the value of the consideration. In

the context of this appeal, “consideration” should be understood to include anything that would be consideration under the law of contract, and “taxable supply” should be understood to mean anything except a “financial service” (as defined in subsection 123(1) of the *Excise Tax Act*; that definition is considered in more detail below).

[5] Although subsection 165(1) imposes GST on the *recipient* of a taxable supply (the person who pays the consideration), the person who *receives the consideration* (the supplier) generally has the legal obligation to charge the recipient of the taxable supply the applicable GST, collect the GST, and remit it to the government. A supplier who fails to meet that obligation may be held liable for the unpaid GST, and may be assessed accordingly. This appeal involves a GST assessment of that kind. The Crown is alleging that Amex paid Costco consideration for a taxable supply, and Costco failed to charge, collect and remit the applicable GST.

Factual background and procedural history

(a) The contractual arrangements between Costco and Amex

[6] To understand the basis of the reassessments under appeal, it is necessary to consider two contracts made simultaneously by Amex and Costco in November of 1999. Although the two contracts were separate in the sense that there is a separate document for each contract, the judge concluded that the two contracts were part of a single transaction. That conclusion is supported by the evidence and has not been challenged.

[7] One of the contracts was entitled “Agreement for American Express® Card Acceptance” (the “Merchant Agreement”). In the Merchant Agreement, Amex authorized Costco to accept Amex credit cards from its customers and Costco agreed to pay Amex a fee (the “Amex discount”) for that right. It is undisputed that the form of the Merchant Agreement was the same as the form Amex used for all merchants authorized to accept Amex credit cards.

[8] For the purposes of this appeal, the only relevant provisions of the Merchant Agreement are those that refer to the Amex discount. Those provisions read as follows:

> We [Amex] will pay you [Costco] in Canadian Dollars for the face amount of Charges you submit, minus: 1) our Discount; 2) any amounts you owe us; and 3) any Credits you issued. We will send payments to you in accordance with the payment plan you select. …
>
> Discount Rate
>
> The Discount is the amount we charge you for accepting the Card. The Discount rate is [X] % and will apply to all Charges made using Cards. The Discount will be deducted from our payments.

[9] As these provisions indicate, the amount of the Amex discount was a percentage of Costco sales paid with any Amex credit card (“Amex card sales”). The percentage rate is referred to as “X” because in these proceedings, it was agreed that the rate would be kept confidential.

[10] The second contract between Amex and Costco was entitled “American Express/Costco Co-Branded Card Program Agreement” (the “Co-Branding Agreement”). Under the Co-Branding Agreement, Costco and Amex agreed to issue credit cards bearing both the Costco and Amex brand names. These Costco/Amex cards would function as both a Costco membership card and an Amex

credit card. The holder of a Costco/Amex card would be entitled to use it to purchase anything from Costco or from any other merchant who is authorized to accept Amex credit cards.

[11] Article III of the Co-Branding Agreement, entitled “Compensation to Costco”, contained four provisions that obliged Amex to pay money to Costco – section 3.01(a), section 3.01(b), section 3.01(c) and section 3.02.

[12] The assessments under appeal imposed GST only on payments made under section 3.01(a) of the Co-Branding Agreement, which read as follows (my emphasis):

> [3.01] (a) Within thirty (30) days after the end of each calendar quarter during the term of this Agreement, Costco shall be paid an amount equal to [Y] % of the Costco Net Volume of Charges during that calendar quarter. Provided that for the time period ending January 31, 2000, the amount paid to Costco shall equal ___% (instead of [Y] %) of the Costco Net Volume of Charges during that period. Provided further that, if by April 8, 2000 Costco does not complete its information systems requirements to support the issuance of the [Co-Branding] Consumer Cards, then for the time period beginning April 8, 2000 through the date Costco completes its information systems requirements, the amount paid to Costco shall equal ___% (instead of [Y] % of the Costco Net Volume of Charges during that period. (It is understood that, to make a payment promptly, Amex may be required to use Net Annual Volume of Charge figures which are tentative, and therefore may require adjustments in a future calendar quarter.)

[13] The amount of each section 3.01(a) payment was a specified percentage of Amex card sales during a calendar quarter. The percentage rate is referred to as “Y”, again because in these proceedings it was agreed that the rate would be kept confidential.

[14] The computational basis of the Amex discount and the section 3.01(a) payments was the same – a percentage of Amex card sales. The only asymmetry was that the Amex discount payments were made within days of each submission by Costco of Amex charges, while the section 3.01(a) payments were made quarterly. It is undisputed that X was greater than Y. Thus, on a net basis and ignoring timing differences, cash flowed from Costco to Amex in an amount equal to X minus Y, multiplied by Amex card sales.

[15] As mentioned above, there were three other provisions of the Co-Branding Agreement that required Amex to make payments to Costco. One of those provisions was section 3.01(b), which read as follows (my emphasis):

> [3.01] (b) In exchange for the marketing efforts provided by Costco as contained in Section 2.02 (a) above, Costco shall be paid for each 12-month period beginning with the issuance of the first [Co-Branding] Card, the amount specified in the charts below for each [Co-Branding] Consumer Card Account and each [Co-Branding] Small Business Card Account acquired during that 12-month period. All payments are inclusive of applicable Taxes. "Acquired", for purposes of this subsection (b) means that a [Co-Branding] Card Account was approved, a Basic Card is issued by Amex, and the Basic Card is not canceled prior to the end of the calendar quarter in which it was approved. The number of Accounts Acquired is determined for each such 12-month period independently under the charts below as if each 12-month period begins with 0 Acquired Accounts, i.e., there is no accumulation from one 12-month period to the next 12-month period. Payments under this subsection (b) shall be made within thirty (30) days after the end of each calendar quarter in a given 12-month period.

[16] The parties refer to the section 3.01(b) payments as "bounty fees" because the amount of each payment was a function of the number of Costco/Amex cards issued during a specified period.

The section 3.01(b) payments were stipulated to be in exchange for the marketing efforts provided by Costco pursuant to section 2.02(a) of the Co-Branding Agreement.

[17] However, Costco had other obligations under the Co-Branding Agreement that were not covered by section 2.02(a). The most prominent example of such an obligation was “exclusivity”, or the obligation of Costco under section 2.11 of the Co-Branding Agreement not to accept any credit cards except Amex credit cards.

[18] Amex was also required to make payments to Costco under section 3.01(c) and section 3.02 of the Co-Branding Agreement. Those payments related, respectively, to the Costco/Amex card usage and new membership targets. No section 3.01(c) or section 3.02 payments were made during the period relevant to this appeal, and the parties agree that these payments can be disregarded for the purposes of this case.

(b) GST implications of the contractual arrangements

[19] It is undisputed that when Amex permitted Costco to accept Amex credit cards pursuant to the Merchant Agreement, Amex was supplying a “financial service” as defined in section 123(1) of the *Excise Tax Act*, which by definition was an exempt supply and therefore not a taxable supply.

[20] It is also undisputed that the Amex discount was the consideration Costco paid for that financial service, and therefore Costco had no liability to pay GST on the Amex discount. Although the record is not explicit on this point, I assume that the service supplied by Amex fell within one or

more of paragraphs (*g*), (*i*) and (*l*) of the definition of "financial service". During the period relevant to this case, those provisions read as follows:

"financial service" means	« service financier »
...	[…]
(*g*) the making of any advance, the granting of any credit or the lending of money,	*g*) l'octroi d'une avance ou de crédit ou le prêt d'argent;
...	[…]
(*i*) any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued,	*i*) un service rendu en conformité avec les modalités d'une convention portant sur le paiement de montants visés par une pièce justificative de carte de crédit ou de paiement;
...	[…]
(*l*) the agreeing to provide, or the arranging for, a service that is referred to in any of paragraphs (*a*) to (*i*).	*l*) le fait de consentir à effectuer, ou de prendre les mesures en vue d'effectuer, un service qui, à la fois est visé à l'un des alinéas *a*) à *i*).

[21] As mentioned above, the assessments under appeal imposed GST on the payments Amex made to Costco pursuant to section 3.01(a) of the Co-Branding Agreement. To determine whether the section 3.01(a) payments were subject to GST as the Crown contends, it is necessary to determine the purpose of those payments or, more precisely, for what consideration (if any) the section 3.01(a) payments were made. The section 3.01(a) payments were subject to GST only if they were consideration for a taxable supply by Costco.

[22] The purpose of the section 3.01(a) payments must be discerned by interpreting the Co-Branding Agreement and the Merchant Agreement. The interpretative challenge is that nothing in

either agreement specifies why the section 3.01(a) payments were made. Costco and the Crown offer different interpretations.

(i) Costco's position on the purpose of the section 3.01(a) payments

[23] Costco argues that the *actual* Amex discount – the consideration Costco *actually* paid to Amex for an exempt supply – was not X% of Amex card sales, but (X-Y) % of Amex card sales. Costco's position is based on the business objective of the Merchant Agreement and the Co-Branding Agreement (considered together), and relies on the fact that the same computational basis was used for the Amex discount and the section 3.01(a) payments, both being a percentage of Amex card sales.

[24] Specifically, Costco argues that as a matter of contractual interpretation, the section 3.01(a) payments were a reduction or partial refund of the Amex discount, and not consideration for anything supplied by Costco under the Co-Branding Agreement. It follows, according to Costco, that no GST liability can arise on the section 3.01(a) payments and the assessments under appeal cannot stand.

(ii) The Crown's position on the purpose of the section 3.01(a) payments

[25] The Crown's position begins with the proposition that all obligations of Costco under the Co-Branding Agreement were supplies Costco made to Amex, and all payment obligations imposed on Amex under the Co-Branding Agreement were consideration for those supplies. As the Co-Branding Agreement did not state the specific purpose of the section 3.01(a) payments, it is

necessary to interpret the Co-Branding Agreement to determine that question, and then determine whether the section 3.01 payments were consideration for a taxable supply or an exempt supply (specifically, a financial service). If it was a financial service, then the supply was an exempt supply and there would have been no GST liability. Otherwise, GST would be payable and the assessments under appeal would be correct.

[26] The Crown's analysis takes into account the payment provisions other than section 3.01(a), including section 3.01(b) (quoted above). The section 3.01(b) payments were expressly stipulated to be paid for the marketing efforts provided by Costco pursuant to section 2.02(a) of the Co-Branding Agreement. That suggests that the section 3.01(a) payments must have been consideration for something other than Costco's section 2.02(a) marketing obligations.

[27] The Crown argues that, as Costco had substantial obligations under the Co-Branding Agreement that were not within section 2.02(a), including the obligation of exclusivity under section 2.11, the section 3.01(a) payments must have been consideration for those other obligations.

(c) Tax appeals

[28] After the first Tax Court hearing, the judge accepted Costco's position and allowed the appeal. He went on to consider in the alternative whether, if he was wrong on the main point and the section 3.01(a) payments were consideration for a supply by Costco, they were consideration for a taxable supply or an exempt supply. He found, for reasons that are summarized below, that if they were consideration for a supply by Costco, the supply was a financial service as defined in

paragraph (*i*) of the definition of "financial service" in subsection 123(1) of the *Excise Tax Act*, and was therefore an exempt supply.

[29] The Crown appealed to this Court, which concluded that the judge had not put his mind to the statutory definition of "property". On the basis of that omission, the appeal was allowed and the matter was returned to the judge "so that it may be decided again, taking into consideration the definition of "property" based on the existing evidence, or any further evidence which the Tax Court judge may decide to allow" (2010 FCA 9, paragraph 10).

[30] On the rehearing, the judge considered the statutory definition of "property" as he had been directed to do, and also the statutory definition of "service" because that was argued as well. He acknowledged that the parties agreed that rights of exclusivity were "property" as defined in subsection 123(1) of the *Excise Tax Act*, and he discussed this concept at some length.

[31] After a detailed review of the agreements and the additional evidence, he concluded that even if the Crown was correct in interpreting section 2.11 of the Co-Branding Agreement (the exclusivity provision) as stipulating a taxable supply by Amex to Costco, he had no basis for finding that the section 3.01(a) payments were consideration for that supply. Accordingly, he was not persuaded that the section 3.01(a) payments were anything but a reduction or partial refund of the Amex discount, as he had concluded after the first hearing.

[32] The judge also discussed the possibility that the section 3.01(a) payments could be seen as in part a reduction or partial refund of the Amex discount and in part consideration for something supplied by Amex under the Co-Branding Agreement. However, he concluded that because there was no evidence on this point, any attempt at such an allocation would be purely speculative. He confirmed his earlier decision to allow Costco's appeal and vacate the assessments. The Crown has now appealed for a second time to this Court.

Standard of review

[33] In this appeal, the standard of review is correctness for questions of law. Findings of fact or mixed law and fact must stand absent palpable and overriding error, or an extricable error of law (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). The only relevant facts in this case relate to the factual background to the relevant contracts, that which is sometimes called the factual matrix. None of those facts are in dispute.

[34] The dispute is whether the payments made by Amex to Costco pursuant to section 3.01(a) of the Co-Branding Agreement are consideration (within the meaning of the principles of the law of contract) for a taxable supply by Costco. That is essentially a question of contractual interpretation, which is a question of law: *Calgary (City) v. Canada*, 2010 FCA 127 (affirmed but with no discussion of this point: *City of Calgary v. Her Majesty the Queen*, 2012 SCC 20); *McNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306.

Issues

[35] The parties have proposed different analytical frameworks for resolving the issues that arise in this appeal. For that reason they have proposed different questions to be answered. In my view, the issues may be simply stated. This appeal must be dismissed if:

(a) the section 3.01(a) payments were not consideration for a supply by Costco under the Co-Branding Agreement,

or

(b) the section 3.01(a) payments were consideration for a supply by Costco under the Co-Branding Agreement, but the supply was a financial service and thus an exempt supply.

Discussion

Were the payments consideration for a supply?

[36] The judge found that the section 3.01(a) payments were a reduction or partial refund of the Amex discount and not consideration for a supply by Costco under the Co-Branding Agreement. That conclusion was based on two findings of fact made by the judge on the basis of the testimony of Amex and Costco officials.

[37] First, Amex would have been willing to accept a lower discount rate for Amex card sales than the X % stipulated in the Merchant Agreement, and would have agreed to a discount rate of (X-Y) %, if Costco agreed to the Co-Branding Agreement. Second, if the Amex discount were to be set at (X-Y) %, the Y part of the formula would have to be set out in the Co-Branding Agreement so

that the willingness of Amex to accept (X-Y) % could be kept confidential. These findings of fact accord with the evidence and cannot be disputed.

[38] But exactly how do these facts inform the interpretation of the relevant contracts, or assist in determining whether the section 3.01(a) payments were consideration for a supply by Costco? The judge held that they were effectively dispositive in Costco's favour. I respectfully disagree. In my view, the undisputed facts identify, from the point of view of Amex, the business objectives of the contractual arrangements to which Costco and Amex agreed. An understanding of business objectives may be helpful in interpreting a contract that is entered into to meet those objectives. However, it does not necessarily determine the interpretation of the contract if, as in this case, there is more than one way to achieve the business objectives, and the contractual language is not specific as to which solution was chosen.

[39] Amex had a cash flow objective and a confidentiality objective. The cash flow objective was to derive payments of (X – Y) % of Amex card sales from the contractual arrangements with Costco. Those objectives probably could have been achieved in a number of different ways. For example, both objectives would have been met if the section 3.01(a) payments were stipulated in the Co-Branding Agreement to be a reduction or partial refund of the Amex discount. Alternatively, both objectives would have been met if the section 3.01 payments were stipulated to be consideration for any or all of the obligations of Amex under the Co-Branding Agreement.

[40] However, the legal rights and obligations necessary to give effect to these two possible solutions are not the same. The first solution would have embodied Costco's position that the actual amount of the Amex discount rate was (X-Y) % of Amex card sales. The second solution would have embodied the Crown's position that the section 3.01(a) payments were consideration paid by Amex for one or more obligations of Costco under the Co-Branding Agreement.

[41] The judge accepted the contractual interpretation proposed by Costco, and found that the section 3.01(a) payments were a reduction or partial refund of the Amex discount payable by Costco under the Merchant Agreement. In my view, there are three difficulties with Costco's interpretation.

[42] First, section 3.01(a) is located in the part of the Co-Branding Agreement that describes the compensation payable by Amex to Costco. Thus, the implication from the face of the agreement is that the section 3.01(a) payments were consideration for one or more of Costco's obligations under the Co-Branding Agreement.

[43] Second, Costco's interpretation assumes that the confidentiality objective of Amex could not be met by identifying the section 3.01(a) payments as a reduction or partial refund of the Amex discount. In my view, that assumption is unfounded. As I understand the record, the confidentiality advantage was achieved by limiting access to the Co-Branding Agreement, not by failing to be explicit in section 3.01(a).

[44] Third, Costco's interpretation assumes that Costco was providing nothing of value to Amex under the Co-Branding Agreement that was not being paid for by the section 3.01(b) payments (the bounty fee). That is not consistent with the evidence that exclusivity – Costco's obligation under section 2.11 of the Co-Branding Agreement to accept only Amex credit cards – had substantial value to Amex, and therefore was something that could justify the payment of consideration by Amex. The value to Amex of exclusivity is readily discernible from the contractual terms. Every Costco sale on a credit card other than an Amex credit card would reduce the value to Amex of the entire co-branding arrangement. It would defy common sense to suggest that Amex would have agreed to the Co-Branding Agreement without exclusivity.

[45] In my view, the interpretation of the contracts that is more consistent with the language of the contracts and the undisputed facts is that the section 3.01(a) payments were consideration paid by Amex to Costco, either for Costco entering into the Co-Branding Agreement, or specifically for the exclusivity provision. In either case, Costco was providing Amex with something of value by entering into the Co-Branding Agreement (apart from the marketing efforts required by section 2.02(a) for which the consideration was the bounty fees; it is undisputed that the bounty fees were subject to GST.)

[46] Were the section 3.01(a) payments made as consideration for a "supply" as defined in the *Excise Tax Act*? The answer must be yes, because of the breadth of the statutory definitions of "supply", "property" and "service". Those definitions read in relevant part as follows:

"supply" means … the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition.	« fourniture » […] livraison de biens ou prestation de services, notamment par vente, transfert, troc, échange, louage, licence, donation ou aliénation.
"property" means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money.	« bien » À l'exclusion d'argent, tous biens — meubles et immeubles — tant corporels qu'incorporels, y compris un droit quelconque, une action ou une part.
…	[…]
"service" means anything other than (*a*) property, (*b*) money, and (*c*) anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person.	« service » Tout ce qui n'est ni un bien, ni de l'argent, ni fourni à un employeur par une personne qui est un salarié de l'employeur, ou a accepté de l'être, relativement à sa charge ou à son emploi.

[47] Every supply of a property or a service is a taxable supply (and therefore subject to GST) unless it is an exempt supply, which in the context of this case means a financial service. In other words, anything supplied by Costco to Amex under the Co-Branding Agreement is subject to GST unless it is a financial service. Therefore, the only remaining issue is whether what Costco supplied to Amex under the Co-Branding Agreement was a financial service. That issue is discussed in the next part of these reasons.

Is the supply by Costco a financial service and therefore an exempt supply?

[48] As mentioned above, the judge concluded after the first Tax Court hearing that if the paragraph 3.01(a) payments were consideration paid by Amex for a supply by Costco under the Co-Branding agreement, the supply by Costco was an exempt supply because it fell within paragraph (*i*) of the definition of "financial service" in subsection 123(1) of the *Excise Tax Act*. Paragraph (*i*) of the definition is quoted above and is repeated here for ease of reference:

"financial service" means	« service financier »
…	[…]
(*i*) any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued.	*i*) un service rendu en conformité avec les modalités d'une convention portant sur le paiement de montants visés par une pièce justificative de carte de crédit ou de paiement.

[49] I summarize as follows the judge's reasoning on this point. Whether the section 3.01(a) payments are treated as part of the consideration for all of Costco's obligations under the Co-Branding Agreement, or as consideration only for Costco's obligations other than marketing, Costco is providing the services of an intermediary between Amex, a major credit card company, and its potential customers. Essentially, Costco's function under the Co-Branding agreement is to support Amex in its business of supplying credit, and its services are an integral part of that aspect of the business of Amex. The judge concluded as follows at paragraph 43 of his reasons (2009 TCC 134 – emphasis in original):

> Further, paragraph (*i*) of the definition of financial service which refers to <u>any service</u> provided pursuant to the terms of <u>any agreement</u> relating to payments of amounts for which credit card vouchers have been issued is so broad as to easily capture Costco's obligations, especially if read in conjunction with the

> expression "agreeing to provide" such services, even where these obligations are not the direct "marketing efforts" obligation of subsection 2.02(a).

[50] The reasons for judgment in the first appeal to this Court are silent on the issue of whether any supply by Costco to Amex is a financial service, and this issue is not mentioned in the reasons for the Tax Court judgment now under appeal. Nor has the Crown argued in this appeal that the judge erred in his first decision when he concluded that the Costco supply fell within paragraph (*i*) of the definition of “financial service”. Further, I see no basis in the record as it was at the time of the first Tax Court hearing, or the expanded record from the second Tax Court hearing, to find that the judge erred on this point. Normally, that would be a sufficient basis for concluding that the Crown’s appeal from the second Tax Court judgment should be dismissed.

[51] However, the Crown has submitted that this Court must go further and consider whether, because of retrospective amendments to the definition of “financial service”, this Court should conclude that the Costco supply does not fall within the *current* definition, and was therefore a taxable supply when it was made.

[52] By the time of the second Tax Court hearing, the definition of “financial service” had been amended by section 55 of the *Jobs and Economic Growth Act*, S.C. 2010, c. 12 (assented to on July 12, 2010). Those amendments were deemed to come into effect on December 17, 1990, subject to transitional provisions in subsection 55(5) for certain services rendered under a written agreement. No change was made to paragraph (*i*) of the definition of “financial service”.

[53] The definition of ‘financial service” in subsection 123(1) of the *Excise Tax Act* now reads as follows (the words added by section 55 of the *Jobs and Economic Growth Act* are underlined):

“financial service” means	« service financier »
(*a*) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,	*a*) L’échange, le paiement, l’émission, la réception ou le transfert d’argent, réalisé au moyen d’échange de monnaie, d’opération de crédit ou de débit d’un compte ou autrement;
(*b*) the operation or maintenance of a savings, chequing, deposit, loan, charge or other account,	*b*) la tenue d’un compte d’épargne, de chèques, de dépôt, de prêts, d’achats à crédit ou autre;
(*c*) the lending or borrowing of a financial instrument,	*c*) le prêt ou l’emprunt d’un effet financier;
(*d*) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,	*d*) l’émission, l’octroi, l’attribution, l’acceptation, l’endossement, le renouvellement, le traitement, la modification, le transfert de propriété ou le remboursement d’un effet financier;
(*e*) the provision, variation, release or receipt of a guarantee, an acceptance or an indemnity in respect of a financial instrument,	*e*) l’offre, la modification, la remise ou la réception d’une garantie, d’une acceptation ou d’une indemnité visant un effet financier;
(*f*) the payment or receipt of money as dividends (other than patronage dividends), interest, principal, benefits or any similar payment or receipt of money in respect of a financial instrument,	*f*) le paiement ou la réception d’argent à titre de dividendes, sauf les ristournes, d’intérêts, de principal ou d’avantages, ou tout paiement ou réception d’argent semblable, relativement à un effet financier;
(*f.1*) the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy,	*f.1*) le paiement ou la réception d’un montant en règlement total ou partiel d’une réclamation découlant d’une police d’assurance;

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

g) l'octroi d'une avance ou de crédit ou le prêt d'argent;

(*h*) the underwriting of a financial instrument,

h) la souscription d'un effet financier;

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

i) un service rendu en conformité avec les modalités d'une convention portant sur le paiement de montants visés par une pièce justificative de carte de crédit ou de paiement;

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

j) le service consistant à faire des enquêtes et des recommandations concernant l'indemnité accordée en règlement d'un sinistre prévu par :

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

(i) une police d'assurance maritime,

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

(ii) une police d'assurance autre qu'une police d'assurance-accidents, d'assurance-maladie ou d'assurance-vie, dans le cas où le service est fourni :

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

(A) soit par un assureur ou une personne autorisée par permis obtenu en application de la législation d'une province à rendre un tel service,

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

(B) soit à un assureur ou un groupe d'assureurs par une personne qui serait tenue d'être ainsi autorisée n'eût été le fait qu'elle en est dispensée par la législation d'une province;

(*j.1*) the service of providing an insurer or a person who supplies a service referred to in paragraph (*j*) with an

j.1) le service consistant à remettre à un assureur ou au fournisseur du service visé à l'alinéa *j*) une évaluation des

appraisal of the damage caused to property, or in the case of a loss of property, the value of the property, where the supplier of the appraisal inspects the property, or in the case of a loss of the property, the last-known place where the property was situated before the loss,

dommages causés à un bien ou, en cas de perte d'un bien, de sa valeur, à condition que le fournisseur de l'évaluation examine le bien ou son dernier emplacement connu avant sa perte;

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

k) une fourniture réputée par le paragraphe 150(1) ou l'article 158 être une fourniture de service financier;

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

l) le fait de consentir à effectuer, ou de prendre les mesures en vue d'effectuer, un service qui, à la fois :

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

(i) est visé à l'un des alinéas *a*) à *i*),

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

(ii) n'est pas visé aux alinéas *n*) à *t*);

(*m*) a prescribed service,

m) un service visé par règlement.

but does not include

La présente définition exclut :

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

n) le paiement ou la réception d'argent en contrepartie de la fourniture d'un bien autre qu'un effet financier ou d'un service autre qu'un service financier;

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

o) le paiement ou la réception d'argent en règlement d'une réclamation (sauf une réclamation en vertu d'une police d'assurance) en vertu d'une garantie ou d'un accord semblable visant un bien autre qu'un effet financier ou un service autre qu'un service financier;

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

p) les services de conseil, sauf un service visé aux alinéas *j*) ou *j.1*);

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

(i) a management or administrative service, or

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

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

q) l'un des services suivants rendus soit à un régime de placement, au sens du paragraphe 149(5), soit à une personne morale, à une société de personnes ou à une fiducie dont l'activité principale consiste à investir des fonds, si le fournisseur est une personne qui rend des services de gestion ou d'administration au régime, à la personne morale, à la société de personnes ou à la fiducie :

(i) un service de gestion ou d'administration,

(ii) tout autre service (sauf un service prévu par règlement);

(*q.1*) an asset management service,

q.1) un service de gestion des actifs;

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

r) les services professionnels rendus par un comptable, un actuaire, un avocat ou un notaire dans l'exercice de sa profession;

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

r.1) le fait de prendre des mesures en vue du transfert de la propriété des parts du capital social d'une coopérative d'habitation;

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

r.2) le service de recouvrement de créances rendu aux termes d'une convention conclue entre la personne qui consent à effectuer le service, ou qui prend des mesures afin qu'il soit effectué, et une personne donnée (sauf le débiteur) relativement à tout ou partie d'une créance, y compris le service qui consiste à tenter de recouvrer la créance, à prendre des mesures en vue de son recouvrement, à en négocier le paiement ou à réaliser ou à tenter de réaliser une garantie donnée à son égard; en est exclu le service qui

consiste uniquement à accepter d'une personne (sauf la personne donnée) un paiement en règlement de tout ou partie d'un compte, sauf si la personne qui effectue le service, selon le cas :

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

(i) peut, aux termes de la convention, soit tenter de recouvrer tout ou partie du compte, soit réaliser ou tenter de réaliser une garantie donnée à son égard,

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

(ii) a pour entreprise principale le recouvrement de créances;

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

r.3) le service, sauf un service visé par règlement, qui consiste à gérer le crédit relatif à des cartes de crédit ou de paiement, à des comptes de crédit, d'achats à crédit ou de prêts ou à des comptes portant sur une avance, rendu à une personne qui consent ou pourrait consentir un crédit relativement à ces cartes ou comptes, y compris le service rendu à cette personne qui consiste, selon le cas :

(i) checking, evaluating or authorizing credit,

(i) à vérifier, à évaluer ou à autoriser le crédit,

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

(ii) à prendre, en son nom, des décisions relatives à l'octroi de crédit ou à une demande d'octroi de crédit,

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

(iii) à créer ou à tenir, pour elle, des dossiers relatifs à l'octroi de crédit ou à une demande d'octroi de crédit ou relatifs aux cartes ou aux comptes,

(iv) monitoring another person's payment record or dealing with payments made, or to be made, by the other person,	(iv) à contrôler le registre des paiements d'une autre personne ou à traiter les paiements faits ou à faire par celle-ci;
(*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	*r.4*) le service, sauf un service visé par règlement, qui est rendu en préparation de la prestation effective ou éventuelle d'un service visé à l'un des alinéas *a*) à *i*) et *l*), ou conjointement avec un tel service, et qui consiste en l'un des services suivants :
(i) a service of collecting, collating or providing information, or	(i) un service de collecte, de regroupement ou de communication de renseignements,
(ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,	(ii) un service d'étude de marché, de conception de produits, d'établissement ou de traitement de documents, d'assistance à la clientèle, de publicité ou de promotion ou un service semblable;
(*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*),	*r.5*) un bien, sauf un effet financier ou un bien visé par règlement, qui est livré à une personne, ou mis à sa disposition, conjointement avec la prestation par celle-ci d'un service visé à l'un des alinéas *a*) à *i*) et *l*);
(*s*) any service the supply of which is deemed under this Part to be a taxable supply, or	*s*) les services dont la fourniture est réputée taxable aux termes de la présente partie;
(*t*) a prescribed service.	*t*) les services visés par règlement.

[54] The Crown relies in particular on paragraphs (*r.3*), (*r.4*) and (*r.5*) of the amended definition, but without specifying which of these paragraphs capture the services of Costco for which Amex paid the section 3.01 payments. The Crown's position is that the enactment of these provisions

should be taken as an indication that services provided by retailers such as Costco to financial institutions such as Amex were not intended to be exempt supplies.

[55] The Crown's argument is based on the assumption that the enactment of paragraphs (*r.3*), (*r.4*) and (*r.5*) precludes the need for a detailed examination of the statutory definition against the relevant facts. I do not accept that assumption. In my view, when the Court is required to determine whether a particular supply falls within the statutory definition of "financial service", the Court must determine, on the basis of the evidence, whether the supply is within the scope of one of the inclusions in paragraphs (*a*) to (*m*) of the definition, or within the scope of one of the exclusions in paragraphs (*l*) to (*t*) of the definition, and must identify which inclusion or exclusion applies.

[56] In this case, the Court is faced with the decision of the judge that the supply in issue was included in the definition of "financial service" by virtue of paragraph (*i*). The Crown has not argued that the judge's decision was wrong when it was made, and I have been able to discern no reason for concluding that it was wrong.

[57] More importantly, the Crown has pointed to nothing in the record that would justify a finding by this Court that the supply in issue is within one of the newly enacted exclusions in paragraphs (*r.3*), (*r.4*) and (*r.5*) of the definition of "financial service" (assuming, without deciding, that such a finding would necessarily exclude the supply from the definition of "financial service" where the supply is also within paragraph (*i*) of the definition). In the absence of any submissions by the Crown addressing the factual basis for the application of paragraphs (*r.3*), (*r.4*) and (*r.5*) in this

case, I am not persuaded that this Court has any basis for finding that the supply in issue is within the scope of paragraphs (*r.3*), (*r.4*) or (*r.5*).

[58] I do not say that retrospective amendments to the Excise *Tax Act* cannot be made, or cannot be applied. I say only that in this case, I am not persuaded that there is a factual basis for finding the supply in issue to be within the scope of paragraphs (*r.3*), (*r.4*) or (*r.5*).

[59] Costco has submitted that it is "grandfathered" or, in other words, that by virtue of the transitional provisions in subsection 55(5) of the *Jobs and Economic Growth Act*, it is relieved from the retrospective effect of the amendments to the statutory definition of "financial service". It is not necessary for me to consider that argument, and I decline to do so.

[60] I conclude that there is no basis upon which this Court should intervene in the judge's conclusion that the supply in issue was an exempt supply.

Observations on dealing with retrospective amendments

The importance of a trial decision

[61] In the unusual circumstances of this case, there is force in Costco's argument that, for reasons of fairness, this Court should not entertain the Crown's argument that is based on the retrospective amendments made by section 55 of the *Jobs and Economic Growth Act*. Nevertheless, the Crown's argument has been considered as fully as possible on the available record.

[62] The amended provisions are complex and technical, and are part of a statutory scheme that is even more complex and technical. A proper consideration of the application of the amended provisions requires an informed analysis of a number of related provisions (including sections 138 and 139). This Court is at a considerable disadvantage in attempting to deal with these matters without the assistance of the reasoned decision of a judge who has presided at a trial where evidence was presented specifically to address the factual issues raised by the amended provisions.

[63] I hasten to add that neither party suggested that this case would justify a third Tax Court hearing, and I do not suggest that any such step is warranted.

Procedure for raising a new argument based on a retrospective amendment

[64] The amended statutory provisions upon which the Crown seeks to rely were argued in the second Tax Court hearing without the benefit of amended pleadings or evidence presented specifically to address the factual issues raised by the amended provisions. Generally, where the Crown seeks to defend an assessment in the Tax Court on the basis of a new statutory provision (including a newly enacted retrospective amendment), the Crown should, subject to the applicable procedural rules, amend its pleadings to include any new factual allegations that may be required and to refer to the new statutory provisions.

[65] The onus would then be on the Crown to prove any new facts that are relevant to the application of the new provisions and that are not within the factual assumptions upon which the assessment was based. If that onus cannot be met by evidence in the existing record, the Crown

should present further evidence, subject to the applicable procedural rules. In this case, the Crown had the opportunity to adduce evidence at the second Tax Court hearing, but apparently did not do so.

Conclusion

[66] For the reasons set out above, I have concluded that the payments made by Amex pursuant to section 3.01(a) of the Co-Branding Agreement were consideration for a supply by Costco, and that the supply was a "financial service" and therefore an exempt supply. I would dismiss the appeal. Costco is entitled to its costs of this appeal and the first appeal in this Court.

"K. Sharlow J.A."

J.A.

"I agree
John M. Evans J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-493-10
(APPEAL FROM A JUDGMENT OF JUSTICE CAMPBELL J. MILLER DATED NOVEMBER 30, 2010, DOCKET NO. 2007-1374(GST)G)	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. COSTCO WHOLESALE CANADA LTD.
PLACE OF HEARING:	Toronto
DATE OF HEARING:	January 23, 2012
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	EVANS J.A. LAYDEN-STEVENSON J.A.
DATED:	May 30, 2012

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