Federal Court of Appeal | Cour d'appel fédérale

Date: 20190515

Docket: A-170-18

Citation: 2019 FCA 147

CORAM: **NOËL C.J.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

CIBC WORLD MARKETS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 21, 2019.

Judgment delivered at Ottawa, Ontario, on May 15, 2019.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: LASKIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal by CIBC World Markets Inc. (the appellant) from a decision of Bocock J. of the Tax Court of Canada (the Tax Court judge) confirming the validity of assessments issued by the Minister of National Revenue (the Minister) under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA). By these assessments, the Minister denied input tax credits (ITCs) claimed by the appellant with respect to its 2008 through 2013 reporting periods on the basis that the supplies

with respect to which they were claimed were exempt financial services, and therefore provided no entitlement to ITCs.

[2] The Tax Court judge reached this conclusion on the basis that the joint election made pursuant to subsection 150(1) of the ETA by the appellant and Canadian Imperial Bank of Commerce (CIBC) had the effect of deeming all supplies between them to be exempt supplies, including the supply of services exported to CIBC's permanent establishments as constituted by its foreign branches.

[3] In support of its appeal, the appellant contends that the Tax Court judge placed undue emphasis on the text of subsection 150(1) and provided for an outcome that defeats the objectives underlying the ETA. When subsection 150(1) is construed in light of these objectives, it becomes clear that exported supplies fall outside the scope of this provision and that the ITCs can be claimed.

[4] For the reasons which follow, I am of the view that the interpretation proposed by the appellant is correct as it is one that is consistent with the text of the relevant provisions and which provides for a result that achieves the statutory objectives and gives effect to the entire statutory scheme. I therefore propose to allow the appeal.

[5] The provisions of the ETA that are relevant to the analysis are set out in the annex to these reasons.

FACTS

[6] The appellant is an investment dealer and a wholly-owned subsidiary of CIBC, a Canadian chartered bank. CIBC conducts banking operations in Canada and elsewhere through branch operations.

[7] During each reporting period, the appellant provided administrative services from its office in Toronto in support of CIBC's Canadian and foreign banking operations. It claimed ITCs for goods and services tax (GST) paid on costs incurred in supplying these services to CIBC's foreign branches as follows:

2008	2009	2010	2011	2012	2013
$214,920	$144,548	$314,368	$308,095	$145,520	$174,713

[8] Throughout the relevant time, a subsection 150(1) election was in place between CIBC and the appellant whereby "every supply" between them was deemed to be a supply of a financial service and as such, exempt. Relying on this election, the Minister denied the claimed ITCs.

[9] Notices of objection were filed on the basis that a joint election under subsection 150(1) can only be made by Canadian resident persons with respect to supplies made between them. Specifically, it was argued that because CIBC "was deemed to be a non-resident person in respect of […] the activities […] carried on through" its foreign branches (ETA ss. 132(3)), it could not be a party to this election insofar as the supplies made to these branches are concerned.

[10] The appellant further argued that even if the services in issue were covered by the subsection 150(1) election, they were exported financial services which are zero-rated by virtue of Part IX of Schedule VI.

[11] These objections were rejected by notices of confirmation issued in 2016 and 2017, and the appeal before the Tax Court was brought.

DECISION OF THE TAX COURT JUDGE

[12] The Tax Court judge identified the issues to be decided as follows: does subsection 150(1) deem supplies made to a non-resident branch to be exempt financial services for which no ITCs can be claimed? If so, is the appellant nevertheless entitled to the claimed ITCs on the basis that the exported financial services are zero-rated under section 1 of Part IX of Schedule VI, rather than exempt supplies under Schedule V?

[13] The Tax Court judge answered the first question in the affirmative and the second question in the negative. Dealing with the first, he observed that the deeming rules in subsections 132(2) and 150(1) conflict with one another. On the one hand, a subsection 150(1) election provides commensurate tax treatment between parties to the election for every supply made by a closely related member. On the other hand, subsection 132(3) has an opposite effect: "it creates [a] distinction between an entity and its own 'subsidiary' non-resident branch such that an exported supply is effectively deemed [to have taken place] between them and the right to claim an ITC arises" (Reasons, para. 42).

[14] In order to resolve this conflict, the Tax Court judge held that the deeming rule in subsection 132(3) has a limited application. Specifically, it only applies to the activities carried on through the permanent establishments and does not provide that the deemed supplies are made to separate persons (Reasons, para. 43). Had Parliament intended to deem the existence of separate persons, it would have used words similar to those used in subsection 132(4). Under that provision, the two referenced permanent establishments are deemed to be separate persons (Reasons, para. 44).

[15] The Tax Court judge also focussed on the text of subsection 150(1) which, in his words, provides that "[e]very supply between [the appellant] and CIBC is deemed […] to be a financial service" (Reasons, para. 45). According to him, it would have been a simple matter for Parliament to exclude supplies made to foreign branches from the application of subsection 150(1) if that was the intent. In his view, the fact that no express exclusion was made indicates that exported supplies are to be included.

[16] Having found that deemed exported supplies came within the scope of subsection 150(1), the Tax Court judge then asked whether these "exported deemed financial services" are zero-rated pursuant to section 1 of Part IX of Schedule VI or exempt pursuant to section 2 of Part VII of Schedule V (Reasons, paras. 47 to 55). Relying on the latter's greater specificity, he held, citing *National Bank Insurance v. Canada*, 2006 FCA 161, [2006] F.C.J. No. 681, that the supplies were exempt (Reasons, para. 55). As a result, the appellant had no entitlement to the claimed ITCs.

[17] At the close of his reasons, the Tax Court judge recognized that his conclusion ran against fundamental statutory goals. He observed in sequence that a tax is imposed on exported services, a result that is not intended; that subsection 150(1), which is meant to add administrative simplicity, ends up levying an unexpected tax; and that the federal treasury receives a windfall of GST on exported services (Reasons, para. 56, see also para. 46).

POSITION OF THE PARTIES

- *The appellant*

[18] The appellant no longer argues that the supplies in issue can be zero-rated even if they come within the scope of subsection 150(1). Its sole contention on appeal is that the supplies made to CIBC's foreign permanent establishments fall outside the scope of that provision as the election thereunder can only be made by Canadian resident persons. More precisely, because CIBC is deemed to be a non-resident person in respect of the activities carried on through its foreign permanent establishments pursuant to subsection 132(3), it cannot in that capacity be a party to the joint election. Given that the supplies do not come within subsection 150(1), they are zero-rated pursuant to sections 7 and 23 of Part V of Schedule VI, rather than exempt pursuant to section 2 of Part VII of Schedule V.

[19] In advancing this argument, the appellant, citing *R. v. Verrette,* [1978] 2 S.C.R. 838 at 845, 85 D.L.R. (3d) 1, insists that the fiction created by subsection 132(3) must be given effect and that consequently, the supplies in issue must be taken as having been made to a separate non-resident person.

[20] According to the appellant, this construction of subsections 132(3) and 150(1) achieves the statutory objectives underlying both provisions and gives effect to the scheme put in place by Parliament in order to ensure that GST is not levied extra-territorially (Memorandum of the appellant, paras. 50 and 57).

- *The Crown*

[21] Adopting the reasons given by the Tax Court judge, the Crown maintains that subsection 132(3) does not deem CIBC's foreign permanent establishments to be separate non-resident persons (Memorandum of the Crown, paras. 43 and 48). Although subsection 132(3) gives CIBC's foreign permanent establishments this status with respect to particular activities, it does not deem them to be separate persons for any other matter, including the ability to enter a subsection 150(1) election (Memorandum of the Crown, para. 48). Indeed, if subsection 132(3) were to apply for that purpose, the election between CIBC and the appellant would be void altogether as CIBC would lack the required Canadian resident status to enter into it (Memorandum of the Crown, para. 42).

[22] Because supplies made to a foreign permanent establishment fall within the scope of subsection 150(1), exported supplies of administrative services made by the appellant to CIBC's permanent establishments are deemed to be financial services under that provision.

[23] The Crown adds that this construction is consistent with subsection 150(2) as amended in 1997, which excludes imported services from the application of subsection 150(1) in express

terms. Had Parliament intended to exclude exported services from the scope of subsection 150(1), it would have proceeded the same way (Memorandum of the Crown, paras. 54 to 56).

[24] Contrary to what the Tax Court judge observed, the Crown maintains that there is no conflict between subsection 132(3) and subsection 150(1) and no ambiguity to resolve (Memorandum of the Crown, paras. 41 to 53). It is therefore not open to the Court to ignore the clear wording of these provisions in order to achieve some overarching policy objective as the appellant urges (Memorandum of the Crown, paras. 3 and 36).

[25] At the end of its submissions, the Crown acknowledges that the construction which it proposes results in GST being collected on exported supplies. However, it submits that if the appellant and CIBC did not want to pay extra-territorial GST, they simply should have refrained from electing (Memorandum of the Crown, para. 50).

ANALYSIS AND DECISION

[26] The issue to be decided is whether the joint election made by the appellant and CIBC pursuant to subsection 150(1) extends to all supplies made by the appellant to CIBC, including those made in connection with the activities carried on by CIBC through its foreign permanent establishments. As this question is one of statutory construction, the decision of the Tax Court judge is reviewable on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 8, [2002] 2 S.C.R. 235; *Canada v. Cheema*, 2018 FCA 45 at para. 13, 420 D.L.R. (4th) 534).

[27] I reject, at the outset, the Crown's contention that the intent of Parliament is so clearly expressed that a purposive and contextual interpretation cannot alter the outcome. I agree that as a matter of first impression, subsection 150(1) leaves no room for any supply being treated differently as it applies to "every supply" made between the appellant and CIBC. However, as was explained in *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at paragraph 24, [2019] F.C.J. No. 228:

> Even where, as here, the words of the legislative provision seem to be precise and unequivocal, we still must examine legislative purpose and context: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 S.C.R. 140 at para. 48. This is to ensure that we are not mistaken in our understanding of the meaning of the legislative text. On occasion, words that, at first glance, seem clear, can admit of ambiguity after broader examination: *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141 at para. 10; [I have omitted the reference to *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 47 as the paragraph cited addresses the distinct and particularized application of the General Anti-Avoidance Rule under section 245 of the *Income Tax Act*, R.S.C., 1985, c.1 (5th Supp.).]

[28] Adopting this approach, an ambiguity does arise from a broader examination of the ETA as to how subsections 132(3) and 150(1) interact. The task when confronted with seemingly conflicting provisions is to determine whether they can be made to work coherently in a manner which gives effect to the statutory scheme (*R. v. L.T.H.*, 2008 SCC 49 at para. 47, [2008] 2 S.C.R. 739). This requires a consideration of the framework under which the ETA operates.

[29] GST is imposed on all taxable supplies made in Canada (ETA, ss. 165(1)), which includes supplies that are imported into Canada (ETA, divs III and IV). Because the economic burden of GST is borne by the final user, suppliers are entitled to claim ITCs on the tax they have paid as part of their cost of providing taxable supplies (*CIBC World Market Inc. v. Canada*,

2011 FCA 270 at paras. 6 to 15, 426 N.R. 182). Being a tax on domestic consumers, GST is removed from exported supplies. This is achieved by zero-rating these supplies thereby allowing for the recovery of previously paid GST by way of ITCs (ETA, ss. 165(3)).

[30] Unlike tangible goods, services do not physically cross the border; but they are nevertheless exported in a virtual sense when they are "made to a non-resident person" (ETA, Sch. VI, Part V, s. 7). Conversely, a service is imported when it is "made outside of Canada to a person resident in Canada" (ETA, s. 217 (definition of "imported taxable supply")).

[31] Turning to the notion of residence under the ETA, a corporate entity that is incorporated in Canada is treated as a Canadian resident person (para. 132(1)(*a*)). In contrast, a permanent establishment has no legal personality of its own; it is simply defined as a place where business is carried on and includes a branch (ETA, ss. 123(1)). This has significant repercussions. Absent some specific rule, a supply made by a Canadian resident person to its foreign permanent establishment would not be recognized as such, since a supply requires the existence of two separate persons. Also, a supply made by a Canadian resident person to a foreign permanent establishment of another Canadian resident person, as is the case here, would not be recognized as an exported supply as the transaction takes place between two Canadian resident persons. Conversely, a supply made by the foreign permanent establishment of a Canadian resident person to that person in Canada, or to another Canadian resident person, would not be recognized as an imported supply.

[32] The failure to account for the supplies which take place when permanent establishments are involved would undermine the operation of Part IX of the ETA by allowing imported supplies to go untaxed. It would also prevent Canadian resident suppliers from claiming ITCs on exported supplies, thereby effectively levying GST on extra-territorial supplies.

[33] Subsections 132(2), (3) and (4) are part of a scheme devised by Parliament in order to recognize, through the use of deeming rules, cross-border supplies made to and from permanent establishments, thus allowing GST to be levied on imported supplies and ITCs to be recovered on exported supplies. In effect, these provisions allow for the same tax treatment as would apply if the persons concerned had operated through the use of subsidiaries rather than permanent establishments. The result is that GST is levied in the same way, regardless of the business model chosen.

[34] The deeming rules in subsections 132(2), (3) and (4) apply to all supplies of goods and services. In contrast, subsection 150(1) only applies to supplies within a closely related group; it allows two or more members of such a group, each of which must reside in Canada (the "residency requirement"), to file an election whereby inter-group supplies that would otherwise be taxable are treated as exempt. This is achieved by deeming these supplies to be financial services which in turn are exempted under section 2 of Part VII of Schedule V. In the end, no tax is charged on inter-group supplies and no ITCs can be claimed. This treatment is available on an elective basis because, depending on the circumstances, it may be more advantageous for a financial institution to go through the exercise of classifying each service, charge the tax on those that give rise to taxable supplies and are not zero-rated, and recover the GST paid on the inputs.

[35] The election provided by subsection 150(1) applies to "every supply […] of a service that is made at a time when the election is in effect […]" (My emphasis). Focussing on these words, the Tax Court judge held that the election applies to all supplies between the appellant and CIBC, whether domestic or deemed to have been exported under subsection 132(3).

[36] In assessing the correctness of this conclusion, it is useful to consider the context in which subsection 150(1) was enacted. Like subsection 132(3), it applies "For purposes of this Part" – *i.e.*, Part IX. As explained in the Technical Paper that accompanied the introduction of the tax on goods and services in 1990, the treatment of financial services provided by financial institutions gave rise to particular challenges (Canada, Department of Finance, "Goods and Services Tax: Technical Paper" (Ottawa: Department of Finance, 1989) at p. 141 [*1989 Technical Notes*]):

> […] financial transactions are often structured in a way that makes it difficult to apply a sales tax. The price for the service is often implicit, being reflected in, for example, the spread between interest received from borrowers and returns to depositors, policyholders and annuitants. While conceptually it is possible to identify these implicit prices, doing so in practice is extremely complex.

[37] Because of these complexities, a decision was made to treat financial services that are provided domestically as exempt supplies (See ETA, s. 123 and Sch. V), while maintaining the general treatment applicable for financial services that are provided to non-residents:

> In accordance with this decision, the supply of financial services to domestic consumers and businesses will be tax-exempt under GST. In other words, tax will not be charged on such consumer services as loans, deposits, mortgages and life and automobile insurance. However, the providers of financial services will pay tax on their own purchases.
>
> As with all other goods and services, financial services provided to non-residents will be zero-rated. This will ensure that Canadian firms providing financial services remain competitive on world markets.

[38] Exempting financial services provided to domestic consumers and businesses created significant classification problems. Absent a subsection 150(1) election, each service provided within the same closely related group has to be assessed against the extensive list in paragraphs (*a*) to (*t*) of the section 123 definition of "financial services" and the applicable schedule in order to determine whether it qualifies as a financial service in which case it is to be treated as an exempt supply, or is a taxable service on which tax has to be collected, if not zero-rated, and ITCs can be claimed. Subsection 150(1) eliminates these classification difficulties by treating all supplies provided within a closely related group as exempt, regardless of their true nature (ETA, Sch. V, Part VII, s. 2). I note in this respect that exported supplies, being zero-rated, do not give rise to the classification difficulties which subsection 150(1) addresses.

[39] Relying on the residency requirement, the appellant refers to the deeming rule in subsection 132(3) and maintains that because CIBC is deemed to be a non-resident person with respect to the activities conducted through its foreign permanent establishments, it cannot be a party to, or be bound by, the subsection 150(1) joint election with respect to the supplies made in the course of these activities.

[40] The Tax Court judge rejected this argument. He first noted that subsection 132(3) deems CIBC to be a non-resident person only "in respect of the activities it carries on" through its foreign permanent establishments and added that CIBC is not deemed to be a non-resident person for all purposes (Reasons, paras. 43 and 44). However, GST is a transactional tax and the activities carried on through CIBC's foreign permanent establishments are those in the course of which the supplies in issue were made and the ITCs are being claimed. Furthermore, the

deeming rule in subsection 132(3) applies “For the purpose of this Part” which includes subsection 150(1). When regard is had to those words, CIBC must be treated as a non-resident person insofar as subsection 132(3) deems it so.

[41] The Tax Court judge overcame this obstacle by holding that this provision did not deem the existence of two separate persons (the “deemed separate person argument”, Reasons, paras. 31, 44 and 45). He compared subsection 132(3) with subsection 132(4) and acknowledged that if subsection 132(3) deemed the existence of two separate persons the way subsection 132(4) does, with respect to the two permanent establishments that it contemplates, he would have accepted that a separate non-resident person is deemed to exist under subsection 132(3) (Reasons, para. 44). However, he held that in contrast with subsection 132(4), no two separate persons are deemed to exist by virtue of subsection 132(3).

[42] In my view, the reference to two separate persons in subsection 132(4) can be explained by the fact that two permanent establishments are involved – one in Canada and one outside Canada – neither of which are legal persons on their own account, with the result that each had to be deemed to be a person that is separate from the other in order for cross-border supplies between them to be recognized. In contrast, the “resident person” referred to at the beginning of subsection 132(3) is a legal person on its own account so that all that was needed in order to recognize cross-border supplies to or from its permanent establishment, was to deem that person to be a non-resident person with respect to the activities carried on through this permanent establishment. The converse logic holds true for the “non-resident person” referred to at the

beginning of subsection 132(2) and cross-border supplies between the permanent establishment in Canada and a person outside Canada.

[43] Notably, subsections 132(2), (3) and (4) all deal with separate persons – the non-resident person and the deemed resident person embodied by the Canadian permanent establishment in the first case; the resident person and the deemed non-resident person embodied by the foreign permanent establishment in the second case; and the two deemed separate persons embodied by the Canadian and foreign permanent establishments in the third case. Indeed, no imported or exported supply could be recognized in the absence of two separate persons, one in Canada and one outside Canada, which explains why the deeming rules were devised this way.

[44] It can therefore be seen that as is the case under subsection 132(4), subsections 132(2) and (3) also contemplate the existence of two separate persons. The deemed existence of CIBC as a separate non-resident person disposes of the Crown's argument that this non-resident status, if recognized for purposes of subsection 150(1), would have the effect of nullifying the election which it made as a Canadian resident person.

[45] At the hearing of the appeal, counsel for the Crown made the further argument that if two separate persons were deemed to exist by subsection 132(2), the deeming rule contained in the definition of "closely related group" in subsection 123(1) would become superfluous and meaningless, particularly as it relates to non-resident insurers. Because the argument was unannounced, short written submissions were invited and provided by the parties on this narrow point.

[46] In its submissions, the Crown points to the fact that under the definition of "closely related group" in subsection 123(1), a non-resident insurer that has a permanent establishment in Canada is deemed to be a Canadian resident person. Counsel argues that if subsection 132(2) deems the existence of a separate resident person as the logic advanced by the appellant commands, the deeming rule governing non-resident insurers would be redundant (Further Submissions of the Crown, para. 13).

[47] However, as the appellant points out, the deeming rule in subsection 123(1) has a broader application than the one in subsection 132(2). It deems a non-resident insurer that has a permanent establishment in Canada to be a resident of Canada without the need for the activities in the course of which the supplies are made to be conducted through that establishment. As a result, a non-resident insurer that is deemed to reside in Canada by virtue of subsection 123(1) and that is a party to a subsection 150(1) election would have to treat as exempt all supplies made within the closely related group, including those that are exported. As subsection 123(1) makes clear, this exceptional treatment is restricted to non-resident insurers (Further Submissions of the appellant, paras. 7 to 13). It follows that the construction proposed by the appellant does not render the deemed residency rule in subsection 123(1) meaningless.

[48] At the end of its memorandum of fact and law, the Crown makes a further textual argument. This time, it points to the amendment brought to subsection 150(2) in 1997, which provides in express terms that imported supplies are excluded from the ambit of subsection 150(1). According to the Crown, had Parliament intended to exclude exported supplies from the

scope of this provision, it would have done so in similar terms (Memorandum of the Crown, paras. 55 and 56).

[49] I do not believe that this necessarily follows. In contrast with exported supplies, GST is levied on supplies that are imported and the failure to provide in express terms that imported supplies are excluded from the scope of subsection 150(1) could have given rise to significant compliance problems and tax revenue losses.

[50] Those problems stem from the fact that, as noted earlier, services in contrast with tangible goods cross the border only in a virtual sense so that the exigible tax on imported services cannot be collected in the usual way – *i.e.*, at the time of entry when the goods are released (Joint Book of Authorities, Tab 14, p.71, 1989 Technical Notes, *supra*; ETA, div. III). As a result, reliance had to be placed on self-assessment by the parties to the importation in order to collect the tax (ETA, s. 218). The prospect of collecting the tax was made more challenging when a joint election under subsection 150(1) was in place between the parties to the importation. As explained in the commentaries which accompanied the amendment to subsection 150(2), "[a]pplying the closely-related group election to those supplies would result in both parties to the election avoiding tax altogether …" (Joint Book of Authorities, Tab 13, p. 45, Canada, Department of Finance, Technical Notes (July 1997)). The amendment to subsection 150(2) closes this avenue by preventing parties to an election from relying on subsection 150(1) to justify a decision to not report or self-assess. For example, using the present set of facts, but reversing the flow of the cross-border services, it would not be open to the appellant to justify a decision not to report the importation of these services on the basis of the incorrect, but

nevertheless reasonably arguable position that, as the Crown maintains here, CIBC's foreign permanent establishments are not deemed to be non-resident persons for the purpose of the subsection 150(1) election.

[51] I therefore reject the suggestion that by expressly excluding imported supplies from the scope of subsection 150(1) without doing the same for supplies that are exported, Parliament was signalling that exported services came within this provision. When regard is had to the context, the better view is that Parliament was intent on preventing subsection 150(1) from being used to avoid tax on imported supplies.

[52] I am further driven to this conclusion because there is no reason why Parliament would have wanted the distinct advantages conferred by subsection 132(3) and subsection 150(1) to be mutually exclusive. Confronted with this during the hearing, the Crown argued that beyond resolving classification problems, subsection 150(1) was also intended to eliminate the need to allocate ITCs when both domestic and cross-border supplies are made by the parties to a joint election. According to the Crown, excluding exported supplies from the scope of subsection 150(1) would defeat this purpose (Further Submissions of the Crown, para. 2).

[53] This reading ignores the fact that the subsection 150(1) election is restricted to Canadian resident persons and that only domestic supplies flow between such persons. It is therefore difficult to see how, in enacting this provision, Parliament could have had in mind allocation issues which arise when supplies are exported. Furthermore, construing subsection 150(1) as

proposed by the Crown would defeat the scheme put in place by Parliament in enacting subsections 132(2), 132(3) and 132(4).

[54] These provisions, beyond insuring that cross border supplies made to and from a permanent establishment are accounted for under the ETA, provide for a tax neutral application of the GST. When supplies are made from Canada to a foreign permanent establishment, the deeming rule in subsection 132(3) ensures that ITCs can be recovered the same way as if a foreign subsidiary was instead in play. Had CIBC operated abroad this way, both the right to treat inter-group domestic supplies as exempt under subsection 150(1) and the right to claim ITCs on exported supplies would have been available at once. Notably, the input allocation issue which the Crown claims to be within the remedial scope of subsection 150(1) would have to be addressed the same way. Applying subsection 150(1) to deemed exported supplies under subsection 132(3) would defeat the tax neutrality which this provision is designed to achieve by imposing a less favourable and more onerous tax treatment on financial institutions that operate abroad through foreign branches rather than foreign subsidiaries.

[55] Moreover, as the Tax Court judge himself recognized, exhibiting a commendable concern for completeness, this interpretation would defeat the "fundamental purpose and goal of the *ETA*" as it results in the effective imposition of GST on supplies exported and consumed externally; impedes the competitiveness of Canadian financial institutions abroad; and encourages the outsourcing of supplies (Reasons, paras. 46 and 56).

[56] The construction proposed by the appellant should be preferred because it overcomes these unintended results while allowing subsections 132(3) and 150(1) to be applied harmoniously in a manner that achieves the statutory objectives. In particular, it gives effect to the deeming rule in subsection 150(1) with respect to domestic supplies, an application that is consistent with the residency requirement for electing, while allowing the deeming rule in subsection 132(3) to apply to exported supplies so that GST is not levied extra-territorially.

[57] Adopting the reasoning advanced by the appellant, I conclude that because CIBC is deemed to be a separate non-resident person with respect to the activities conducted through its foreign permanent establishments, the services provided to those establishments in the course of those activities fall outside the scope of subsection 150(1), and therefore are not deemed to be financial services under that provision. It follows that they must be treated as zero-rated exported supplies by the combined operation of subsection 132(3) and sections 7 and 23 of Part V of Schedule VI.

[58] For these reasons, I would allow the appeal with costs here and before the Tax Court and, giving the judgment which the Tax Court judge ought to have given, I would refer the assessments back to the Minister for reconsideration and reassessment on the basis that the appellant is entitled to the claimed ITCs.

"Marc Noël"

Chief Justice

“I agree
J.B. Laskin J.A.”

“I agree
Marianne Rivoalen J.A.”

ANNEX

***Excise Tax Act*, R.S.C., 1985, c. E-15**	***Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15**
PART IX	**PARTIE IX**
Goods and Services Tax	**Taxe sur les produits et services**
DIVISION I	**SECTION I**
Interpretation	**Définitions et interprétation**
123 (1) In section 121, this Part and Schedules V to X, …	**123 (1)** Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X. […]
closely related group means a group of corporations, each member of which is a registrant resident in Canada and is closely related, within the meaning assigned by section 128, to each other member of the group, and for the purposes of this definition,	***groupe étroitement lié*** Groupe de personnes morales dont chaque membre est un inscrit résidant au Canada et est étroitement lié, au sens de l'article 128, à chacun des autres membres du groupe. Pour l'application de la présente définition:
(a) a non-resident insurer that has a permanent establishment in Canada is deemed to be resident in Canada, and	**a)** l'assureur non-résident qui a un établissement stable au Canada est réputé résider au Canada;
(b) credit unions and members of a mutual insurance group are deemed to be registrants; …	**b)** les caisses de crédit et les membres d'un regroupement de sociétés mutuelles d'assurance sont réputés être des inscrits […]
financial service means …	***service financier*** […]
(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; […]
permanent establishment, in respect of a particular person, means	***établissement stable***
(a) a fixed place of business of the particular person, including	**a)** Installation fixe d'une personne, par l'entremise de laquelle elle effectue des fournitures, y compris :
(i) a place of management, a branch, an office, a factory or a workshop, and	**(i)** le siège de direction, la succursale, le bureau, l'usine ou l'atelier,

(ii) a mine, an oil or gas well, a quarry, timberland or any other place of extraction of natural resources,

through which the particular person makes supplies, or …

(ii) les mines, les puits de pétrole ou de gaz, les carrières, les terres à bois ou tout autre lieu d'extraction de ressources naturelles; […]

person means an individual, a partnership, a corporation, the estate of a deceased individual, a trust, or a body that is a society, union, club, association, commission or other organization of any kind; …

personne Particulier, société de personnes, personne morale, fiducie ou succession, ainsi que l'organisme qui est un syndicat, un club, une association, une commission ou autre organisation; ces notions sont visées dans des formulations générales, impersonnelles ou comportant des pronoms ou adjectifs indéfinis.

132 (1) For the purposes of this Part, a person shall be deemed to be resident in Canada at any time

132 (1) Pour l'application de la présente partie, sont réputés résider au Canada à un moment donné :

(a) in the case of a corporation, if the corporation is incorporated or continued in Canada and not continued elsewhere; …

a) la personne morale constituée ou prorogée exclusivement au Canada; […]

(2) For the purposes of this Part, where a non-resident person has a permanent establishment in Canada, the person shall be deemed to be resident in Canada in respect of, but only in respect of, activities of the person carried on through that establishment.

(2) Pour l'application de la présente partie, la personne non résidante qui a un établissement stable au Canada est réputée y résider en ce qui concerne les activités qu'elle exerce par l'entremise de l'établissement.

(3) For the purposes of this Part, where a person who is resident in Canada has a permanent establishment in a country other than Canada, the person shall be deemed to be a non-resident person in respect of, but only in respect of, activities of the person carried on through that establishment.

(3) Pour l'application de la présente partie, la personne qui réside au Canada et qui a un établissement stable à l'étranger est réputée être une personne non résidante en ce qui concerne les activités qu'elle exerce par l'entremise de l'établissement.

(4) For the purposes of this Part, where a person carries on a business through a permanent establishment of the person in Canada and through

(4) Pour l'application de la présente partie, dans le cas où une personne exploite une entreprise par l'intermédiaire de son établissement

another permanent establishment of the person outside Canada,

stable au Canada et d'un autre établissement stable à l'étranger, les présomptions suivantes s'appliquent :

(a) any transfer of personal property or rendering of a service by the establishment in Canada to the establishment outside Canada shall be deemed to be a supply of the property or service; and

a) le transfert d'un bien meuble ou la prestation d'un service par l'établissement au Canada à l'établissement à l'étranger est réputé être une fourniture;

(b) in respect of that supply, the permanent establishments shall be deemed to be separate persons who deal with each other at arm's length.

b) en ce qui concerne cette fourniture, les établissements sont réputés être des personnes distinctes sans lien de dépendance.

150 (1) For the purposes of this Part, where at any time a person who is a member of a closely related group of which a listed financial institution is a member files an election made jointly by the person and a corporation that is also a member of the group at that time, every supply between the person and the corporation of property by way of lease, licence or similar arrangement or of a service that is made at a time when the election is in effect and that would, but for this subsection, be a taxable supply is deemed to be a supply of a financial service.

150 (1) Pour l'application de la présente partie, un membre d'un groupe étroitement lié, dont une institution financière désignée est membre, et une personne morale qui est également membre du groupe peuvent faire un choix conjoint pour que chaque fourniture de biens, par bail, licence ou accord semblable, ou de services qui est effectuée entre eux, à un moment où le choix est en vigueur, et qui, sans le présent paragraphe, constituerait une fourniture taxable, soit réputée être une fourniture de services financiers.

(2) Subsection (1) does not apply to …

(2) Le paragraphe (1) ne s'applique pas à ce qui suit : […]

(b) an imported taxable supply, as defined in section 217; …

b) une fourniture taxable importée, au sens de l'article 217; […]

151 For the purposes of this Part, where a corporation that is a member of a closely related group has made an election under subsection 150(1), the corporation shall be deemed to be a financial institution throughout the period during which the election is in effect.

151 Pour l'application de la présente partie, la personne morale, membre d'un groupe étroitement lié, qui fait le choix prévu au paragraphe 150(1) est réputée être une institution financière tout au long de la période au cours de laquelle le choix est en vigueur.

DIVISION II

Goods and Services Tax

SUBDIVISION A

Imposition of Tax

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. […]

(3) The tax rate in respect of a taxable supply that is a zero-rated supply is 0%.

DIVISION III

Tax on Importation of Goods

212 Subject to this Part, every person who is liable under the Customs Act to pay duty on imported goods, or who would be so liable if the goods were subject to duty, shall pay to Her Majesty in right of Canada tax on the goods calculated at the rate of 5% on the value of the goods.

DIVISION IV

Tax on Imported Taxable Supplies

217 The following definitions apply in this Division.

imported taxable supply means

(a) a taxable supply (other than a zero-rated or prescribed supply) of a service made outside Canada to a person who is resident in Canada, …

SECTION II

Taxe sur les produits et services

SOUS-SECTION A

Assujettissement

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. […]

(3) Le taux de la taxe relative à une fourniture détaxée est nul.

SECTION III

Taxe sur l'importation de produits

212 Sous réserve des autres dispositions de la présente partie, la personne qui est redevable de droits imposés, en vertu de la Loi sur les douanes, sur des produits importés, ou qui serait ainsi redevable si les produits étaient frappés de droits, est tenue de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5 % sur la valeur des produits.

SECTION IV

Taxe sur les fournitures taxables importées

217 Les définitions qui suivent s'appliquent à la présente section.

fourniture taxable importée Sont des fournitures taxables importées :

a) la fourniture taxable d'un service, sauf une fourniture détaxée ou visée par règlement, effectuée à l'étranger au profit d'une personne qui réside au Canada, […]

218 Subject to this Part, every recipient of an imported taxable supply shall pay to Her Majesty in right of Canada tax calculated at the rate of 5% on the value of the consideration for the imported taxable supply.

218 Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable importée 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.

SCHEDULE V

Exempt Supplies

ANNEXE V

Fournitures exonérées

PART VII

Financial Services

PARTIE VII

Services financiers

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

1 La fourniture de services financiers qui ne figurent pas à la partie IX de l'annexe VI.

2 A supply deemed under subsection 150(1) of the Act to be a supply of a financial service.

2 La fourniture réputée par le paragraphe 150(1) de la loi être une fourniture de service financier.

SCHEDULE VI

Zero-Rated Supplies

ANNEXE VI

Fournitures détaxées

PART V

Exports

PARTIE V

Exportations

7 A supply of a service made to a non-resident person, but no including [*no exclusions are relevant*]

7 La fourniture d'un service au profit d'une personne non-résidente, à l'exclusion des [*aucune exclusion n'est pertinente*]

23 A supply of an advisory, professional or consulting service made to a non-resident person, but not including [*no exclusions are relevant*]

23 La fourniture d'un service consultatif ou professionnel au profit d'une personne non-résidente, à l'exclusion des [*aucune exclusion n'est pertinente*]

PART IX

Financial Services

PARTIE IX

Services financiers

1 A supply of a financial service (other than a supply that is included in section 2) made by a financial institution to a non-resident person, except [*no exclusions are relevant*]

1 La fourniture d'un service financier, à l'exception d'une fourniture figurant à l'article 2, effectuée par une institution financière au profit d'une personne non résidante, sauf [*aucune exclusion n'est pertinente*]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-170-18

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BOCOCK OF THE TAX COURT OF CANADA DATED MAY 29, 2018 IN DOCKET 2016-2606(GST)G.

STYLE OF CAUSE:	CIBC WORLD MARKETS INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 21, 2019
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	LASKIN J.A. RIVOALEN J.A.
DATED:	MAY 15, 2019

APPEARANCES:

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