Federal Court of Appeal

Cour d'appel fédérale

Date: 20190809

Docket: A-194-17

Citation: 2019 FCA 217

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WOODS J.A.

BETWEEN:

SLFI GROUP - INVESCO CANADA LTD. - INVESCO CANADA FUNDS (INCLUDING EACH FUND LISTED IN SCHEDULE "A" TO THE NOTICE OF APPEAL), INVESCO CANADA LTD. / INVESCO CANADA LTÉE, INVESCO CANADA MONEY MARKET FUND (FORMERLY AIM CANADA MONEY MARKET FUND), and EACH OF THE OTHER FUNDS LISTED IN SCHEDULE "B" TO THE NOTICE OF APPEAL

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 29, 2018.

Judgment delivered at Ottawa, Ontario, on August 9, 2019.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

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Appellants

and

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REASONS FOR JUDGMENT

WOODS J.A.

[1] This is an appeal of a judgment of the Tax Court of Canada (2017 TCC 78) that dismissed an appeal from assessments of goods and services tax (GST) under the *Excise Tax Act*, R.S.C. 1985, c. E-15.

[2] The appellants, mutual funds (Funds) and their manager, Invesco Canada Ltd. (Manager), appealed to the Tax Court from assessments of GST in respect of a third party funding arrangement (Citibank funding arrangement). The aggregate amount of tax assessed for the relevant reporting periods from December 1, 2002 to December 31, 2011 was approximately $45 million. The Tax Court dismissed the appeal, and the appellants have appealed further to this Court.

[3] There are two distinct issues:

(a) Did the Tax Court err in concluding that the Funds are required to self-assess GST in respect of the arrangement for reporting periods from December 1, 2002 to December 31, 2011?

(b) If the Funds are not required to self-assess, are the Funds entitled to rebates of GST paid in error for reporting periods from February 1, 2007 to June 30, 2010? The Tax Court was not required to consider this issue since it found that GST was payable.

[4] For the reasons below, I conclude that the appeal should be allowed in part. The Funds are not required to self-assess GST in respect of the arrangement. However, the Funds are not entitled to rebates of the tax paid for reporting periods from February 1, 2007 to June 30, 2010.

I. Background

[5] The reasons of the Tax Court contain a helpful and comprehensive description of the facts. It is not necessary to repeat them here except for those facts that are essential for purposes of this appeal. Facts relating to the rebate issue are provided separately below in the analysis of that issue.

[6] The Citibank funding arrangement was undertaken by the Funds to facilitate the payment of commissions due to brokers on the purchase of investments in the Funds. The obligation to pay the commissions crystallized at the time that the Funds' securities were purchased.

[7] The commissions were generally payable by purchasers of the securities but the purchasers were given a deferred payment option that enabled them to avoid payment altogether if they remained invested in the Funds for a period of time. Regardless of whether the option was exercised, the commissions were due to the brokers at the time of purchase and someone had to pay.

[8] The deferred payment option was provided to purchasers as an incentive not to redeem their securities within a short period of time. Mr. David Warren, Executive Vice President and Chief Financial Officer of the Manager, explained that the general theory of offering this type of incentive was to boost a manager's fees which fluctuated with the asset values of the funds. Mr. Warren also explained that several types of financing arrangements for the deferred payment option were used by mutual funds, such as funding by limited partnerships, by managers, and

more recently, by securitizations. The appellants used all of these funding mechanisms from time to time.

[9] Immediately prior to the implementation of the Citibank funding arrangement, the Manager funded the commissions required by the deferred payment option. When the Manager decided that it no longer wanted to finance this large expense, a securitization was negotiated with Citibank, N.A. (Citibank). This arrangement lasted several years, and when it terminated the Manager again funded the commissions.

[10] The Citibank funding arrangement was structured to avoid business and regulatory constraints. In particular, the financing was not on the balance sheet of the Funds or the Manager. In addition, securities regulations prohibited the Funds from paying the commissions themselves and they were not able to borrow for this purpose. As described below, the arrangement with Citibank was designed to avoid these restrictions by providing a funding mechanism that was not a payment of commissions by the Funds, and was not a borrowing of money.

[11] In the securitization, Citibank marketed cash flows that were payable by the Funds as consideration for the funding of commissions. In order to create a property interest that could be marketed, the Funds did not enter into the funding arrangement directly with Citibank. Instead, the Funds entered into an agreement with a single-purpose entity established by Citibank, Canada Funding Corp. I (Funding Corp.). Funding Corp., which was based in the United States,

in turn entered into an agreement with Citibank, which agreement had cash flows that matched those in the agreement between the Funds and Funding Corp.

[12] The two back-to-back agreements were called a Fee Payment Agreement and a Purchase and Sale Agreement, respectively.

[13] The Fee Payment Agreement was an agreement between Funding Corp. and the Funds, among others. In it, Funding Corp. agreed to arrange for daily payments of money into trust accounts for brokers' commissions (Funding Amounts). Funding Corp. also agreed that the payments of the Funding Amounts would be arranged by it entering into the Purchase and Sale Agreement with Citibank.

[14] As consideration for Funding Corp.'s obligation to arrange for the payments of the Funding Amounts, the Funds agreed to pay fees to Funding Corp. (Earned Fees). There were two types of Earned Fees. One was an Earned Daily Fee which fluctuated with the asset values of the Funds, and which was earned on a daily basis while the securities relating to particular Funding Amounts were outstanding, to a maximum of eight years. The other, an Earned DSC Fee, was a one-time fee equal to the amount payable by purchasers on an early redemption of the relevant securities.

[15] The Purchase and Sale Agreement was an agreement between Funding Corp. and Citibank, among others. Funding Corp. agreed to sell to Citibank on a daily basis all its interest in Earned Fees payable with respect to particular Funding Amounts. This was the cash flow that

Citibank intended to market. In consideration, Citibank agreed to pay the corresponding Funding Amounts. The interests in the Earned Fees were sold by Funding Corp. when the corresponding Funding Amounts were paid. In essence, the Purchase and Sale Agreement enabled Citibank to market an eight year cash flow that fluctuated with the asset value of the Funds.

[16] To facilitate the payments under the Purchase and Sale Agreement, Funding Corp. agreed to provide Citibank with details of the Funding Amounts payable (Funding Notices).

[17] In its reasons, the Tax Court provides some understanding of the amounts involved in the financing. During the period from April 1, 2002 to September 30, 2009, Funding Amounts in the aggregate of $640 million were deposited into the trust accounts and Earned Fees totalling $717 million were paid by the Funds.

[18] The Manager's role is also relevant to this appeal. In general, the Manager provided the services that were necessary for the operation of the Funds pursuant to a management agreement (Management Agreement). Under this agreement, the Manager was entitled to receive a management fee, which was equal to 2 percent of the net asset value of the Funds. In anticipation of the Citibank funding arrangement, the Management Agreement was amended such that the management fee would be reduced by the amount payable to a third party who provided funding for the brokers' commissions under the deferred payment option. As well, the amended Management Agreement specifically contemplated the possibility that the Funds could make arrangements relating to the funding or payment of brokers' commissions.

[19] In reference to the Citibank funding arrangement, the Manager undertook the planning and negotiation of the arrangements with Citibank on behalf of the Funds.

[20] In addition, the Manager was a party to the Fee Payment Agreement. In this agreement, the Manager agreed to waive any entitlement to Earned Fees and to reduce its management fee from the Funds by the amount of the Earned Daily Fees. The Manager also agreed to prepare the Funding Notices and provide them to Funding Corp.

[21] Although the Manager was a party to the Fee Payment Agreement, the Earned Fees payable to Funding Corp. were payable by the Funds alone as consideration for Funding Corp. agreeing to arrange for the payments of Funding Amounts.

[22] Under a services agreement between the Manager and Citibank, the Manager agreed to provide administrative services to Citibank in connection with the arrangement, in exchange for a monthly fee.

[23] The Minister of National Revenue issued assessments with respect to this arrangement which imposed GST on the Earned Fees payable by the Funds on the basis that the Earned Fees were consideration for an imported taxable supply.

II. Legislative scheme

[24] Section 218 of the Act imposes GST on the recipients of an imported taxable supply. Subject to certain exceptions that are not relevant to the case at bar, an imported taxable supply includes 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" (paragraph (*a*) of the definition of "imported taxable supply" in section 217 of the Act). A "taxable supply" is a "supply that is made in the course of a commercial activity" (definition of "taxable supply" in subsection 123(1) of the Act). Accordingly, there is no imported taxable supply unless there is both a "supply" and a "taxable supply."

[25] "Supply" is defined in subsection 123(1) of the Act to mean "the provision of property or a service in any manner […]", subject to sections 133 and 134 of the Act (which are not relevant for this appeal). "Property" and "service" are also defined in subsection 123(1) of the Act; their definitions explicitly exclude "money".

[26] Financial services are not taxable supplies and therefore do not constitute an imported taxable supply (definitions of "commercial activity" and "exempt supply" in subsection 123(1), Part VII of Schedule V). "Financial service" is defined in subsection 123(1) of the Act as follows, in part:

"**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	*a*) L'échange, le paiement, l'émission, la réception ou le transfert d'argent, réalisé au moyen d'échange de monnaie,

debiting accounts or otherwise,

…

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

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

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

…

but does not include

…

(*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,

d'opération de crédit ou de débit d'un compte ou autrement;

[…]

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

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

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

[…]

La présente définition exclut :

[…]

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);

… […]

[27] It is worth commenting that the exclusion in paragraph (*q*) applies to a supply of a management or administrative service, and also to a supply of any other service if the supplier is a person who provides management or administrative services to the investment plan.

III. Tax Court decision

[28] The Tax Court concluded that the Funds were required to self-assess GST on the basis that they received an imported taxable supply from Funding Corp. In reaching this conclusion, the Court rejected two submissions made by the Funds – that there was no "supply", and that if there were a supply it was a supply of a "financial service".

[29] In accordance with established jurisprudence, the Court made three preliminary findings. It determined what services were provided to the Funds, whether there was a single supply, and if so, what was the dominant element of the supply.

[30] As for the services that were provided, the Tax Court concluded that since the relevant agreements were interdependent, the services that should be considered are all the services provided by Citibank entities to the Funds. The Court identified three:

(a) Funding Corp. provided the service of arranging for the payment of the Funding Amounts;

(b) Funding Corp. provided the service of receiving, processing and transmitting the Funding Notices to Citibank; and

(c) on a daily basis, Citibank deposited the Funding Amounts in a trust account for the brokers' commissions. The Court did not identify whether it was Citibank or Funding Corp. that provided this service to the Funds.

[31] The Court then concluded that there was a single supply in which the dominant element was the daily payment of the Funding Amounts.

[32] The Tax Court then considered whether the payments of the Funding Amounts were a "supply", for purposes of the Act, or whether the payments were simply money which is not encompassed by the definition of "supply". The Court concluded that the payments were a supply because the payment of money is specifically enumerated as a supply of a "financial service".

[33] The Court then considered whether the supply was a "financial service" and therefore not a taxable supply. The Court concluded that the payments of the Funding Amounts were included in paragraph (*a*) of the definition of "financial service", but were excluded as a management or administrative service provided to an investment plan as contemplated by paragraph (*q*). In this regard, the Court concluded that arranging for the payment of commissions and the payment of commissions is a management duty of the Manager, and "delegating that duty to Citibank Entities did not change the nature of the duty" (Tax Court reasons at paras. 109-110).

[34] Accordingly, the Court concluded that the Funds received an imported taxable supply on which they had to self-assess GST on the consideration for the supply, i.e., the payments of Earned Fees. In light of this conclusion, the Court was not required to consider the second issue, which was whether the Funds were eligible for rebates of tax paid in error.

IV. Issue 1 - Did the Tax Court err in concluding that the Funds received an imported taxable supply?

A. *Overview*

[35] The first question is whether the Tax Court erred in concluding that the Funds received an imported taxable supply. The Funds submit that there was no imported taxable supply, first because there was no supply, and alternatively because there was no taxable supply.

[36] These questions raise issues of mixed fact and law for which, absent an extricable legal error, the appropriate standard of review is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 36-37). Accordingly, this Court is to defer significantly to the Tax Court decision and intervene only where there is an error that is both obvious and overriding in the sense that it "goes to the very core of the outcome of the case" (*Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46).

[37] For the reasons below, I conclude that the Tax Court did not err in finding that there was a supply, but it did err in finding that there was a taxable supply. Funding Corp. did not provide a taxable supply to the Funds; it provided an exempt supply of a financial service. The service

provided to the Funds was in the nature of a financing service provided by third party financial institutions. It did not have any of the usual characteristics of a management or administrative service. The Tax Court concluded that the Manager had delegated this service to Funding Corp. as a management or administrative service but, with respect, the Tax Court made a palpable and overriding error in this regard.

B. *Did Tax Court err in concluding that there was a supply?*

[38] The first issue is whether the Tax Court erred in concluding that there was a supply, as opposed to a service of providing money. There is no palpable and overriding error in the Tax Court's conclusion on this issue that would justify the intervention of this Court. The Court refers in its reasons to the specific inclusion of the payment of money in the definition of "financial service" in subsection 123(1) of the Act. It is not a reviewable error for the Court to take this into account in determining the meaning of "supply", especially since the service provided to the Funds in this case is made in the context of a complex financing arrangement. I conclude that the Tax Court did not make a palpable and overriding error in concluding that there was a "supply" for purposes of the Act.

C. *Did Tax Court err in concluding that paragraph (a) of the definition of "financial service" applied?*

[39] The second issue is whether the Tax Court erred in concluding that the Funds did not receive a "financial service". There are two questions: Was the service described in paragraph (*a*) or (*l*) of the definition of "financial service"; and, if so, was the service excluded by paragraph (*q*)?

[40] As correctly identified by the Tax Court, the first part of the analysis is to determine what services were provided to the Funds, whether there was a single supply, and if so what was the dominant element of the supply.

[41] The Tax Court identified three services provided to the Funds: arranging for the payment of Funding Amounts, depositing the Funding Amounts, and providing Funding Notices to Citibank. The Court determined that this was a single supply, which had as its dominant element the daily payment of Funding Amounts into a trust account.

[42] The Crown submits that it is an error to consider the deposit of Funding Amounts by Citibank as the provision of a service to the Funds because the Funds did not have an agreement with Citibank. This is an arguable point since Funding Corp., which did have an agreement with the Funds, may be considered to have provided this service to the Funds by agreeing in the Fee Payment Agreement to enter into the Purchase and Sale Agreement.

[43] However, this does not matter for purposes of determining whether Funding Corp. provides a financial service to the Funds. The dominant element of the supply by Funding Corp. is either the payment of Funding Amounts or arranging for such payments. Both types of supplies are encompassed by the inclusions in the definition of “financial service” in paragraphs (*a*) or (*l*).

[44] The Crown submits that paragraph (*l*) does not apply because the services provided by Funding Corp. were not in the nature of “arranging for” anything. I disagree with this

submission. By virtue of the Fee Payment Agreement, Funding Corp. did arrange for the payments of the Funding Amounts. This is a service described in paragraph (*l*).

D. *Did Tax Court err in concluding that paragraph (q) applied?*

[45] Since the dominant element of the supply is encompassed by the inclusions in the definition of "financial service", the remaining question is whether the Tax Court erred in concluding that the Funds received a service described in the exclusion in paragraph (*q*).

[46] The Crown suggests that the exclusion in paragraph (*q*) applies either because the dominant element of the supply is a management or administrative service, or because Funding Corp. provided other services to the Funds which were in the nature of management or administrative services, such as providing Funding Notices to Citibank. Based on the statutory language, the exclusion in paragraph (*q*) would apply in either case.

[47] I first consider whether the Tax Court erred in concluding that the dominant element of the supply is a management or administrative service. At paragraphs 109-110 of its reasons, the Tax Court concludes that arranging for the payment of commissions and the payment of commissions was integral to the day-to-day business and operations of the Funds, and that this was a management duty which was delegated to Citibank Entities:

> [109] The "arranging for the payment" of commissions and the payment of commissions was integral to the day-to-day business and operations of the Funds. This was a Management duty. That the Manager may have hired third parties to perform some of its duties did not alter the fact that the duties performed continued to be a management service.
>
> [110] It is my view that the dominant service provided by the Citibank Entitites was a management duty and delegating that duty to Citibank Entities did not

> change the nature of the duty. Paragraph 123(q) applies and the transaction is excepted from being a "financial service".

[48] As for the Tax Court's conclusion that arranging for the payment of commissions and the payment of commissions was integral to the day-to-day business and operations of the Funds, there is no error in this conclusion, as far as it goes.

[49] However, the Tax Court concludes that this was a management duty which was delegated to Citibank Entities. With respect, this was an error. The Tax Court appears to assume that all activities integral to the business and operations of the Funds are management duties which must be provided by the Manager. This is not the case.

[50] Under securities regulations and pursuant to the Management Agreement, the Manager had a duty to ensure that the Funds were operating properly. This does not mean, however, that the Manager had to provide all services required by the Funds. With respect to the deferred payment option, the Funds themselves entered into the agreement with Funding Corp. Therefore, these services were not among those which the Manager was required to provide as the Funds themselves assumed responsibility for them. The Tax Court's conclusion to the contrary was a palpable and overriding error that warrants the intervention of this Court.

[51] The Tax Court's decision appears to have been significantly influenced by three factual conclusions: (1) the Manager had to manage all aspects of the business because the Funds had no employees; (2) the Funds were permitted to pay Earned Fees under securities regulations because they were allowed to pay management fees; and (3) the Manager previously provided this service

and therefore had the duty to provide the service, as reflected in a simplified prospectus (Tax Court reasons at paras. 104-108). As discussed below, these factual findings are not supported by the record.

[52] With respect to first finding, that the Manager was required to delegate this service to Citibank because the Funds did not have any employees, this conclusion disregards the fact that the Funds had officers and trustees who had the authority, and responsibility, to act on their behalf. In fact, the officers and trustees did enter into the Fee Payment Agreement on behalf of the Funds. In addition, the decisions of the Funds were overseen by boards of directors and advisory committees that acted in a capacity similar to directors. It was not necessary for the Manager to provide this service to the Funds, and the Manager did not do so.

[53] The Funds hired Funding Corp. directly. Although the Manager was a party to the Fee Payment Agreement, the mutual obligations for payments of money under this Agreement were clearly between the Funds and Funding Corp., and not between the Manager and Funding Corp. This direct relationship is also reflected in amendments to the Management Agreement which stated that "the Funds may make arrangements relating to funding or payment of sales commissions" (Tax Court reasons at para. 55).

[54] It is worth mentioning that the Manager wore two hats in its role with the Funds because it was the manager and also the trustee of the Funds that were trusts. In this case, the Manager executed the Fee Payment Agreement on behalf of Funds that were trusts. The record establishes that the Manager did so in its capacity as trustee, and not as a provider of management services.

[55] Therefore, it was an error for the Tax Court to conclude that the service must have been delegated by the Manager because the Funds had no employees.

[56] The Tax Court also erred with respect to the second finding, that the characterization of the arrangement for securities regulations suggests that the service was delegated to Citibank. This finding is based on testimony by Mr. Warren that the arrangement complied with securities regulations because the Funds were allowed to pay management fees.

[57] This testimony does not support the Tax Court's finding that Funding Corp. provided management or administrative services to the Funds. It is possible that Mr. Warren's testimony supports an argument that the Earned Fees were paid by the Funds for the benefit of the Manager and therefore were an indirect payment of management fees due to the Manager for services that it provided. However, this was not the basis of the tax assessments, which was that services provided by Funding Corp., not the Manager, were management or administrative services.

[58] In addition, the manner in which the arrangement would be interpreted for securities purposes does not affect the characterization of the legal relationships for taxation purposes. The Tax Court erred by concluding that Mr. Warren's testimony supported a finding that Funding Corp. provided a management or administrative service to the Funds.

[59] The Tax Court also erred in concluding that it was relevant that the Manager had previously funded the commissions. This fact is not relevant in characterizing the arrangement with Citibank. To hold otherwise would mean that the characterization of the arrangement could

be different in a situation where the Manager did not previously provide the services. The determination of whether Funding Corp. is providing a management or administrative service to the Funds should not be affected by a prior relationship that the Funds may or may not have had with the Manager. Instead, the Citibank arrangement should be considered on its own.

[60] Finally, the Tax Court erred in relying on general language in a simplified prospectus that stated that third parties may be hired by the Manager to provide services (Reasons at para. 108). This statement does not support the Tax Court's conclusion that all services were either performed by, or delegated by, the Manager. The language does not purport to preclude the Funds from making their own arrangements for services, which is what happened in this case. In addition, as borne out by the testimony of Mr. Warren, the simplified prospectus is not intended to provide a detailed description of the operation of the Funds, except to the extent that the detail is relevant for investors. It was an error for the Tax Court to draw an inference from the prospectus that the Manager must have delegated the service to Citibank.

[61] In concluding that the Manager delegated the funding services to Citibank, the Tax Court clearly misconstrued the facts in a manner that affects the outcome of the appeal, and in this regard has made a palpable and overriding error. It is appropriate in this case for this Court to give the decision that should have been given by the Tax Court.

E. *Does paragraph (q) apply?*

[62] The question is whether the exclusion in paragraph (*q*) of the definition applies. As discussed below, I have concluded that the exclusion does not apply. Specifically, the supply is

not a management or administrative service, and there was no other service provided by Funding Corp. to the Funds. Accordingly, I conclude that the service provided to the Funds was not excluded as a financial service under paragraph (*q*).

[63] As for whether the supply itself is a management or administrative service, the character of the supply is determined by its dominant element, which in this case is either depositing money or arranging for the deposits. In either case, the supply is in the nature of a financing service provided by third party financial institutions. These are not management or administrative services. The services do not have the usual characteristics of management services which typically involve decision-making on behalf of the business. The services also do not have the usual characteristics of administrative services which typically involve support services.

[64] Having concluded that the supply is not a management or administrative service itself, it remains to be considered whether Funding Corp. provided other services to the Funds which were management or administrative services. In this case, the exclusion in paragraph (*q*) would also apply.

[65] The Crown suggests that Parliament's intent in enacting the exclusion in paragraph (*q*) is to encompass arrangements such as this, which involve an unbundling of services provided to an investment plan.

[66] I do not agree with this submission. The exclusion in paragraph (*q*) is aimed at circumstances in which GST is avoided by having a provider of management services to an investment plan unbundle its services and provide non-management services under a separate arrangement. For example, paragraph (*q*) precludes the avoidance of GST by having a manager provide financing services and management services in separate agreements.

[67] Paragraph (*q*) is not intended to apply to circumstances such as this where a financing service is provided by a person who is not providing management or administrative services. The services by Funding Corp. are not encompassed by paragraph (*q*) simply because the Manager previously provided them. In an appropriate case, the general anti-avoidance rule may apply to arrangements designed to circumvent the provision, but the general anti-avoidance rule was not invoked in this case.

[68] The Crown also suggests that Funding Corp. provided other services to the Funds which were in the nature of management or administrative services. For example, the Crown suggests that the Funding Corp. provided an administrative service to the Funds by providing Funding Notices to Citibank. However, this service was not a separate supply to the Funds. It was part of the single supply, which was not a management or administrative service.

[69] The Crown also suggests that paragraph (*q*) should apply because Citibank "was closely involved in monitoring the Manager's product shelf" which the Crown submits is a "management or administrative service in its own right" (respondent's memorandum at paras. 78-79).

[70] This submission misunderstands the purpose of Citibank's right to monitor products. According to the record, Citibank had its own interest in monitoring products sold by the Funds. This makes sense. The monitoring by Citibank was not a service provided to the Funds; it was an operational impediment.

[71] Accordingly, I disagree with the Crown that other services were provided to the Funds which were in the nature of management or administrative services. I conclude, therefore, that the exclusion in paragraph (*q*) does not apply to the services provided to the Funds and that the Funds received an exempt supply of a financial service from Funding Corp.

V. Issue 2 - Are the Funds entitled to rebates of GST paid in error?

[72] In light of the conclusion above, it is necessary to consider a further argument of the Funds that rebates should be paid in respect of GST paid in error on the Earned Daily Fees. The periods for which this is at issue are from February 1, 2007 to June 30, 2010. This issue will be considered afresh as it was not considered by the Tax Court.

[73] The background facts are not in dispute:

(a) During the relevant period, the Manager self-assessed tax under section 218 of the Act on behalf of the Funds on the Earned Daily Fees paid by the Funds. The Manager included the tax in its own GST returns. The total amount of GST paid for the relevant period was over $14 million.

(b) The Minister assessed these amounts in notices of assessment issued in the name of the Manager.

(c) Neither the Manager nor the Funds filed notices of objections to these assessments.

(d) After each assessment was issued, a rebate application was filed to recover the GST as tax paid in error. The applications stated that they are made by the Manager in its own capacity and/or as "Trustee" of a Fund or "on behalf of" a corporate Fund.

(e) The Minister issued notices of assessment to deny the rebate applications in full. The Manager filed notices of objection to these assessments and the Minister subsequently issued notices of confirmation.

[74] The rebate applications were made pursuant to subsection 261(1) of the Act which allows a rebate of GST that is not payable, but was paid whether by mistake or otherwise. The Crown submits that the Funds do not qualify for this rebate by virtue of exclusions set out in paragraphs 261(2)(*a*) and (2)(*b*) of the Act. These provisions are reproduced below.

261. (1) Where a person has paid an amount (*a*) as or on account of, or (*b*) that was taken into account as,	**261.** (1) Dans le cas où une personne paie un montant au titre de la taxe, de la taxe nette, des pénalités, des intérêts ou d'une autre obligation selon la présente partie alors qu'elle n'avait pas à le payer ou à le verser, ou paie

tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) to (3), pay a rebate of that amount to the person.

un tel montant qui est pris en compte à ce titre, le ministre lui rembourse le montant, indépendamment du fait qu'il ait été payé par erreur ou autrement.

(2) A rebate in respect of an amount shall not be paid under subsection (1) to a person to the extent that

(2) Le montant n'est pas remboursé dans la mesure où :

(*a*) the amount was taken into account as tax or net tax for a reporting period of the person and the Minister has assessed the person for the period under section 296;

a) le montant est pris en compte à titre de taxe ou de taxe nette pour la période de déclaration d'une personne et le ministre a établi une cotisation à l'égard de la personne pour cette période selon l'article 296;

(*b*) the amount paid was tax, net tax, penalty, interest or any other amount assessed under section 296; or

b) le montant payé était une taxe, une taxe nette, une pénalité, des intérêts ou un autre montant visé par une cotisation établie selon l'article 296;

(*c*) a rebate of the amount is payable under subsection 215.1(1) or (2) or 216(6) or a refund of the amount is payable under section 69, 73, 74 or 76 of the *Customs Act* because of subsection 215.1(3) or 216(7).

c) un remboursement du montant est accordé en application des paragraphes 215.1(1) ou (2) ou 216(6) ou des articles 69, 73, 74 ou 76 de la *Loi sur les douanes* par l'effet des paragraphes 215.1(3) ou 216(7).

[75] In general, paragraphs 261(2)(*a*) and (2)(*b*) of the Act are intended to deny the right to rebates where assessments have been issued. The rationale for the exclusion presumably is that taxpayers are able to appeal assessments through notices of objection and it is not appropriate to provide another appeal mechanism through rebate applications.

[76] The Funds submit that the exclusions in subsection 261(2)(*a*) and (2)(*b*) do not apply because the Funds were never assessed. The assessments were issued only to the Manager.

[77] This submission does not assist the Funds. Even if the assessments were issued only to the Manager, which is not clear on the record, the exclusion in paragraph 261(2)(*b*) applies in any event.

[78] There is a subtle difference between the language in paragraphs 261(2)(*a*) and (2)(*b*). Paragraph 261(2)(*a*) applies where a person who paid tax has been assessed for the relevant period. Paragraph 261(2)(*b*), on the other hand, applies where a person has paid tax and there has been an assessment of that particular tax.

[79] In this case, assessments were made of the particular tax that was paid by the Funds. The exclusion in paragraph 261(2)(*b*) applies in this case. The provision is not limited to assessments issued to persons who paid the tax.

[80] The Funds express concern about the overbreadth of a literal interpretation of paragraph 261(2)(*b*). They suggest that the exclusion should apply only to the person who remitted the tax. However, the Funds do not suggest that the interpretation is overly-broad in this particular case. Instead, they submit that the provision is overly-broad in another circumstance, that is, the exclusion of a rebate to a recipient of a supply where the tax has been remitted by a supplier. This is not the case here and it is not necessary that this Court consider the hypothetical scenario posited by the Funds because the facts in this case are quite different.

[81] In the case at bar, there was a remittance of tax by the Manager on behalf of the Funds. The Manager was in a position to file a notice of objection to the assessments which were made based on the filing in the returns, and did not do so. It does not make sense to have a different result under section 261 of the Act depending on whether the assessments were issued to the Manager or to the Funds, and the language used in paragraph 261(2)(*b*) reflects this intent.

[82] I agree with the submission of the Crown that a notice of objection should have been filed in order to preserve the right to recover the tax. This was not done.

[83] For completeness, I recognize that the Supreme Court has addressed the issue of whether a rebate or refund is payable in *United Parcel Service Canada Ltd. v. Canada*, 2009 SCC 20, [2009] 1 S.C.R. 657. However, it considered the issue in the context of paragraph 261(2)(*c*), which essentially denies a rebate if a rebate or refund "is payable" under another provision. The issue in *UPS* was whether the rebate was "payable" under other provisions if no rebate application was made under them. The Supreme Court decided that a rebate under the other provisions was not payable in these circumstances, and therefore a rebate under section 261 was payable. The legislation at issue in the case at bar is quite different. The rebate is denied under paragraph 261(2)(*b*) if the particular tax has been assessed.

[84] Accordingly, I conclude that the Funds were correctly assessed to disallow rebates for the periods from February 1, 2007 to June 30, 2010. Therefore, I would dismiss the appeal concerning this issue.

VI. Conclusion

[85] I would allow this appeal and set aside the judgment of the Tax Court. Making the judgment that the Tax Court should have given, I would allow the Tax Court appeal and refer the reassessments back to the Minister of National Revenue for reconsideration and reassessment in accordance with these reasons.

[86] In light of the mixed success in this appeal, I would not order costs in both this Court and the Tax Court.

"Judith Woods"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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