Federal Court of Appeal | Cour d'appel fédérale

Date: 20210122

Docket: A-274-18

Citation: 2021 FCA 10

CORAM: **WOODS J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the Registry on December 2, 2020.
Judgment delivered at Ottawa, Ontario, on January 22, 2021.

REASONS FOR JUDGMENT BY: LASKIN J.A.

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

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Introduction

[1] Under Canada's GST/HST regime, the supply of a financial service is an exempt supply, on which no tax is payable. The statutory scheme contains a lengthy and complex definition of the term "financial service," a definition that states both what the term means and what it does

not include. Among the exclusions is “any administrative service,” unless the supplier of the service is a “person at risk,” as defined.

[2] Canadian Imperial Bank of Commerce, an issuer of Visa credit cards, sought rebates of tax it paid on fees charged to it by Visa for the supply CIBC received as a participant in the Visa payment system. CIBC sought these rebates on the basis that it had paid the tax in error, because the supply that it received from Visa was an exempt supply of a financial service. The Minister of National Revenue issued assessments denying the rebate claims. CIBC’s appeal to the Tax Court of Canada was dismissed (2018 TCC 109, Rossiter C.J.). The Tax Court concluded that the supply CIBC received from Visa was an administrative, not a financial, service, and that Visa was not a person at risk.

[3] On appeal to this Court, CIBC submits that the Tax Court committed reversible errors both in concluding that the service Visa supplied to CIBC was an administrative service, and in determining that Visa was not a person at risk.

[4] I would allow the appeal. While I do not accept CIBC’s submission that the Tax Court erred in law in determining the meaning of “administrative service,” in my view, the Tax Court committed a reversible error by making contradictory and irreconcilable findings concerning the nature and impact of the Visa supply. Once that error is corrected, there is no longer a basis to conclude that the supply made by Visa to CIBC was an administrative service. It is also no longer necessary to consider the ground of appeal that relates to the definition of “person at risk.”

II. Statutory definition of "financial service"

[5] As this Court has observed, exempting the supply of a financial service from GST/HST, while based on the complexities involved in taxing financial transactions, has itself "created significant classification problems": *CIBC World Markets Inc. v. Canada*, 2019 FCA 147 at paras. 36-38.

[6] Subsection 123(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, sets out the definition of "financial service." It begins with a list of 15 ways in which a service may come within the term. These include the services of paying money (paragraph (a)), arranging for the payment of money (paragraph (l)), and any service provided under an agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued (paragraph (i)). The provision then sets out, following the words "but does not include," 13 categories of services excluded from the definition. These include a "prescribed service" (paragraph (t)).

[7] The portions of the definition most relevant in this appeal read as follows:

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;
[…]	[…]
(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	**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),	**(i)** est visé à l'un des alinéas a) à i),
[…]	[…]
but does not include	La présente définition exclut :
[…]	[…]
(t) a prescribed service;	**t)** les services visés par règlement.

[8] Section 4 of the *Financial Services and Financial Institutions (GST/HST) Regulations*, SOR/91-26, provides the definition of a "prescribed service" for the purposes of exclusionary paragraph (t). The prescribed services include in relevant part (and thus exclude from the definition of "financial service") "any administrative service," unless the service is supplied by a "person at risk." The term "administrative service" is not defined. The relevant part of section 4 reads as follows:

4 (1) In this section,	**4 (1)** Les définitions qui suivent s'appliquent au présent article.
instrument means money, an account, a credit card voucher, a charge card voucher or a financial instrument;	***effet*** Argent, compte, pièce justificative de carte de crédit ou de paiement, ou effet financier.
person at risk, in respect of an instrument in relation to which a service referred to in subsection (2) is provided, means a person who is financially at risk by virtue of the acquisition, ownership or issuance by that person of the instrument or by virtue of a guarantee, an acceptance	***personne à risque*** Personne exposée à un risque financier du fait de la propriété, de l'acquisition ou de l'émission par la personne d'un effet à l'égard duquel un service mentionné au paragraphe (2) est offert, ou à cause d'une garantie, d'une acceptation ou d'une indemnité

or an indemnity in respect of the instrument, but does not include a person who becomes so at risk in the course of, and only by virtue of, authorizing a transaction, or supplying a clearing or settlement service, in respect of the instrument.	se rapportant à l'effet, à l'exclusion de la personne qui s'expose à un tel risque dans le cadre et du seul fait de l'autorisation d'une opération relative à l'effet ou de la fourniture d'un service de compensation ou de règlement relativement à l'effet.
(2) Subject to subsection (3), the following services, other than a service described in section 3, are prescribed for the purposes of paragraph (t) of the definition ***financial service*** in subsection 123(1) of the Act:	**(2)** Sous réserve du paragraphe (3), pour l'application de l'alinéa t) de la définition de ***service financier***, au paragraphe 123(1) de la Loi, sont visés les services suivants, sauf ceux mentionnés à l'article 3 :
[…]	[…]
(b) any administrative service, including an administrative service in relation to the payment or receipt of dividends, interest, principal, claims, benefits or other amounts, other than solely the making of the payment or the taking of the receipt.	**b)** les services administratifs, y compris ceux reliés au paiement ou au recouvrement de dividendes, d'intérêts, de capital, de créances, d'avantages ou d'autres montants, à l'exclusion des services ne portant que sur le paiement ou le recouvrement.
(3) A service referred to in subsection (2) is not a prescribed service for the purposes of paragraph (t) of the definition ***financial service*** in subsection 123(1) of the Act where the service is supplied with respect to an instrument by	**(3)** Pour l'application de l'alinéa t) de la définition de ***service financier***, au paragraphe 123(1) de la Loi, ne sont pas visés les services mentionnés au paragraphe (2) et fournis relativement à un effet par :
(a) a person at risk,	**a)** la personne à risque;
[…].	[…].

[9] The central question before the Tax Court was whether the supply by Visa to CIBC came within the definition of "financial service."

III. Facts

[10] The parties filed a partial agreed statement of facts, which the Tax Court judge adopted in his reasons. In addition, CIBC called two witnesses, and the Crown, one. There was little dispute concerning the facts themselves; the differences between the parties largely related to their characterization.

A. *CIBC and the Visa payment system*

[11] CIBC is a Schedule I bank under the *Bank Act*, S.C. 1991, c. 46. It issues Visa-branded credit cards to customers as part of its retail banking business.

[12] CIBC paid fees for the supply in question to Visa Canada. The periods covered by the assessments that CIBC appealed to the Tax Court extended from 2003 to 2013. Until 2007, Visa operated in Canada as Visa Canada Association, a member-owned corporation without share capital. CIBC was among the owners. Following a restructuring implemented in 2007, Visa operated in Canada as Visa Canada Corporation, an indirect subsidiary of Visa Inc., a Delaware corporation. For simplicity, I will refer to the relevant Visa entity as "Visa," except where more specificity is required.

[13] The supply CIBC purchased from Visa entitled CIBC to participate in the Visa payment system. This system is the set of instruments, procedures, rules, and technology by which money and transaction information are circulated among system participants. Among other things, it allows holders of Visa credit cards to make purchases from participating merchants by

immediately accessing, at the point of purchase, credit granted by the financial institution that issued the card.

[14] Participation in the Visa payment system is governed by the Visa rules, a body of contractually binding by-laws, operating regulations, guides, and directives. These rules set out the procedures within the payment system, and the criteria for participation in the system. Visa established these rules. It is also entitled to change them without other participants' approval, though the rules were described in the evidence as relatively static. Visa regularly monitors compliance with the rules. Sanctions for non-compliance may include expulsion from the system.

B. *A typical Visa transaction*

[15] A typical transaction using a Visa credit card and the Visa payment system involves the cardholder, who uses a Visa credit card to pay for goods or services; the merchant, which accepts the Visa credit card as payment; the issuer (here CIBC), which issued the Visa credit card to the cardholder and provides the cardholder with credit; the acquirer, which entered into an agreement with the merchant to accept Visa credit cards as payment; and Visa, as operator of the Visa payment system.

[16] When the cardholder presents the Visa credit card to the merchant as payment, an authorization request is sent electronically from the merchant to the acquirer, and almost simultaneously from the acquirer to Visa and from Visa to the issuer. The issuer (or, in some cases, a third party to which the issuer has outsourced the approval function) checks the

cardholder's available credit, and returns either an approve or a decline message to Visa. The message is transmitted almost simultaneously from Visa to the acquirer and from the acquirer to the merchant. The authorization process takes but a second or two, and Visa processes approximately 65,000 transactions per second.

[17] If the purchase transaction is authorized and completed, the merchant transmits a transaction record to the acquirer, ordinarily as part of a file transmitted daily with records of other transactions. The acquirer then sends it to Visa, which sorts the records by issuer, and advises each issuer of the net daily settlement amount payable. This comprises the amounts charged on the Visa credit card less interchange fees (fees payable by the acquirer to the issuer) and chargebacks (amounts reflecting the issuer's reversal of a transaction – for example, for fraud). The issuer then sends the net settlement amount to Visa by paying it into the settlement bank account Visa has designated (in this case, an account with Scotiabank). Visa then pays out of this account to each acquirer the settlement amount the acquirer is owed. Each acquirer in turn pays each of its merchants the net amount the merchant is owed, taking account of fees payable. Finally, the issuer includes the amount payable by the cardholder on the cardholder's monthly statement, and collects payment, plus any applicable interest, from the cardholder.

[18] Where an acquirer disputes a chargeback, the dispute is subject to rules and a dispute-resolution process established by Visa. Visa will also sometimes stand in to authorize transactions on an as-needed basis when the system of an issuer (or third party processor) is temporarily non-operational. These stand-in authorizations are subject to parameters communicated to Visa by the issuer.

C. *Risks and indemnities*

[19] Under the Visa rules, Visa is exposed to a variety of risks. One of these is settlement risk. Visa indemnifies its customers for any settlement loss suffered as the result of another customer's failure to fund its daily settlement obligations. Visa may indemnify customers on this basis even where a transaction is not processed on the Visa system.

[20] In its annual report (Form 10-K) for 2009 filed with the United States Securities and Exchange Commission (Public Appeal Book, Vol. III, Tab K4, p. 964), Visa explains that "[t]his indemnification creates settlement risk for [it] due to the difference in timing between the date of the payment transaction and the date of subsequent payment. The term and amount of the indemnification are unlimited." It goes on to state that concurrent settlement failures by customers, or systemic operational failures that last more than one day, could expose it to significant losses and materially affect its financial condition.

[21] To manage its exposure to settlement risk, Visa maintains a credit risk policy that contains credit standards and risk control measures. These include regular evaluation of customers to which it has significant exposure, and a variety of potential remedial actions up to and including terminating the right of participation in the system.

[22] According to the notes to its 2009 financial statements, Visa's estimated maximum settlement risk exposure as of September 30, 2009 was approximately US$41.8 billion, of which US$3.7 billion was covered by collateral. As of the same date, the estimated probability-weighted fair value of the settlement risk guarantee was less than US$1 million. The evidence in

the Tax Court was that Visa Canada has never had to make any payments on the settlement indemnity, and that Visa Inc. has incurred no material loss related to settlement risk in recent years.

[23] Other risks to which Visa is exposed are sovereign risk, foreign exchange risk, and merchant risk. Sovereign risk is the risk from operating in countries whose financial institutions are of questionable solvency. Foreign exchange risk arises from settling in multiple currencies, which in turn requires maintaining a large foreign exchange position all over the world.

[24] Merchant risk is the risk that, after the cardholder has made a valid purchase using a Visa credit card, the merchant will become insolvent and fail to provide the purchased goods or services. In these circumstances, Visa would indemnify the cardholder by not charging the issuer for the goods or services. For this reason, Visa's risk management division actively monitors financially distressed merchants, consults with their acquirers, and may require the acquirers to post collateral. There was evidence before the Tax Court that concern about merchant risk, including the need for indemnification, was the main reason why Visa and its competitor MasterCard started up: their systems relieved individual issuers from the need to assess and monitor the credit-worthiness of merchants who were unknown to the issuer and might be located anywhere in the world. Like the settlement risk indemnity, Visa also provides this indemnity even in cases where the transaction is not processed on its system.

[25] While under the Visa rules it is the issuer or acquirer, and not Visa, that bears responsibility for fraud risk, Visa analyzes and responds to fraudulent transaction activity on an

ongoing basis. Issuers and acquirers must agree to follow Visa-specified anti-fraud requirements and controls.

D. *Benefits to CIBC*

[26] Participation in the Visa payment network provides CIBC with a variety of benefits, in addition to the indemnities and controls just discussed.

[27] One obvious benefit is that CIBC earns revenue from its Visa credit card business. It does so in three principal ways. First, it earns net interest income to the extent that the interest it charges customers who do not pay their monthly credit card bills exceeds its cost of funding these receivables. Second, it earns interchange fees from acquirers, based on a percentage of purchases made with CIBC-issued Visa credit cards. Visa establishes default interchange rates, which CIBC has adopted, though CIBC is (like other issuers) free to negotiate its own rates. The third source of revenue is the annual fees charged to cardholders.

[28] Apart from serving as a source of revenue, the Visa payment system benefits CIBC by making it possible for merchants to trust that they will always be paid for goods and services charged to a Visa credit card. Absent this trust, merchants would not accept, and CIBC's customers would not be able to use, Visa credit cards in payment for goods or services. The Visa rules also protect CIBC, through the chargeback mechanism, from having to fund purchases of goods and services that the merchant fails to provide.

[29] CIBC and other issuers also derive benefits from the Visa brand, which leads cardholders to trust and recognize the utility of the card and the ability to use it around the world.

[30] In considering the application of the inclusionary paragraphs in the definition of "financial service," the Tax Court judge described the utility of Visa's services to CIBC as follows (at paragraphs 92 and 95 of his reasons):

> The services provided by Visa are linked to the financial services provided by CIBC in that they form an essential part of the ability for CIBC to offer credit card based services to their clients, as Visa helps to ensure that merchants are successfully paid after a CIBC client uses a Visa credit card to purchase goods and services. […]
>
> […] Visa gives CIBC the opportunity to offer new financial products to its customers. Specifically, it benefits CIBC and CIBC customers by arranging for a payment network to be in place which gives CIBC customers the ability to purchase goods and services anywhere in the world without CIBC having to individually contact each merchant to set up payment arrangements with them. If CIBC was forced to create such a payment network on its own, even if technically feasible, this network would invariably be much less widely accepted than the one offered by Visa.

[31] However, later in his reasons (at paragraph 116), in considering whether the services should be excluded from the definition as an administrative service, the Tax Court judge stated that "[a]t its most basic level […], the benefit that Visa offered CIBC was cost saving and logistical simplification." I will return later in these reasons to the significance of these two quite different descriptions of the role the services play in the business of CIBC.

IV. Reasons of the Tax Court judge

A. *Characterization of the supply*

[32] Before the Tax Court, the parties agreed, and the Tax Court judge accepted, that the supply provided by Visa was a single compound supply, comprising several distinct but indivisible components. Consistent with the guidance given by this Court, the Tax Court judge then sought (beginning at paragraph 56 of his reasons) to determine the predominant elements of that single supply, since only the predominant elements may be taken into account in applying the inclusions and exclusions in the definition of "financial service": *Global Cash Access (Canada) Inc. v. Canada*, 2013 FCA 269 at paras. 25-26, 37-38; G*reat-West Life Assurance Company v. Canada*, 2016 FCA 316 ("*GWL FCA*") at paras. 43, 46-48.

[33] In determining the predominant elements, the Tax Court judge took into account both the perspective of CIBC, as the purchaser of the supply, and the end result of the supply. He characterized the supply (at paragraphs 73 and 75) as "the facilitation of the transactions between CIBC, CIBC customers, merchant acquirers and participating merchants," or "the providing of a payment platform and facilitating payments on that platform."

B. *Inclusion in the definition of "financial service"*

[34] The Tax Court judge then turned to the inclusionary paragraphs of the definition of "financial service" in subsection 123(1) (excerpted above in paragraph 7). He found that the services supplied by Visa, as he had characterized them, came within three of the inclusionary paragraphs: a combination of paragraphs (a) ("the exchange, payment, issue, receipt or transfer

of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise") and (l) ("the agreeing to provide, or the arranging for, a service that is […] referred to in any of paragraphs (a) to (i)"), and paragraph (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").

[35] In finding the services to come within a combination of paragraphs (a) and (l), the Tax Court judge described the role Visa's services play for CIBC using the language quoted above at paragraph 30 – they are "an essential part of the ability for CIBC to offer credit card based services" and "[give] CIBC the opportunity to offer new financial products to its customers."

[36] The determination that inclusionary paragraphs (a), (l), and (i) apply is not challenged in this appeal.

C. *Exclusion from the definition as the supply of an "administrative service"*

[37] The Tax Court judge proceeded to consider whether the supply CIBC obtained from Visa, though it came within the three inclusionary paragraphs of the definition of "financial service," was nonetheless excluded from the definition. He rejected the applicability of four of the exclusionary paragraphs the Crown argued should apply. However, he determined that the Visa supply constituted the supply of an "administrative service" within the meaning of paragraph 4(2)(b) of the Regulations (excerpted above in paragraph 8). It was therefore, subject to the saving provision for a "person at risk," excluded from the definition of "financial service" by paragraph (t) of the definition.

[38] In coming to this conclusion, the Tax Court judge relied heavily on the decision of the Tax Court in *Great-West Life Assurance Company v. The Queen*, 2015 TCC 225 ("*GWL TCC*"), affirmed by this Court in *GWL FCA*. I therefore briefly digress to describe the relevant aspects of *GWL TCC* and *GWL FCA* for purposes of this appeal.

[39] At issue in *GWL TCC* was whether the supply that Great-West Life obtained from Emergis Inc. was an exempt financial service. Great-West Life offered group health benefits plans to employers. It entered into agreements with Emergis under which Emergis received and adjudicated employees' claims for benefits paid by these plans, and arranged for payment on a real-time basis, at the point of sale in pharmacies, of drug benefits to which employees were entitled. Employees could, in this way, have prescriptions filled at pharmacies without having to pay out of pocket the amount covered by their benefit plans.

[40] Emergis carried out this process largely electronically. It made agreements with pharmacies under which they would fill prescriptions on the basis that payment would follow. Once prescriptions were filled, Emergis would pay the pharmacies using Great-West Life's funds. Emergis had no discretion as to whether claims should be paid. In adjudicating claims, it was required to apply the terms of the benefit plans and industry rules. As a result of the claims process that Emergis provided, Great-West Life did not have to make payments by cheque to individual employees, but was able to make one daily payment to Emergis. Great-West Life's payments to Emergis included a fee to Emergis for each completed drug transaction.

[41] The Tax Court in *GWL TCC* found the supply of services by Emergis to Great-West Life to be a single compound supply, whose essential character was the payment of plan benefits to employees. It therefore came within inclusionary paragraph (f.1) of the definition of "financial service," which included "the payment […] of an amount in full or partial satisfaction of a claim under an insurance policy." However, for two reasons, the Tax Court determined (at paras. 108-109) that the services comprising the predominant elements of the supply were properly described as an "administrative service" within paragraph 4(2)(b) of the Regulations. First, the services provided by Emergis did not involve any independent decision-making on its part. And second, the services were "quintessentially administrative in nature": they provided a simpler and more cost-effective procedure for paying benefits, but did not alter the substance of what was done.

[42] The Tax Court's decision in *GWL TCC* was appealed to this Court (in *GWL FCA*) on the ground that the exclusion in paragraph 4(2)(b) of the Regulations of "any administrative service" was not intended to, and could not, limit the scope of a specifically-framed inclusionary paragraph in the Act's definition of "financial service." This Court did not accept that submission: it held (at paragraph 40) that treating a supply that came within paragraph 4(2)(b) of the Regulations as excluded from paragraph (f.1) of the definition of "financial service" was consistent with a textual, contextual and purposive interpretation of the legislative provisions.

[43] This Court also raised the question whether the Tax Court had properly applied the principle, set out in *Global Cash*, that both the inclusions and exclusions from the definition are to be determined by the predominant elements of the supply. It concluded (at paragraphs 44 and

51) that the Tax Court had made no error in this regard: it had not improperly taken non-predominant elements into account in its analysis of either the inclusions or the exclusions. This Court did not itself either lay down or approve a definition of the term "administrative service."

[44] Returning to this case, the Tax Court judge determined (at paragraph 120) that ultimately, the differences between the services supplied by Visa here and those supplied by Emergis in *GWL TCC* were "purely a function of scale and not of substance." He stated (at paragraph 116) that "[a]t its most basic level […], the benefit that Visa offered CIBC was cost saving and logistical simplification. Both of which, like in [*GWL TCC*], are quintessentially administrative in nature." The Tax Court judge also stated (at paragraph 117) that, like the system operated by Emergis, the Visa network operated "with minimal decision making involved." He added (at paragraph 119) that although Visa, unlike Emergis, was responsible for creating and updating the rules that governed its payment network, these rules appeared to be "largely static in practice."

D. *Saving provision for a "person at risk"*

[45] The Tax Court judge went on to consider and reject CIBC's alternative argument that, even if what Visa supplied was properly described as an "administrative service," the supply was not a prescribed service within exclusionary paragraph (t) of the definition of "financial service," because Visa was a "person at risk" as that term is defined in subsection 4(1) of the Regulations.

[46] In rejecting the submission that Visa was a "person at risk," the Tax Court judge stated (at paragraph 130) that "the person at risk definition refers to a person providing a clearing or settlement service as not being a person at risk, which accurately describes the service that was

provided by Visa." However, he did not advert to the portion of the definition (which I underline for ease of reference) under which it "does not include a person who becomes so at risk in the course of, and only by virtue of, authorizing a transaction, or supplying a clearing or settlement service, in respect of the instrument."

[47] The Tax Court judge was reinforced in his conclusion on this issue by what he described (at paragraph 131) as "the fact that it does not appear as though Visa was actually put financially at risk as a result of the services it provided, at least not to the extent necessary to satisfy the person at risk definition." He reviewed the various types of risk to which reference was made in the evidence, and (at paragraph 134) described the risk to Visa Canada before the 2007 restructuring as "almost entirely non-existent" in light of the responsibility borne during that period by Visa International and issuing financial institutions. Referring to the information in Visa's Form 10-K described above (at paragraph 20), he noted (at paragraph 135) that after the restructuring, Visa itself seemed to value its probability-adjusted risk exposure as "extremely low." He added (at paragraph 136) that, according to a news release issued by the Department of Finance, the exception for a "person at risk" was "not meant to apply to risks which have only a remote chance of occurring." He saw the risks to Visa Canada (at paragraph 137) as "purely hypothetical remote risks," and concluded that they were "insufficient for them to be considered a person at risk."

V. Errors alleged and standard of review

[48] CIBC submits that the Tax Court judge erred in interpreting the term "administrative service" in paragraph 4(2)(b) of the Regulations, or alternatively, in applying the term to the

supply made by Visa to CIBC. It further submits that, even if the Tax Court judge properly concluded that Visa provided an administrative service, he erred in interpreting the definition of "person at risk" in subsection 4(1) of the Regulations.

[49] The issues of statutory interpretation put forward by CIBC raise questions of law, reviewable on the correctness standard. The proper application of the term "administrative service" involves a determination of mixed fact and law. Unless there is an extricable question of law, it is subject to review only on the highly deferential standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

VI. Analysis

A. *Did the Tax Court judge err in interpreting or applying the term "administrative service"?*

[50] CIBC submits that the Tax Court judge erred in law by failing to interpret the term "administrative service," as used in paragraph 4(2)(b) of the Regulations, to mean a service that is "clerical" in nature. It draws support for this submission from the decision of this Court in *Royal Bank of Canada v. Canada*, 2007 FCA 72, leave to appeal refused, 2007 CanLII 39159 (SCC), from the decision of the Tax Court in *GWL TCC*, and from certain other decisions of the Tax Court considering the inclusionary paragraphs of the definition of "financial service." CIBC also submits that the meaning it proposes is consistent with the policy of the legislation and with commercial reality.

[51] In the alternative, CIBC submits that the Tax Court judge committed a palpable and overriding error in applying the term "administrative service," and more specifically in finding the supply made by Visa to be no different in kind from the supply made by Emergis in *GWL TCC*.

[52] In response, the Crown submits that the Tax Court judge made no error of interpretation, and that CIBC's real complaint is with the Tax Court judge's conclusions on matters of mixed fact and law, to which this Court should defer. The Crown embraces the Tax Court judge's decision, and in particular his conclusion that the services at issue in this case differ from those in *GWL TCC* only in scale and not in kind. It argues that the policy considerations of consistency, fairness, and predictability require equal treatment of all electronic services provided to financial institutions. It also submits that services that comprise "administrative services" can nonetheless be important services.

[53] In my view, the Tax Court judge did not err in law in interpreting the term "administrative service." He did not attempt an exhaustive definition of the term. The two factors on which he ultimately relied for his conclusion that the services supplied by Visa were "administrative services" – first, that there was minimal decision-making involved, and second, what role the services played in the business of the party receiving them – cannot be regarded as irrelevant factors in determining whether a service is an "administrative service" within paragraph 4(2)(b) of the Regulations.

[54] However, I agree with CIBC's alternative submission that the Tax Court judge committed a palpable and overriding error in considering whether the term "administrative service" applied to the supply by Visa to CIBC.

[55] An error is palpable when it is plainly seen, and overriding when it affects the result: *Hydro-Québec v. Matta*, 2020 SCC 37 at para. 33. One recognized form of palpable error is making contradictory and irreconcilable findings: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 62; *AFD Petroleum Ltd. v. Frac Shack Inc*., 2018 FCA 140 at paras. 41-46.

[56] Here, as I have already observed, the Tax Court judge described the nature of the services supplied by Visa and their role in the business of CIBC in two quite different ways. On one hand, he found (at paragraphs 92 and 95 of his reasons) that Visa's services "form an essential part of the ability for CIBC to offer credit card based services to their clients," and that they "[give] CIBC customers the ability to purchase goods and services anywhere in the world without CIBC having to individually contact each merchant to set up payment arrangements with them." He added that "[i]f CIBC was forced to create such a payment network on its own, even if technically feasible, this network would invariably be much less widely accepted than the one offered by Visa."

[57] On the other hand, in concluding (at paragraph 116) that the services provided by Visa were, like those considered in *GWL TCC*, "quintessentially administrative in nature," the Tax

Court judge stated that "[a]t its most basic level […], the benefit that Visa offered CIBC was cost saving and logistical simplification."

[58] In my view, these findings cannot stand together: they therefore disclose a palpable error. This palpable error is overriding: the finding that "the benefit that Visa offered CIBC was cost saving and logistical simplification" was key to the Tax Court judge's conclusion that the Visa supply comprised administrative services.

[59] It is open to this Court either to remit the matter to the Tax Court to resolve this contradiction or, where this Court considers that doing so would be in the interests of justice and feasible on a practical level, to resolve the contradiction itself: see *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 52(c); *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd.*, 2002 FCA 158 at paras. 81-83; *Piot v. Canada*, 2019 FCA 53 at para. 115. Given the limited and specific nature of the evidence bearing on the application of the term "administrative service," it would, in my view, be an efficient use of resources, and in the interests of justice, for this Court to resolve the issue. I propose to do so.

[60] The relevant evidence includes that of Steven Webster, a CIBC vice-president with experience in various aspects of its credit card operations. His evidence concerning the role VISA plays in CIBC's credit card business included the following (Public Appeal Book, Vol. II, Tab H1, p. 141, Transcript p. 37, ll. 8-15; p. 149, Transcript p. 71, ll. 1-4, 12-23):

> Q. At a basic level, what role does VISA play in relation to CIBC's credit card business?
>
> A. So VISA plays a central role in our credit card business. The VISA system essentially enables our business to exist by facilitating the ability of our clients to purchase goods and services at merchants by enabling the transfer of money from our clients to the merchant.
>
> […]
>
> Q. Can CIBC establish a payment system comparable to VISA's on its own?
>
> A. It's theoretically possible, but it would be extremely, extremely difficult […].
>
> […]
>
> Q. Okay, and why is that?
>
> A. We just don't have a global reach to establish a system that would enable a client to use their card anywhere in the world. So we might be able to establish one within Canada, but that would be of limited value. But we, I just, we just don't have a global operation to go out and establish a system that could be used globally.
>
> Q. Okay.
>
> A. Even within Canada, it would be, I'll say extremely difficult. We just don't have the relationships.

[61] There was also evidence from Paul Vessey, whose extensive experience includes serving as head of CIBC's credit card business, in positions with involvement with credit cards at TD Bank and American Express, and as a member and chair of the board of Visa Canada. He testified as follows concerning the role of the indemnities provided by Visa (Public Appeal Book, Vol. II, Tab H3, p. 188, Transcript p. 148, l. 17 – p. 149, l. 8):

> Q. Okay. What is the importance of the indemnity in terms of how the overall VISA payment network – or VISA payment services works?
>
> A. It's absolutely critical. If you didn't have that indemnity, a Canadian bank or, for that matter, any bank would have to understand the underlying risk of a merchant that might be located half a world away and completely unknown to them. I mentioned earlier – I used the example of airlines and the risk that they pose. There may be some small airline operating in Kazakhstan, and the VISA cardholder that's on vacation goes in there to buy an airline ticket somewhere in Europe. You're going to pay for that. Without the VISA guarantee, I would not know whether I was going to ultimately have to pay that transaction back. I would feel it necessary to underwrite the risk of every merchant that's out on the network out there. I can't possibly do that. In fact, I would argue it's that indemnification and the need for that indemnification which was the reason why VISA and its competitor MasterCard happened, to start.

[62] This evidence was not impaired in cross-examination.

[63] In the face of this evidence and the evidence concerning the operation of the Visa payment system, I would find, consistent with the Tax Court judge's findings at paragraphs 92 and 95 of his reasons, that Visa's services "form an essential part of the ability for CIBC to offer credit card based services to their clients," that they "[give] CIBC customers the ability to purchase goods and services anywhere in the world without CIBC having to individually contact each merchant to set up payment arrangements with them," and that "[i]f CIBC was forced to create such a payment network on its own, even if technically feasible, this network would invariably be much less widely accepted than the one offered by Visa." To this I would add that Visa's services relieve CIBC and other issuers of the need to investigate and analyze the risk profile and solvency of the merchants that accept credit cards in payment for goods and services. To describe the benefit that CIBC obtained from Visa's services as merely "cost saving and logistical simplification," and on that basis to describe the services as "quintessentially

administrative," does not, in my view, adequately recognize the reality of the benefit that CIBC derived.

[64] Nor can it properly be said, in my view, that the Visa payment network differs from that provided by Emergis in *GWL TCC* only in scale and not in substance. In *GWL TCC*, the Tax Court was able to find that the supply by Emergis did not alter the substance of what was being done. As the evidence cited above makes clear, that is not the case here.

[65] These findings mean that all that is left as the basis for the Tax Court judge's conclusion on "administrative service" is his finding that, like the system operated by Emergis, the Visa network operated "with minimal decision making involved." But in my view, this factor is not capable on its own of supporting the conclusion that the Visa supply was an "administrative service," particularly when Visa sets all of the rules of the payment network and maintains decision-making authority in the application of those rules.

[66] In oral argument, the Crown submitted that it would be wrong to conclude that the Visa supply led to any real change in the nature of CIBC's business. All that it accomplished, the Crown argued, was to permit CIBC, which has long been in the consumer lending business, to make a different kind of consumer loan to its clients. The Crown went on to submit that "a loan is a loan is a loan," and that obtaining credit through a credit card is the same in substance as obtaining a line of credit.

[67] I would reject this submission. To treat a credit card as no different from a line of credit is to ignore the fundamental attributes of a credit card – that it is a widely accepted method of payment that permits the cardholder to obtain virtually instantaneous access to credit, and to use that credit at the point of sale to purchase goods and services.

[68] As already mentioned, the Crown also emphasizes the need for consistency, fairness, and predictability in determining what is a "financial service." In this case, the Crown submits, these important values require a decision identical to that in *GWL TCC*. I cannot, of course, disagree that like cases should be decided alike. But for the reasons I have attempted to express, I disagree that this case and *GWL TCC* constitute like cases.

[69] The conclusions to which I have come necessarily undermine the Tax Court judge's determination that the supply Visa provided to CIBC came within paragraph 4(2)(b) of the Regulations, and on that basis came within exclusionary paragraph (t) of the definition of "financial service." As noted above, the findings of the Tax Court judge that the supply came within inclusionary paragraphs (a), (i) and (l) are not disputed in this Court. It follows, in my view, that while the inclusions are established, no exclusion is made out. Therefore, the Visa supply to CIBC constituted a "financial service."

B. *Did the Tax Court judge err in interpreting the term "person at risk"?*

[70] Under the scheme of the Regulations, the question whether Visa was a "person at risk" arises only if the Visa supply was shown to be an "administrative service." I have concluded that it was not shown to be an "administrative service." This conclusion is also sufficient to dispose

of the appeal. I would leave the interpretation of "person at risk" to a case in which it would have a practical consequence.

VII. Proposed disposition

[71] I would allow the appeal with costs in this Court and the Tax Court, set aside the judgment of the Tax Court, and, giving the decision that the Tax Court should have given, refer the assessments back to the Minister for reconsideration and reassessment in accordance with these reasons.

"J.B. Laskin"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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