Federal Court of Appeal | Cour d'appel fédérale

Date: 20220915

Docket: A-233-20

Citation: 2022 FCA 154

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

CONTACT LENS KING INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Montreal, Quebec, on June 8, 2022.

Judgment delivered at Montreal, Quebec, on September 15, 2022.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] The appellant, a non-resident corporation that is in the business of selling contact lenses online, is challenging a judgment that was rendered by Justice Guy R. Smith of the Tax Court of Canada (TCC) on July 28, 2020 (reasons amended on July 31, 2020) and that is cited as 2020 TCC 71 (the Decision). The issue before Justice Smith (or the TCC judge) essentially concerned whether the supply of such lenses to customers residing in Canada is a zero-rated supply within

the meaning of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act), and more specifically, section 9 of Part II of Schedule VI of the Act (Section 9).

[2] A zero-rated supply is a supply taxed at zero percent, meaning that the supplier that makes this supply does not have to collect goods and services tax (GST) on it. Otherwise, the supplier collects GST, as set out in subsection 221(1) of the Act. In the case of a supplier outside Canada, this obligation, still in respect of taxable supplies, arises if, as provided for in paragraph 143(1)(b) of the Act, the supplier is GST "registered", which is the case for the appellant.

[3] Section 9 reads as follows:

Schedule VI, Part II	**Annexe VI, Partie II**
9 A supply of eyeglasses or contact lenses if the eyeglasses or contact lenses are, or are to be, supplied under the authority of a prescription prepared, or an assessment record produced, by a person for the treatment or correction of a defect of vision of a consumer named in the prescription or assessment record and the person is entitled under the laws of the province in which the person practises to prescribe eyeglasses or contact lenses, or to produce an assessment record to be used for the dispensing of eyeglasses or contact lenses, for the treatment or correction	**9** La fourniture de lunettes ou de lentilles cornéennes, lorsqu'elles sont fournies ou destinées à être fournies sur l'ordonnance écrite d'une personne, ou conformément au dossier d'évaluation établi par une personne, pour le traitement ou la correction d'un trouble visuel du consommateur qui y est nommé et que la personne est autorisée par les lois de la province où elle exerce à prescrire des lunettes ou des lentilles cornéennes, ou à établir un dossier d'évaluation devant servir à délivrer des lunettes ou des lentilles cornéennes, pour le traitement

of the defect of vision of the consumer.	ou la correction du trouble visuel du consommateur.

[4] The TCC judge ruled that in order to benefit from zero-rating, the appellant had to obtain and keep a copy of the prescription or assessment record (the Prescription) that was issued by a health care professional; this prescription is referred to in Section 9. According to the TCC judge, it was the only way for the respondent, represented here by the Minister of National Revenue (the Minister), to find that the appellant's Canadian customers had a Prescription for the treatment and correction of a defect of vision. The TCC judge held that this requirement was an essential condition for the supplies at issue to receive zero-rated status; he arrived at this conclusion based on an analysis of the language, context and purpose of Section 9 as well as of the duty to keep records, which also apparently stems from that section and, alternatively, from subsection 286(1) of the Act.

[5] The appellant argues that the TCC judge erred in his interpretation of these two provisions of the Act, which, in the appellant's view, do not impose on it a duty to obtain from its Canadian customers a copy of the Prescription referred to in Section 9 and keep that copy. The appellant further claims that the interpretation adopted by the TCC judge runs counter to the tax policy underlying the general zero-rating of supplies of contact lenses. Finally, the appellant criticizes the TCC judge for not having taken into consideration the evidence in the record showing that the appellant's Canadian customers, to be able to submit an order to the appellant for contact lenses for the treatment or correction of a defect of vision, must have a Prescription because those customers must provide the appellant with specialized biometric information that can normally only be found on a Prescription.

[6] For her part, the Minister conceded at the hearing that Section 9 does not go as far as stating that the supplier must absolutely obtain and keep a copy of the Prescription; however, she submits that this provision requires, at the very least, that reasonable evidence be provided of the Prescription's existence, which, according to the Minister, the appellant failed to do because the evidence that it submitted in this regard was strictly speculative. The Minister contends that there is therefore no reason to interfere with the decision of the TCC judge.

[7] For the reasons set out below, I am of the view that the appellant was not required under the Act to obtain and keep a copy of the Prescriptions relating to the supplies at issue, but that it still had to prove that the Prescriptions existed by providing sufficient and credible evidence. On this latter point, however, I consider that in finding that the appellant had not met this burden, the TCC judge did not commit any error that would justify this Court's intervention.

I. Background

[8] The facts relevant to this case are relatively straightforward and are, for all intents and purposes, undisputed. They are set out, in part, in an agreement filed by the parties before the TCC judge and are based in particular on the information posted on the website that the appellant runs for the purposes of its business (the Transaction Site) and on the testimony of the appellant's president, Samir Gad, who was the only witness heard at the trial.

[9] These facts can be summarized as follows:

(a) The appellant is a company incorporated in the United States; it has been in business since the early 2000s; it is an authorized reseller of four major brands of contact lenses; its customers are people who wish to replenish their supply of contact lenses at an attractive price;

(b) The appellant makes most of its sales in the United States but has had customers in Canada for several years; it has been a GST registrant under the Act since 2013; as such, it submits quarterly reports to the Minister on its Canadian sales; these reports show that it does not collect GST on the said sales; it does not collect it because it considers these sales to be zero-rated supplies;

(c) In December 2014, the Minister initiated an audit of the appellant's business, which covered the first three quarters of 2014; notices of assessment were issued as a result of this audit, the Minister being of the opinion that the sales that the appellant had made in Canada during this period were not zero-rated supplies because the appellant, who does not require that its Canadian customers provide a copy of the Prescription referred to in Section 9, was unable to provide evidence in this regard;

(d) Indeed, when the appellant sells contact lenses to a customer who is in Canada, that person is not required to seek to have his or her Prescription verified by a health care professional—this is contrary to what is done in the United States, where there is a legal requirement to do so under the *Fairness to Contact Lens*

Consumers Act; the appellant does not make this a requirement either, in particular for reasons related to competitiveness, and does not check whether the biometric information recorded on the order form matches the information on the Prescription or even whether the Prescription is still valid;

(e) However, for the appellant to fill an order from a Canadian customer, this customer must be able to provide the appellant with the biometric information—such as the base curve, diameter and strength for each eye—that is normally only found on a Prescription or, if one is not available, on the box of the contact lenses that the customer would like to reorder.

[10] The amount of GST that the appellant allegedly failed to collect for the audit period at issue is $29,770.97.

II. Decision

[11] Noting that Section 9 had never been the subject of judicial interpretation before, the TCC judge proceeded to analyze this provision by applying the well-known principle of statutory interpretation according to which "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Decision at para. 32, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed., (Toronto: Butterworths, 1983) at p. 87 (Driedger)). However, he pointed out, this time citing the Supreme Court of Canada in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 21 (*Placer Dome*),

that because of the degree of precision and detail characteristic of many tax provisions, “a greater emphasis has often been placed on textual interpretation” (Decision at para. 33).

[12] After listing what the TCC judge considered to be the five conditions for zero-rating set out in Section 9, the TCC judge determined that the appellant, in order to benefit from zero-rating, had to establish that each criterion had been met and could therefore not take these criteria for granted. According to the TCC judge, a textual analysis of the provision also shows that if a supplier does not obtain from its customer, as was the case for the appellant, evidence that a Prescription was prepared for this customer, the supplier is not in a position to verify whether (i) the lens order matches the Prescription; (ii) the Prescription was issued by an authorized person; (iii) the Prescription was issued for the customer who is named in that Prescription; and (iv) the lenses that were ordered will be used for the treatment or correction of a defect of vision (Decision at para. 36). The TCC judge also noted that Section 9 does not apply differently because the appellant only provides a contact lens replacement service (Decision at para. 40).

[13] The TCC judge then determined that this reading of the wording of Section 9 was perfectly consistent with the objective of Part II of Schedule VI of the Act, which, in his view, is to provide zero-rated status to the supply of medical devices—unlike the supply of devices sold for cosmetic, aesthetic or non-medical purposes—provided that the medical devices are supplied by, or under the supervision of, a health care professional (Decision at paras. 42–43). According to the TCC judge, this presupposes the existence of a Prescription prepared by a health care

professional (Decision at para. 46). For a supplier who cannot provide evidence that this Prescription exists, the supply of such devices is taxable (Decision at para. 47).

[14] In so finding, the TCC judge rejected the appellant's argument that Parliament intended to provide zero-rated status to the supply of contact lenses regardless of how they are sold in Canada because simply dispensing such lenses in Canada is not an act that provincial law reserves for health care professionals. In doing so, the TCC judge departed from provincial appellate court rulings establishing that the mere sale of contact lenses by a business operating in one province to a customer residing in another province was neither a violation of legislation governing the field of optometry nor an illegal practice of the profession. Indeed, according to the TCC judge, whether or not contact lenses sold in Canada by the appellant should be taxed does not depend on whether the appellant's commercial activities comply with applicable provincial regulations; it depends solely on the interpretation of Section 9 (Decision at para. 56).

[15] Finally, the TCC judge stated that he was of the opinion that the need to obtain and keep a copy of the Prescription relating to the dispensing of contact lenses to a Canadian customer also flowed from the appellant's duty to keep records; according to the TCC judge, this duty arose not only from the wording of Section 9, but also from the wording of subsection 286(1) of the Act, as evidenced by the TCC case law, which has repeatedly recognized the duty to keep records for zero-rated supplies (Decision at paras. 62–66).

[16] The TCC judge was of the view that his finding would not have been different even if he had accepted the appellant's submission that it was reasonable to assume that when customers

place an order, they have a Prescription in their possession, because in such a scenario, the appellant would not be able to verify whether the Prescription had expired. The TCC judge found that nevertheless, the testimonial evidence in the record did not make it possible to establish that the appellant had provided reasonable evidence that its Canadian customers had a Prescription in their possession within the meaning of Section 9 when they ordered contact lenses (Decision at paras. 61–62).

[17] In short, according to the TCC judge, it is not sufficient for "the appellant's website to inform consumers that they need a valid [P]rescription." For the supplies at issue to be zero-rated, the appellant must obtain and keep a copy of the Prescription; in his view, it is the only way to be able to conclude "that a consumer has a [P]rescription on hand 'for the treatment or correction of a defect of vision'" (Decision at para. 69).

III. Issues and standard of review

[18] The appellant submits that five issues arise in this appeal; the Minister is of the opinion that two issues arise in this appeal. In my view, the following two issues arise in this matter:

(a) Did the TCC judge err in finding that the appellant, in order for the supply of contact lenses to its Canadian customers to be zero-rated, had to obtain and keep a copy of the Prescription showing, for each customer, that the said lenses had to be used for the treatment or correction of a defect of vision?

(b) If he erred in so finding, did the TCC judge also err in holding that the appellant had failed to provide reasonable evidence of the existence of such Prescriptions for the supplies made during the audit period at issue?

[19] It is now settled law that the applicable standard of review on appeal with respect to the first issue—an issue of statutory interpretation—is that of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8 (*Housen*); *Canada v. Villa Ste-Rose Inc.*, 2021 FCA 35, [2021] F.C.J. No. 174 (QL) at para. 27 (*Villa Ste-Rose*)). As for the second issue, which is a question of fact or of mixed fact and law, it is, also according to *Housen*, only reviewable if there is a palpable and overriding error (*Housen* at para. 28).

IV. Analysis

A. *The appellant was not required by the Act, as a* sine qua non *of the zero-rating, to obtain and keep a copy of the Prescriptions for the supplies at issue.*

(a) It was not required to do so under Section 9.

[20] The TCC judge correctly identified the various components of Section 9. Thus, to be zero-rated, the supply of contact lenses must have the following characteristics:

(a) The lenses must be supplied, or be scheduled to be supplied, under the authority of a prescription prepared, or an assessment record produced, by a person;

(b) The persons issuing the prescription, or those producing the assessment record, must be authorized by the laws of the province in which they practise to prescribe contact lenses or to produce an assessment record to be used for the dispensing of contact lenses;

(c) The consumer must be named in the prescription or assessment record; and

(d) The prescription—or assessment record—must be prepared for the treatment or correction of a defect of vision.

[21] There is no dispute that each of these elements must be present to zero-rate a supply of contact lenses. Rather, the issue raised in this appeal is what is required to demonstrate that these elements are present. As we have seen, the TCC judge considered that the supplier must obtain and keep a copy of the Prescription. According to him, this is an essential condition. In other words, without this documentation, there is no way around it: the supply is taxable.

[22] Does Section 9 contain this requirement, without which zero-rated status cannot be demonstrated? The appellant does not think so because, in particular, that would be reading words into this provision, and as we have seen, the Minister concedes, as it were, that Section 9 does not go as far as to make it a *sine qua non* that the supplier obtain and keep a copy of the Prescription. At most, according to the Minister's arguments at the hearing, keeping the Prescription allows the supplier to provide the [TRANSLATION] "best evidence" that the conditions for zero-rated status to apply have been met.

[23] With respect, in my opinion, the TCC judge erred in extending the scope of Section 9 in this way.

[24] As required by the modern approach to statutory interpretation, the words of Section 9 are to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Driedger at 87, cited at para. 32 of the Decision).

[25] As this Court recently noted in *Villa Ste-Rose*, a case that also concerned the Act, this approach to interpretation "now applies to taxation statutes no less than it does to other statutes" (*Villa Ste-Rose* at para. 39, citing *Placer Dome* at para. 21 and referring to *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paras. 10–11; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 at para. 73; see also Pierre-André Côté and Mathieu Devinat, *Interprétation des lois*, 5th ed., (Montreal: Thémis, 2021) at p. 541–544 (Côté & Devinat)).

[26] More particularly with respect to the role that the words of a taxation statute play in this interpretative process, the Court also noted that although they can play a dominant role in this process when they are "precise and unequivocal", the analysis of the context and purpose of the Act "is also useful in all circumstances as it can reveal or resolve latent ambiguities in a provision that may appear to be unambiguous at first glance" (*Villa Ste-Rose* at para. 40, citing *Placer Dome* at paras. 21–22).

[27] As the appellant points out, the wording of Section 9 does not make any explicit reference to the fact that the contact lens supplier must obtain a copy of the Prescription from its customers and then keep that copy. There is therefore a risk in this case that the interpretation adopted by the TCC judge supplements the text of Section 9, which the courts must refrain from doing. In other words, the courts cannot, under the guise of interpreting legislation, read in words that are not there. This is the role of Parliament and not of the courts (*Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300 at para. 27, citing *R. v. McIntosh*, [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16 (QL) at p. 701). It is therefore appropriate to exercise considerable caution when dealing with an interpretation that, as is the case here, appears to supplement the legislation.

[28] Be that as it may, I am of the view that a few contextual elements weigh against the interpretation adopted by the TCC judge, namely, Parliament's objective in adopting Part II of Schedule VI of the Act, the internal structure of the Act, and—although it does not, in my opinion, have the scope that the appellant claims it has—the 1999 amendment to the text of Section 9.

(b) Objective of Part II of Schedule VI

[29] Even if the Act sets out the rule that all supplies are taxable and that therefore, zero-rated status is, as the Minister argues, an exception to this rule, Parliament's objective in adopting Part II of Schedule VI of the Act, which deals with the zero-rating of supplies of medical and assistive devices, appears to have been to ease the economic burden of persons who have a

disability or impairment and for whom these devices are a necessity—a social objective that supports a generous interpretation of Section 9.

[30] At least, that is the opinion of tax expert and author David Sherman, who has stated that there is no reason to treat the provisions of Part II of Schedule VI of the Act differently, in terms of their interpretation, from the provisions of sections 118.2 to 118.4 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), which deal with medical expense credits and credits for mental and physical impairments; according to a principle endorsed by this Court in *Johnston v. Canada*, [1998] F.C.J. No. 69 (QL), 52 D.T.C. 6169, these provisions must be given a broad and liberal interpretation and not a narrow and technical one (David M. Sherman, "Sch. VI – Part II – Medical and Assistive Devices: C. Liberal Interpretation Required" in *Canada GST Service: Analysis/Commentary* (Toronto: Thomson Reuters, 1990) at VI-173 (Sherman, "Sch. VI – Part II")).

[31] As David Sherman pointed out, Ontario courts have also endorsed this same principle in the context of tax exemptions provided for in the *Retail Sales Act*, R.S.O. 1990, c. R.31, and related to the purchase of medical equipment designed for the use of persons who have chronic issues or who have a disability or impairment. These courts held that these exemptions reflect important social values that justify that they be interpreted generously (*Toronto Transit Commission v. Ontario (Minister of Finance)*, 2008 CanLII 67910, [2008] O.J. No. 5251 (QL) (ONSC) at para. 68, aff'd 2009 ONCA 658, [2009] O.J. No. 3771 (QL); Sherman, "Sch. VI – Part II" at VI-173 and VI-174).

[32] I also fail to see why the provisions of Part II of Schedule VI of the Act should not, given their underlying objective, also be given a broad and liberal interpretation insofar as the text of these provisions allows for it. In this case, the TCC judge seems to have overlooked this contextual element as he did not mention it at all in the Decision. In my view, this undermines his reading of Section 9, which imposed such a stringent burden on the appellant to demonstrate the tax status of its supplies of contact lenses to its Canadian customers.

(c) Internal structure of the Act

[33] As the appellant points out, if Parliament had intended to impose specific obligations on contact lens suppliers with respect to obtaining and keeping supporting documents, it could have said so expressly, as it did elsewhere in the Act.

[34] As an example, the appellant cites what the Act requires of "registered" suppliers who claim input tax credits, which includes information prescribed by regulations, namely, the *Input Tax Credit Information (GST/HST) Regulations*, SOR/91-45. With respect to certain other zero-rated supplies, Schedule VI of the Act also contains specific provisions as regards obtaining and keeping supporting documents that may satisfy the Minister that the conditions for zero-rated status have been met. This is the case, in particular, for paragraph 1(e) and subparagraph 15.1(a)(v) of Part V, which concern the zero-rating of supplies of goods for export; these provisions require that the supplier concerned maintain evidence satisfactory to the Minister that some or all of the conditions for zero-rated status have been met. This is also the case for the definition of "continuous journey" in section 1, as well as for section 10 of Part VII,

which deals with the zero-rating of supplies related to certain transportation services. These two provisions also require that the supplier obtain and keep supporting documents, deemed satisfactory by the Minister, to establish that all or at least some of the applicable conditions for zero-rated status have been met.

[35] I am of the opinion that the definition of the term "prescription" in Part I of Schedule VI, which deals with the zero-rating of prescription drugs, is another example of more specific and compelling wording than the wording in Section 9 because it specifies that for supplies to be zero-rated, the prescription must, among other things, have been given to a pharmacist by a medical practitioner. Section 9 contains no such wording, which in my view made it risky, as the appellant argues, for the TCC judge to have relied on the definition of the term "prescription" in Part I of Schedule VI as a contextual element supporting his interpretation of Section 9.

[36] In short, when Parliament requires suppliers to keep supporting documents to substantiate their entitlement to certain benefits under the Act (zero-rated status for certain supplies, input tax credits), it seems that it does so explicitly. It did not do this in Section 9.

[37] In light of the principle that it is presumed that the legislature avoids superfluous words and does not speak in vain and that what it says in one case but does not say in another is presumed to reveal its intention (*Canada v. Canada North Group Inc.*, 2021 SCC 30, 2021 D.T.C. 5080 at para. 64, quoting *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846 at para. 36; Côté & Devinat at pp. 316–317; Ruth Sullivan, *Sullivan on the Construction of Statutes,* 7th ed., (Toronto: LexisNexis, 2022) at p. 211), I believe that the

TCC judge could not, without erring in law, give an interpretation to Section 9 that would require the supplier to obtain and keep a copy of the Prescription that the customer received from an optometrist or another eye specialist. It is a matter of the internal consistency of the Act. Again, the Minister does not seem—or at least no longer seems, according to the arguments made at the hearing—to disagree with this point of view.

(d) The 1999 Amendment

[38] In my opinion, the 1999 amendment to the text of Section 9 is another contextual element that weighs against the interpretation adopted by the TCC judge. It was at that time that the words "are supplied" in this text were expanded to "are, or are to be, supplied". Thus, contact lenses prescribed for the treatment or correction of a defect of vision, instead of only being eligible for zero-rated status when they are supplied under the authority of a prescription prepared by a person entitled under the laws of the province in which that person practises to prescribe contact lenses, as was the case up until that time, became eligible for zero-rated status not only if they were supplied under the authority of a prescription prepared by such a person, but also if they were "to be . . . supplied" under the authority of such a prescription.

[39] According to the material entered in the record in this case, Parliament's intention was to extend zero-rated status to the stages preceding the retail sale of contact lenses for the benefit of the various stakeholders in the supply chain—manufacturers, wholesalers and distributors—in order to "remove inconsistencies in treatment between different types of prescription eyewear and ease compliance burdens for suppliers, who currently must distinguish between those

pre-retail supplies that are zero-rated and those that are not" (Department of Finance, "Secretary of State Announces Sales Tax Measures Including a Change in the Effective Date Of Previously Proposed Passenger Transportation Measures", 1999-086 news release (October 8, 1999) at para. 5).

[40] According to an opinion issued by the Minister via the Canada Revenue Agency on October 2, 2000 (the October 2000 Opinion), this meant that henceforth, supplies could be zero-rated without a Prescription (at least for supplies made at the pre-retail level) provided that the contact lenses at issue were of the same type as those normally supplied under the authority of a Prescription (GST Headquarters Letters (online), *30920 GST/HST Interpretation Proposed Law*, "Application of GST/HST to Frame and Clip-on Sets: Specifically Designed for Prescription Eyeglasses" (October 2, 2000)).

[41] The appellant submits that the objective of the 1999 amendment was to ensure the zero-rating of the supply of contact lenses throughout the supply chain, namely, from the manufacturer to the consumer, provided that the lenses are used for the treatment or correction of a defect of vision. The appellant added that according to the October 2000 Opinion, this amendment meant that for a supplier to benefit from zero-rating, even at the stage of the sale to the consumer, it was no longer necessary to obtain a physical copy of the Prescription at each stage of the supply chain. It was sufficient for the Minister to be satisfied that the contact lenses at issue were of the same type as those that are normally supplied under the authority of a Prescription.

[42] The appellant goes on to argue that Parliament therefore intended to make unconditional the zero-rating of contact lenses supplied for the treatment or correction of a defect of vision.

[43] The TCC judge briefly discussed the 1999 amendment. He expressed the view that its objective was to provide zero-rated status to the sale of contact lenses before the final sale to the consumer (Decision at para. 39). However, he refused to give the expression "are to be . . . supplied" a meaning that would make the requirement to obtain a copy of the Prescription an optional step, therefore refusing to mitigate the imperative aspect of the word "supplied" (Decision at para. 37). From this, I understand that the TCC judge meant that the 1999 amendment did not have the effect of making the obligation to obtain a copy of the Prescription an optional step at the stage of the sale to the consumer by the retailer because otherwise, it would be virtually impossible for the contact lens manufacturers or distributors to fulfill this obligation given that it is impossible to associate a sale of lenses with a Prescription at these stages of the supply chain.

[44] The appellant claims that the TCC judge's position on this issue has the effect of imposing on the supplier—or the retailer—a heavier burden than the burden imposed on stakeholders in the contact lens industry who are involved earlier on in the supply chain, which would run counter to Parliament's intention. It also criticizes the Minister for doing an about-face by taking a position in this case that is contrary to the October 2000 Opinion; in the appellant's view, this opinion clearly shows that obtaining and keeping a copy of a Prescription are no longer required for zero-rating. This opinion reads as follows:

> An amendment has been proposed to section 9 of Part II of Schedule VI of the [Excise Tax Act] which will include in that provision corrective eyeglasses that are, or are intended to be, supplied under the written order of an eye-care professional for a consumer named in the order. The proposed amendment, which will apply to supplies made after October 8, 1999, will extend zero-rated status to supplies of corrective eyeglasses made at the pre-retail level, i.e. from manufacturing or distributor to the retailer. The proposes amendment has the effect of providing zero-rated status to a supply made in the absence of a written prescription from an eye-care professional issued to a customer. The eyeglasses must still be of the type that are supplied under a written order by an eye-care professional for the treatment or correction of vision of a customer named in the order, i.e. prescription eyeglasses. …

[45] Therefore, according to the appellant, the determining factor in establishing whether a supply of contact lenses is taxable or zero-rated has not been, since 1999, the way in which these lenses are sold; rather, this factor is the requirement that the lenses be of the same type as those supplied to a consumer under the authority of a Prescription. The appellant submits that this is the understanding of all those in the business of selling contact lenses online in Canada. However, there is no evidence to this effect in the record.

[46] It is settled law that an administrative practice that is based on an administrator's interpretation of a statutory provision that the administrator is responsible for applying is not binding on the courts but can nevertheless be an "important factor" to be considered in case of doubt about the meaning of this provision (*Placer Dome* at para. 40, citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 83 D.T.C. 5041 at p. 37).

[47] In this case, I find that the appellant is going too far and that the words "are supplied" were expanded to "are, or are to be, supplied" for the benefit of manufacturers, wholesalers and distributors and not for the benefit of retailers, i.e., those who do business directly with the

consumer who pays the tax. I am of the view that this is how the October 2000 Opinion should be construed; this opinion clearly concerns “pre-retail level” sales and, in my opinion, best reflects the purpose of this amendment.

[48] In my view, this purpose was not to make the zero-rating of contact lenses unconditional; this position appears to me to be inconsistent with the text of Section 9. Otherwise, it would be appropriate to consider why Parliament did not amend the rest of the text of Section 9, which retained the requirement that, in order to be zero-rated, the lenses must have been supplied under the authority of a Prescription for the treatment or correction of a defect of vision of a consumer named in the Prescription prepared by a person entitled under the laws of the province in which the person practises to prescribe contact lenses for the treatment or correction of the defect of vision of the consumer. It seems to me that if Parliament had wanted to make the zero-rating of contact lenses unconditional, it would have taken a different approach. On this point, I agree with the TCC judge that the term “supplied” continues to have meaning and remains fully relevant.

[49] That said, the 1999 amendment also unquestionably reflects Parliament’s intention to adopt a more flexible approach with regard to the conditions for the zero-rating of contact lenses sold for the purpose of treating or correcting a defect of vision, as well as with regard to what is needed to demonstrate that these conditions have been met.

[50] Therefore, in my opinion, it cannot have been Parliament’s intention to ease the compliance burden on manufacturers and distributors to this extent while requiring that retailers meet a burden as stringent as the one imposed on them pursuant to the TCC judge’s

interpretation. It must be recalled that retailers are involved at the stage of the supply chain that has the most direct impact on the consumer who is supposed to benefit from the zero-rated status. As we have seen, a generous interpretation is warranted.

[51] In short, I am of the opinion that Section 9, both by its wording as amended in 1999 as well as by its underlying objective and the internal structure of the Act, did not impose on the appellant, as a *sine qua non* for the zero-rating of its Canadian supplies, the burden of obtaining and keeping the Prescriptions of its Canadian customers.

[52] However, this did not relieve the appellant of the burden of demonstrating, by means of reasonable or [TRANSLATION] "sufficient and credible" evidence, that its supplies to its Canadian customers qualified as zero-rated supplies. In my opinion, to hold otherwise would drain Section 9 of its substance.

[53] Therefore, the interpretation upon which I prefer to rely in no way affects, within the limits that it imposes, the auditing power conferred on the Minister under the Act. What this interpretation essentially implies is that the Minister, when performing an audit of supplies referred to in Section 9, cannot decide to tax such supplies on the sole basis that the supplier or retailer did not require from its customers a copy of the Prescriptions related to its supplies and did not keep this copy on file.

[54] Now, does subsection 286(1) of the Act allow the Minister to do so? In my view, it does not.

(e) Subsection 286(1) of the Act is of no assistance to the Minister.

[55] The TCC judge ruled that if there was any doubt as to the obligations imposed on a registered retailer for a supply to receive zero-rated status under Section 9, including the obligation to obtain and keep a copy of the Prescription, this doubt was removed by subsection 286(1) of the Act, pursuant to which any person required to file a return under the Act shall keep "records". The TCC judge further stated that on the basis of the settled case law of the TCC, this obligation would apply to zero-rated supplies (Decision at paras. 64–65).

[56] The appellant essentially argues that subsection 286(1) of the Act only requires that records be kept of the accounting and financial documentation needed to determine the amount of tax to be collected and remitted, and that by ruling that this provision requires that Prescriptions be obtained and kept, the TCC judge gave it a scope of application that it does not have.

[57] The appellant adds that the two decisions cited by the TCC judge—namely, *1882320 Ontario Inc. v. The Queen*, 2019 TCC 81, 2019 D.T.C. 1077 (*1882320 Ontario*) and *Nwaukoni v. The Queen*, 2018 TCC 252, 300 A.C.W.S. (3d) 212 (*Nwaukoni*)—in support of his assertion that the TCC has repeatedly applied subsection 286(1) to zero-rated supplies did not support his finding that the duty to keep records extends to documents other than accounting or financial documents, such as the Prescriptions referred to in Section 9.

[58] The Minister did not address this issue in her memorandum; she was of the opinion that it was superfluous because in her view, even assuming that the appellant had not been required to obtain and keep a copy of the Prescriptions for the supplies at issue, the evidence in the record did not support the conclusion that the appellant had met, for the reporting periods at issue, the substantive conditions for zero-rated status to apply pursuant to Section 9.

[59] Subsection 286(1) is in Subdivision C, entitled "General", of Division VIII of the Act, which relates to the administration and enforcement of the Act. This subsection reads as follows:

Keeping books and records	**Obligation de tenir des registres**
286 (1) Every person that carries on a business or is engaged in a commercial activity in Canada, every person that is required under this Part to file a return and every person that makes an application for a rebate or refund shall keep all records that are necessary to enable the determination of the person's liabilities and obligations under this Part or the amount of any rebate or refund to which the person is entitled.	**286 (1)** Toute personne qui exploite une entreprise au Canada ou y exerce une activité commerciale, toute personne qui est tenue, en application de la présente partie, de produire une déclaration ainsi que toute personne qui présente une demande de remboursement doit tenir les registres permettant d'établir ses obligations et responsabilités aux termes de la présente partie ou de déterminer le remboursement auquel elle a droit.

[60] As is clear from its wording, this provision creates an obligation for every person who is bound under the terms of Part IX of the Act, which concerns GST, to keep records. This obligation is important because the Canadian tax system, it should be recalled, is based on the principles of self-assessment and self-reporting; this is why the Minister has been given broad powers to ensure compliance (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 90 D.T.C. 6243 at p. 648).

[61] Subsection 2(1) of the Act defines the documents and information that "are included in the records". Pursuant to subsection 286(1.1), the Minister may always specify the form a record is to take and any information that the record shall contain. In 2013, the Minister published a guide that aims to use "plain language to explain the most common requirements for keeping records" (Canada Revenue Agency, *Keeping Records* (Guide), RC4409, (Ottawa: CRA, 2013) at p. 2 (*Keeping Records Guide*)).

[62] According to this guide, records are "accounting and other financial documents that should be kept in an organized way" and that are "generally substantiated by supporting documents", namely, documents that provide "evidence of transactions". Ultimately, records "summarize the information contained in the supporting documents" (*Keeping Records Guide* at p. 4).

[63] As the appellant points out, it is true that the documents listed in the *Keeping Records Guide* as examples of supporting documents are accounting or financial in nature and that, unlike prescriptions that health care professionals issue to their patients, these documents generally attest to transactions in which the taxpayer concerned is a party. However, this guide specifies that the list of these examples is not exhaustive (*Keeping Records Guide* at p. 4). This reflects the fact that the list of documents and information in the definition of the term "record" in the Act is itself not exhaustive, as evidenced by the introductory words of the said definition: "***record*** includes …" / "***registre*** Sont compris parmi les registres …". Therefore, efforts should be made not to use the *Keeping Records Guide* to draw firm conclusions on the specific meaning to be given to the term "records".

[64] Be that as it may, in my opinion, the problem that lies in the TCC judge's position on subsection 286(1) of the Act is that it has long been recognized that the concepts of "records" and of their sufficiency, for the purposes of determining whether a taxpayer has complied with this provision, are vague and subjective and are more a question of fact than a question of law, subject to express statutory requirements that the taxpayer must satisfy. Therefore, each case must be assessed on its merits, including by means of testimonial evidence, provided that it is credible (David M. Sherman, "Division VIII: 286 – Keeping Books and Records" in *Canada GST Service: Analysis/Commentary*, (Toronto: Thomson Reuters, 1990) at 286-103-104, 108.2-111; *Chandan v. The Queen*, 2005 TCC 685, D.T.C. 1563 at para. 34, 59; *Rotondi v. The Queen*, 2010 TCC 378, 192 A.C.W.S. (3d) 668 at paras. 16–17).

[65] Ultimately, records, to satisfy the obligation created by subsection 286(1), must be "proper" (*P.R. Investments Inc. v. The Queen*, 2006 TCC 686, [2006] G.S.T.C. 160 at para. 4), and the fact that they do not contain everything that the Minister would have liked them to contain is not necessarily fatal (*Atlantic Mini & Modular Homes (Truro) v. The Queen*, [1999] T.C.J. No. 431 (QL), 7 G.T.C. 3197 (TTC) at para. 25).

[66] *1882320 Ontario* and *Nwaukoni*, which were cited by the TCC judge in support of his interpretation of subsection 286(1), do not state otherwise. While these decisions emphasize the importance of keeping records in accordance with subsection 286(1) of the Act, they note that it is ultimately the sufficient and reliable evidence test, which may include testimonial evidence, that must be met by taxpayers defending themselves against a notice of assessment issued by the Minister (*Nwaukoni* at para. 14; *1882320 Ontario* at para. 28).

[67] Both cases involved taxpayers who claimed that the supplies at issue—motor vehicles—were zero-rated supplies because they were sold abroad and were therefore intended for export. It is important to note that under subsection 1(e) of Part V of Schedule VI of the Act, these taxpayers were expressly required to maintain "evidence satisfactory to the Minister" of the exportation of the supplies at issue. As we have seen, Section 9 does not contain any such requirement. In this sense, these two cases certainly do not have the effect sought by the TCC judge.

[68] In short, the Act does not dictate the specific contents of the records referred to in subsection 286(1). Whether a person referred to in this provision kept proper records is a question of fact. In the Minister's view, an incomplete record is not in itself fatal because ultimately, taxpayers can provide sufficient and credible evidence to establish the merits of their claims against the notice of assessment that they are challenging. This includes testimonial evidence.

[69] Consequently, I am of the opinion that the TCC judge erred in law insofar as he added into subsection 286(1) of the Act a requirement that does not appear in that subsection, namely, the requirement that the appellant would have had to obtain and keep, within the records that it maintained under that subsection, a copy of the Prescriptions issued to its Canadian customers by health care professionals. These records, however important they may have been, provided a way, but not the only possible way, to determine the tax status of the supplies at issue during the reporting periods referred to in the notices of assessment issued by the Minister.

[70] Having determined that Section 9 does not impose such a requirement, I am of the opinion that the TCC judge could not use subsection 286(1) to compensate for this silence without erring. Under the circumstances, the question that he had to ask himself was whether the appellant had submitted sufficient and credible, or reasonable, evidence making it possible to conclude that the supplies at issue in this case were zero-rated supplies within the meaning of Section 9; the TCC judge asked himself this question in the alternative.

[71] This brings me to the second part of this appeal.

B. *In finding that the appellant had not provided reasonable evidence that the supplies at issue were zero-rated, the TCC judge did not make any errors that would warrant this Court's intervention.*

[72] The evidence in the record is rather succinct. The TCC judge, in paragraphs 11 to 15 of the Decision, which are in the summary of the facts section, referred to two excerpts from the Transaction Site and gave a brief overview of the testimony of the appellant's main representative, Mr. Gad. Essentially, the excerpts in question indicate that:

(a) it is important for U.S. residents to have the validity of the prescription referred to on an order verified;

(b) orders from outside the United States are not verified; and

(c) customers who do not have a Prescription on hand can "[t]ake a look at one of [their] contact lens boxes" to see "the brand name and prescription parameters . . . indicated on the box";

[73] On the basis of Mr. Gad's testimony, which he found "candid and honest", the TCC judge noted that (i) Canadian consumers are not required to provide a Prescription and that (ii) it is assumed that they have a valid Prescription and that the information entered on the order form is indeed the information shown on the Prescription.

[74] In his analysis, the TCC judge asserted that if he had erred in finding that Section 9 requires that a copy of a valid Prescription be obtained and kept as an essential condition for zero-rated status, the "testimony does not support the conclusion that the appellant had 'reasonable proof' that a prescription had been issued" (Decision at para. 62). I understand that this assertion is based on Mr. Gad's explanations that it is assumed that when Canadian customers place an order, they have a valid Prescription in their possession and that the information that they enter on the order form reflects the information shown on the Prescription.

[75] The appellant's evidence was sparse and based on assumptions and deduction, without any verification. This is what led the Minister to state that the appellant had not discharged its burden of demonstrating, by means of reasonable evidence, that the supplies at issue in this case met the conditions of Section 9.

[76] I would point out that the error is palpable if it is plain to see and that it is overriding if it also leads to a wrong result (*Housen* at paras. 4–5). This standard requires that I, as an appellate judge, accord a high degree of deference to the TCC judge's findings of fact and inferences of fact (*Housen* at paras. 10–21) and to any findings of mixed fact and law that he may have made (*Housen* at para. 36).

[77] As I have already mentioned, the appellant submits that given the specific and specialized nature of some of the information required to place an order, Canadian customers must have a Prescription in their possession because the consumer cannot reasonably be expected to know this information without such a document. As evidence, the appellant provided the list of this information, which is posted on the transaction page of the appellant's website (Appeal Book at p. 83).

[78] The appellant also argues that the TCC judge should have taken into account the legislative framework governing the practice of optometrists and opticians. It submits that he would thus have found that in Quebec, for example, these health care professionals must maintain and keep, at the place where they practise their profession, a record for each of their patients; that an expiration date is not information that must be entered in patient records (*Regulation respecting the keeping of the optometrical record*, C.Q.L.R., c. O-7, r. 20, s. 2.02); that an optometrist is authorized to give a prescription verbally (*Règlement sur les ordonnances verbales ou écrites d'un optométriste*, C.Q.L.R., c. O-7, r. 15, art. 5); and that such a prescription is only required to state a period of validity if warranted by the patient's condition (C.Q.L.R., c. O-7, r. 15, art. 1(6°)).

[79] In light of the evidence in the record and this legislative framework, the only finding that the TCC judge had to make, according to the appellant, is that this evidence [TRANSLATION] "attests to the existence, for each consumer who acquired contact lenses from the appellant, of a prescription or an assessment record that has been kept by a person entitled, under the laws of the province in which the person practises, to prescribe contact lenses for the treatment or correction

of the defect of vision of any such consumer" (Appellant's Memorandum of Fact and Law at para. 76). In its view, this evidence was sufficient, on a balance of probabilities, to rebut the presumption that the notices of assessment at issue in this case were valid.

[80] Is the fact that the TCC judge did not accept these arguments a palpable and overriding error? In my view, it is not.

[81] The TCC judge was asked to make inferences of unknown facts (the existence of a Prescription) based on known facts (the information that must accompany an order form) against the backdrop of the regulatory framework governing the practice of optometrists and opticians in Quebec. He was asked to do so when he also had Mr. Gad's candid testimony before him indicating that the appellant does not perform any verification of the validity of the Prescription, which is assumed to exist, or of the information entered on the order form. This testimony put into perspective the information posted on the Transaction Site regarding the supplies that the appellant made in Canada.

[82] I would point out that even though the appellant was not required to obtain and keep a copy of the relevant Prescriptions, the appellant, in order to demonstrate that it was entitled to zero-rating, was still required to provide [TRANSLATION] "sufficient and credible" evidence of their existence.

[83] However, the task of whether or not to make inferences or presumptions of fact is a core function of the trier of fact. As we have seen, an appellate court can only overturn the resulting

conclusions in the presence of a palpable and overriding error (*Housen* at para. 21; see also *Tiger-Vac International inc. c. Mambro*, 2021 QCCA 53, [2021] J.Q. No. 129 at para. 18). Furthermore, however tempting it may be, an appellate court "must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities" (*Housen* at para. 3, citing *Underwood v. Brown* (1987), 12 B.C.L.R. (2d) 199, [1987] B.C.J. No. 470 (BCCA) at 204).

[84] To use the well-known metaphor, when arguing palpable and overriding error, it is not enough "to pull at leaves and branches and leave the tree standing. The entire tree must fall" (*Canada v. South Yukon Forest Corp.*, 2012 FCA 165, [2012] F.C.J. No. 669 (QL) at para. 46).

[85] Here, I cannot conclude that the appellant was successful, especially since the evidence in the record shows that the appellant can do more to discharge its burden of meeting the conditions for Section 9 to apply. Indeed, Mr. Gad testified that since its disputes with the Minister over the notices of assessment at issue in this case, the appellant now requires that Canadian customers who place an order with it attest that they have a Prescription in their possession. This requirement did not exist at the material time, and in this context, it is not for this Court to assess its impact on the burden that the appellant must meet. The issue is bound to arise at some point.

[86] Nor is there any evidence that the appellant performs random checks or that it asks, but does not require, customers who are willing to do so to send it a copy of their Prescription. Although the appellant is not required to provide them to the Minister, nothing is preventing it from doing so of its own volition in keeping with the best evidence rule.

[87] It is this total lack of even the slightest amount of effort that, I think, led the TCC judge to find, in the alternative, that the appellant had not met its burden of establishing, by means of sufficient and credible evidence, the existence of Prescriptions for the supplies taxed by the Minister. Given the little leeway that I have, I cannot criticize the TCC judge, in light of the evidence in the record, for having ruled as he did because there was some evidence upon which he relied to reach his conclusion on this point (*Housen* at para. 1).

[88] I would therefore dismiss the appeal, but because success is divided, I would do so without costs in this Court.

[89] Pursuant to the Practice Direction issued by the Chief Justice of this Court on September 9, 2022, to members of the legal profession and all parties to proceedings in this Court, the designation of the respondent in this appeal was changed to “His Majesty the King”.

“René LeBlanc”

J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Mary J. L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
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