Docket: 2009-3904(GST)G

BETWEEN:

SURREY CITY CENTRE MALL LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on January 17, 18 and 19, 2012 at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Joel A. Nitikman<br>Jessica Fabbro |
| Counsel for the Respondent: | Ron D.F. Wilhelm<br>Bruce Senkpiel |

---

## JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, for the reporting period from July 1, 2002 to July 31, 2002, is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with and for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada this 2nd day of October 2012.

"J.E. Hershfield"

Hershfield J.

Citation: 2012 TCC 346
Date: 20121002
Docket: 2009-3904(GST)G

BETWEEN:

SURREY CITY CENTRE MALL LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Hershfield J.

## Background

[1] The Appellant (Mall Co) has appealed an assessment for GST (the "Appeal") made under subsection 182(1) of the *Excise Tax Act* (the "*Act*").

[2] At all relevant times, Mall Co was a wholly owned subsidiary of ICBC Properties Ltd. ("IPL") which, at all relevant times, was a wholly owned subsidiary of The Insurance Corporation of British Columbia ("ICBC")[1] which is a provincial Crown Corporation operating a mandatory scheme of motor vehicle insurance in British Columbia. IPL, or its subsidiaries, managed all of ICBC's real estate investments.

[1] This was the structure in 2002 when the transaction giving rise to the assessment under appeal occurred. According to the pleadings, IPL was wound-up in 2004 at which time the Appellant, Mall Co, became a wholly owned subsidiary of ICBC.

[3] At all relevant times, Mall Co and ICBC were both registrants for the purposes of Part IX of the *Act*.

[4] A series of transactions led to Mall Co acquiring lands in Surrey, British Columbia in 1999 and 2000. These lands were intended to be used for the development of a mall and university space for the Technical University of British Columbia ("Tech BC") created by an enactment of the legislature of the Province of British Columbia (the "Province") to own and operate a new university in Surrey.

[5] To document the respective undertakings of the parties, a series of agreements were entered into amongst them. Each of these agreements will be discussed under the next heading. They include a Development Agreement which was entered into among Mall Co, ICBC, Tech BC and the Province as represented by the Minister of Advanced Education Training and Technology (the "Authorized Ministry") in 2000 whereby, in general terms, the Appellant agreed to develop and construct a mall and the university space. Under that agreement, Mall Co agreed to lease the university space to Tech BC and Tech BC agreed to lease the space from Mall Co. ICBC agreed to fund Mall Co's obligations under the agreement to complete the university space.

[6] The development proceeded. ICBC advanced funds to IPL which in turn advanced such funds to Mall Co in respect of the project. However, in 2002, the Province closed Tech BC and announced that it would not fulfill its obligations to lease the university space.[2]

[7] After negotiations between ICBC and the Province, a Settlement Agreement was entered into among ICBC, Mall Co, IPL, Tech BC and the Province, as represented by the Authorized Ministry. Under the Settlement Agreement, Tech BC agreed on behalf of itself and the Province to pay to ICBC or its nominee $41.1MM (the "Payment") in exchange for ICBC, IPL and Mall Co releasing Tech BC and the Province from all obligations under the Development Agreement and related agreements.[3]

[8] The Payment was made but there is no agreement between the parties to the Appeal as to whom the Payment was intended to be made or benefit or on whose behalf it was received although it is not in dispute that the Payment was directed to

---

[2] According to the pleadings, Tech BC was dissolved in 2003.

[3] Tech BC agreed on behalf of itself and the Province – i.e. denotes agency.

and received in the bank account of ICBC. It is also not in dispute that after ICBC received the Payment, Mall Co's books showed a reduction in its liability to IPL in the amount of $41.1MM.

[9] In December 2005, the Minister of National Revenue (the "Minister") assessed ICBC for GST in respect of the Payment under subsection 182(1) of the *Act*. That provision would be applicable if ICBC received the Payment for the termination of an agreement to make a taxable supply. The taxable supply said to have been agreed to was a lease. ICBC was asserted to be the supplier of the lease right. Subsection 225(1) of the *Act* calculated the net tax payable based on the amount received by ICBC. In the alternative, the Minister pleaded that Mall Co was the party that made the taxable supply but that ICBC was still liable for the net tax under subsection 225(1) as the recipient of the payment on behalf of Mall Co. ICBC appealed, pleading, *inter alia*, that Mall Co was the party under the Development Agreement that made the supply and that ICBC incurred no liability under subsection 182(1).

[10] The Minister consented to judgment in favour of ICBC and proceeded with the assessment now under appeal on the basis that Mall Co was the party that made the taxable supply and received the Payment. The assessment against Mall Co relates to the period from July 1, 2002 to July 31, 2002 and is for $2,405,055.67 plus penalties and interest.

[11] The Appeal launched by Mall Co now denies liability under subsection 182(1).

## Further Background and Particulars of the Agreements and Related Documents

[12] Background documentation establishes that in 1998 ICBC, in an effort to diversify its investments, decided to invest in real estate. It became aware of an opportunity to become the lead developer in a major project integrating Tech BC with office and retail space in Surrey, British Columbia. ICBC made all the preparatory plans to purchase the requisite lands and develop and finance the project with fixed targets for its development profit and return on funds invested. Research and analysis was undertaken by planners and financial advisors retained by ICBC. There is no doubt that from the outset Tech BC, as the promised anchor tenant, was a critical player in this entire project. However, as noted throughout these Reasons, while that "promise" was made by both the Province and Tech BC, the promise ultimately relied on was that of the Province.

[13] In September of 1999, ICBC, Tech BC and the Province, as represented by the Authorized Ministry, executed a Memorandum of Understanding ("MOU") that underlined the significant contributions of ICBC and Tech BC and the Province including ICBC's proposed significant financial investment in the project. While the MOU anticipated the chain of subsidiary corporations that unfolded to carry out the ownership, development and operation of the project, the financing responsibility imposed on ICBC and the mutual reliance that all the parties to the MOU placed on each other is very evident.

[14] Although the pleadings suggest that the MOU is not a legally binding agreement,[4] it sets the project out in considerable detail. The entire project to be developed by ICBC had several components and more than one phase. In the first phase Tech BC was to lease 425,000 square feet of space designed and built for it and ICBC was to develop up to 250,000 square feet for its own use. As I understand it, the first phase also included the redevelopment of the existing adjacent Surrey Place Mall that ICBC had acquired (the "Surrey Mall"). The redevelopment of the Surrey Mall was to include the development of neighboring parcels that were to be assigned by Tech BC to the project on a partnership basis. The redevelopment of the Surrey Mall was conditional on agreements being reached with three major retailers whose tenancies were critical to the success of that part of the project.[5]

[15] It is also evident from the MOU, that the base rent Tech BC was required to pay to the corporation in the chain of ICBC subsidiaries that was to become the legal owner of the subject property (which turned out to be Mall Co), was fixed by a formula. That formula depended on two numbers: the "base building budget" and the "lease rate". The lease rate itself was set out in the MOU as an effective annual interest rate of 7%. The base building budget was said to be set out in an appendix. Although the appendix was not in evidence, I accept the Appellant's witness's testimony that the base building budget was "basically" frozen at $82.9MM at the time of entering into the MOU. The MOU formulates the base rent at $7MM payable at the commencement of the lease plus: the base building budget amount

---

[4] Asserted in the Notice of Appeal and admitted in the Reply. As well, an executed cover page to the MOU refers to it as representing "the essence of an agreement". However, also asserted in the Notice of Appeal and admitted in the Reply is that in September of 2009, the Province approved the joint development proposal involving ICBC and Tech BC.

[5] See paragraph 6.2 of the Mutual Objectives and Endowment Agreement which provides for the requirement to reach agreements with the Bay, Sears and Extra Foods stores.

less $21MM[6] amortized at the lease rate over the 25 year term of the lease payable monthly on the first of each month from commencement of the lease.

[16] The base building budget was essentially a turnkey development cost amount requiring ICBC to be responsible for cost overruns subject to very limited exceptions where adjustments specified in the MOU were to be allowed. For example, the base building budget could change by adjusting for final construction financing costs and for cost increases resulting from delays, or change orders, caused by or required by Tech BC.

[17] In March 2000, three agreements were entered into, all effective on the same day in March of that year. The first agreement, the Mutual Objectives and Endowment Agreement (the "MOEA") was entered into by Mall Co, the Province, as represented by the Authorized Ministry, and Tech BC. It committed the Province and Tech BC to assign to Mall Co certain of the requisite lands that Tech BC had a right to acquire from the City of Surrey to Mall Co. These endowment lands were referred to as the Surrey Lands and would earn Tech BC an endowment payment of $1.625MM (being 50% of the stipulated phase one development profit) plus a 50% interest in the profit earned from the development of additional endowment parcels.[7] The MOEA also confirms Tech BC making a further substantial contribution to the project by becoming a major tenant.

[18] The MOEA sets out in some detail future development plans for the Surrey Lands. In very general terms these plans provide for the development of contiguous parcels for the benefit of the parties and include Tech BC having a right to acquire back a parcel of land for $1 for the construction of further university space.

[19] The MOEA clearly commits Mall Co to the development of the initial space for Tech BC and has a binding arbitration provision.

---

[6] According to the pleadings, the $21MM reduction in the base building budget that was to be amortized in the calculation of rent was $7MM to reflect the initial rent payment on commencement of the lease plus a $14MM option fee payment at the end of the lease.

[7] The MOEA calculates this initial endowment payment as 50% of the $10.00/sq ft stipulated profit that relates to a deemed percentage of the phase one development of 1,000,000 sq ft. The deemed percentage is the percentage that the uncommitted 325,000 sq ft is of the total leasable space of 1,000,000 sq ft. That is, 50% x 32.5% x (1,000,000 x $10).

[20] Mall Co's commitment to the development of initial space for Tech BC as provided for in the MOEA is said to be pursuant to the Tech BC Lease as contemplated in the Development Agreement. The Development Agreement is the second of the three agreements signed in March, 2000.

[21] The parties to the Development Agreement were Mall Co, ICBC, Tech BC and the Province as represented by the Authorized Ministry. The Development Agreement details the construction terms for the initial Tech BC space and confirms the turnkey base building budget with limiting adjustments not dissimilar from those set out in the MOU. Details of completion, turn over and the lease commencement date of the Tech BC space are set out. The base rent is set out by the same formula set out in the MOU. There is provision for a lease inducement payment[8] of $700,000 payable on delivery of certain completion certificates. The Development Agreement has a binding arbitration clause. As a party to this agreement, ICBC has the right to seek arbitration on any dispute under the agreement. That would appear to include a dispute relating to the lease which would not be extraordinary since as the party financing the project it has an interest in the lease.

[22] As well, the Development Agreement has specific provisions pertaining to ICBC's covenants:

> **Agreements related to Current Project**
>
> 4.1 ICBC Mall Co. and ICBC agree that they will not directly or indirectly sell a majority position in, or relinquish control of management of, the Current Project until such time as it is substantially complete but, subject to the foregoing, ICBC Mall Co. and ICBC shall not be precluded from:
>
> (a) obtaining financing on the Current Project, so long as the other terms of this Agreement and the Surrey Lands Agreement are complied with; or
>
> (b) entering into joint ventures or other similar agreements with another party or parties in respect of all or parts of the Current Project provided that ICBC Mall Co. and ICBC shall each remain fully responsible for its respective obligations under this Agreement.

[8] The $700,000 payment is included in paragraphs 3.6 and 3.7 of the Development Agreement as a "one-time payment". The $700,000 payment is referred to as a lease inducement payment in the Appellant's and Respondent's written submissions.

**Agreements of ICBC**

4.2 ICBC agrees, whether or not any of the matters referred to in §4.1 have occurred, to fund:

(a) to completion ICBC Mall Co.'s obligations to complete the Initial University Space;

(b) any payments required pursuant to the Surrey Lands Agreement in respect of the completion of Development Goal #1 and Development Goal #2; and

(c) any repayment or return of the Security Deposit required under the TechBC Leases(s), including the drawdown of the Security Deposit commencing in the twentieth year of the Term.

[23] Further, as a party to the Development Agreement, there are many other provisions of that agreement that impose obligations on ICBC. For example, paragraph 3.6 which sets out the base rent calculations (the full text of which is appended to these Reasons as Appendix A) includes a sentence that the *parties* have contemplated the gross buildable area for Tech BC's rental space would be approximately 425,000 square feet and under one of the provisions dealing with design change orders, namely paragraph 2.7, ICBC, not Mall Co, is included in the obligation to meet and identify promptly changes in design plans. As well, paragraph 3.8 provides:

**Lease Delivery Agreement**

3.8 The parties agree that they will enter into the Lease Delivery Agreement attaching the settled form of the TechBC Lease and providing:

(a) instructions to complete certain blanks in the form with information as it becomes available;

(b) providing how certain information or amounts will be obtained or calculated;

(c) providing for how any dispute as to the completion of the blanks or the calculation of any amount will be resolved.

[24] The form of lease referred to in the Development Agreement is attached to that agreement and consists of 56 pages of lease terms. However, the basic terms set out in the first 4 pages are replete with blank spaces that are required to be filled in. The Lease Delivery Agreement provides details for determining various essential terms of the lease and filling in the blank spaces in the form of a lease attached to the Development Agreement.

[25] The Lease Delivery Agreement, in addition to being an attachment to the Development Agreement, exists as a stand alone document and is the third agreement executed in March 2000. The parties to that agreement were Mall Co and Tech BC. The Lease Delivery Agreement has a binding arbitration provision which provides as follows:

> (a) If there is any dispute as to the completion of any part of the Lease pursuant to this Agreement, *the dispute shall be resolved by arbitration as contemplated in the Development Agreement* but the terms of the Lease shall continue to apply. If the dispute involves a monetary matter, the Tenant will pay the amount specified. [Emphasis added.]
>
> (b) Pending resolution of any dispute in respect of the Lease Form, the Tenant will occupy the Leased Premises on the terms and conditions (including the payment of Rent) specified by the Landlord and, upon receipt of a final decision of any arbitration or agreement by the parties, the parties will make such adjustments as may be required including, if applicable, the payment of interest at the Default Interest Rate on adjusted amounts.
>
> (c) In completing the Lease Form, all square bracketed provisions or instructions will be deleted.
>
> (d) The parties agree to act reasonable, diligently and in good faith to resolve, at the appropriate time, all documentation called for herein or to agree upon or settle any dispute or difference with regard to completion of the Lease Form.

[26] This was the state of the agreements when the construction of the project commenced. According to the Appellant's witness, the construction of the building, designed to accommodate Tech BC's specific needs, was about half complete in February of 2002 when the Province announced that Tech BC would no longer operate a university and would not fulfill its obligation to enter into the subject lease. Correspondence from ICBC, signed by the President and CEO, in May 2002 to the Deputy Minister of Finance of the Province of British Columbia confirms that in February of 2002 the Government decided that Tech BC would not occupy the subject space. The correspondence refers to ICBC's proposed settlement where the Government would pay ICBC $41.1MM for ICBC to release Tech BC and the Crown from their obligations. Reference is made to the lease between Tech BC and ICBC's subsidiary as well as to incurred or committed costs in respect of which there was no commensurate value or opportunity for mitigation. In spite of a noted likely write down of the property, the letter reflects an agreement for ICBC to refund monies if it later recovers its costs on a present value basis after

expenses, and further, after a full refund, ICBC would split any further amount on a 50/50 basis. A commitment letter from the Government accepting these terms was said to have been furnished to ICBC.

[27] On July 16, 2002, ICBC, Mall Co, Tech BC, IPL and the Province, as represented by the Authorized Ministry entered into a Settlement Agreement under which Tech BC agreed to pay $41.1MM, on behalf of itself and the Province, to ICBC. The endowment payment made to Tech BC in the amount of $1.625MM was not required to be repaid. In exchange, ICBC, IPL and Mall Co released Tech BC and the Province from all of their obligations under the March 2000 agreements and all related agreements (i.e. indemnification from lawsuits from other tenants of Surrey Mall).

[28] The Settlement Agreement recital acknowledges that all the parties to the agreement had participated in a series of agreements relating to the acquisition and development of lands in the City of Surrey. The agreement is clearly a definitive settlement of all agreements, entitlements and obligations of all parties under these various agreements. Tech BC and the Province gave up all of their interest in all phases of the project excepting reserving some leased space to be assigned to Simon Fraser University. ICBC undertakes to take financial responsibility for the obligations of both the ICBC subsidiaries.

[29] The Settlement Agreement consists of 5 Parts. Reproduced below are Parts 2, 3, 4 and two paragraphs of Part 5.

**PART 2**
**PAYMENT OBLIGATIONS**

> 2.1 Tech BC does hereby, for itself, and for and on behalf of the Province, agree to pay ICBC, or to its nominee, the Settlement Monies, on the execution of this Agreement.
>
> 2.2. The parties acknowledge and agree that the respective agreements and obligations of the parties described in the Agreement are conditional upon the payment by Tech BC to ICBC of the Settlement Monies and that the respective entitlements and obligations described herein will not be effected or effective until that payment is made.

## PART 3
## SURRENDERED ENTITLEMENTS

3.1 Tech BC and the Province do hereby quit claim and surrender unto the ICBC Companies all of their respective, right, title and interest in and to participation in any manner in the development and utilization of any part of the Central City Development;

3.2 Despite the generality of the foregoing, Tech BC does hereby surrender and release to ICBC Mall Co. all of its right, title and interest under the Mutual Objectives and Endowment Agreement;

3.3 Despite the generality of § 3.1, the Province and Tech BC do hereby surrender and release to the ICBC Companies all of the entitlements and benefits respectively accruing to them or either of them under or pursuant to the Tech BC Agreements;

3.4 Notwithstanding any of the other terms of this Agreement, nothing in this Agreement affects in any way the leases identified in Schedule "A" made between Tech BC and ICBC Mall Co. for space in the Central City Development, which leases are being assigned by Tech BC to Simon Fraser University.

## PART 4
## RELEASES AND INDEMNIFICATIONS

4.1 The ICBC Companies accept the surrender by the Province and by Tech BC of all of their respective participation interests in and to the Tech BC Agreements and in and to the Central City Development and the ICBC Companies acknowledge that the participation of the Province and of Tech BC in the Central City Development is cancelled and that all of the respective obligations imposed upon the Province and upon Tech BC by the Tech BC Agreements are at an end and of no further force or effect;

4.2 By their execution of this Agreement, the ICBC Companies fully release and discharge the Province and Tech BC from all liability for the losses, damages, costs and expenses suffered by the ICBC Companies as a result of the cancellation of the participation of the Province and of Tech BC in the Central City Development;

4.3 The ICBC Companies further release the Province and Tech BC, and each of the them, from any requirements for further participation in the Tech BC Agreements and from any of the obligations imposed upon the Province and Tech BC therein;

4.4 The ICBC Companies do hereby agree to indemnify and save harmless the Province and Tech BC from and against all claims and causes of action that may arise against the Province and Tech BC as a result of the cancellation by the Province and Tech BC of their respective participations in the Central City Development, brought by:

a) the City of Surrey,

b) tenants or prospective tenants at the Central City Development, or

c) any other parties who have suffered damages as a result of the determination that the Central City Development will not be occupied by either Tech BC or by the ICBC Companies to the extent that those parties had originally intended to occupy the development;

provided however that the ICBC Companies will not indemnify the Province and Tech BC with respect to any claims or causes of action arising out of:

d) agreements or commitments made by the Province or Tech BC with parties other than the City of Surrey, including, without limitation, agreements with suppliers or construction contractors regarding construction, fit-up, servicing, or furnishing of the Tech BC premises at the Central City Development, or

e) the operations or proposed operations of Tech BC as an educational institution, including claims brought by employees, unions, professional organizations, students or prospective students.

4.5 Despite the generality of the foregoing sub-paragraphs, the ICBC Companies acknowledge that neither the Province nor Tech BC has any obligation or responsibility to repay to the ICBC Companies any part of the Initial Endowment Payment;

4.6 ICBC does hereby specifically undertake financial responsibility for the obligations of the ICBC Companies described herein, and agrees that if any one of the ICBC Companies is called upon to pay pursuant to the indemnity agreement provided herein, and is for any reason unable to do so, then ICBC will make such payments as would have been paid by such other of the ICBC Companies but for such inability.

4.7 The Province and Tech BC acknowledge and agree that all of the respective obligations to the Province and Tech BC imposed upon the ICBC Companies by the Tech BC Agreements are at an end and of no further force or effect.

> 4.8 The Province and Tech BC release the ICBC Companies, and each of them, from any requirements for further participation in the Tech BC Agreements and from any of the obligations to the Province and Tech BC imposed upon the ICBC Companies therein.
>
> **PART 5**
> **GENERAL PROVISIONS**
>
> 5.1 It is the intention of this Agreement to provide a full and complete mutual release of the parties respective obligations under the Tech BC Agreements;
>
> 5.2 The payment by the Province of the Settlement Monies is intended to fully release and discharge the Province and Tech BC from all further participation in and liability for the Tech BC Agreements and the Central City Development;

[30] The Settlement Agreement did not refer to GST.

[31] As noted above, initially, ICBC was assessed for the deemed GST portion of the Payment pursuant to subsection 182(1) of the *Act*. A Consent Judgment was issued in favour of ICBC and a corresponding assessment was issued against the Appellant.

## Appellant's Submissions

[32] The Appellant submits that the Development Agreement was an invalid "agreement to agree". The basis for this submission is that at its core is an appended form of lease which never came into existence – that is, there was never an actual lease in force. The Appellant argues that the Development Agreement did not set out the rent to be paid. The formulistic stipulations to calculate the rent were subject to future specified, but unknown, adjustments and "such other amount as may be agreed to between Tech BC and Mall Co."[9] Many authorities are cited for the rule that the amount of rent is an essential term of a valid lease agreement. The Minister never assumed that the rent was agreed upon.

[33] As a separate but related argument, the Appellant submits that if the Development Agreement is a valid agreement, there is still no "supply". The assumed supply is the lease. However, it is a future lease and a future lease is not a

---

[9] Paragraph 2.3(g) of the Development Agreement incorporated by reference into section 3.5 of the Development Agreement and section II(A) of the Lease Delivery Agreement.

supply. That section 133 provides that entering into any agreement to supply property is an immediate supply of property, does not include an as yet unfinalized appended form of lease.

[34] The Appellant further submits that if the Court finds that the Development Agreement was a valid agreement, then subsection 182(1) still does not apply as the party that breached the agreement, Tech BC, was the relevant supplier and not the recipient. The Appellant claims that Tech BC supplied Mall Co with the right to force Mall Co to enter into the lease and be the anchor tenant for the proposed mall. Thus, the Payment was made by the intended supplier under the Development Agreement. The charging provision does not apply if the payment is made by the supplier.[10]

[35] As well, the Appellant submits that the Payment was not "paid" to Mall Co but was paid to ICBC and that the word "paid" must mean "actually paid". Subsection 182(1) is not concerned with the reasoning behind the registrant getting paid, only who is getting paid. The Appellant points to overwhelming evidence that the Payment was actually paid to ICBC not Mall Co. The Appellant relies on an asserted Crown concession that ICBC did not receive the Payment as agent or trustee for Mall Co and asserts that the legal obligation here was solely to pay the Payment to ICBC not Mall Co. Any money that later flowed down to Mall Co from ICBC for the construction of the mall were separate transactions.

[36] The Appellant also submits that section 17 of the *Technical University of British Columbia Act* ("*Tech BC Act"*) provides that: "The university is not liable to taxation except to the extent the government is liable." It is argued that this provision means that if the Province of British Columbia would not be liable for tax under section 165 of the *Act* as the recipient of the supply, then Tech BC is similarly not liable. The Appellant points out that, pursuant to paragraph 122(*b*) of the *Act* and section 125 of the *Constitution Act*, the Province would not have to pay taxes as a recipient of a supply.

---

[10] The Appellant relies on CRA policies and guidelines in advancing this argument. See CRA Policy Paper P-218R – "Tax Status of Damage Payments, Whether or not within Section 182 of the *Excise Tax Act*", May 25, 1998, Revised August 9, 2007; GST/HST Memorandum 19.4.1 – "Commercial Real Property – Sales and Rentals", August 1999; Department of Finance News Releases, 90-169, December 18, 1990; and Bill C-112, Explanatory Notes, February 11, 1993, clause 46.

[37] Lastly, in response to the Respondent's reliance on Mall Co having had its debt to IPL reduced "as a consequence" of the Payment, the Appellant relies on *Dieni v. The Queen*.[11] The Appellant asserts that the causal connection between the debt reduction and the Payment is not strong enough to meet the requirement imposed by subsection 182(1).

**Respondent's Submissions**

[38] The Respondent submits that the conditions for subsection 182(1) to apply are all present in this case.

[39] The Respondent submits that while Tech BC might have made the Payment to ICBC, as a result of doing so, Mall Co owed $41.1MM less to IPL. Beyond the suggestion that there was a constructive receipt of the Payment by Mall Co given Mall Co's entitlement, indirect benefit received and acquiescence as where the Payment would go, a broad construction of the language of the subject provision is advocated to catch all payments made, and all reductions in the debts of the registrant occasioned, as a consequence of the termination of an agreement for the making of a taxable supply. The language of the provision does not require that the recipient of the supply be the person making the payment to the registrant supplier. Similarly, the language of the provision does not require that debt reduced be a debt owed to the intended recipient of the supply. Such a wide scope for the application of the subject provision should thereby import an intention to include a payment to a third party where that payment reduces a debt of the registered supplier. Further, it is noted that where the intended recipient of the supply is not the person making the payment to the registrant supplier, the intended recipient of the supply gets the input tax credit ("ITC"). Similarly, where the debt reduced is not a debt owed to the intended recipient of the supply, the intended recipient of the supply gets the ITC.[12] The integrity of the system requires that the party who gets the ITC should be seen as the payor and that the payee be seen as the registered supplier. Otherwise, there would be no tax to offset the ITC. Further, the purpose of subsection 182(1) would be defeated if a registrant could avoid it by allowing a termination payment to be directed to a related party or creditor while, nonetheless, getting its financial benefit.

---

[11] 2001 DTC 290 (TCC).

[12] Sections 32 and 176 of the *Act*.

[40] The Payment was an economic substitute for the rent that should have been paid.[13] A common sense appreciation of all the surrounding circumstances in this case point to the Payment having been intended to replace a rent obligation, an obligation that all relevant agreements imposed on Tech BC to pay to the lessor, Mall Co.[14] As evidenced by settlement correspondence, all parties recognized and acknowledged that Payment was to compensate for Tech BC's failure to enter into the lease and meet its obligations to Mall Co. As such the Payment must be taxed accordingly. That is the clear intent of the subject provision and that intention must be given effect. In support of this contention, the Respondent submits that Mall Co was incorporated to own and operate the mall on its own account and that the fundamental obligations under the agreements were between Tech BC and Mall Co. That obligation was to pay rent. The other parties' obligations were merely ancillary. Putting a slightly different slant on this argument, it is submitted that on acceptance of Tech BC's repudiation of the lease, Mall Co had a claim for compensatory damages relating to costs incurred for the special tenancy needs of Tech BC, the resultant costs of refitting the building and lost profit. The Payment extinguished Mall Co's right to compensatory damages and benefited Mall Co by reducing its upstream debt obligations.

[41] Furthermore, the Respondent posits that ICBC had no legal claim to the Payment and, therefore, suffered no direct loss. Any loss suffered was predicated on the lost value in the mall or of its assets. ICBC acted on Mall Co's behalf in respect of its involvement in the settlement. It received no net benefit from the Payment. Where it directed the Payment to be made cannot be determinative of the issue. Paying ICBC discharged its obligation to Mall Co and that is sufficient to satisfy the "paid" requirement in subsection 182(1). In interpreting "paid" in this way is consistent with the Parliament's intention.

[42] The Respondent submits that Mall Co's supply of a right to a lease was a taxable supply. A right to a lease is "property". The lease itself is not property but is the manner of providing property. The right to a lease is admitted to arise only where its essential material terms have been agreed upon. However, it is argued that all such terms were sufficiently certain to bind the parties and where there

---

[13] The Respondent cites a long list of examples (written submissions, footnote 94), evidenced by exhibits, that all regard the Payment as compensation for terminating the lease.

[14] Authorities for this approach relied on by the Respondent include: *Societé en Commandite Sigma-Lamaque v. Her Majesty the Queen* (2010), 2011 GTC 906, 2010 CarswellNat 4438 (TCC).

could be a difference of opinion on a few points, recourse to arbitration would resolve them. Mall Co and Tech BC intended to enter into a binding lease agreement and conducted themselves accordingly.

[43] While acknowledging that the Payment was made as a consequence of terminating the various agreements, it is maintained that the parties negotiated it to compensate for Tech BC terminating its obligation to lease the subject space from Mall Co. On the other hand, it is also submitted that the Payment was made as compensation for the termination of Tech BC's right to use the subject space.

[44] In response to the Appellant's submission that Tech BC was the supplier, the Respondent submits that this argument is irrelevant. In response to the Appellant's submission that the Payment is clothed by a Crown immunity, the Respondent submits that Tech BC made the Payment on its own account and that the Government of British Columbia owed no compensation to ICBC or Mall Co in respect of the termination of the lease obligation. The Crown immunity from taxation does not protect Tech BC unless it made the Payment on behalf of the Province as its agent. Tech BC was neither a Crown agency nor any other type of agent of the Province. Any agency argument would have to be supported by express language in its empowering statute and/or clear evidence of the Province's control over the agent's mandate and operations. Neither have been established in the case at bar.

[45] The Respondent submits, overall, that Mall Co is responsible to remit the taxes deemed to have been collected on the Payment as per the formula in subsection 182(1). The Respondent requests that the appeal be dismissed, with costs.

## Evidentiary Issue

[46] In its pleadings the Appellant admitted that under the Development Agreement Tech BC agreed to pay it a monthly rent of $426,630. The Respondent admitted that statement in its pleadings.[15] The Respondent objected at the hearing to the Appellant's attempt at arguing, on the basis of evidence presented at the hearing, that there was no fixed monthly rent agreed to at the time the Development Agreement and the Lease Delivery Agreement were signed with the appended form of lease. The admission is said to be binding and that it dispenses the need for proof of it. Allowing a withdrawal of that admission would result in a

[15] The Reply on the other hand stated that the Minister assumed the rent was $376,000.

radical change in the nature of the issue in controversy and not only be contrary to the *Rules* of the Court[16] and common law but would be an abuse of process as well.

[47] No notice was given of the Appellant's intention to make an issue of whether the rent had been fixed and it did not seek an order to withdraw its admission or amend its pleading. The Respondent submits that the lateness of the change in the factual admissions and the prejudice it causes demand a finding that the admission must stand. The prejudice is irreparable having lost the chance to more fully explore the matter in discoveries and bring contextual evidence of the understandings of the various parties.

[48] The Appellant asserts that there has been no admission of the rent actually being fixed but rather there was only a reiteration of the references to the monthly rent amount in the subject agreements that was subject to change and not fixed and that, in any event, whether the rent was sufficiently fixed to constitute a binding term of an agreement, versus warranting a finding that there was only an agreement to agree, is a question of law in respect of which no admission can be made. The Respondent answers that even if the rent is a question of law, the pleadings did not make an issue of it.

[49] The Appellant further submits that prior proceedings made the Respondent alive to the issue and that it was canvassed by the Respondent on cross examination of the Appellant's witness at the hearing of the instant appeal. The Respondent answers that the prior proceedings demonstrate, by contrast in the pleadings, that what was at issue there was not an issue here and that the cross examination of the Appellant's witness neither opened the issue nor afforded a sufficient opportunity to address the issue raised only in argument.

[50] The various authorities relied on the by the Appellant were distinguished by the Respondent.[17]

---

[16] *Tax Court of Canada Rules (General Procedure)*.

[17] Cases relied on by the Appellant that were distinguished by the Respondent include: *Hammill v. Canada*, [2005] FCJ No. 1197 (CA) (QL); *Sinclair v. Blue Top Brewing Co. Ltd*., [1947] 4 DLR 561 (SCC); *Abrahams v. Minister of National Revenue (No. 2)*, 1966 CarswellNat 312 (Ex. Ct.); *Wardean Drilling Co. v. Minister of National Revenue*, 1978 CarswellNat 189 (FCA); *McAdam v. The Queen*, 1978 CarswellNat 182 (FCA); *Ha v. The Queen*, 2011 DTC 1214 (TCC) and *Kerry Properties Ltd. v. Her Majesty the Queen*, 2008 DTC 2729 (TCC). Cases relied on by the Respondent include: *Canderel Ltd. v. Canada*, [1993] FCJ No. 777 (CA) (QL); *Merck & Co. v. Apotex Inc.*, [2003] FCJ No. 1925 (CA) (QL) and *11675 Société en commandite v. Canada*, [2002] TCJ No. 636 (QL).

## Statutory Provisions

[51] Subsection 182(1) of the *Act* provides:

> Forfeiture, extinguished debt, etc.
>
> 182. (1) For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant to a person, an amount is paid or forfeited to the registrant otherwise than as consideration for the supply, or a debt or other obligation of the registrant is reduced or extinguished without payment on account of the debt or obligation,
>
> (a) the person is deemed to have paid, at that time, an amount of consideration for the supply equal to the amount determined by the formula
>
> (A/B) × C
>
> where
>
> A is 100%,
>
> B is
>
> (i) if tax under subsection 165(2) was payable in respect of the supply, the total of 100%, the rate set out in subsection 165(1) and the tax rate for the participating province in which the supply was made, and
>
> (ii) in any other case, the total of 100% and the rate set out in subsection 165(1), and
>
> C is the amount paid, forfeited or extinguished, or by which the debt or obligation was reduced, as the case may be; and
>
> (b) the registrant is deemed to have collected, and the person is deemed to have paid, at that time, all tax in respect of the supply that is calculated on that consideration, which is deemed to be equal to
>
> (i) where tax under subsection 165(2) was payable in respect of the supply, the total of the tax under that subsection and under subsection 165(1) calculated on that consideration, and

> (ii) in any other case, tax under subsection 165(1) calculated on that consideration.

[52] In short then, when a registrant agrees to make a taxable supply to a person and as a consequence of the breach, modification or cancellation of that agreement an amount is paid to the registrant other than as consideration for the supply, the person is deemed to have paid consideration for the supply that includes GST and the registrant is deemed to have collected such tax amount in respect of the supply and must remit it. The assessment seeks to uphold that remittance obligation on Mall Co on the basis that it agreed to make a taxable supply to Tech BC and as a consequence of Tech BC reneging on its commitment under that agreement, a GST included payment is deemed to have been made to Mall Co.

## Analysis

### Refining the Issues

[53] While I have organized my analysis of the several issues in this Appeal under the separate headings set out below, it will be helpful to put two issues in this Appeal in context, namely the existence of an enforceable lease and the recipient of the Payment.

[54] It is clear that the parties agree that the taxable supply at issue is the lease. While my analysis will respect that consensus, it will also reveal that the Payment may be seen as having been made in respect of a different service that ICBC provided to the Province. In the context of this Appeal, the *Act* defines "service" as anything other than property or money. Given that broad definition, my analysis suggests that ICBC and the Province exchanged mutual covenants that ICBC honoured but the Province did not. If that is the case and the Payment to ICBC was made by the Province in respect of a service ICBC provided the Province, then subsection 182(1) cannot apply to invoke a tax liability on Mall Co. That said, while my analysis will elaborate on this approach, as demanded by my findings of fact, it is also consistent with a finding that ICBC also had a right to receive the Payment from the Province in respect of the breach of the taxable supply at issue, namely the lease.

[55] With respect to a finding that ICBC received the Payment for its own account, I note that while the Appellant separates its argument in respect of the lease issue and the Payment issue, they are clearly complimentary arguments. That

is, the argument that the Payment was to ICBC for its own account is bolstered if there is no lease.

[56] For example, the Appellant's suggestion at the hearing, that the computation of the Payment amount had nothing to do with lost rent, would not only illustrate that the Payment was not tied to an enforceable lease but would underline ICBC's entitlement to the Payment. I agree that it appears clear that the Payment was calculated simply as 50% of $82.2MM being the base building budget of $82.9MM less $700,000 on account of the lease inducement obligation. However, how the damage amount is calculated is of no significance if it is payable to the Appellant as a result of the failure to pay rent. Subsection 182(1) simply requires that the Payment be made as a consequence of the termination of a taxable supply that a registrant has agreed to make. The inference suggested by the Appellant then is that what must be drawn from the method of computing the quantum of the damage payment is that it was based on ICBC's investment requirements. That requirement was not a mere guarantee, it was an actual contractually committed financing outlay on a building under construction.[18] There was no going back. The agreements were sufficient to give ICBC a standing to claim and receive damages independent of any rights of Mall Co. That ICBC might be indirectly compensated had the Payment been made to Mall Co should not distract from ICBC's entitlement and receipt for its own account.

[57] On the other hand, a finding that there was an enforceable lease at the time the Lease Delivery Agreement was entered into is not fatal to the Appellant's position that ICBC was entitled to receive the Payment for its own account. That the Appellant had an entitlement arising from the termination of an existent lease does not preclude a finding that ICBC enjoyed a similar right based on its investment commitment. While there are a bundle of rights and obligations here amongst various players, the Appellant essentially is asserting that even if there is an existent lease, the express terms of the settlement, requiring payment to ICBC, must be accepted as accurately reflecting its entitlement.

[58] With those comments in mind my analysis will proceed under 7 headings:

A. The Evidentiary Issue
B. The Lease

[18] It has not been argued that such supply was an exempt supply of a financial service although that may well have been an argument advanced when ICBC was first assessed.

C. The Payment
D. Debt Reduction
E. Tech BC as Supplier of a Taxable Supply
F. The Province's Constitutional Protection from Liability under the *Act*.
G. Conclusions

## A. The Evidentiary Issue

[59] As noted above, the Respondent objected to the Appellant raising what is asserted to be a new issue: namely, whether the Appellant can argue that there was no valid lease on the basis that the lease rate or monthly rent amount was not fixed. The Respondent asserted that the pleadings confirmed the lease rate had been fixed and was not an issue.

[60] In short, I agree with the Appellant on this point. The Notice of Appeal read as a whole clearly puts at issue whether there was a binding lease agreement in place in respect of which subsection 182(1) of the *Act* can apply. The case for finding that there was only an agreement to agree inherently puts at issue whether a stipulated rent amount or formula had been fixed. If not, then an essential term of a lease is missing and there is no binding lease agreement. Rather, there is only an agreement to agree on a lease agreement which is the basis for the Appellant's argument that there has been no taxable supply made by it.

[61] On the other hand, it is open to the Respondent to argue that the rent calculation is sufficiently formulated to satisfy the requirement that, as an essential term of a lease, the rent amount had been agreed upon. Indeed, the Respondent had sufficient documentary evidence to make that argument and it did. I see little prejudice caused by this asserted late emergence of a new issue. The Respondent can also rely on the assumption in the Reply that the Appellant agreed to lease the initial Tech BC space to Tech BC.[19] That assumption inherently assumes that all the terms essential to creating a binding lease were present. Short of the Appellant proving otherwise, I should find that there was a lease and that section 133 of the *Act*, as cited in the Respondent's submissions, can then be relied on even if there is only an agreement to enter into that lease. Section 133 provides that an agreement to make a supply is deemed to be a supply made at the time the agreement is entered into.

[19] Paragraph 14(f)(i) of the Reply.

[62] That said, I find this issue to be academic. I am satisfied that the Appellant has not met its burden to undermine the assumption that an enforceable lease agreement existed at the time of entering into the Lease Delivery Agreement.

[63] Indeed, to the contrary, I am satisfied on the evidence that there was a binding, enforceable agreement to enter into the lease at the time of entering into the Lease Delivery Agreement. There was then, as required by section 133, an agreement to enter into a taxable supply when the Lease Delivery Agreement was signed. I will expound on this finding under the next heading.

## B. The Lease

[64] In my view, all the information required to fill the blanks in the appended form of lease were readily determinable and if any issues arose, it was clear, reading all the agreements together, particularly the Development Agreement and the Lease Delivery Agreement, that those issues were, by formula or other stipulated parameters, sufficiently detailed to be resolvable without suggestion that a court would have to write-in essential but missing terms.[20] The essential elements of the lease were all provided for: the parties, the premises, the commencement date, the term and the rent.[21] The comfort level of the parties that there was a binding lease or agreement to lease on determinable and enforceable terms is reflected by the binding arbitration provisions in every agreement[22] and by the conduct of the parties which in turn reflects their intention to be bound.[23] The execution of the Lease Delivery Agreement followed by the performance of the parties of various undertakings imposed under the various agreements and ultimately as well, by the Settlement Agreement itself, all demonstrate an intention to be bound under the lease.

---

[20] See *Deshugh Estates Ltd. v. Robin's Food Inc*. (1998), 19 RPR (3d) 40 (BCSC) at paras. 22-23 [*Deshugh*]; *Sacks v. Canada Mortgage and Housing Corp*., [2001] BCJ No. 511 (SC) (QL) at paras. 118, 127-128 [*Sacks*]; *Dolphin Transport Ltd. v. Weather B Transport Co*., (1993) 30 RPR (2d) 11 at page 117 [*Dolphin Transport*]; *Canada Square Corp. v. Versafood Services Ltd.* (1981), 130 DLR (3d) 205 (Ont. CA) at pages 217-218 [*Canada Square*] and *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at paras. 330-333 [*Le Soleil*].

[21] See Bentley, McNair, Butkus, Williams & Rhodes, Canadian Law of Landlord and Tenant (6th ed., looseleaf, Carswell), chapter 3; *Deshugh* at para. 22 and *Canada Square* at page 214.

[22] See *Dolphin Transport* at page 117.

[23] *Canada Square* at pages 216-217; *Le Soleil* at paras. 327-334; and *Sacks* at paras. 118-119.

[65] To be more specific, and focusing on what was essentially the only contractual element of the lease that the parties put at issue, namely the lease rate or rent amount, I find, as noted earlier, that there was in place a rent formulation understanding established in 2009 even before the various agreements were signed. Such formulations for fixing the rent were then locked-in in March of 2010. The only notable or possible material variations were those caused by actual construction financing costs and price changes *caused by Tech BC's change orders*. If there was no agreement on the adjustment costs, there appears to be no requirement that changes had to be made as requested. Alternatively, if there was no agreement on the adjustment costs, which would re-determine the rent, binding arbitration was in place to resolve the issue.

[66] Indeed, the Lease Delivery Agreement itself speaks loudly of the existence of an intention to create legally binding rights and obligations. The existence of that agreement and, for that matter, the existence of the Development Agreement, which relies on the lease, is incompatible with a finding that there was here an unenforceable agreement to agree. Reference to all the authorities on the subject of when a lease becomes a binding agreement and when it does not, as cited by the parties,[24] have not persuaded me otherwise on the facts of this case. The cases only demonstrate that the exercise is fact specific.

[67] The facts of this case, as I find them, are that Tech BC was obligated at law to occupy sufficiently defined premises on a readily determinable commencement date at an agreed ascertainable rent for a specified duration. That is, the terms of the appended form of lease read together, as and if necessary, with the Development Agreement and the Lease Delivery Agreement, do not lack the necessary certainty required to form a binding agreement. As I said, the formula for calculating the rent, being the focus of the dispute between the parties, cannot be found to lead to uncertainties that could not be resolved according to clearly defined objectives and principles. These documents would guide, if not direct, an arbitrator, if arbitration became necessary, with a road map for the determination of all the rights and obligations of the parties according to the clear principles agreed to in these documents. As I said, all the parties to the various agreements intended and understood there to be an enforceable lease agreement. They all relied

---

[24] *Canada Square* at 216-217; *Gutter Filter Co., LLC v. Gutter Filter Canada Inc.*, 2011 FC 234; *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 45 BLR (4th) 105; *Deshugh; Sacks; Dolphin Transport; Le Soleil and Gichuru v. Ash Estate*, 2010 BCSC 849.

on there being a binding rental commitment on terms sufficiently set out to ensure that result. Suggesting otherwise, as Appellant's counsel has done, is simply argumentative.

[68] The more difficult questions in this case are: who can enforce the lease and who is damaged by the breach of it?

[69] While the Appellant has not argued, except indirectly or by inference, that ICBC had the right to enforce the lease, that in fact is at the heart of the issue in this case. It is possible that the Appellant making that argument directly, would fly in the face of prior proceedings that dealt with an assessment of ICBC's liability under subsection 182(1). However, be that as it may, there is nothing in the prior proceedings that necessarily imposes a particular view of the rights and remedies of the parties in this case.

[70] In my view, ICBC did have a right to enforce the lease and clearly suffered damage by the breach of it as discussed under the next heading.

## C. The Payment

[71] Subsection 182(1) speaks clearly of the making of a supply by a registrant to a person and deems a payment to be consideration for the supply where the payment is made, as a consequence of the breach or termination of an agreement for the making of a taxable supply, *to the registrant* who agreed to make the supply. The registrant asserted to have agreed to make the supply in this case is Mall Co. The Payment, however, was made to ICBC.

[72] After numerous reviews of the evidence, I do not accept the Respondent's view that ICBC's entitlements were ancillary to or derived from Mall Co's entitlements or were derived from its relationship with Mall Co. ICBC had genuine pursuable entitlements that arose from the Province's decision to terminate Tech BC's existence.

[73] There are three main reasons for my coming to this conclusion. First, the separate existence of Mall Co did not diminish, undo or vitiate the essential and binding mutual assurances between ICBC and the Province. Second, ICBC had an entitlement to be compensated for the decline in the value of a very significant investment made in reliance on promises made by the Province. Third, the Settlement Agreement recognizes that the Payment was made to ICBC for its own account.

[74] As to the first of these reasons, that the separate existence of Mall Co did not diminish, undo or vitiate the essential and binding mutual assurances between ICBC and the Province, the following factors support that finding:

- ICBC generated the entire project from its initial feasibility studies to the formulation of the participation of the Province. Its presence as a party to the Development Agreement and its covenants under that agreement confirm that ICBC's commitment goes beyond a typical financing arrangement. It is an open-ended commitment without any evidence of a security interest. It has an uncapped funding obligation on the initial and further development phases and pursuant to paragraph 3.8 of the Development Agreement it was responsible for the performance of many of the obligations of Mall Co under the Lease Delivery Agreement. For all intents and purposes the Province and Tech BC have kept ICBC as a principal player in this entire project.

- Mall Co was created after the terms of the project had been substantially agreed upon and after the essential mutual assurances between ICBC and the Province were given. I am satisfied that these assurances survived the formation of Mall Co.

- Mall Co's existence as a separate entity cannot in anyway be seen as having any impact on the ongoing mutual assurances between ICBC and the Province. The entire project was dependant on ICBC's financing commitment and the Province's implied, if not express, commitment to ICBC to ensure Tech BC's participation in the project.

- ICBC, kept its governing hand on the project irrespective of the rights of Mall Co. It could initiate mandatory arbitration that would bind Mall Co, the Province and Tech BC on any matter in dispute including any dispute pertaining to the lease. As a party to the Development Agreement it agreed to the terms of the lease and the Lease Delivery Agreement and even had an obligation to meet where there were building design changes.

[75] As to the second of these reasons, that ICBC had an entitlement to be compensated for its reliance on promises made by the Province to it, the following factors support that finding:

- ICBC, in making the investment it made in Mall Co relied on the Province's commitment to ICBC to ensure Tech BC's participation in the entire project. This commitment was breached and is the fundamental breach at the heart of ICBC's entitlement that is quite distinct from a claim by Mall Co for lost rent.

- On the breach of this commitment, ICBC would have invested in Mall Co, as loans or otherwise, directly or indirectly, a significant part of the budgeted cost of the project and was facing the uncertainty of the costs and risks of continuing to finance, or not, Mall Co's completion of a project designed largely for Tech BC's use. That is, the potential loss in the value of ICBC's investment in Mall Co occasioned by the breach of the Province's and Tech BC's covenants to ICBC was significant. The Province's admission of its liability to ICBC by funding the Payment to ICBC does not strike me as evidence that ICBC's entitlement derived from Mall Co's entitlement or was the result of Mall Co's direction that the Payment be made to ICBC. To the contrary, the Payment was funded by the Province to secure its release from liability for its breach of covenants made to ICBC.

- The Province's admission of its liability and its commitment to fund the Payment is recognized in settlement correspondence. In a letter dated May 2, 2002, the Province agreed to the lump sum payment of $41.1MM. In that letter the payment was said to be made for IPL's release of Tech BC and the Province for their obligations under the Development Agreement. No mention is made of Mall Co.

- On the same date, ICBC responded to the Province's May 2nd letter as follows:

> *ICBC* proposed a settlement where *the Government* will pay ICBC $41.1 million as a lump sum payment for ICBC to release TechBC and the Crown from its obligation … The final agreement has not been finalized, however, a commitment letter accepting these arrangements has been furnished to ICBC from the Government on May 2, 2002. [Emphasis added.]

This letter also commits ICBC to reimburse the Province if ultimately revenues from the premises to have been occupied by Tech BC exceeded the settlement amount.

- Further, the Province was made aware in the ICBC May 2nd letter that the payment was being recorded *by ICBC* as income in its first quarter. The letter distinguished between "ICBC" and "ICBC's subsidiary" but speaks only of the impairment in value of its, ICBC's, investment, offering *its* release of the Province and Tech BC in consideration of the Province paying *it* $41.1MM.

- The understanding of the parties that the payment would be made by the Province as the party liable for a breach of an undertaking it made to ICBC is also reflected in a letter dated May 3rd from ICBC to Tech BC which was initialed and acknowledged by the Province on May 6th "indicating concurrence with the terms outlined". This May 3rd letter, acknowledged on May 6th and referred to as the "May 6th Agreement" by the Appellant's counsel, stated that ICBC had:

> reached an agreement with *the Province* on behalf of *ICBC* and its wholly owned subsidiary, ICBC Properties Ltd. with respect to the termination of the Tech BC lease. [Emphasis added.]

  This letter makes no reference to Mall Co and was incorporated by reference into the Settlement Agreement where it was referred to as the May 3rd letter in section 5.8. It is the only outside communication, representation or understanding that is said not to be superseded by the Settlement Agreement.

[76] Based on the foregoing, it is hard to accept that ICBC was acting solely for Mall Co in reaching a settlement. That Mall Co necessarily got swept into the releases does not dissuade me from the view that ICBC negotiated this settlement on its own behalf notwithstanding repeated references to IPL.

[77] As to the third of these reasons, that the Settlement Agreement recognizes that the Payment was made to ICBC for its own account, provisions in that agreement that support that finding include:

- Paragraph 2.1 clearly states that the Payment is to be made to ICBC or its nominee by Tech BC for itself and for and on behalf of the Province. This is totally consistent with my view that the overarching covenants here are between ICBC and the Province. ICBC had the right to redirect the Payment to, say, Mall Co or not. The Respondent's assertion that it was Mall Co that redirected the Payment is not supported by the express language of the Settlement Agreement. The express language of that agreement is consistent with how the parties understood their rights and obligations. That ICBC's

potential loss might have been similarly accommodated by an agreement to make the Payment to Mall Co does not change the reality that ICBC had a right to be compensated for the subject breach.

- Under Parts 3 and 4, under the headings "Surrendered Entitlements" and "Releases and Indemnifications", references to the ICBC Companies, which include ICBC, confirm ICBC's rights and obligations under the various agreements. As well, Part 5, under the heading "General Provisions" references to releases of the Province confirm, *vis-à-vis* the ICBC Companies, that the Province is a principal in respect of the agreements entered into by Tech BC. The entire venture ends the way it started, the real players, the Province and ICBC, deal head to head. I have no reason to believe that the separate entities created by the Province and ICBC were intended to exculpate either of them from their obligations to each other.

## D. Debt Reduction

[78] The Respondent relies on Mall Co having its debt obligation to IPL reduced or extinguished without a payment by it on account of the debt. That is, "as a consequence of" the Payment to ICBC, Mall Co's obligation to IPL was reduced by like amount. As well, the Respondent relies on Mall Co being the constructive recipient of the Payment. Mall Co was the party legally entitled to the Payment and was the economic beneficiary of it. That Mall Co directed that the Payment be made to ICBC or acquiesced to the Payment going there should be necessarily inferred from its entitlement, not ICBC's entitlement, to the Payment.

[79] The debt reduction or debt extinguishment argument is based on the express language of subsection 182(1):

> For the purposes of this Part, where at any time, *as a consequence of the breach*, … of an agreement for the making of a taxable supply … by a registrant to a person, an amount is paid or forfeited to the registrant otherwise than as consideration for the supply, or *a debt or other obligation of the registrant is reduced or extinguished without payment on account of the debt or obligation*, … [Emphasis added.]

[80] That language clearly requires that Mall Co have a debt reduced or extinguished as a consequence of the breach of the supply agreement. Arguably, it is implicit that the debt reduced or extinguished would be a debt owed by Mall Co to Tech BC. That is, arguably, the debt reduction language in the subject provision

is there to eliminate any doubt that an amount "paid" would include the amount by which a prior debt owed to the payor is set-off.

[81] Alternatively, as is essentially argued by the Respondent, the section must be given a broader construction. There is no mention in the subject provision that the debt reduction be a debt between the maker and recipient of the supply. That is, from the Respondent's perspective, where the party making the supply (Mall Co) has a debt to any third party (IPL) reduced as a consequence of the breach by the recipient of the supply agreement (Tech BC) and a payment is made to any other party (ICBC), the provision is operative. The Respondent, relying on section 12 of the *Federal Interpretation Act* and an historical analysis of the changes to subsection 182(1), argues that Parliament intended subsection 182(1) to be interpreted broadly to apply in cases such as this. The Respondent asserts that the provision is worded broadly enough to capture both payments made *by third parties* and payments made *to third parties* where a debt of the maker of a supply has been reduced as a result of such a payment.

[82] I accept the Respondent's construction of the subject provision that the reduction or extinguishment of a debt, in the context of subsection 182(1), does not require the reduction or extinguishment be of a debt owed to a party to a supply agreement. A plain reading of the provision does not warrant such a restrictive construction. I am more cautious, however, about accepting the Respondent's position that the provision is worded broadly enough to capture both payments made *by third parties* and payments made *to third parties* where a debt of the maker of a supply has been reduced as a result of such a payment. This could easily lead to cases of imposing a liability under subsection 182(1) on two suppliers for the same amount in respect of a single jointly made supply or to cases where both suppliers avoid liability by each of them pointing a finger at the other – which seems to be the case we have here.

[83] In any event, in accepting that the reduction or extinguishment of a debt, in the context of subsection 182(1), does not require the reduction or extinguishment be of a debt owed to a party to a supply agreement, I have acknowledged my view that the subject provision goes further than a mere application of a constructive receipt doctrine. That doctrine would typically require that Mall Co direct the payor (Tech BC) as to where the Payment (the $41.1MM) should go and that the recipient of the Payment (ICBC) did not receive it as compensation to which it was entitled for its own account.

[84] That is, subsection 182(1) applies even though ICBC did not need Mall Co's direction or acquiescence to receive the Payment.

[85] That takes me then to the Appellant's argument that even if Mall Co benefited from the Payment, the benefit, a reduction of its debt to IPL, did not arise "as a consequence of" Tech BC's breach of the supply agreement.

[86] The Respondent points to ledger entries in the records of Mall Co that show Mall Co's liability to IPL was reduced by $41.1MM on account of the Payment by the Province. The Respondent asserts that that was a benefit derived as a consequence of the settlement and the Payment under the settlement.

[87] The Appellant argues that the Payment was made by Tech BC and the Province as a result of the breach of the three agreements. Any subsequent accounting entries by ICBC, IPL and Mall Co were purely internal to the ICBC companies. The Appellant referred to evidence given at the hearing by Mr. Stonnell who was the Chief Financial Officer of Mall Co and IPL in 2002. He testified that Mall Co's journal entries were made only because ICBC had reduced its inter-company account with IPL and ICBC had told him to match that reduction.

[88] It is the Appellant's position that the breach of the agreements is five steps removed from Mall Co making a journal entry to reduce its inter-company account with IPL. Specifically, there had to be an agreement to pay ICBC; ICBC had to reduce its account with IPL in its books; ICBC had to instruct IPL to reduce its account with ICBC in its books; IPL had to reduce its account with Mall Co in its books; and finally, IPL had to instruct Mall Co to reduce its account with IPL in its books. The Appellant argues that this is not a sufficiently strong causal connection to support a finding that Mall Co's journal entry reducing its inter-company account was "as a consequence of" the breach of the supply agreement. ICBC received the Payment for its own account pursuant to an entitlement and the journal entries were the result of its actions as to how to account internally amongst the chain of subsidiary corporations in which it had invested.

[89] The issue then is simply whether or not the benefit to Mall Co arises as a consequence of the breach of the supply agreement and that in turn rests on the determination of whether the phrase "as a consequence of" should be given a construction that requires a direct causal link or whether an indirect link would be sufficient.

[90] The Respondent agrees that the words "as a consequence of" require a causal connection. However, the Respondent argues that a sufficient causal connection exists here as the Payment inevitably had to benefit to Mall Co as reflected in the chain of book entries identified and acknowledged at the hearing. The domino effect giving Mall Co the benefit of the Payment was a result of the Payment to ICBC.

[91] Having considered these able arguments, I am of the view that the debt reductions that Mall Co enjoyed were as a consequence of the failure of Tech BC to fulfill its obligations under the supply agreement. That Tech BC's failure to fulfill its obligations was a consequence of the Province's failure to honor its commitment to ICBC would not disentitle Mall Co from having an actionable right against Tech BC. Even if that right did not extend to the Province, which I believe it would have, as a separate entity Mall Co would have required some *quid pro quo* from ICBC to forgo its entitlement against Tech BC if not against the Province. While that is not the same as acquiescing to its damage entitlement going to ICBC, it is, nonetheless, a benefit to which it was entitled and which it did receive as a consequence of the breach of the supply agreement. The causal link is sufficient in my view.[25]

## E. Tech BC as Supplier of a Taxable Supply

[92] It is the Appellant's position that even though Mall Co was going to lease the property to Tech BC, Tech BC was supplying something to Mall Co in return. Tech BC's agreement to become the anchor tenant in the mall was a supply of a service from Tech BC to Mall Co. The Appellant cited a GST/HST Memorandum as authority to support the view that a tenant can be supplying a service to a landlord in entering into a lease.[26] More specifically, the Memorandum provides that:

> If the landlord makes a cash payment to the lessee as an inducement to enter into the lease, the lessee is considered to have made a taxable supply to the landlord. The taxable supply is the service of entering into the lease. The lessee, if a GST/HST registrant, must collect and account for the GST/HST on this supply.[27]

---

[25] *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54 at para. 10; *Minister of National Revenue v. Armstrong*, [1956] S.C.R. 446 at pages 447 and 449; and *R. v. Melford Developments Inc.*, [1981] 2 F.C. 627 (FCA) at para. 21.

[26] GST/HST Memorandum 19.4.1 – "Commercial Real Property – Sales and Rentals", August 1999.

[27] Paragraph 43.

[93] While I might well agree with the position taken by the Canada Revenue Agency as reflected in this memorandum, I do not see how that advances the Appellant's position if there is also a taxable supply of a lease by Mall Co to Tech BC. That the consideration for that supply includes a taxable supply by Tech BC as tenant, does not alter the fact that there was a taxable supply of a lease to Tech BC. For the Appellant to argue that the Payment was made by a supplier (Tech BC) and that subsection 182(1) does not apply to payments made by a supplier simply distracts from the reality that there was a taxable supply of a lease to Tech BC.

[94] Other than the identifiable inducement payment of $700,000 noted earlier in these Reasons, there is little reason to find that the lease itself, by its terms, did not reflect the full consideration payable for the anchor tenant supply made by Tech BC. In this sense, there is a barter transaction being subsumed into the lease agreement. That is, the terms of the lease reflect and incorporate the consideration payable for an anchor tenancy. The penalty paid for failing to honour the tenancy obligation, both as rent payor and as anchor tenant, is inextricably tied to Tech BC's obligations under the lease.

[95] That there are two suppliers, supplying each other, does not mitigate the obligation of each recipient of a taxable supply to pay GST in respect of the supply acquired. Tech BC was the recipient of a taxable supply fully embodied in the lease supplied by Mall Co. That is a complete answer to the Appellant's argument.

## F. The Province's Constitutional Protection from Liability under the *Act*.

[96] As much as I am satisfied that ICBC had a right to receive the Payment as a consequence of the failure of Tech BC to honour the lease, which in itself defeats the assessment against Mall Co but for the debt reduction provision within subsection 182(1), I am satisfied that the Province had an obligation to make the Payment being the party responsible for such failure.

[97] That is, consistent with my finding that ICBC received the Payment for its own account, I am of the view that the Province had a contractual liability to ICBC and that its obligations were not derived solely from its relationship with Tech BC. The Province's obligations to ICBC arose from its decision to terminate Tech BC's existence and have it pull out of the project. That was a fundamental breach of its commitment to ICBC. Neither ICBC nor the Province intended to avoid their respective obligations to each other in respect to this jointly sponsored project. As I have said, the separate existence of Tech BC did not diminish, undo or vitiate the essential and binding obligations of the Province in this transaction.

[98] We know the Province caused the termination of the lease. We know it funded the Payment. Section 2.1 of the Settlement Agreement acknowledges that the Payment was on behalf of the Province. The May 3rd letter, which was acknowledged by the Province and incorporated into the Settlement Agreement, confirms that the negotiation of the Payment took place between ICBC and the Province. In that letter ICBC wrote:

> … this letter is to confirm that we have reached agreement with the Province on behalf of ICBC …

[99] The letter further confirmed that if the value of a subsequent lease exceeds costs and the Payment to ICBC, then ICBC will reimburse *the Province* up to an amount of $41.1MM. Any further recovery enjoyed by ICBC would be shared equally *between ICBC and the Province*. This reimbursement and profit sharing arrangement demonstrates that the Province, not Tech BC, was the principal with which ICBC was dealing. It does not evidence that the Province was making the payment on behalf of Tech BC.

[100] References throughout the Settlement Agreement acknowledge the Province as having standing as a party with rights and obligations that were being released by the Payment to ICBC.

[101] The Province's obligations were outlined in the MOEA. Section 2.4 of the MOEA states:

> The objectives and principles will be applied in good faith by the parties in the interpretation and carrying out of the intentions of this Agreement and TechBC, *the Crown* and ICBC Mall Co. will act reasonably from time to time in balancing the rights and obligations of each other under this Agreement recognizing such objectives and contributions. [Emphasis added.]

[102] The entire series of documents and the premises from which they evolved illustrate very clearly that there was a breach by the Province of a commitment to ICBC that the lease would be honored. That commitment remained regardless that Tech BC assumed obligations and notwithstanding that ICBC was allowed to nominate Mall Co to own the subject property and enter into the lease. The Province's commitment could not have been understood by ICBC as only to ensure that Tech BC signed the lease. The Province's commitment, recognized by its funding the Payment, was to ensure a viable tenant for the project. That commitment was made principally to ICBC not Mall Co.

[103] The question then is whether Mall Co, who might also be seen as the recipient of a supply, namely the lease, is liable to pay the subject tax notwithstanding that the Payment was made by the Province to ICBC. It did have a debt reduced as a consequence of the Payment. Aside from concerns over a construction of subsection 182(1) that permits more than one party to be liable for tax in respect of the same payment, I am of the view that Mall Co enjoys the same immunity from taxation as the Province.

[104] The Respondent in its argument acknowledged this as well in asserting that the Crown immunity would only apply if the Province was the recipient of the lease. I have concluded that this is the case. That Tech BC had a liability as recipient of a supply that was released by virtue of the Payment was incidental to the Province's need to be released from its liability. In my view, that finding should suffice as reason not to hold Mall Co liable as a result of the application of subsection 182(1). As well, I agree with the Appellant that section 17 of the *Tech BC Act* should be interpreted to support this result. That is, even if I were to find that Tech BC was also a recipient of the supply, it should stand in the shoes of the Province and enjoy the benefit of provincial immunity from taxation, thereby eliminating Mall Co's remittance obligation.

[105] Before concluding these Reasons, more needs to be said about the Province's, immunity from taxation. The Appellant raised two arguments: section 122 of the *Act* and the *Constitution Act*.

[106] Section 122 of the *Act* deals with the application of Part IX of that *Act*, which includes subsection 182(1), to a provincial government. According to paragraph 122(*b*), subsection 182 is binding:

> (b) on Her Majesty in right of a province <u>in respect of obligations as a supplier</u> to collect and to remit tax in respect of taxable supplies made by Her Majesty in right of the province."[Emphasis added.]

[107] This, in my view, says more than the Province as recipient of a supply is not subject to tax under paragraph 122(*b*).[28] It says: unless the Province acts as a supplier, it is not subject to tax under paragraph 122(*b*). Although the Respondent has not

[28] CRA New Memoranda Series chapter 18.2, "Provincial Governments", May 2010; CCH Commentary, "Imposition of Tax" paragraph 122(*b*) [¶4510]; Analysis/Commentary – David Sherman's Analysis, 122 – Application of the GST and HST to Governments (taxnetpro); CRA's Topical Research Paper TRP-09, "Sales to Provincial Governments".

suggested that the Province has made a taxable supply, I agree with the Appellant that indeed the Province did, in fact, make a supply: namely the supply of an anchor tenant. That being the case, I can only find that subsection 182(1) applies notwithstanding that it was also a recipient of a supply, namely, the lease and ICBC's financing commitment. It is the supplier side of the transaction that takes the Province out of the protection of section 122(*b*).

[108] That takes me finally to the Appellant's argument that provinces are protected constitutionally from taxation. That assertion must surely be correct. In *Reference re: Goods and Services Tax (GST),*[29] the Supreme Court of Canada reviewed the constitutional validity of the federal GST in Part IX of the *Act* and relying on *Reference re: Exported Natural Gas Tax*[30] concluded that provincial governments are not liable to pay tax on their purchases. Section 125 of the *Constitution Act, 1867*, states that:

> No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

[109] Quoting from *Reference re: Exported Natural Gas Tax* the majority of the Court in *Reference re: Goods and Services Tax (GST)* stated:

> Section 125 provides, in broad term, that no lands or property of the federal or provincial Crown shall be "liable to taxation". The purpose of this immunity, as we have seen, is to prevent one level of government from appropriating to its own use the property of the other, or the fruits of that property. This immunity would be illusory if it applied only to taxes "on property" but not to a tax on the Crown in respect of a transaction affecting its property or on the transaction itself. The immunity would be illusory since, by the simple devise of framing a tax as "in personam" rather than "in rem" one level of government could with impunity tax away the fruits of the property owned by the other. The fundamental constitutional protection framed by s.125 cannot depend on subtle nuances of form.

[110] It is well settled by these high court decisions then that the Province is not liable to pay tax under the *Act*.

[111] Still, it has been suggested that provincial immunity is subject to provincial/federal agreements and that certain requirements under those

---

[29] *Reference re: Goods and Services Tax (GST),* [1992] 2 S.C.R. 445 at paras. 53-55.

[30] *Reference re: Exported Natural Gas Tax,* [1982] 1 S.C.R. 1004 at page 1078.

agreements have not been met in this case.[31] Assuming that the Province of British Columbia would intend to respect such agreements, it seems necessary then to consider the agreement that it had with the federal government. At the relevant time, the federal government and certain provinces, including the Province of British Columbia, had entered into an arrangement by which provincial government departments would not pay GST on purchases if the Province certified that the property or services were purchased by the provincial government.[32]

[112] Short of using certificates it would appear that other documentary evidence of purchases by a provincial government would suffice. For example, Memoranda 400-4 states that "suppliers are not required to charge the GST/HST on their taxable supplies of property and services made to "listed entities" if the suppliers maintain sufficient documentary evidence that a listed entity was the recipient of the supplier." This documentary evidence includes "any document validly issued or signed by the GST/HST registered provincial government entity concerning the purchase". "Listed entity" is defined as a provincial government department that is entitled to make purchases without paying the GST/HST, which includes the Province of British Columbia and its departments for transactions that took place before July 1, 2010.
[113] Clearly, in this case there is no documentary evidence of the type contemplated by this administrative regime. However, it is equally clear to me that such evidentiary regime only facilitates the administration of the constitutional right of a province not to be subject to tax. Any failure to comply with such evidentiary requirements cannot deny a province that right where in fact it, a province, has been found by this Court to be the recipient of the supply in respect of which it made a payment. That is the case here, although it may be of concern in this case that the immunity claim is made by counsel for the Appellant, acting for the Appellant, not the Province. Still, I find that the Appellant's reliance on section 17 of the *Tech BC Act* is a sufficient response to that concern. That provision is, in my view, the voice of the Province claiming immunity for Tech BC.

---

[31] Based on these Supreme Court of Canada decisions, there should be no doubt that the constitutional protection of provinces from taxation includes protection from the application of GST in respect of services. While the jury might still be out as to the enforceability of a provincial/federal agreement that purports to give up a province's constitutional protection from taxation, cases such as *Vander Zalm v. British Columbia*, [2010] G.S.T.C. 139 (BCSC) (currently under appeal) speak of a cooperative federalism that obviates the need to resort to inter-jurisdictional immunity.

[32] GST/HST Info Sheet GI-073 "Ontario and British Columbia: Transition to the Harmonized Sales Tax – Payment of the GST/HST by Ontario and B.C. Government Entities", May 2010; Government Publications – GST Memoranda, 400-4 - - "Public Sector Bodies", January 18, 1991.

## G. Conclusions

[114] Accordingly, it is my view that the appeal must be allowed, with costs, for the reasons set out above. Costs awarded hereunder are exclusive of costs relating to the hearing of the Appellant's application to bring a motion under section 58 of the *Tax Court of Canada Rules (General Procedure)*, heard at Vancouver, British Columbia on September 3, 2010. Each party shall bear their own costs in respect of that hearing.

Signed at Ottawa, Canada this 2nd day of October 2012.

"J.E. Hershfield"

Hershfield J.

Appendix A

**Payment of Base Rent**

3.6 Base Rent will be payable as follows:

(a) $7,000,000 payable 120 days after the Commencement Date,

(b) Annual Base Rent, payable monthly and pro-rated as hereinafter provided, commencing 120 days after the Turnover Date with respect to the TechBC space in the Quadrangle Building and in the Entrance Atrium and Mezzanine and continuing until 120 days after the Turnover Date for the Galleria;

(c) Annual Base Rent, payable monthly, commencing 120 days after the Turnover Date for the Galleria for the entire premises leased pursuant to the TechBC Lease.

A pro-rated amount of calculated or estimated Annual Base Rent based on the known Base Buildings Budget at the time and amortized as contemplated in §3.5 will be paid for the period from 120 days after the Commencement Date (being the Turnover Date for the Quadrangle Building and Mezzanine) until 120 days after the Turnover Date for the Galleria and a calculated or estimated amount equal to full Annual Base Rent determined on the same basis will be paid after the latter 120 days. The payments will be adjusted based on the final Base Buildings Budget when determined so that the final Annual Base Rent can be calculated. Appropriate adjustments will be made by TechBC and ICBC Mall Co. For the purposes of the estimation and determination of Annual Base Rent, space in any part or parts of the Current Project will have the same per square foot value.

The parties have contemplated that the gross buildable area of the Initial University Space will be approximately 425,000 square feet. The Tenant agrees that the Landlord will adjust the Annual Base Rent in the event that the gross buildable area of the Leased Premises is found to be less that 420,000 square feet, i.e. if Tech BC gets 420,000 square feet GBA or more there will be no adjustment up or down. If there is less than 420,000 square feet GBA there will be a pro rata adjustment of Annual Base Rent by a fraction of which the numerator is the difference between 420,000 square feet and the actual area and the denominator is 425,000 square feet.

| | |
|---|---|
| CITATION: | 2012 TCC 346 |
| COURT FILE NO.: | 2009-3904(GST)G |
| STYLE OF CAUSE: | SURREY CITY CENTRE MALL LTD. AND HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Vancouver, British Columbia |
| DATE OF HEARING: | January 17, 18 and 19, 2012 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice J.E. Hershfield |
| DATE OF JUDGMENT: | October 2, 2012 |

APPEARANCES:

| | |
|---|---|
| Counsel for the Appellant: | Joel A. Nitikman<br>Jessica Fabbro |
| Counsel for the Respondent: | Ron D.F. Wilhelm<br>Bruce Senkpiel |

COUNSEL OF RECORD:

For the Appellant:

| | |
|---|---|
| Name: | Joel A. Nitikman<br>Jessica Fabbro |
| Firm: | Fraser Milner Casgrain<br>250 Howe Street, 20th Floor<br>Vancouver, British Columbia<br>V6C 3R8 |
| For the Respondent: | Myles J. Kirvan<br>Deputy Attorney General of Canada<br>Ottawa, Canada |