Docket: 2016-2606(GST)G

BETWEEN:

CIBC WORLD MARKETS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 18, 2017, at Toronto, Ontario
Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Al Meghji
	Al-Nawaz Nanji
Counsel for the Respondent:	Justine Malone

JUDGMENT

IN ACCORDANCE with the Reasons for Judgment attached, the appeal in respect of the claimed input tax credits for expenses attributable to certain supplies made by the Appellant to the non-resident branches of its parent bank for the reporting periods ending in 2008, 2009, 2010, 2011, 2012 and 2013, respectively, is hereby dismissed on the basis that such supplies were exempt financial services under subsection 150(1) of the *Excise Tax Act*, RSC 1985, c. E-15, as amended.

Costs are awarded to the Respondent in accordance with the Tariff subject to right of either party to make further submissions within 30 days of the date hereof.

Signed at Ottawa, Canada, this 29th day of May 2018.

"R.S. Bocock"

Bocock J.

Citation: 2018 TCC 103
Date: 20180529
Docket: 2016-2606(GST)G

BETWEEN:

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Appellant,

and

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REASONS FOR JUDGMENT

Bocock J.

I. Introduction and Issues

[1] The Appellant, CIBC World Markets Inc. ("WMI" or the "Appellant") is a resident Canadian financial services corporation wholly owned by Canadian Imperial Bank of Commerce ("CIBC"). CIBC is a Canadian chartered bank. In addition to its Canadian operations, CIBC also operates branches outside of Canada ("non-resident branches"). WMI provides administrative services to CIBC. Certain services are provided by WMI to CIBC in connection with CIBC's activities carried on at its non-resident branches.

[2] Within reporting periods ending in 2008 through 2013, WMI claimed input tax credits ("ITCs") on expenses allocable to services (the "exported services") supplied by WMI to CIBC relating to activities carried on at CIBC's non-resident branches. WMI asserts ITCs may be claimed because such exported services were made to a non-resident. As such, they are zero-rated supplies.

[3] There is a complicating factor. WMI and CIBC executed and have a subsisting election under subsection 150(1) (the "s.150 election") of the *Excise Tax Act*, RSC 1985, c. E-15, as amended (the "*ETA*"). The specifics of section 150 are analyzed herein, but generally, the section allows closely related entities, comprising collectively a financial institution, to elect to deem every supply of property and services between them as financial services. Administratively, the

election obviates the need for these closely related entities to file returns, pay tax and then claim ITCs on their "inter-group" (otherwise) taxable supplies.

[4] Relying upon the s.150 election, the Minister of National Revenue (the "Minister") disallowed the claimed ITCs allocable to the exported services solely on the basis that section 150 deems every supply made to be a financial service and that referable section 2, Part VII of Schedule V deems financial services to be exclusively exempt supplies. ITCs may not be claimed on exempt supplies.

[5] But for the election, both parties submit that the supply of services by WMI and CIBC, to the extent of the exported services, would be zero-rated services. This is because the services are supplied by a resident Canadian to a non-resident permanent establishment, so deemed, under subsection 132(3) of the *ETA* and its referable Part IX of Schedule VI. In such circumstances, the Canadian resident registrant would be entitled to claim ITCs upon the allocable exported services related to its non-resident branch activities.

[6] The overarching issue is whether these exported supplies are zero-rated supplies or exempt supplies; if zero-rated, ITCs may be claimed by WMI, if exempt supplies, they may not.

[7] The more narrow sub-issues to be determined are whether the exported services are: (i) services to which the s.150 election applies and deems financial services supplied "inter-group"; and, if so, (ii) are such deemed financial services exempt supplies notwithstanding their export to and consumption by a deemed non-resident person to the extent of such activities?

[8] There are no material facts in dispute. The parties handed up a statement of agreed facts at the outset of the hearing. No witnesses were called.

II. Legislative Provisions and Commentary

[9] The following are the relevant excerpts from legislation, rulings and commentary.

a) The *ETA*

[10] In placing the *ETA* as a whole in logical order for the purposes of considering the main issue and sub-issues, the Court identifies and excerpts the following provisions in a non-chronological order:

(i) The general charging section

[11] Subsections 165(1) and (3) of Division II of the *ETA* provide:

> 165(1) **Imposition of goods and services tax** - Subject to this Part, every recipient of a taxable supply made in Canada shall pay […] tax in respect of the supply calculated at the rate of 5% […]
>
> 165(3) **Zero-rated supply** - The tax rate in respect of a taxable supply that is a zero-rated supply is 0%.

(ii) Exempt supplies and zero-rated supplies

> *Exempt supply* means a supply included in Schedule V.
>
> *Zero-rated supply* means a supply included in Schedule VI.

(iii) Other Relevant definitions

[12] Relevant definitions within subsection 123(1) that inform the issue before the Court are described below:

> *Taxable supply* is defined as a supply made in the course of commercial activity.
>
> *Supply* … [the provision of] … property or services in any manner including sale, transfer, barter, exchange, license, rental, lease, gift or disposition.
>
> *Commercial activity* of a person means
>
> > (a) a business carried on by the person …, except to the extent to which the business involves the making of *exempt supplies* by the person, […]
>
> *Business* includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment; […]

(iv) The "conflicting" sections

[13] Subsection 150(1), referenced as an exempt financial service provides as follows:

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

[14] In turn, closely related group means:

> 123(1) **Closely related group** – means a group of corporations, each member of which is a registrant resident in Canada and is closely related, within the meaning assigned by section 128, to each other member of the group [...]

[15] In contrast, section 132 provides for the following:

> **132(1) Person resident in Canada -** For the purposes of this Part, a person shall be deemed to be resident in Canada at any time
>
> > **(a)** in the case of a corporation, if the corporation is incorporated or continued in Canada and not continued elsewhere; […]
>
> **(2) Permanent establishment of non-resident -** For the purposes of this Part, where a non-resident person has a permanent establishment in Canada, the person shall be deemed to be resident in Canada in respect of, but only in respect of, activities of the person carried on through that establishment.
>
> **(3) Permanent establishment of resident -** For the purposes of this Part, where a person who is resident in Canada has a permanent establishment in a country other than Canada, the person shall be deemed to be a non-resident person in respect of, but only in respect of, activities of the person carried on through that establishment.
>
> **(4) Supplies between permanent establishments -** For the purposes of this Part, where a person carries on a business through a permanent establishment of the person in Canada and through another permanent establishment of the person outside Canada,
>
> > **(a)** any transfer of personal property or rendering of a service by the establishment in Canada to the establishment outside Canada shall be deemed to be a supply of the property or service; and

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

[16] Generally, a financial service is defined as follows:

> *Financial service* is defined in section 123(1) to mean […]
>
> > (k) any supply deemed by subsection 150(1) or section 158 to be a supply of a financial service.

(v) The relevant schedules: Schedule V [exempt supplies] and Schedule VI [zero-rated supplies]

[17] Firstly, specifically as to exempt supplies, comprising financial services:

> Schedule V [Exempt Supplies], Part VII – *Exempt Financial Services*
>
> 1. A supply of a financial service that is not included in Part IX of Schedule VI.
>
> 2. A supply deemed under subsection 150(1) of the Act to be a supply of financial service.

[18] Secondly, generally as to zero-rated supplies:

> Schedule VI, Part V – Exports
>
> Section 7 – A supply of a service made to a non-resident person, but not including a supply of … [exclusions not applicable]

[19] Thirdly, specifically as to zero-rated supplies, comprising financial services;

> Schedule VI [Zero-Rated Supplies], Part IX – *Zero-rated* financial Services
>
> *A supply of a financial service* (other than a supply that is included in section 2) made by a financial institution to *a non-resident person* to

[20] It is noted that "activities" and "separate persons" are not defined in the *ETA*.

(b) Technical Notes, Bulletins and Other Commentary

[21] No jurisprudence on point reconciles the conflict between subsections 132(2) and 150(1): whether a s.150 election and Schedule V apply universally to every supply thereby overriding the designation of zero-rated supplies otherwise applicable to the exported services or exported financial services under section 132 and Schedule VI. While there is scant jurisprudence directly on point, the following technical notes and commentaries provide views on the text, context and purpose of the concepts in contention.

(i) Exports as zero-rated supplies

[22] For instance, technical notes and papers published at the time of the *ETA*'s passage provide as follows[1]:

> 1. Overview of the System
>
> […]
>
> Since the GST will be a tax on domestic consumer expenditures, it will apply to imports, but not exports. Under the new system, sales tax is fully removed from Canada's export sales – a significant advance over the existing system. This will be accomplished by charging no tax on export sales while, at the same time, allowing exporters to claim full input tax credits. (at page 49)
>
> […]
>
> [(c) Zero-Rates Supply]
>
> […]
>
> Consistent with the principle that the tax should only apply to consumption in Canada, exports of goods and services will be zero-rated (see Section 2.6). This will ensure that exports are completely relieved of GST. (at page 56)
>
> […]
>
> 2.6 Exports
>
> Since the GST is meant to apply only to the consumption of goods and services in Canada, supplies made in Canada that are exports will be categorized as zero-rated supplies, and will not be subject to the tax. (Technically, there is no need to zero-rate exports that are supplies made outside Canada as these will be beyond

[1] Government of Canada, Department of Finance, GST Technical Paper (August 1989) at pages indicated in text above.

> the scope of the GST in any event.) To completely relieve exports of any sales tax content, exporters will be allowed to claim input tax credits in respect of any tax paid or payable on purchases of goods and services relating to their commercial activities. The net result will be a refund to exporters of the tax paid on their purchases. (at pages 72-73)

[23] Similarly, as to exported services and international operations, the same technical paper provides[2]:

> (iii) Exported Services
>
> Financial services provided to non-residents for use outside Canada will be zero-rated, as is the case for all other exports of goods and services. As a result, providers of financial services will be eligible to claim input tax credits in respect of tax-paid purchases used in the provision of exported services. This will ensure that Canadian firms providing financial services remain competitive in global markets. (at page 144)
>
> […]
>
> (ii) International Operations
>
> Canadian financial institutions provide services to both residents and non-residents. Services provided to non-residents for use outside Canada will be zero-rated. As such, banks, trust and loan companies and financial co-operatives will be entitled to claim input tax credits to the extent that taxable purchases are for use in providing zero-rated goods or services to non-residents and foreign branches of Canadian financial institutions for use outside Canada.
>
> Fees charged for various financial services will be considered to be a zero-rated supply to the extent the service is rendered to a non-resident for use outside Canada. The provision of a financial service to a Canadian branch of a foreign corporation will be considered to be a supply made in Canada and, therefore, will be exempt from GST. Conversely, the provision of financial services to a foreign branch of a Canadian company will be considered as an export and, as such, zero-rated. (at page 146)

[24] In turn, such notes and publications have caused authors on the subject to conclude that a Canadian foreign permanent establishment (herein non-resident

[2] *Government of Canada, supra,* at pages indicated in text above.

branch) is deemed to be not only a non-resident person[3], but also a separate person[4]:

> A Canadian resident person is deemed to be a non-resident person in respect of activities carried on through a permanent establishment located outside of Canada. Here, the foreign permanent establishment is deemed to be a person.
>
> This is due to subsection 132(3), which deems a Canadian resident person, including a corporation, to be a non-resident person in respect of the activities carried on through a permanent establishment located outside of Canada. Here the foreign permanent establishment is deemed to be separate person and thus there is no issue with respect to the status of the Canadian permanent establishment of the corporation.

(ii) "deemed" financial services as exempt supplies

[25] In contrast, it has also been said that the s.150 election approaches the all-encompassing[5]:

> Section 150 entitles two corporations that are members of the same closely related group that includes a listed financial institution (i.e., a person described in paragraph 149(1)(a) of the Act) to make an election to treat certain supplies of property and services between them as exempt supplies of financial services. The effect is that the supplying member bears the tax on any inputs attributable to the provision of the property or services to the related member. The supplying member is not entitled to claim input tax credits in respect of those inputs and does not charge tax to the related member.

(c) Related Jurisprudence

[26] Although not directly on point, where both section 150 and section 132 are competing, the limited scope of subsection 132(2) has been considered. Justice Hogan in *SWS Communication Inc.*[6] wrote as follows:

> It is clear from the wording of subsection 132(2) that, where a non-resident person has a permanent establishment in Canada, the person is deemed resident in Canada in respect of, but only in respect of activities carried on through that permanent establishment. In other words, a non-resident person remains a non-

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[3] Steven D'Arcy, "GST Hot Topics – 1997", 1997 CICA Commodity Tax Symposium (Canadian Institute of Chartered Accountants, 22-24 September 1997) at 42-45.
[4] Steven K. D'Arcy, "Establishment in More than One Country" (28 September 1999) 132 Canadian GST Monitor (CCH) at 1-2.
[5] Government of Canada, Revised Technical Notes, GST, July 10, 1997 at page 45.
[6] *SWS Communication Inc.* v *The Queen*, 2012 TCC 114 at paragraph 19.

> resident person except with respect to the activities carried on through the person's Canadian permanent establishment. In my opinion, a service is supplied to the Canadian permanent establishment of a non-resident person if it is consumed or used in the activities carried on in Canada through the permanent establishment.

[27] Subsection 132(3), which is under consideration, is a mirror image of subsection 132(2). Both employ identical language regarding "activities", but subsection (3) references a permanent establishment "in a country other than Canada" rather than "activities carried or in Canada" as in subsection (2). As seen above, Justice Hogan identifies that not only must a permanent establishment exist, but services must be supplied for the furtherance of such activities in order for the limited scope deemed residency to apply.

III. The Parties' Arguments in Brief

(a) Respondent

[28] In denying the foreign branch ITCs, the Respondent, in reassessing, concludes that section 150 and related schedules override section 132 and its related schedules textually, contextually and purposively. In its submissions the Respondent states:

> Schedule V, Part VII, s. 2 provides that those supplies which are deemed to be financial services under s. 150(1) are exempt supplies.
>
> A supply deemed under subsection 150(1) of the Act to be a supply of a financial service.
>
> Pursuant to the combined operation of s.150(1) and Schedule V, Part VII, s.2, all taxable supplies between members of the closely related group who have made an election are deemed to be exempt supplies. The Explanatory Notes to s.150 explain:
>
> > Subsection 150(1) provides that two members of a closely related group can jointly elect to have all inter-company supplies of services or leases, which would otherwise be taxable, treated as exempt supplies. A service or lease imported by a Canadian company is not eligible for this exemption and, therefore, is treated as a taxable supply and subject to GST on a self-assessment basis under Division IV (sections 217 to 220 of the Act).

> Parliament did carve out an exception to s.150, that being in the case of imported taxable supplies (initially referenced in subsection 150(1), and later in s.150(2)). If the election were to apply to imported taxable supplies, it would result in an avoidance of tax altogether, and creating a bias in favour of importing over acquiring inputs domestically. As such, the situation is specifically excluded from the [150] election's application.
>
> The purpose of the s.150 election is to provide for consistent treatment of supplies within a corporate group, as would be the case if the services were provided in-house by employees. Parliament intended that the supplying member who has made such an election, in this case the appellant, bears the tax on any inputs, and cannot claim ITCs and does not charge tax to the related member.

[29] The Respondent asserts that subsection 132(3) does not apply to exported "deemed" financial services as it otherwise would to exported supplies and exported financial services. The latter are not specifically "deemed" financial services under subsection 150(1). Such deemed financial services under the s.150 election are exclusively and uniformly exempt supplies under the specific wording of section 2, Part VII of Schedule V.

(b) Appellant

[30] In response, the Appellant says:

> Absent a subsection 150(1) election, it is clear that WMI would be entitled to ITCs on inputs to exported supplies of administrative services to CIBC's Non-Resident Branches because those supplies would be zero-rated taxable supplies as CIBC is treated as a separate non-resident person in respect of its Non-resident branches.
>
> Parliament's purpose in providing for a subsection 150(1) election was to facilitate administrative ease and simplicity. The election was not intended to alter the overall design of the Act to ensure that exports are GST-free. Consistent with that purpose, WMI says the subsection 150(1) election does not transform its zero-rated taxable supplies into exempt supplies. The election is not intended to punitively deny WMI's ITCs and alter the cornerstone principle of the Act that exports are zero-related.
>
> The Crown's interpretation should not be preferred because such an interpretation is contrary to the fundamental premise of the Act and is not consistent with the text, context and purpose of subsection 150(1).

[31] In its amended notice of appeal, the following summarizes the overall grounds of appeal of the Appellant:

> 1. primarily, CIBC is a deemed separate person to the extent of its foreign activities under subsection 132(3), cannot be a member of a closely related group to the extent of such activities and therefore, was not able to elect under subsection 150(1) to elect to have supplies related to such activities deemed financial services (the "deemed separate person" argument); and
>
> 2. in the alternative, if section 150 is applicable, the deemed financial services nonetheless are zero-rated supplies under Schedule VI rather than exempt supplies under Schedule V.

(c) the re-stated issues

[32] To reiterate, the issues are:

(i) does the s.150 election apply to supplies made to a non-resident branch and deem such supplies financial services?; and

(ii) if the s.150 election applies, are the exported financial services exempt supplies under Schedule V or zero-rated under Schedule VI?

IV. Analysis and Decision

A. Is "every supply" a financial service?

[33] While there may not be ambiguity readily apparent within each section *per se*, when examined comparatively in this appeal, conflict exists. As between sections 132 and 150, each section says, "… subject to this Part", but each applies to the same "Part": Part IX of the *ETA* and the relevant Schedules: Schedules V-X. Similarly, the respective sections conflict on whether ITCs may be claimed on exported services, whether services *per se*, financial services or deemed financial services. A resolution is possible only through either rendering one section and/or schedule paramount or supercedeous, or possibly finding both compatible. To achieve this, a textual, contextual and purposive analysis of the *ETA*, the relevant "Part" and these ostensibly warring sections and schedules is needed.

a) The Textual Analysis

(i) Section 150 and subsection 150(1)

[34] Section 150 and the triggering s.150 election under subsection 150(1) will be primarily analyzed against the backdrop of section 132 and the *ETA* as a whole. The wording of section 150 provides that upon filing the prescribed election every supply between the two parties that would, but for this subsection, be a taxable supply is deemed to be a supply of a financial service. This deeming, aside from the deemed separate person argument of the Appellant, directs the reader to the *ETA* Schedules. One must fairly ask which schedule applies: Part VII Schedule V – exempt supplies of financial services or Part V of Schedule VI – zero-rated supplies of exported financial services?

[35] The Respondent argues that Schedule V is the only direction one may look because subsection 150(1) is clearly referenced in section 2 of Part VII of Schedule V (the "Exempt Schedule"). Exempt financial services are referenced twice in Part VII: section 1 and section 2. Although repetitive, the two sections with annotated notes concerning this specie of exempt supply read as follows[7]:

> 1. A supply of a financial service that is not included in Part IX of Schedule VI.
>
> 2. A supply deemed under subsection 150(1) of the Act to be a supply of a financial service.
>
> Notes: See Notes to 123(1) "financial services". V-VII allows a zero-rated supply under VI-IX to take priority, so that input tax credits can be claimed on inputs (see Notes 123(1) "exempt supply" and "zero-rated supply"). V-VII -2 overrides this rule where a section 150(1) election has been made by closely related corporations; in such case, no ITCs are allowed even if the supply also falls within VI-IX.

[36] Textually, taken together, this seems a compelling direction unless the deemed separate person argument holds sway to deny application of the s.150 election; or, some overarching context or purpose of the *ETA* suggests otherwise.

(ii) Section 132 and subsection 132(3)

[37] Subsection 132(3) provides that where a resident person has a permanent establishment outside Canada the person "shall be deemed to be a non-resident person in respect of, but only in respect of, activities of the person carried on through that establishment". This circuitously renders such exported services zero-rated by virtue of the applicability of section 7 of Part IX of Schedule VI [services provided to non-resident – general] (the "Zero-rated Schedule"). Of note,

[7] *Goods and Services Tax Annotated*, 2017, 30th Edition, David M. Sherman, p.1006.

subsection 132(3) describes activities, and not commercial activities, in reference to the deemed non-resident. Subsection 165(1), the paramount charging provision within the *ETA* levies tax only upon a "recipient of a taxable supply made in Canada". Plainly, supplies (otherwise taxable) made outside Canada are not subject to GST.

[38] Section 142 of the *ETA* also speaks to place of supply. It deems a supply to be made outside Canada if in the case of a service not otherwise described "the service is, or is to be, performed wholly outside Canada". As well, the annotated text provides distinction to the zero-rating of exports[8]:

> Notes: a zero-rated supply (see list in Schedule VI) is technically a taxable supply that is taxed at 0%. A zero-rate supply has virtually no GST or HST built into its costs, since all GST/HST paid on inputs is recoverable by the supplier as an input tax credit under 169(1) (subject to 236.01). Note that a supply made outside Canada (see 142(2), 143(1), 144 and 179(2) and (3)) is technically not a zero-rated supply; it is simply not taxed because it is outside the scope of 165(1). For practical purposes it is almost identical to a zero-rated supply (the principal differences are in s. 249 affecting filing frequency, and that an exemption that excludes a zero-rated supply, such as V-VI-2(a) or V-VI-23(a), will not exclude a supply made outside Canada).

(iii) Exported Services and Financial Services under the *ETA*

[39] Goods and services supplied outside Canada are not taxed by virtue of subsection 165(1). By virtue of Schedule VI which also prescribes other goods and services as zero-rated supplies well beyond exports, supplies made in Canada, but subsequently exported, methodologically become zero-rated. Subject to certain limited exceptions, the reason for this is fundamentally purposive and is discussed below.

[40] A domestic/export dichotomy continues for financial services. Financial services are either exempt (Schedule V) or zero-rated (Schedule VI). This entirely depends on whether the financial services are supplied within or without Canada. Aside from the contextual argument concerning the deemed separate person argument, the deemed financial services referenced in subsection 150(1) may either be exempt under Schedule V or zero-rated under Schedule VI.

[8] Annotated GST, *supra*, at page 138.

[41] To resolve this choice and consider the deemed separate person argument, a mere careful consideration of the words[9] may not suffice. Where the text is unequivocal, words play a dominant role, but where two meanings are possible they play a lesser role. In short, the Court must utilize the textual, contextual and purposive interpretative process in order to read all the provisions of the *Act* within the overall scheme of the legislation as a harmonious whole[10].

b) Reconciling the contexts and purposes of sections 150 and 132

[42] Purposively, section 150 provides commensurate tax treatment between every supply received by a person (financial institution) made by a closely related member who supplies same and supplies made "in-house" by an identical person. Although no ITCs are allowed on the services provided to a closely related entity, the supplier need not charge and collect GST[11]. Subsection 132(2) has an oppositive effect. It creates distinction between an entity and its own "subsidiary" non-resident branch such that an exported supply is effectively deemed to have been between them and the right to claim an ITC arises.

[43] However, the assertion that the deemed separate person argument of a non-resident branch accomplishes this falls short. There is no "separateness" within subsection 132(3). The subsection provides that the "resident" person becomes a "deemed non-resident" to the extent of the "activities" carried on through the permanent establishment. It does not mention supplies of goods or services at all. It does not provide context or purpose for the conclusion that all supplies made in respect of the activities of the "deemed non-resident" are deemed supplies to a separate person. Neither does the section provide directly that supplies made to the non-resident branch become zero-rated supplies. If either of these express provisions had been made in a fashion similar to section 150, a conclusion regarding the context and purpose of the section deeming supplies to be zero-rated or the existence of a deemed separate person may have sheltered applicability of the s.150 election to every supply made to the non-resident branch and prevented every supply from becoming a financial service.

[44] By virtue of both subsection 132(3) and 123(1), the permanent establishment's non-resident branch activities effectively become de-coupled from the activities of their closely related group in Canada, but the person is not separate *per se* for any other purposes; the non-resident branch is not excluded contextually

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[9] *Imperial Oil Ltd.* v *Canada,* [2006] 2 SCR 447, at paragraphs 24-29.
[10] *Canada Trustco Mortgage Co.* v *Canada,* [2005] SCR 54 at paragraph 10.
[11] *Revised Technical Notes, GST, supra*, at page 45.

from being a "member of a closely related group". This is further borne out by subsection 132(4) appearing directly subsequent to 132(3). Within it, two permanent establishments are clearly and plainly deemed to be separate persons with specific reference to supplies made between them. Why did Parliament not do so for non-resident branches in the preceding subsection if it intended to create a deemed separate person there as well? Contextually, because it did not wish to do so. Such context and purpose within subsection 132(3) prevent any roundabout existence of a "deemed separate person" for other purposes beyond the activities of the non-resident branch. Simply repeating the words "in respect of any exported supplies, the person resident in Canada and its permanent establishment outside Canada shall be deemed to be separate persons" would have done so.

[45] In contrast, where Parliament wished to do so, it did so immediately below. This also stands contextually in contrast to the broadly unrestrictive "every supply… is deemed to be a supply of a financial service" in subsection 150(1). Such context and competing purposes end such a "deemed separate person" argument. Every supply between WMI and CIBC is deemed by virtue of the s.150 election to be a financial service. Specifically in the context of subsection 150(1), had Parliament wished to exclude supplies to non-resident branches from application of the s.150 election, the legislation may have specifically done so. As an example, the words "Every supply, other than an otherwise zero-rated supply" would have sufficed.

B. Exempt or Zero-Rated Deemed Financial Services

a) Purposive Conflict Exists

[46] While the Court has rejected the Appellant's submission concerning the deemed separate person argument, it is mindful that an exported zero-rated supply has been rendered an exempt supply. As a result, an exported service, not consumed in Canada, has been levied non-refunded and unrecoverable GST. This is counterpuntal to the overarching principle that supplies made outside Canada are not subject, *ab initio*, to GST and, correspondingly, those made in Canada but exported are to be zero-rated. If one accepts the Respondent's submission regarding the conjunctive effect of section 150 and section 2 of the Exempt Schedule, then an exported supply in the form of an exported financial service is subject to HST notwithstanding two clear principles with the *ETA*. The first is

overriding, purposive and fundamental: exported supplies are not subject to GST[12]. The second is contextual to financial services, aside as the Respondent contends, from those "deemed" financial services by s.150. Generally, financial services made in Canada are exempt supplies, but those supplied or exported outside of Canada are zero-rated[13]. The question remains, how to reconcile the Minister's altered application of s.150 and Schedule V with these principles. The Court understands the methodic and simple logic, textually supportable, of including the deemed financial services pursuant to the strict textual application of section 2 of Part VII of Schedule V. However, such a finding does not consistently fulfill the legislative purposes of subsection 165(1), section 142, Parts of Schedule VI concerning exported services and most specifically, Part IX of Schedule VI in the context of an exported financial service, itself specifically referenced in section 1 of Part VII of Schedule V.

(i) Purposive consistency of exported "deemed" financial supplies being exclusively exempt supplies?

[47] Is it purposively consistent that "deemed financial services" under section 150, where exported to a "non-resident" should, exclusively become exempt supplies? By virtue of subsection 132(3) and section 142, exported financial services proper are primarily zero-rated subject to certain limited exceptions. Of critical importance to any analysis of this assertion is the overarching jurisprudence which mandates that all parts of the *ETA*, or any Act for that matter, are to move compatibly and consistently, each contributing something towards the intended legislative goal[14]. Section 150 deems every supply within it a financial service. Based upon the court's finding above, this is no longer in dispute. The heart of the purposive question is whether the deemed financial service is domestically consumed or exported. The bedrock charging provision of the *Act*, section 165, does not tax supplies, taxable or otherwise, made outside of Canada. This is not to suggest that domestically supplied financial services, otherwise zero-rated under Schedule VI[15], would not be caught by section 150 and Schedule V. Even apart from section 150, domestically consumed financial services are generally exempt supplies. The Respondent contends that section 150, which makes every supply

[12] Upon introducing of the GST, the then Minister of Finance in Technical Notes made the announcement reflected in note 1, *supra*.

[13] Respectively, s. 1 of Part VII of Schedule V and Part IX, Schedule IX.

[14] *R.* v *L.T.H.* [2008] 2 SCR 739; 2008 SCC 49 at paragraph 47, itself referencing "Sullivan on the Construction of Statutes" (4th ed. 2002 at page 168).

[15] For example, a supply of a financial service made by a financial institution to a non-resident person in Canada or a supply of certain financial services to insurance policies cit. Schedule VI, Part IX of the *ETA*.

within it an exempt supply, is purposively consistent with the overall regime of the *ETA*.

[48] The unique nature of supplies made outside Canada sets exported services apart within the *ETA*; supplies made outside Canada are not subject to tax under the *ETA*. The characterization of exported supplies as zero-rated supplies where such supplies including financial services originate in Canada, but are exported, is a mechanism to refund GST on supplies not consumed by an end user in Canada and are therefore not taxable[16]. This is reflected in the considered view that zero-rating for exports approximates, but does not entirely reflect their unique position within the category of zero-rated supplies[17]. In short, these supplies consumed externally are different than other policy specific zero-rated goods and services consumed domestically: groceries, etc.

(ii) Are exempt and zero-rated "deemed" financial services both purposively supportable within the *ETA* and schedules?

[49] In light of the wording of section 2 of the Exempt Schedule, it may be suggested that two distinct strains of jurisprudence exist to thwart the above-noted possible distinction between domestically supplied financial services and exported financial services. Firstly, there is the position that an exempt supply is paramount or takes priority to a zero-rated supply[18]. Secondly, as a matter of statutory interpretation, the specific language of section 150 and critically, section 2 of Part VII of Schedule V preclude the applicability of Part IX of Schedule VI: *generalia specialibus non derogant*[19].

[50] Regarding the first point, the jurisprudence suggesting that exempt supplies are paramount to zero-rated supplies emanates from informal procedure appeals. More importantly, the cases do not concern either of exported supplies or exported financial services, deemed or otherwise. Such authorities may be distinguished on that basis. This distinction is important. First, exported financial services, not consumed in Canada, are not subject to unrecoverable GST. Second, the zero-rating mechanism is used to refund that GST collected, but ultimately not due. This zero-rating purpose of exported financial services is also distinct from policy based and determined zero-rated supplies such as groceries, certain pharmaceuticals and the like. Such zero-rated supplies are consumed domestically and otherwise taxed

[16] Section 165(1) *ETA* and cit. paragraphs [39, 40 and 41] *supra*.
[17] Cit. paragraph [38], *supra*.
[18] *Buccal Services Ltd.* v *Canada* [1994], GSTC 70; *Dr. Brian Hurd Dentistry P. C.* v *HMQ*, 2017 TCC 142.
[19] Roughly translated: "the general will not diminish the specific".

by the hierarchy of the *ETA*. Such domestic zero-rating is specific and plainly driven by other policy purposes aside from the supply being exported and thereby logically lying outside the reach of the charging provisions of the *ETA*.

[51] This leads to the second issue: the principle of statutory interpretation concerning the specific excluding the general. Section 150 is engaged to render every supply a financial service within a closely related group. Just as subsection 132(3) does not render a foreign permanent establishment a deemed separate entity, section 150 *per se* does not deem the financial service to be an exempt supply. That is accomplished by the financial service either falling within the Exempt Schedule or the Zero-rated Schedule. If the financial service is supplied in Canada, it becomes exempt[20]. This marches along with the convenient administrative purpose of section 150, the s.150 election and section 2 of the Exempt Schedule[21] which obviates the need to charge and remit GST within the closely related group. Of note, no such inconvenience otherwise existed for exported supplies (including financial services) which were not ultimately taxable supplies made in Canada and became free of tax upon export through claimed ITCs.

[52] Further, the Exempt Schedule has two distinct sections. Within section 1, reference and exclusion is made to zero-rated supplies of exported financial services specifically listed in the Zero-rated Schedule. In section 2, which solely references the "deemed" financial services of subsection 150(1), there is no such reference to the Zero-rated Schedule. Does this omitted cross-reference to the Zero-rated Schedule in the Exempt Schedule open a gap too wide for the concept of "deemed" exported financial services to reach across to Part XI of the Zero-rated Schedule? This question is purposively posed given that generally all other exported financial services otherwise do so. Generally, exported financial services, along with exported supplies, are not subject to GST through zero-rating.

[53] Mindful of that considerably important purpose, what may be taken from the context of Schedules V and VII to discern Parliament's intention? The Federal Court of Appeal in *National Bank Life*, has previously considered similar arguments concerning financial services supplied by a financial institution to a non-resident person[22]. Within the case, while not dealing with the conflict of exempt versus zero-rated financial services within the two distinct schedules, the

[20] The combined effect of section 1, Part VII of Schedule V.
[21] Department of Finance Technical Notes (May 1990) s.150 and (July 1997) s.150(1).
[22] *National Bank Life Insurance* v *HMQ*, 2006 FCA 161.

Court did resolve the conflict arising from ambiguity within a single schedule, coincidentally Part IX of the Zero-rated Schedule of the *ETA*[23]. More helpfully, the Court considered the same principle of statutory interpretation referenced above[24]. In *National Bank Life*, the appellant argued that financial services listed in the subsequent specific section were already definitionally included in the preceding section 1. However, financial services associated with an insurance policy were excluded from section 1 and otherwise were dealt with in section 2. If not falling within an insurance policy, the financial service would have been zero-rated. However, section 2 would have rendered the appellant's financial service an exempt supply. In resolving this ambiguity, the Court at paragraph 8 wrote:

> [8] The only way of understanding section 1 and giving it a coherent meaning consistent with the principles of taxation, zero-rating and exempt supplies contained in the Act is to see and recognize in section 1, in the exception of a supply of services contained in section 2, an intention on the part of Parliament to deal in section 2 specifically and exhaustively with the financial services relating to an insurance policy. In other words, section 2 is a special and specific provision applicable to financial services relating to an insurance policy. In section 2, Parliament has defined the conditions under which the supply of such services will be zero-rated and only the supply of services which meet those conditions shall be so rated. Other supplies of financial services related to insurance policies are, pursuant to Part VII of Schedule V, entitled "Financial Services", exempt supplies.

[54] In paraphrasing and applying such analyses to the present appeal this Court must analogously ask: does section 2 of Part VII of the Exempt Schedule, as a special and specific provision, apply and override the preceding section 1, Part VII exclusion of the Exempt Schedule? To answer that question two principles are relevant: Parliament knows its mind and does not speak without purpose. Parliament was aware of the general proposition that GST is refunded through ITCs on exports. This was the subsisting situation: section 1 of Part VII of the Exempt Schedule and Part IX of the Zero-rated Schedule were co-extensive prior to the enactment of section 2. If section 2 of Part VII of the Exempt Schedule had not been enacted, logically and constructively, the enactment of subsection 150 and the s.150 election, "deemed" financial services would have simply slipped into either sleeve of the Exempt Schedule or Zero-rated Schedule; domestically consumed "deemed" financial services falling within Schedule V and exported deemed financial services falling within Schedule VI by virtue of the exception in section 1 of Part VII of the Exempt Schedule. But section 2 was enacted and it

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[23] *Ibid,* at paragraphs 3 and 4.
[24] Cit. note 21, *supra*.

deals specifically and exceptionally with "deemed" financial services under subsection 150(1). As such, the more general financial service is not left to simply fall within either Schedule V or Schedule VI based upon domestic or external consumption, but, as a "deemed" financial service, is exclusively diverted into the Exempt Schedule as an exempt supply.

[55] Given the clear authority of *National Bank Insurance*[25], section 2 of Part VII of the Exempt Schedule prevails over the preceding section 1 and its reference by exception to Part IX of Schedule VI of the Zero-rated Schedule. A taxable supply originating in Canada and also deemed a financial service by virtue of the s.150 election is an exempt supply even where exported to a non-resident branch. As such, there is no right to claim ITCs in respect of such financial services.

V. Conclusion and Costs

[56] The Court acknowledges that the present result is not uniformly balanced and symmetrical. While specific inconsistency, absurdity and confusion are not created, contextual versus purposive conflict exists. Firstly, exported services, including exported financial services, remain free from GST under the *ETA* save for exported deemed financial services. The fundamental purpose and goal of the *ETA* to tax only supplies made and consumed in Canada are not universally preserved. Secondly, the s.150 election, contemplated legislatively and purposively to add administrative simplicity to exempting inter-entity domestic supplies within listed financial institutions, has levied unrecoverable GST on supplies of services exported and consumed externally; an otherwise domestic consumption tax now renders a "sub-species" of exported financial services less competitive. Thirdly, the federal treasury receives a windfall of GST on exported services never to be consumed in Canada. It was not generally intended to have such revenue by virtue of a fundamental and purposive principle of a critically important taxing statute. Exported supplies, in the form of financial services, were never intended to be irrevocably taxed under the *ETA*. However, given the clear, analogous and directive jurisprudence of the Federal Court of Appeal in *National Bank Life* on specific contextual interpretation within the *ETA*, this Court cannot stretch that fundamental principle as far as would be necessary to grant this appeal, even in the name of uniform, general purposive consistency.

[57] On such a basis, the appeal is dismissed. The exported services from WMI to the CIBC's non-resident branches are exempt supplies. Costs are awarded to the

[25] *National Bank Insurance, supra*, paragraphs 9 and 10.

Respondent in accordance with the Tariff subject to the proviso that either party may make written submissions to the contrary within 30 days of the date hereof.

Signed at Ottawa, Canada, this 29th day of May 2018.

"R.S. Bocock"

Bocock J.

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APPEARANCES:

Counsel for the Appellant:	Al Meghji Al-Nawaz Nanji
Counsel for the Respondent:	Justine Malone

COUNSEL OF RECORD:

For the Appellant:

Name:	Al Meghji Al-Nawaz Nanji
Firm:	Osler, Hoskin & Harcourt LLP

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada