

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260216

Docket: A-225-23

Citation: 2026 FCA 31

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

BETWEEN:

AMEX BANK OF CANADA

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on September 5, 2024.

Judgment delivered at Ottawa, Ontario, on February 16, 2026.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**LASKIN J.A.
MONAGHAN J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

I. Introduction

[1] In this appeal, the appellant (Amex) asks this Court to set aside a judgment of the Tax Court of Canada that upheld goods and services tax assessments made under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA) (2023 TCC 93, Hogan J.). The issue involves input tax credits

(ITCs) claimed by Amex for GST/HST paid on expenses to operate Amex's rewards program related to its credit card operation. The assessments relate to ITCs in the aggregate amount of \$13,973,869 that were claimed over an 11-year period ending on December 31, 2012.

[2] The Tax Court determined that the ITCs relating to the rewards program were properly disallowed because the expenses were not made or incurred in the course of a commercial activity. Instead, they were made or incurred in the course of providing financial services, which do not form part of a commercial activity.

[3] In reaching this conclusion, the Tax Court judge considered Amex's services to members of the rewards program, to holders of Amex credit cards, and to merchants who accept Amex credit cards, and whether Amex provided marketing services to persons who supply the rewards to Amex. The judge rejected Amex's submission that some of these services were taxable supplies and part of Amex's commercial activity.

[4] In this appeal, Amex submits that the judge made several errors of law and fact. For the reasons below, I disagree with these submissions and would dismiss the appeal.

II. Background facts

[5] The parties' Partial Agreed Statement of Facts (PASF) reproduced below provides a useful description of the background facts.

Background

1. The Appellant ... was incorporated under the *Canada Business Corporations Act* on June 22, 1987 and continued under the *Bank Act* (Canada) on April 25, 1990 and has been thereafter a Schedule II bank regulated under the *Bank Act* (Canada).
2. Amex is, and was throughout Amex's 2002 through 2012 annual reporting periods (the "Relevant Periods"), registered for the Goods and Services Tax/Harmonized Sales Tax (the "GST/HST") under Part IX of the *ETA*.
3. Amex issued American Express charge cards and credit cards (collectively, "Cards") to members of the public ("Cardholders") who applied for and qualified for such Cards.
4. Amex Canada Inc. ("ACI") is an Ontario corporation and, during the Relevant Periods, was a member of a "closely related group" (as that term is defined in the *ETA*) with Amex.
5. During the Relevant Periods, ACI carried on the business of, *inter alia*, providing travel agency services to the public.

The Membership Rewards Program

6. During the Relevant Periods, Amex operated a loyalty program known as the Membership Rewards Program (the "MRP").
7. A Cardholder who was a member of the MRP (a "Member") accrued and was credited with a certain number of points (the "Points") by Amex for each dollar charged to a Card for the purchase of goods or services.
8. Under the MRP, Amex did not credit a Member with Points for amounts charged to a Card for, *inter alia*, delinquency fees, interest, Card fees, purchases of American Express Travellers Cheques and Gift Cheques, balance transfers, or the purchase of foreign currency.
9. The more dollar value of eligible purchases a Cardholder charged on the Card, the more Points the Cardholder earned.
10. The more Points a Cardholder accumulated, the more Rewards (as defined below) or the higher the value of the Reward a Cardholder could redeem from Amex.

Becoming a Member of the MRP

11. Participation in the MRP was available only to Cardholders.

12. Amex offered a variety of Cards with different rights and obligations attached to each.

13. Some Cards required the Cardholder to pay an annual fee to Amex (a “Card Fee”), with different Card Fees payable for different Cards.

14. Amex did not charge Cardholders GST/HST on the Card Fees.

MRP Fees

15. Some Cards (the “MRP-Inclusive Cards”) carried with them enrollment of the Cardholder in the MRP with no additional enrollment fee charged to the Cardholder.

16. For other Cards (the “MRP-Extra Cards”), a Cardholder had the option (but was not required) to join the MRP by paying Amex an enrollment fee (the “MRP Enrollment Fee”) (the MRP-Inclusive Cards, together with all MRP-Extra Cards whose Cardholders opted to join the MRP, are collectively referred to as “MRP Cards”).

17. MRP-Extra Cardholders could enroll in, or withdraw from, the MRP at any time.

18. Amex charged MRP-Extra Cardholders GST/HST on the MRP Enrollment Fee.

19. Under some MRP Cards, a Member had the option to pay an extra fee (the “Points Accelerator Fee”) to be entitled to be credited with a higher ratio of Points per dollar charged to a Card.

20. Amex charged Members GST/HST on the Points Accelerator Fees.

Claiming Rewards

21. A Member was entitled to exchange or redeem his or her accrued Points for various rewards (the “Rewards”) such as airline tickets, airline frequent flyer points, hotel chain loyalty points, travel certificates, meals at restaurants, gift cards and tangible items such as watches, golf clubs, luggage and headphones.

22. A Member was required to redeem a specific number of Points to claim any particular Reward.

23. Amex determined the number of Points required for each Reward.

24. It was Amex that determined limitations on MRP Point redemptions for a Reward.

25. Subject to certain conditions, if a Member did not have enough Points to claim a particular Reward, the Member could purchase from Amex for a fee (the “Points Fee”) the additional Points required.

26. Amex charged Members GST/HST on the Points Fee.

The Participation Agreements

27. To ensure that there were Rewards available for its Members, Amex entered into agreements (“Participation Agreements”) with suppliers (the “Participants”) of various Rewards.

28. Under each Participation Agreement, Amex agreed to pay the Participant a negotiated amount of money for providing the Rewards.

29. The Rewards purchased by Amex from the various Participants are offered and provided to the Cardholders, in exchange for Points.

30. The Members did not pay Amex or the Participants for obtaining the Rewards (other than by redeeming Points and/or purchasing additional Points).

31. The Participants charged Amex and Amex paid the Participants GST/HST where applicable (the “Participant GST”), in respect of the Participants’ supplies of goods and services that are being used as Rewards.

The ACI Participants Agreements

32. Amex and ACI also entered into Participation Agreements that were in place throughout the Relevant Periods (the “ACI Participation Agreements”).

33. Under the ACI Participation Agreements, a Member could exchange a specific number of Points for a certificate (a “Travel Certificate”) from Amex that would have a fixed face value (e.g., \$100, \$500, etc.).

34. A Member who acquired a Travel Certificate from Amex could redeem it with ACI or an ACI franchised travel agency (collectively, “ACI”) up to the fixed face value to pay for all or part of travel products or services (with the Member paying ACI for any remaining costs).

35. If a Member used a Travel Certificate as aforesaid, ACI would invoice Amex for the Travel Certificate, which Amex would pay to ACI (the “Travel Certificate Payments”).

36. It was Amex that determined the denominations for Travel Certificates that may be issued.

Amex's Card Operations

37. A Cardholder could present a Card to a store as payment instead of cash. Amex would pay the Canadian store the amount charged on the Card (less a discount or merchant fee). Amex would then send the Cardholder a monthly statement with the total of all payments charged by that Cardholder to that Card that month (the "Card Operations").

38. Most of Amex's domestic supplies made in the course of its Card Operations during the Relevant Periods were "exempt supplies" for *ETA* purposes such that no GST/HST was charged by Amex on Card Fees, discount fees and delinquency charges or interest on late paid account balances.

Amex's MRP Operations

39. In the course of operating the MRP, Amex paid system maintenance and other overhead costs (the "Overhead") used in connection with the MRP.

40. Amex self-assessed, under Division IV of the *ETA*, GST/HST on the Overhead (the "Overhead GST").

Amex's Revenue and Expenses

41. At all relevant times, Amex earned substantial revenue from credit card and charge card operations.

42. In 2009 and 2010, the revenue received from the credit/charge cards was more than 96% of Amex's total revenue, whereas the revenue from the MRP fees accounted for under 0.75% of Amex's total revenue.

43. At all relevant times, interest income, transaction charges, and discount revenue earned from the credit/charge card operations were Amex's largest revenue sources.

44. The more a Cardholder spent using an Amex Card, the more discount revenue Amex earned.

45. At all relevant times, MRP Points redemption cost was an expense of Amex on its income statement.

46. At all relevant times, reserves for the estimated cost of anticipated MRP Points redemption were recorded as a liability on Amex's balance sheet.

Calculation of Net Tax

47. For the Relevant Periods, Amex filed its GST/HST returns.

48. In calculating its net tax for each Relevant Period, Amex claimed ITCs on the Participant GST and the Overhead GST, and claimed ITCs under subsection 181(5) in respect of GST/HST (the “Notional GST”) that Amex was deemed to have paid in respect of the Travel Certificate Payments.

49. With respect to the Participant GST, Amex claimed ITCs as follows:

- (i) in its GST/HST returns for its 2002 through 2012 reporting periods, a portion of the Participant GST based on the percentage of the MRP Extra Cards to the total of all MRP Cards issued (the “Fee Extra Ratio”); and
- (ii) in its GST/HST returns for its 2005 and 2008 reporting periods, Amex also claimed the balance of the Participant GST paid and not claimed in those years and in the immediately two preceding years it applied the Fee Extra Ratio.

The Assessments

50. By Notices of Assessment dated:

- (i) May 1, 2006 with Reference Number 05CP0119127 for the reporting period ending December 31, 2002;
- (ii) December 20, 2007 with Reference Number 04063000170100001 for the reporting period ending December 31, 2003;
- (iii) June 2, 2008 with Reference Number 05090000970100031 for the reporting period ending December 31, 2004;
- (iv) April 16, 2012 with Reference Number 06116011312370001 for the reporting period ending December 31, 2005;
- (v) April 16, 2012 with Reference Number 07113000172360903 for the reporting period ending December 31, 2006;
- (vi) March 19, 2012 with Reference Number 08091000172360196 for the reporting period ending December 31, 2007;
- (vii) March 10, 2014 with Reference Number 13008001212370001 for the reporting period ending December 31, 2008;
- (viii) March 20, 2014 with Reference Number 14024004212370001 for the reporting period ending December 31, 2009;
- (ix) September 3, 2015 with Reference Number 13184005712370001 for the reporting period ending December 31, 2010;

- (x) June 6, 2016 with Reference Number 13150000112370001 for the reporting period ending December 31, 2011; and
- (xi) August 29, 2017 with Reference Number 13196004612370001 for the reporting period ending December 31, 2012,

(collectively, the “Assessments”),

the [Minister] assessed Amex in respect of the Relevant Periods by, *inter alia*, denying ITCs claimed in each Relevant Period in respect of the Participant GST, the Overhead GST and the Notional GST less \$2,643,833.19 of GST/HST collected by Amex on Enrollment Fees, Points Accelerator Fees and Points Fees in the amounts set out below:

Period	ITCs Disallowed
January 1–December 31, 2002	\$1,533,218.06
January 1–December 31, 2003	\$1,102,733.30
January 1–December 31, 2004	\$1,249,498.95
January 1–December 31, 2005	\$4,759,312.45
January 1–December 31, 2006	\$463,515.30
January 1–December 31, 2007	\$398,217.85
January 1–December 31, 2008	\$2,904,774.56
January 1–December 31, 2009	\$234,593.00
January 1–December 31, 2010	\$496,527.00
January 1–December 31, 2011	\$418,945.93
January 1–December 31, 2012	\$412,533.35
Total:	\$13,973,869.75

51. In making the Assessments, the Minister denied the above noted ITCs and, as a result of such denials and other adjustments that are not being appealed, assessed Amex additional net tax plus penalties and interest.

52. Amex filed Notices of Objection to the Assessments.

53. The Minister confirmed each of the Assessments with respect to the denial of ITCs related to the MRP through Notices of Confirmation dated December 10, 2018 and December 17, 2018 (the “Confirmations”).

54. Throughout the Relevant Periods, Amex and ACI were parties to an election under section 150 of the *ETA* and did not revoke such election throughout the Relevant Periods.

[6] In these reasons, defined terms have the meanings assigned to them in the PASF. In addition, the term “MRP Expenses” encompasses Overhead expenses, Travel Certificate

Payments, and Amex's cost of acquiring Rewards. The term "MRP Terms and Conditions" means the agreement with Cardholders relating to the MRP.

III. Applicable law

A. *Introduction*

[7] The ETA generally permits suppliers of goods and services to claim deductions from tax, ITCs, with respect to their inputs, that is, property or services acquired for consumption, use or supply in the course of the supplier's commercial activities. As described by the Tax Court, commercial activities do not include the provision of exempt supplies. Further, financial services are generally exempt supplies. Accordingly, ITCs typically cannot be claimed with respect to GST/HST paid on inputs to provide financial services.

[8] This section outlines the main statutory provisions relied on by Amex—subsections 169(1), 181(5) and 141.01(4) of the ETA. The section also briefly describes the leading jurisprudence regarding single composite supplies. I begin with the jurisprudence as it provides the foundation for the statutory analysis.

B. *Jurisprudence regarding single composite supplies*

[9] In the infancy of the GST, the Tax Court of Canada in *O.A. Brown Ltd. v. The Queen*, [1995] G.S.T.C. 40 [*O.A. Brown*] adopted principles developed in England to provide a

commonsense approach to applying the ETA where an arrangement involves the provision of several properties or services. These principles were more recently adopted by the Supreme Court of Canada in *Calgary (City) v. Canada*, 2012 SCC 20 [*City of Calgary*]. The relevant excerpt from *City of Calgary* is set out below:

[35] *O.A. Brown* established the following test to determine whether a particular set of facts revealed single or multiple supplies for the purposes of the ETA:

The test to be distilled from the English authorities is whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply. One must examine the true nature of the transaction to determine the tax consequences.

[36] When reaching his decision, Justice Rip made the following observation:

. . . one should look at the degree to which the services alleged to constitute a single supply are interconnected, the extent of their interdependence and intertwining, whether each is an integral part or component of a composite whole.

[37] Justice Rip also noted the importance of common sense when the determination is made. McArthur T.C.J. made a similar observation in *Gin Max Enterprises Inc. v. R.*, 2007 TCC 223, [2007] G.S.T.C. 56, at para. 18:

From a review of the case law, the question of whether two elements constitute a single supply or two or multiple supplies requires an analysis of the true nature of the transactions and it is a question of fact determined with a generous application of common sense.

[10] Accordingly, the provision of multiple interconnected properties or services is generally considered to be a single supply for GST purposes. This is sometimes referred to as a single composite supply.

[11] This Court subsequently addressed how a single composite supply that includes a financial service may be characterized as an exempt or taxable supply for GST purposes: *Global Cash Access (Canada) Inc. v. Canada*, 2013 FCA 269 [*Global Cash Access*]. In that decision, the Court concluded that the nature of the composite supply may be determined for purposes of the ETA by the supply's predominant element. In determining the predominant element, one must identify all the elements of the single composite supply and then identify the element that is predominant (*Global Cash Access* at para. 26).

[12] In connection with determining the essence or nature of the supply, the Tax Court noted that the parties agree that one must take into account the perspective of the recipient of the supply (reasons at para. 66). This principle was enunciated by this Court in *Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 96 at para. 33 [*CIBC*].

[13] For completeness, I note that the Tax Court made the very same comment for purposes of determining whether there is a single composite supply or multiple supplies in accordance with *O.A. Brown* (reasons at para. 37). However, this was not addressed in *CIBC* where there was no dispute the supply was a single composite supply.

[14] This is a useful reminder that the inquiries in *City of Calgary* and *Global Cash Access* are quite different. As illustrated above, the Tax Court's reasons appeared to blur the distinction at times, but that does not affect the outcome of this appeal. In order to limit further confusion, in these reasons I adopt the following defined terms—the “*O.A. Brown* test” and the “Characterization test”.

C. *Statutory provisions*

[15] As mentioned, Amex mainly relied on three provisions in the ETA: ss. 169(1), 181(5) and 141.01(4).

[16] Subsection 169(1) provides the general method for calculating ITCs. It reads in relevant part, with emphasis added:

Input Tax Credits

General rule for credits

169 (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable;

Crédit de taxe sur les intrants

Règle générale

169 (1) Sous réserve des autres dispositions de la présente partie, un crédit de taxe sur les intrants d'une personne, pour sa période de déclaration au cours de laquelle elle est un inscrit, relativement à un bien ou à un service qu'elle acquiert, importe ou transfère dans une province participante, correspond au résultat du calcul suivant si, au cours de cette période, la taxe relative à la fourniture, à l'importation ou au transfert devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable :

$$A \times B$$

où :

A représente la taxe relative à la fourniture, à l'importation ou au transfert, selon le cas, qui, au cours de la période de déclaration, devient payable par la personne ou est payée par elle

<p>and</p> <p>B is</p> <p>...</p> <p>(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, <i>for consumption, use or supply in the course of commercial activities of the person.</i></p>	<p>sans qu'elle soit devenue payable;</p> <p>B :</p> <p>...</p> <p>c) dans les autres cas, le pourcentage qui représente la mesure dans laquelle la personne a acquis ou importé le bien ou le service, ou l'a transféré dans la province, selon le cas, <i>pour consommation, utilisation ou fourniture dans le cadre de ses activités commerciales.</i></p>
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[17] Accordingly, in order to qualify for ITCs under subsection 169(1), the inputs must be “for consumption, use or supply in the course of commercial activities.”

[18] “Commercial activity” generally includes a business, broadly defined, except to the extent that the business involves the making of exempt supplies, including financial services.

The definition in subsection 123(1) of the ETA reads in relevant part:

Interpretation	Définitions et interprétation
<p>Definitions</p> <p>123 (1) In section 121, this Part and Schedules V to X,</p> <p>...</p> <p><i>commercial activity</i> of a person means</p> <p>(a) a business carried on by the</p>	<p>Définitions</p> <p>123 (1) Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X.</p> <p>[...]</p> <p><i>activité commerciale</i> Constituent des activités commerciales exercées par une personne :</p> <p>a) l'exploitation d'une entreprise</p>

person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

...

(à l'exception d'une entreprise exploitée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées;

[...]

[19] Therefore, the GST/HST paid on inputs acquired in the course of providing financial services generally does not qualify for ITCs.

[20] Subsection 181(5) of the ETA, commonly known as the “notional ITC rule”, is another ITC provision relied on by Amex. It provides for the calculation of ITCs relating to a redemption of a coupon. The definition of “coupon” in subsection 181(1) of the ETA would include the Travel Certificates. Subsection 181(5) reads, with emphasis added:

Coupons and Rebates

Redemption of coupon

181 (5) For the purposes of this Part, where, in full or partial consideration for a taxable supply of property or a service, a supplier who is a registrant accepts a coupon that may be exchanged for the property or service or that entitles the recipient of the supply to a reduction of, or a discount on, the price of the property or service and a particular person at any time pays, in the course of a commercial activity of the particular person, an

Bons et remises

Rachat

181 (5) Pour l'application de la présente partie, lorsqu'un fournisseur qui est un inscrit accepte, en contrepartie, même partielle, de la fourniture taxable d'un bien ou d'un service, un bon qui est échangeable contre le bien ou le service ou qui permet à l'acquéreur de bénéficier d'une réduction ou d'un rabais sur le prix du bien ou du service, et qu'une autre personne verse dans le cadre de ses activités commerciales un montant

amount to the supplier for the redemption of the coupon, the following rules apply:

- (a)** the amount shall be deemed not to be consideration for a supply;
- (b)** the payment and receipt of the amount shall be deemed not to be a financial service; and
- (c)** if the supply is not a zero-rated supply and the coupon entitled the recipient to a reduction of the price of the property or service equal to a fixed dollar amount specified in the coupon (in this paragraph referred to as the “coupon value”), the particular person, if a registrant (other than a registrant who is a prescribed registrant for the purposes of subsection 188(5)) at that time, may claim an input tax credit for the reporting period of the particular person that includes that time equal to the tax fraction of the coupon value, unless all or part of that coupon value is an amount of an adjustment, refund or credit to which subsection 232(3) applies.

au fournisseur pour racheter le bon, les règles suivantes s’appliquent :

- a)** le montant est réputé ne pas être la contrepartie d’une fourniture;
- b)** le versement et la réception du montant sont réputés ne pas être des services financiers;
- c)** lorsque la fourniture n’est pas une fourniture détaxée et que le bon permet à l’acquéreur de bénéficier d’une réduction sur le prix du bien ou du service égale au montant fixe indiqué sur le bon (appelé « valeur du bon » au présent alinéa), l’autre personne, si elle est un inscrit (sauf un inscrit visé par règlement pour l’application du paragraphe 188(5)) au moment du versement, peut demander, pour sa période de déclaration qui comprend ce moment, un crédit de taxe sur les intrants égal à la fraction de taxe de la valeur du bon, sauf si tout ou partie de cette valeur représente le montant d’un redressement, d’un remboursement ou d’un crédit auquel s’applique le paragraphe 232(3).

[21] Subsection 141.01(4) of the ETA, often referred to as the free supply rule, is also relied on by Amex. The provision generally operates to recharacterize a taxable supply that is a free supply to take into account the purpose of another supply. It provides:

Free supplies

141.01 (4) Where

(a) a supplier makes a taxable supply (in this subsection referred to as a “free supply”) of property or a service for no consideration or nominal consideration in the course of a particular endeavour of the supplier, and

Fournitures gratuites

141.01 (4) Lorsqu’un fournisseur effectue, dans le cadre de son initiative, la fourniture taxable (appelée « fourniture gratuite » au présent paragraphe) d’un bien ou d’un service sans contrepartie ou pour une contrepartie symbolique et qu’il est raisonnable de considérer que la fourniture gratuite a pour objet notamment de faciliter, de favoriser ou de promouvoir soit une initiative, soit l’acquisition, la consommation ou l’utilisation d’autres biens ou services par une autre personne, les présomptions suivantes s’appliquent :

a) pour l’application du paragraphe (2), le fournisseur est réputé, dans la mesure où il a acquis ou importé un bien ou un service, ou l’a transféré dans une province participante, afin d’en effectuer la fourniture gratuite ou afin de le consommer ou de l’utiliser dans le cadre de pareille fourniture, avoir acquis ou importé ce bien ou ce service, ou l’avoir transféré dans la province, selon le cas, à la fois :

(i) afin de l’utiliser dans le cadre de son initiative,

(ii) aux fins auxquelles la fourniture gratuite est effectuée et non pas afin d’effectuer cette

fourniture;

(b) it can reasonably be regarded that among the purposes (in this subsection referred to as the “specified purposes”) for which the free supply is made is the purpose of facilitating, furthering or promoting

b) pour l’application du paragraphe (3), le fournisseur est réputé, dans la mesure où il a consommé ou utilisé un bien ou un service afin d’effectuer la fourniture gratuite, avoir consommé ou utilisé ce bien ou ce service aux fins auxquelles la fourniture gratuite est effectuée et non pas afin d’effectuer cette fourniture.

(i) the acquisition, consumption or use of other property or services by any other person, or

(ii) an endeavour of any person,

the following rules apply:

(c) to the extent that the supplier acquired or imported a particular property or service or brought it into a participating province for the purpose of making the free supply of that property or service or for consumption or use in the course of making the free supply, the supplier shall be deemed, for the purposes of subsection (2), to have acquired or imported the particular property or service or brought it into the province, as the case may be,

(i) for use in the course of the particular endeavour, and

(ii) for the specified purposes and not for the purpose of making the free supply, and

(d) to the extent that the supplier consumed or used a particular property or service for the purpose

of making the free supply, the supplier shall be deemed, for the purposes of subsection (3), to have consumed or used the particular property or service for the specified purposes and not for the purpose of making the free supply.

IV. Tax Court of Canada

[22] The main findings of the Tax Court relevant to this appeal are summarized below.

A. *Overview*

[23] In its overview, the Tax Court stated that the key issue was whether ITCs may be claimed with respect to the MRP Expenses. The Tax Court then cited the general tests under subsections 169(1) and 181(5): Are the MRP Expenses incurred in the course of a commercial activity?

[24] The Court then addressed Amex's main argument—the MRP Expenses qualify for ITCs because the supplies to Members under the MRP were taxable supplies, separate and distinct from Amex's exempt supplies. The Tax Court disagreed. It determined that supplies to Members under the MRP were not separate and distinct from Amex's credit card operations. Instead, they were all components of a single composite supply by Amex to Members. The Tax Court then characterized that supply as an exempt supply of a financial service.

[25] The Tax Court also found that Amex did not make supplies of marketing services to persons who sold reward products to Amex, and further, that Amex's supplies to merchants are exempt supplies.

[26] At the outset, the Tax Court judge described the framework to be followed in determining the nature of the supplies to Members (reasons at paras. 30-31). First, he was required to determine whether the MRP Expenses were incurred in the course of a single composite supply made to Members. If they were, second, he was required to determine the nature of the supply having regard to its predominant element.

B. *O.A. Brown test*

[27] In applying the *O.A. Brown* test, the judge made the following findings:

- (a) When the credit card is accepted by a merchant, Amex extends credit to the Cardholder. This is a supply of a financial service (reasons at para. 45).
- (b) After considering the links between the MRP and the status as a Cardholder, the judge concluded that it was hard "to imagine a supply where the different elements and components of a supply are more closely intertwined and linked" (para. 47).
- (c) There is a link between the discount revenue that Amex received from merchants and a Cardholder's use of a credit card (para. 44).

- (d) Amex incurred the MRP Expenses to increase the volume of credit card transactions (para. 50).
- (e) Becoming a Member does not have commercial efficacy on its own (para. 53).
- (f) As for transactions between Amex and merchants, the Court characterized these as a supply of financial services by Amex to merchants (para. 44).

[28] The Tax Court summarized these findings by stating that the elements of the MRP are “intertwined and connected with the exempt supply of financial services made by [Amex] to its Members and merchants” (reasons at para. 59). The suggestion in this paragraph that the services provided to Members and merchants constitute one supply is clearly a slip. When the reasons are read as a whole, including paragraphs 57 and 70, the Tax Court concluded that Amex provided two exempt supplies—an exempt supply to Members and an exempt supply to merchants.

[29] Finally, the Tax Court judge made the following finding: “With this backdrop in mind, I conclude that all of the elements or components of the MRP are integrated and intertwined components of a composite supply of exempt financial services made by Amex to MRP Cardholders” (reasons at para. 60).

C. *Characterization test*

[30] In determining the nature of the single composite supply made by Amex to Members, the Tax Court adopted the Characterization test (reasons at paras. 61-65). In addition, as mentioned

earlier, the Tax Court added that, “in determining the essence or nature of the supply, the parties agree that the law requires one to take into account the perspective of the recipient of the supply” (reasons at para. 66).

[31] The Tax Court judge concluded that “all of the facts considered above and relied on by me to determine that all of the elements and components of the MRP are elements of a composite supply also establish that the predominant element of that supply is the extension of credit by Amex to a Member” (reasons at para. 68, see also para. 76). He explained that the evidence revealed that the accumulated Points are an additional benefit to the credit card. Further, he determined that the “commercial efficacy of the supply, from the Cardholder’s perspective, is credit ... that allows the MRP Cardholder to procure goods and services without using cash savings or borrowing funds from a different source” (reasons at para. 69).

[32] The Court then turned to discuss other possible supplies made by Amex that could affect ITCs under subsection 169(1).

[33] During oral argument in the Tax Court, the Court asked counsel for the Crown whether it was relevant that he consider supplies to merchants. Counsel indicated that it would be relevant in the context of considering Amex’s commercial activity. The Court adopted this approach and determined that Amex provided a financial service to merchants by making arrangements to pay for the goods and services Members acquired using their credit cards (reasons at paras. 70 and 45, including footnote 26).

[34] In addition, the Court addressed Amex's argument that one of the elements of the supply to merchants that are Participants (suppliers of Rewards) was the marketing and promotion of the Participants' products and services (reasons at paras. 9-19, 72). The Tax Court came back to this issue later in the reasons and concluded that Amex did not provide any such services to Participants (reasons at para. 89).

[35] Based on these findings, the Court concluded that subsection 169(1) does not apply because the MRP Expenses were not made or incurred in the course of a commercial activity (reasons at para. 74).

[36] Turning to the notional ITC rule (subsection 181(5)) which provides for a separate calculation of ITCs where coupons have been redeemed, Amex submitted that this calculation applied to the redemption of Travel Certificates. The Tax Court determined that this rule does not apply because the redemption expense is incurred "in respect of a liability that arose because of the supply of an exempt financial service" (reasons at para. 75).

[37] Finally, with respect to the free supply rule in subsection 141.01(4), the Tax Court's analysis is at paragraphs 80-91 of the reasons. I will not repeat the analysis here. The Tax Court concluded that this provision does not support Amex's position.

[38] Accordingly, Amex's appeal to the Tax Court was dismissed.

V. Standard of review

[39] The Tax Court judgment is subject to appellate standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33. Determinations of fact and mixed fact and law are entitled to a high degree of deference and attract the palpable and overriding error standard of review.

Determinations of law (including extricable legal questions) are subject to correctness review.

VI. Analysis

[40] The issue in this appeal is whether the Tax Court erred in disallowing Amex's claim for ITCs with respect to the MRP Expenses. Amex submits that the judge made legal and factual errors in disallowing the claim.

[41] The analysis below is organized under the statutory provisions that Amex relies on, subsections 169(1), 181(5) and 141.01(4) of the ETA.

A. *Subsection 169(1)*

(1) Introduction

[42] As mentioned, the general ITC rule in subsection 169(1) requires that the relevant inputs not be used to make exempt supplies. Amex's position is that the MRP Expenses satisfy this

requirement because the MRP provides only taxable supplies to Members, separate and distinct from Amex's exempt supplies of credit cards.

(2) Did the Tax Court make errors of law?

(a) *Characterization test*

[43] In this Court, Amex forcefully argues that the Tax Court did not properly apply the Characterization test. It relies on *Global Cash Access* at paragraph 26 and *CIBC* at paragraph 33, referred to above.

[44] In my view, no such error was made. The Tax Court judge properly applied the relevant principles at paragraphs 66-69 of the reasons. He identified the elements of the composite supply by Amex to Members which he supported by a detailed review of the relevant agreements (reasons at paras. 38-43, 45-47). The judge then determined that the predominant element was the extension of credit to Cardholders in accordance with *Global Cash Access* at paragraph 26. The predominant element was determined from the perspective of the Members in accordance with *CIBC* at paragraph. 33.

[45] Amex submits that the Tax Court should have applied the Characterization test separately to the MRP Terms and Conditions. This submission fails to appreciate that the Characterization test only applies once it has been determined that there is a single composite supply. It does not apply to one agreement if that agreement is simply a component of a larger composite supply.

The judge adopted the proper approach by first examining what was supplied by Amex to Members under the key agreements in the single composite supply (reasons at para. 67).

[46] Amex suggests that the judge's analysis merely pays lip service to the proper test and actually focussed on Amex's agreements with merchants. This suggestion has no merit. Amex submits that its position is supported by paragraph 71 of the reasons where the Tax Court judge asks: "Why do merchants compensate Amex by paying a merchant discount?" Amex's submission misinterprets paragraph 71 because it has nothing to do with supplies to Members. Paragraphs 70-74 of the reasons discuss whether Amex made supplies to other persons that could affect the ITC calculation at issue. The question about merchants was asked in the context of whether Amex made supplies to merchants. As mentioned earlier, the focus on supplies to merchants was relevant to the Court's overall conclusion that the MRP Expenses were not made or incurred in the course of a commercial activity.

[47] In addition to focussing on the Characterization test, Amex appears to suggest that the Tax Court erred in applying the *O.A. Brown* test by not following the principle from paragraph 33 of *CIBC* that one must consider the perspective of the recipient. To illustrate, Amex refers to paragraphs 44-46 of the reasons which focus on merchants. However, as mentioned earlier, there was no dispute in *CIBC* that the supply was a single composite supply. The *O.A. Brown* test was not at issue.

(b) *Relevance of accounting treatment*

[48] Amex submits that the judge made a legal error by considering how the MRP Expenses are reflected in Amex's financial statements. The Tax Court found these statements reflected a connection between merchant discounts paid to Amex and the MRP Expenses because the financial statements deferred the discount revenue and matched it with MRP Expenses as Points were redeemed.

[49] Amex argues that financial statements cannot alter, let alone be the basis for, making a determination under the *O.A. Brown* test. Nor can they alter the determination under the Characterization test.

[50] The Tax Court judge agreed that the law governs (reasons at para. 58). Indeed, the judge's reasons demonstrate that he properly applied the law. The financial statements were not the basis for the determination but merely considered relevant and consistent with the judge's view of the evidence. The evidence revealed that the MRP is designed to increase use of the credit card, and use of the card increases Amex's merchant discount revenue (reasons at para. 50).

[51] In my view, the judge did not make a legal error in considering the financial statements.

(c) *Reference to a “merchant agreement”*

[52] Amex submits that the Tax Court judge made “a glaring error of law” by referring to an agreement that was not before him. At paragraphs 44 and 46 of the reasons, the judge erred by using the term “MRP Terms and Conditions of the merchant agreement.”

[53] Amex is correct that there is no such agreement in evidence. It appears that the Tax Court used the term for Amex’s agreement with Members regarding the MRP when referring to the separate merchant agreement.

[54] The Tax Court’s error in misnaming the merchant agreement is not significant. The fact that there was a contract with merchants is not controversial.

(3) Did the Tax Court make errors of fact?

[55] Amex submits that the Tax Court made errors of fact, or mixed fact and law, in its application of subsection 169(1). Such errors are subject to the palpable and overriding error standard of review.

(a) *O.A. Brown test*

[56] Amex submits that the Tax Court did not properly apply the *O.A. Brown* test—Amex’s arrangement with merchants was irrelevant to the analysis, and the Tax Court failed to consider

that the card services were a standalone, valuable supply and the MRP was not a condition to receive the card services.

[57] In my view, the Tax Court did not err by considering merchants. The judge summarizes his findings at paragraph 59 of the reasons. He concludes that the elements of the MRP were “inherently intertwined and connected” with the credit card services provided to Members and also with services provided by Amex to merchants. The tie with merchants is described in clause (iv) of that paragraph:

- iv. Amex’s Points Reward liability rises and falls in tandem with the amount of credit that it extends to MRP Cardholders. Similarly, the amount of merchant discount revenue earned by Amex rises and falls in tandem with MRP Cardholders’ spending.

[58] In this case, the judge made no error in referring to merchants and merchant discounts in considering the *O.A. Brown* test. Having an understanding of the merchants’ role in the arrangement between Amex and Cardholders explains the tie between the MRP and the credit cards.

[59] With respect to the argument that the Tax Court failed to properly consider that the credit card operation was a useful supply on its own, the Tax Court understood that to be Amex’s position but was more persuaded by the fact that a person can only become a Member if the person holds an Amex credit card (reasons at para. 40). The Tax Court pointed to several other features of the MRP that tie it to the holding and use of an Amex credit card (reasons at paras. 41-43, 50-52). Amex’s argument essentially asks this Court to reweigh the evidence and

substitute our own view for that of the Tax Court. This Court can only interfere if there is a palpable and overriding error (*Procon Mining and Tunnelling Ltd. v. Canada*, 2024 FCA 1 at para. 22). There is no such error.

[60] In summary, the Tax Court judge did not make a palpable and overriding error in the application of the *O.A. Brown* test.

(b) *Did Tax Court err in finding that consideration under the MRP was nominal?*

[61] Amex submits that the Tax Court made a palpable and overriding error in labelling the consideration under the MRP Terms and Conditions, especially the \$50 enrollment fee to join the MRP, as nominal (reasons at para. 53). Amex submits that since the payments are not nominal, Amex's supplies under the MRP are separate supplies which should be characterized as taxable supplies.

[62] This argument has no merit. While a \$50 fee may be more than a pittance, the Tax Court did not err in determining that the fee is very low in comparison to the value of the MRP and thus insufficient to support a conclusion the Members received anything other than a single composite supply of exempt financial services.

B. *Subsection 181(5) (notional ITCs)*

(1) General

[63] As noted above, subsection 181(5) of the ETA, commonly known as the “notional ITC rule”, is an exception to the general calculation of ITCs in subsection 169(1). Amex submits that subsection 181(5) permits it to claim notional ITCs in respect of Travel Certificate Payments, which are included as MRP Expenses and are described in paragraphs 34-35 of the PASF:

34. A Member who acquired a Travel Certificate from Amex could redeem it with ACI or an ACI franchised travel agency (collectively, “ACI”) up to the fixed face value to pay for all or part of travel products or services (with the Member paying ACI for any remaining costs).

35. If a Member used a Travel Certificate as aforesaid, ACI would invoice Amex for the Travel Certificate, which Amex would pay to ACI (the “Travel Certificate Payments”).

[64] For clarity, as explained in the Tax Court’s reasons at paragraph 24, Amex only claimed notional ITCs with respect to Travel Certificates redeemed by ACI franchisees. No claim was made for redemptions by ACI itself. Nothing in the appeal turns on this.

[65] The Tax Court denied the notional ITCs because Amex failed to satisfy one of the conditions of the provision—that the Travel Certificate Payments be made “in the course of a commercial activity [of Amex]” (reasons at paras. 75). As with all MRP Expenses, the Court concluded that the Travel Certificate Payments were made in the course of making a single composite supply of exempt financial services.

[66] In this Court, Amex submits that Travel Certificate Payments are linked to taxable supplies. The Tax Court determined otherwise and there is no basis to conclude that the Tax Court erred.

(2) Can notional ITCs be claimed pursuant to *President's Choice Bank*?

[67] In considering notional ITCs, the Tax Court judge cited his previous decision in *President's Choice Bank v. The King*, 2022 TCC 84 (reasons at para. 75). That decision also concerned notional ITCs in the context of redemption payments under a loyalty program. The judge concluded that his analysis in that prior decision was also applicable to the Travel Certificate Payments made by Amex.

[68] That Tax Court decision was reversed by this Court approximately two weeks before the hearing of this appeal: *President's Choice Bank v. The King*, 2024 FCA 135 [*PC Bank FCA*]. The decision of the majority in *PC Bank FCA* determined that the redemption payments in that case were made in the course of a commercial activity conducted by President's Choice Bank and thus qualified for ITCs. The commercial activity was described as another business conducted by President's Choice Bank which consisted of participation in "a program that aims to drive retail traffic to Loblaws" (*PC Bank FCA* at para. 56). Loblaws, the grocer, is related to President's Choice Bank. The supplies President's Choice Bank made in that other business were determined to be taxable supplies which qualified for notional ITCs.

[69] Amex took the view that *PC Bank FCA* was applicable in this case, and accordingly the appeal should be allowed. As *PC Bank FCA* had recently been released at the time of the hearing, the Court sought and received post-hearing written submissions from the parties.

[70] Amex argues that *PC Bank FCA* should be followed and is not distinguishable on its facts. It submits that the MRP drives traffic to Participants, just as the loyalty program at issue in *PC Bank FCA* drove traffic to Loblaws.

[71] I agree with the Crown that *PC Bank FCA* is distinguishable on its facts. While I need not address all the factual differences, the Tax Court judge found that the purpose of the MRP was to “drive spending on Amex Cards by Members and promote loyalty” to Amex (reasons at para. 18). He expressly rejected Amex’s claim that “one of the purposes of the Rewards is to promote the activities of Participants” (reasons at para. 89). These conclusions were grounded in the evidence.

[72] In this case, unlike the bank in *PC Bank FCA*, Amex did not incur the MRP Expenses to make any taxable supply. *PC Bank FCA* does not assist Amex in this appeal. There is no need to consider other arguments made by the parties in their post-hearing submissions.

[73] In summary, I conclude that the Tax Court made no error in rejecting Amex’s claim for notional ITCs.

C. *Paragraph 141.01(4) (free supplies)*

[74] Subsection 141.01(4) of the ETA, the free supply rule, may characterize a free supply by the nature of another supply to which the free supply is related. Amex submits that this provision characterizes its free supply of Rewards as taxable supplies because it can reasonably be regarded that one of the purposes of the free supplies is to provide a taxable supply, namely, the promotion of the business of the Participants.

[75] The Tax Court disagreed that one of the purposes of the Rewards is to promote the activities of Participants. In this Court, Amex submits that a palpable and overriding error was made in reaching this conclusion. Amex relies on documentation provided to Participants and submits that the Tax Court improperly evaluated the testimony of one of Amex's key witnesses.

[76] In my view, Amex overreaches with these submissions. The Tax Court provided ample reasons for rejecting this evidence at paragraphs 9-19 of the reasons. No palpable and overriding error was made.

VII. Disposition

[77] I conclude that the Tax Court did not err in concluding that Amex's ITC claim should be denied. I would dismiss the appeal, with costs.

"Judith Woods"

J.A.

"I agree.

J.B. Laskin J.A."

"I agree.

K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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