

Docket: 2014-1301(GST)G

BETWEEN:

ATHABASCA UNIVERSITY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 15, 2015, at Edmonton, Alberta

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant: Justin Kutyan and Thang Trieu

Counsel for the Respondent: Ronald MacPhee and Jack Warren

JUDGMENT

The appeal with respect to reassessments made under the *Excise Tax Act* (the “*Act*”), notice of which is dated June 29, 2012, for the claim periods from April 1, 2008 to December 31, 2011 is allowed. The reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to the printed book rebates claimed for goods and services tax it paid on the printed books for the claim periods on the basis the printed books were acquired otherwise than for the purpose of supply by way of sale within the meaning of subsection 259.1(2) of the *Act*.

Costs are awarded to the appellant on a party and party basis.

Signed at Vancouver, British Columbia, this 4th day of November 2016.

“K. Lyons”

Lyons J.

Citation: 2016 TCC 252
Date: 20161104
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Appellant,

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REASONS FOR JUDGMENT

Lyons J.

[1] Athabasca University (“Athabasca”) delivers instructional services in respect of courses and programs (“courses”) online and through distance learning, to students across Canada and internationally. Athabasca purchased printed books (“Books”) from vendors for courses. Students that registered in and paid for courses, were sent the same Books, by mail, from Athabasca’s warehouse. Athabasca contends it acquired Books for the ultimate purpose of providing exempt instructional services – its only single supply - to its students. Therefore, it is entitled to the “printed book” rebates (“Rebates”) claimed for goods and services tax (“GST”) it paid on Books for the claim periods from April 1, 2008 to December 31, 2011 (“Periods”).

[2] Athabasca appeals the reassessments made by the Minister of National Revenue. The Minister disallowed the Rebates because Athabasca acquired the Books from vendors for the immediate purpose of providing the books to students by way of sale upon registration in courses.¹ Transferring the same Books to its students, as it was obligated to do, constitutes a “sale”. Consequently, Athabasca falls outside the specific language in subsection 259.1(2) of the *Excise Tax Act* (the “Act”) and is not entitled to the Rebates.

[3] At the outset of trial, the respondent admitted that Athabasca made only a single supply of instructional services of the courses (“instructional services”) and

the Books were inputs or integral components provided in the context of the supply of instructional services in respect of the courses (the “concession”).² Also, she disavows the position she advanced, at paragraph 18 of her Amended Reply, that “A printed book is a separable supply of a standalone finished consumer or educational product in and of itself. A printed book does not merge into or become indistinguishable from the supply of instructional services such that printed books and instructional services have become a single supply.” as it is not an issue.³ Notwithstanding the concession, the Books were transferred to its students by sale.

[4] Unless otherwise specified, all references to provisions that follow are to the *Act*.

I. ISSUE

[5] The crux of the dispute in this appeal is whether Athabasca acquired the Books “otherwise than for the purpose of supply by way of sale” within the meaning of subsection 259.1(2) (“rebate provision”).

II. BACKGROUND TO LEGISLATIVE PROVISIONS

[6] It is useful to briefly describe some background to the rebate provisions for GST paid on inputs in making exempt supplies, by municipalities, universities, colleges, schools, hospitals plus qualifying non-profit organizations (“NPOs”) and charities. Rebating provisions were enacted because suppliers of exempt supplies do not receive input tax credits (“ITCs”) for GST that they pay on inputs in making exempt supplies.⁴

[7] Subsections 259(1) and (3) combined provides the basic rebate with specified percentages that vary depending on the type of public service body (“PSB”). This rebate is designed to relieve PSBs of the GST paid for inputs for exempt supplies. Athabasca, a selected PSB, was allowed a 67% rebate pursuant to paragraph 259(1)(d) and the PSB regulations for GST it paid on inputs for the exempt supply of instructional services. Nothing turns on this in this appeal.

[8] Parliament expanded rebating of GST for property, such as printed books, acquired by schools, universities, libraries, certain charities and NPOs and other front-line literacy-promoting/supporting organizations under subsection 259.1(2). A 100% rebate of GST that becomes payable after October 23, 1996 by a specified person upon acquisition of a printed book from a vendor is available. However, a rebate is not available where the printed book was acquired for the purpose of supply by resale.⁵

[9] Parliament amended subsection 259.1(2), effective for GST that becomes payable after March 29, 2012 (beyond the Periods in issue), to include specified property acquired or imported to be given away for free by an organization that is a charity or qualifying NPO whose primary purpose is the promotion of literacy.⁶ Prior to that, literacy-promoting/supporting organizations gave away books but were not given rebates because the extended definition of sale included books given away for free.

III. LEGISLATIVE PROVISIONS

[10] The relevant portion of subsection 259.1(2) reads:

259.1(2) Rebate for printed books, etc. — Where a person that is, on the last day of a claim period of the person or of the person’s fiscal year that includes that claim period, a specified person acquires or imports, otherwise than for the purpose of supply by way of sale, property that is

- (a) a printed book or an update of such a book,
- (b) an audio recording all or substantially all of which is a spoken reading of a printed book, or
- (c) a bound or unbound printed version of scripture of any religion,

the Minister shall, subject to subsection (3), pay a rebate to the person equal to the amount of tax under subsection 165(1) or section 212 that became payable in the claim period by the person in respect of the acquisition or importation. ...

[Emphasis added]

[11] Generally, subsection 259.1(2) provides if a “specified person” purchases a “printed book”, or other property, the Minister shall pay to the specified person the printed book rebate, for the GST that becomes payable to the vendor, if the printed book was acquired for the purpose of supply other than sale.⁷ As a specified

person, Athabasca acquired printed books from publishers/vendors (“vendors”) and claimed the Rebates for the GST it had paid to vendors within the time limits. Except for paragraph 11 b), all of the following requirements have been satisfied by Athabasca:

- a) the claimant is a “specified person”;
- b) the printed book is acquired otherwise than for the purpose of supply way of sale (the exclusionary “phrase”);
- c) GST was payable on the acquired printed book; and
- d) the claimant applies for the printed book rebate within the legislative time limit.

IV. FACTS

[12] The witnesses called by and on behalf of Athabasca were Dr. Alain May, Associate Vice President of Athabasca’s Academic Services, and David Liddell, C.P.A. and Chartered Management Accountant. Nathalie Boutin, a Canada Revenue Appeals Officer, testified on behalf of the Canada Revenue Agency. I find the testimony of all of the witnesses to be reliable.

Background

[13] The facts are largely undisputed.

[14] The appellant, located in Alberta, was originally conceived as a traditional campus-based institution.⁸ It evolved into an online distance education institution. It currently offers courses which comprise of undergraduate and graduate degree, diploma and certificate programs to Canadian and international students, for which credit can be obtained in specific disciplines plus other types of courses. As an “open” university, students are admitted without regard to previous educational background or history.

[15] Distance learning methods and resources (such as printed books, guides, manuals and/or software) are utilized to deliver the instructional services. This enables students to access such services anywhere or anytime on their own schedule and at their own pace barrier free outside of the conventional classroom setting.

Instructors

[16] An academic instructor is tasked with various activities including the delivery and development of the courses, and any revisions, within the area of his/her discipline. An academic instructor can enlist others' assistance to deliver the instructional services and determines the learning resources necessary to be utilized in delivering the instructional services.⁹

Instructional services

[17] During the Periods, Athabasca made exempt supplies of instructional services to students enrolled in the courses and did not charge the students GST on instructional services.

Students

[18] Undergraduate students were charged a single, all-inclusive fee for all courses calculated by combining tuition, learning resources ("LRF") and student union and alumni relations fees.¹⁰ Prior to September 1, 2011, graduate students were charged only course tuition fees that included all required materials. Effective September 1, 2011, a separate learning resource component was introduced.

[19] Mr. Liddell explained that the LRF was not tied to the Books. As an institution, there were constraints and a tuition cap. Since the LRF was separate from the cap, it allowed Athabasca to work within the environment and the funding envelope.

Materials Management Process

[20] The process to acquire and ultimately ship the Books to students was a collaborative effort involving materials management personnel including buyers, the manager and warehouse staff ("Materials") and the instructors. Mr. Liddell was responsible for the acquisition and distribution of the Books. That process was described in detail at the hearing supported by a detailed three-page summary of

activities and responsibilities of the various individuals plus a one-page workflow chart outlining the steps in respect of the Course Material Purchase Order.

[21] After instructors identified the learning resources, they informed Materials personnel via email of the learning resources necessary, including the Books, for the instructional services based on a forecasted amount. Materials followed various steps to purchase the Books from vendors to ensure availability for potential students.

Books

[22] The Books, shrink-wrapped and on pallets, arrived via a truck at Athabasca's warehouse located in the town of Athabasca, Alberta. The pallets were opened and the Books were placed on shelves pending shipment to its students. Upon confirmation of successful registration, enrolment in courses and payment of the all-inclusive fee, a command went to Materials. Within a day or so the same shrink-wrapped Books were sent in packages, often accompanied by handouts for the courses designated by the instructors, from Athabasca's warehouse directly to its students. Unless students withdrew from the courses within 30 days after registration, entitling students to a refund once the Books were returned, students owned the Books outright.

[23] GST was paid by Athabasca to vendors on the purchases of Books and the Rebates for the Periods, totalling \$441,441.99, were claimed by Athabasca pursuant to subsection 259.1(2).

V. PARTIES' POSITIONS

[24] Athabasca's position is it acquired the Books from vendors for the ultimate purpose of making a single supply of exempt instructional services to educate its students, not to resell the Books as a separate supply.¹¹ The Books were inputs and integral to the single supply. Using the Books in providing instructional services, falls squarely within the object of subsection 259.1(2), designed to minimize financial barriers to education (where books are freely distributed to students), by providing PSBs that promote knowledge and education with GST relief.

[25] The respondent's position is that Athabasca acquired the Books from vendors with the intent and for the immediate purpose of having the Books "shipped out" to students, thus Athabasca was obliged to acquire the Books as evidenced by the system designed to facilitate that. Within a day or so of the

successful registration in and payment for courses, the same shrink-wrapped Books were packaged and mailed to its students. Transferring the Books, as it alone was obligated to do, constituted a “sale” as defined in subsection 123(1), thereby disentitling Athabasca to the Rebates pursuant to subsection 259.1(2) because it falls within the exclusion. Athabasca did not retain any Books for its own use, collection or library contrary to Parliamentary intent nor was it a literacy-promoting/supporting organization as contemplated in the 2012 amendment.

VI. ANALYSIS

[26] The parties’ interpretation of the exclusionary phrase in subsection 259.1(2), as to whether the Books acquired by Athabasca were for the purpose of supply by way of sale, applied to the facts, is the focus of this analysis and raises various questions.

Supply of what?

[27] The English version of the provision in subsection 259.1(2) refers to “supply by way of sale” without identifying whether that is a supply of anything or printed books by way of sale. The French version is clear that the exclusion is referring to the supply of the acquired printed books by way of sale. Hence, the rebate is unavailable only if a taxpayer acquires printed books for the purpose of supplying printed books by way of sale.

[28] Arguments from both parties focussed on whether Athabasca acquired the Books with the purpose of supplying Books by way of sale.

“Supply”

[29] The words “supply”, “supplies”, “supplied” and “supplying” are used extensively in the *Act*.

[30] “Supply” in subsection 259.1(2) is used as a verb.

[31] Applying the single supply test (“Test”), based on the principles in *O.A. Brown Ltd. v Canada*, [1995] GSTC 40 [*Brown*] and endorsed by the Supreme Court of Canada in *Calgary (City) v Canada*, 2012 SCC 20, [2012] 1 SCR 689 [*City of Calgary*], Athabasca argues it supplied only the exempt instructional services, not Books.¹² This is premised on the Books being an input or component provided in the context of the single supply of instructional services.¹³

[32] In the *City of Calgary*, the Test arose in circumstances where the taxpayer made a supply with various exempt and non-exempt elements. Parties argued whether each element constituted a separate supply (or multiple supplies) each with its own tax characteristics (taxable, exempt or zero-rated), or whether collectively the elements formed a single supply with one-tax characteristic. Entitlement to ITCs under section 169 was under consideration. ITCs are limited to tax paid on property or services acquired “for consumption, use or supply in the course of commercial activities”. The Court applied the Test and found that it made only one supply: the exempt supply of a municipal transit system such that its activities of acquiring, constructing and making public transit facilities available for the public did not fall within its commercial activities.

[33] “Commercial activity” is defined in subsection 123(1):

“**commercial activity**” of a person means

(a) a business carried on by the 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, ...

[34] The Court held that since the purpose of the property was for the provision of exempt activity, it was not a commercial activity and could only recover ITCs in respect of property or services used to make non-exempt supplies.

[35] The question becomes whether the Test applies to subsection 259.1(2) despite it arose in *City of Calgary* in the context of the definition of “commercial activities.” Athabasca applies the Test to a provision which asks whether a taxpayer upon acquiring the Books had the purpose of supply of printed books.

[36] Although the Test is usually applied in determining whether exempt or non-exempt supplies were made (*City of Calgary*), there is no reason why it cannot apply in the context of a rebate if the words of the provision support the application. In my view, the Test should apply to subsection 259.1(2) because “supply by way of sale” in that provision is equivocal to “making a supply by way of sale”. That is, to supply something by way of sale is to make a supply of that thing by way of sale. By virtue of subsection 33(3) of the *Interpretation Act*, RSC, 1985, c. I-21, the definition of “supply” in subsection 123(1) of the *Act* applies to both the noun and verb form of the word.¹⁴ This means there should be no difference in meaning when “supply” is used as a verb (the supply of something) versus as a noun (making a supply of something). Using the definition of “supply”

to make a supply of something is to provide that thing. There is no apparent meaningful difference between the two.

[37] Further, where the act of supplying something is intended to take on a different meaning than to make a supply of that thing, this is clear from the context.¹⁵ Using “supply” as both a verb and a noun appears to arise from imprecise drafting in the *Act*.

Single supply of instructional services

[38] Athabasca argues a common-sense approach, the statutory scheme, context and the evidence supports that there is no separate supply of selling Books and it did not have a bookstore. Athabasca submits if only a single supply of instructional services is made as conceded, then it has not made a supply of Books. Instead, Books were used as inputs for the single supply of instructional services. Consequently, Athabasca did not acquire the Books for the purpose of supplying those Books by sale.¹⁶

[39] The respondent argued that looking at the true nature of the transaction with a generous application of common sense and focussed on the specific language of the rebate provision, it would show that regardless of whether Books were inputs to the single supply of instructional services, the Books were acquired to satisfy Athabasca’s obligation culminating (by transferring the Books) in a sale within the definition of subsection 123(1).

[40] Since both parties accept that Athabasca only made a single supply of instructional services, then Athabasca did not acquire the Books for the purpose of supply (or supplying) of those Books as contemplated by the specific language in the provision.¹⁷ That is:

- (a) if Athabasca only made a single supply of instructional services, Athabasca did not make a separate supply of the Books; and
- (b) if Athabasca did not make a separate supply of the Books, then Athabasca did not acquire the Books for the purpose of supplying those Books as a separate supply of Books.

[41] Focussing on paragraph 40(a) of my reasons, the Test is used to determine whether a supply with multiple elements, each element having different tax characteristics (i.e. taxable, exempt, zero-rated), should be treated as a single

supply with a single tax characteristic. If, despite finding that an entity only made a single supply - as here - it was still open for the Court to find that some of those elements formed their own separate supply (implicit in the respondent's argument that Athabasca was obligated to acquire and then supplied the Books because of the obligation), then it could also be found that that separate supply had a tax characteristic that differed from the tax characteristic of the single supply.

[42] I respectfully disagree with the respondent's submission. In my view, such approach would either render the Test redundant or decouple it even though she said she accepts Athabasca's analysis of the principles in the Test and was not suggesting that the Court revisit the Test. Effectively, the respondent's submission appears to carve the inputs from the outputs or deem a single supply to be a separate supply/multiple supply. Had Parliament wanted to carve out printed books that are integral to the single supply of instructional services, it would have created a deeming provision as it has done in other instances.¹⁸

[43] Even if she is asserting there was a sale without a supply of Books (by virtue of the concession she acquiesced there was no separate supply), that too is problematic because under the specific language of subsection 259.1(2), it matters not whether there was a sale of the Books if there was no *supply* of Books (by sale). Parliament used two distinct terms of "supply" and "sale" in the exclusionary phrase, which are legal concepts, and must have intended both things to occur.

Purpose in acquiring Books?

[44] Focussing on paragraph 40(b) of my reasons, the Court is required to inquire into Athabasca's "purpose" in acquiring the Books. Athabasca argues that its purpose in acquiring the Books was to use them for the ultimate purpose of providing the single supply of exempt instructional services to its students as evidenced by Dr. May's testimony that the purpose in acquiring any of the learning resource materials was to teach the course and she and Mr. Liddell testified that the reason for the LRF was for students to have the proper tools to learn.

[45] The central argument of the respondent places a more restrictive interpretation in suggesting that the acquisition was for the immediate purpose of selling the same Books to discharge its obligation, evidenced by what happened to the Books (transferred to students) and the processes in place (registration and payment for courses activated shipment of the shelved Books within a day or so of registration). According to the respondent, transferring the Books went against legislative intent that the acquired Books should have been retained by Athabasca

for its own use, library or collection which was not done as confirmed by Mr. Liddell. I note, he also said that the Books were not acquired for resale.

[46] The parties' positions highlight the disparity in the two meanings of the term "purpose" that have emerged based on different interpretations in the jurisprudence below as to the phrase "for the purpose of" or the term "purpose", making it unclear whether it means ultimate or immediate purpose in the context of subsection 259.1(2).¹⁹

[47] Given the uncertainty, a textual, contextual and purposive analysis is required. Whether the conflicting meanings create a textual ambiguity, my conclusion of that will be deferred until after conducting a full statutory interpretation analyses.

[48] The term "purpose" is used extensively in the *Act* (and the *Income Tax Act*) but it is not defined in the legislation and the ordinary meaning is broad. The *Canadian Oxford Dictionary*, 2d ed., defines "purpose" as:

1 a something to be attained; a thing intended. ... **b** the reason for which something is done or made, or for which it exists (*for tax purposes*). ...

[49] Contending that the exclusionary phrase refers to immediate purpose, the respondent relies on the decision of *Avis Immobiliens G.M.B.H. v Canada*, 94 DTC 1039 (TCC), aff'd 97 DTC 5002 (FCA) [*Avis*].²⁰ She asserts that Athabasca acquired the Books for the immediate purpose of having the same unaltered Books shipped to its students to fulfill its obligation to them and the Books were not retained by Athabasca. Described as "Books in, put on a shelf, Books out", the respondent characterizes the nature of such transactions as a "sale" because the transfer (of possession and ownership) of the Books, facilitated by the design of the registration system, made it incumbent on Athabasca to ship the Books within a day or so of the student's successful registration in the courses and payment for same.

[50] However, in *Avis Justice Rip*, as he then was, appears to have limited his conclusion of immediate purpose to the context of subparagraph 40(1)(a)(i) of the *Income Tax Act* having regard to Parliamentary intent and noted it might not apply in other contexts. He contrasted the regime of capital gains with the regime of calculating business income in making his determination and states at paragraph 43, that cases interpreting the phrase "for the purpose of" in paragraph 18(1)(a) might not apply directly to "for the purpose of" in section 40. Paragraph 18(1)(a)

uses the phrase “for the purpose of gaining or producing income”, and purpose in that context has been interpreted more broadly.²¹

[51] In the decision in *398722 Alberta Ltd. v Canada*, [2000] GSTC 32 (FCA), [2000] FCJ No. 644 (QL) (FCA), the Federal Court of Appeal found that the immediate purpose of supplying the four-plex as accommodation for hotel staff took precedence over the ultimate purpose of constructing the hotel in concluding that the four-plex was an exempt supply.²²

[52] Athabasca referred to the Federal Court of Appeal decision in *London Life Insurance Co. v Canada*, [2000] GSTC 111 (FCA), [2000] FCJ No. 2121 (QL) (FCA) [*London*], which involved the entitlement to ITCs. The question under paragraph 169(1)(c) was whether the improvements were “acquired ... for consumption, use or supply in the course of commercial activities”. Although the word “purpose” does not appear in paragraph 169(1)(c), the Court rejected the notion that ultimate purpose should be looked at when considering whether property was acquired for use in the course of commercial activities.²³

[53] Whilst the decisions demonstrate the differing regimes and highlight Parliament’s intent as either an immediate or ultimate purpose, these do not assist in ascertaining the purpose in the context of the rebate provision.

[54] The context in which the term “purpose” is used in the legislation must also be considered. Subsection 259.1(2) is the proper focus of the inquiry which shows Parliament intended it to restrict qualification for the printed book rebate to specified persons provided that the book was acquired “otherwise than for the purpose of supply by way of sale.”

[55] This requires the Court to look into the thing supplied (here instructional services) plus the process for making a supply of the thing which might require the purchase of various inputs to make the supply “for the purpose of” under subsection 259.1(2). Given Athabasca ultimately made only a single supply of instructional services, then it cannot have immediately made a supply of Books and detracts from the single supply concept. Athabasca’s actions surrounding the purchase and subsequent handling of the Books do not demonstrate an immediate purpose of supplying the Books.

[56] A court must look to objective manifestations in ascertaining the purpose or intention behind an action: *Symes v Canada*, 94 DTC 6001 at para 74. The factors in the Test and in *Sterling* and *Avenue Business* provide factors that go to

ascertaining objective manifestations of purpose. In the latter two cases, the Tax Court highlighted the following factors when determining whether books and materials formed a single supply with the instructional services offered by the taxpayer:

- Whether a single price (covering books, supplies, and tuition) was advertised or whether each item was quoted separately (single price suggests single supply);
- Whether a student reviewing the promotional literature would view the price as a single consideration for a course of instruction, or whether the student would think that they were paying several considerations for books, tuition, etc. (single consideration suggests single supply);
- Whether books were sold exclusively to students enrolled in the course, or whether the general public could purchase the books (if sold exclusively to students, then this suggests single supply);
- Whether a student would be reimbursed for books if they withdrew from the course (if not, then this suggests a single supply);
- Whether, upon enrollment in a course, students were required to purchase the books (if the purchase was mandatory, then this suggests single supply); and
- Whether the price books were marked-up when sold to students (if not, then this suggests single supply).

[57] Athabasca's policies, in place when it purchased the Books, are factors to be used as objective manifestations of purpose. As to the findings of fact, on balance, the following factors favour Athabasca's position:

- Despite course fees were broken into a tuition fee and an LRF, undergraduate students were charged a "single, all-inclusive fee" for all courses calculated by combining tuition, learning resources and student union and alumni relations.²⁴
- Prior to September 1, 2011, graduate students were charged only course tuition fees that includes all required materials.²⁵

- The LRF was fixed and mandatory for all courses and entitled students to receive most learning resources to be utilized in and for completion of the courses or programs regardless of whether or not the courses included any printed books and was not correlated with the number of Books required in a course.
- Athabasca sold the Books exclusively to enrolled students, and students were required to purchase the Books even if they already owned them except if a student took the course and failed it or left the course and later registered for the same course and provided the Book was the same.
- Students would be reimbursed for the Books upon withdrawal, but only within 30 days of registration.
- There was no evidence whether Athabasca marked up the prices of the Books.

[58] The respondent submits even if Athabasca's argument is accepted that the Books, as inputs, were for the ultimate purpose of supply of instructional services, Athabasca acquired the Books with the intention of transferring the Books and triggering the exclusion upon transfer (sale) and brings the transaction outside of the language of the provision based on the evidence from Mr. Liddell that the Books were not retained by Athabasca for its own use contrary to Parliament's intent. I will return to Parliamentary intent later in these reasons.

Books remained identifiable

[59] The respondent's next argument is despite Athabasca made only a single supply of instructional services and the Books are inputs, it does not preclude Athabasca from having acquired the Books for the immediate purpose of "supplying" the same Books to its students because the Books were not consumed nor used and remained identifiable. The "Book went in was Book that went out" and was not consumed in the single supply of instructional services. Consequently, "where an element of a single supply is not consumed, processed or modified, it may be acquired for the purpose of simply transferring it to a subsequent party, in the same form of which it was acquired" and therefore was acquired with the purpose of transfer to honour its obligation and triggered the exclusion in subsection 259.1(2).

[60] The *Act* treats the verbs “supply”, “consume”, and “use” as distinct actions. The cases the respondent relied on in support of the consumption argument are not relevant to the issue in the present appeal or are not supportive of her position. For example, *Budget Steel Ltd. v Canada*, [1996] GSTC 90 (FCA), [1996] FCJ No. 1621 (QL) (FCA) [*Budget Steel*] involved two groups of scrap automobiles that were acquired and recycled through a process that produced scrap metal, a new product for sale. One group involved the issue of entitlement to ITCs and whether through the recycling process, the automobiles were “consumed” or “used”. The statute specified if they were consumed or used, then they would not be inventory. The language of subsection 259.1(2), however, does not ask whether the Books were consumed or used. The fact that Books were not consumed or used has no bearing on whether they were acquired for the purpose of supply in the context of the rebate provision.

[61] The second group involved the phrase “acquired for the purpose of supply in the course of commercial activities” under paragraph 176(1)(b). Referring to the definition of “supply” in subsection 123(1), the Court’s finding that they were not acquired for the purpose of supply, does not assist the respondent because the scrap automobiles were consumed and transformed into something else, they were not acquired for the purpose of supplying the same scrap automobiles.²⁶ However, the respondent is arguing the inverse: that if the Books were not consumed, then they were supplied by way of sale.²⁷

[62] Read in the context of the entire decision, the excerpt from paragraph 80 in the decision *Commissioners for Her Majesty’s Revenue and Customs v David Baxendale Limited*, 2009 WL 289314, [2009] EWHC 162 (Ch), relied on by the respondent, appears to illustrate a different point than that suggested by her in her submission. The principle to be drawn from that decision is that once two otherwise separate supplies are found to constitute a single supply under the Test, and it must be determined what tax characteristic to assign that single supply (i.e. taxable, exempt, or zero-rated), it does not necessarily follow that the characteristic assumed by the single supply is based entirely on which element cost the most (thus the “dominant” element).²⁸

[63] Other concerns with the consumption argument are that in focussing on the specific language in subsection 259.1(2), the exclusionary phrase:

- (a) refers to the supply of the Books and what is disputed is whether Athabasca acquired the Books for such a purpose (supply to the students); and

- (b) only asks whether Athabasca supplied the Books and does not use the words consume, subsume, merge into etcetera such that the focus should only be whether Athabasca supplied Books.

[64] The respondent notes that the Books were purchased, stored, and shipped out in the exact same form, and uses this as support for the argument that Athabasca intended to make a supply of the Books. However, when viewed in the context of Athabasca's non-traditional based campus, this fact is not inconsistent with an intent to make a supply of instructional services. Also, faculty rely on published textbooks in providing instructional services. There would be no reason for a university to alter widely-used textbooks in the field and should not be altered as it might impact the consistency of educational standards in the education system. The fact that the Books retained identity does not change the purpose for which the Books were acquired.

[65] When students enrolled for courses, barrier free, in a non-traditional campus setting, paid a single, all-inclusive, mandatory fee and could only obtain the Books once registered, applying common sense (per the Test), this would be a single supply of instructional services. I find that a supply of the Books was not made and were inputs into the single supply of instructional services. I also find that Athabasca's purpose in acquiring the Books was to utilize these as inputs in its supply of exempt instructional services rather than to supply the Books by way of sale. Accordingly, I conclude "purpose" in the exclusionary phrase refers to the ultimate purpose.

[66] Turning to a purposive analysis of subsection 259.1(2), the scheme of that subsection indicates that the broad purpose of the rebate provision is to promote literacy and aims to achieve this by eliminating the GST on books in certain circumstances. It is clear Parliament intended the Rebates to be available to public libraries that held books in its collections but not to bookstores that sell books (and can claim ITCs relating to commercial activities). It is unclear whether Parliament intended the Rebates to be available to entities that purchase books as inputs into instructional services such as Athabasca.

[67] A further complicating factor is a comparison of the Finance Minister's broad statements that universities will receive the Rebates on all their purchases of books and the restrictive language in the Technical Notes reveals a disparity.

[68] Athabasca argues that Parliament intended the Rebates to be widely available based on statements made when printed books rebates were being introduced. The Minister of Finance at the time said:

The [Rebate] ... means there will be no GST on all books purchased by educational institutions and learning organizations across Canada. It means no GST on all books distributed freely in primary schools, secondary schools and other educational settings. It means tax relief on books, not only for structured learning in our schools and colleges, but also for lifelong learning through public libraries and front-line literacy groups.

Mr. Speaker, we do not claim that today's measure answers all the challenges we face with respect to literacy in this country. But, by targeting assistance in this way, we can get greater impact for every dollar we spend at a time of limited resources. The 100 per cent rebate provides this kind of targeted relief to groups and organizations on the front lines of literacy in Canada.²⁹

[69] Although the quotes provided in Athabasca's submissions suggest that the rebates should be widely available, the statutory provision and accompanying Technical Notes contemplate restrictions on availability.

[70] Athabasca incorrectly stated in its submissions that the Technical Notes [July 1997] did not contain the phrase "or to give away permanently." However, the reproduction of the Notes in its written submissions and at Tab 1 of the respondent's Book of Authorities includes that phrase as follows:

New subsection 259.1(2) provides authority for the Minister of National Revenue to pay to specified persons rebates equal to the GST payable in respect of their acquisitions or importations of printed books (and their updates), audio recordings of spoken readings of such books and printed versions of religious scriptures, except where the specified persons have acquired or imported these items for the purpose of resale or to give away permanently.

[71] The respondent argues that Parliament intended for the Rebates to provide GST relief for books and textbooks only where the entity retains the books and does not transfer them to a third party. Her argument is supported by those Technical Notes. However, the plain wording of the exclusionary phrase refers to an entity supplying the book, not merely giving it away permanently. Conceivably, the intent behind the Technical Notes is that entities that purchase books and give those same books away will not get the Rebates (likely a supply by way of sale), but the Technical Notes for the Periods in issue do not refer to entities that

purchase books for use in the supply of instructional services and in the process give books away.

[72] Although there is some support for the argument that this outcome contradicts Parliamentary intent because Athabasca did not retain ownership of the Books, the wording of the provision is clear that Athabasca was to have made a supply of the Books and not merely a transfer ownership of the Books. If Parliament did not intend this outcome, it is up to Parliament to revise the rebate provision.

[73] To reconcile the disparity previously noted, it could be said that Parliament only intended universities to get the rebates for books purchased for use in their libraries, since these books would not be given away permanently to students. Athabasca is a long distance on-line non-traditional university.

[74] The plain meaning of the words, if unambiguous, should be applied. In *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715, the Supreme Court of Canada held that the plain meaning of words still plays a primary role when interpreting tax legislation if the words of a statute give rise to a single reasonable interpretation:

21 In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (p. 578): see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.

[75] Subsection 259.1(2) clearly contemplates if a specified person was to supply Books by way of sale, it would become disentitled to the rebate. To the extent that there is a mismatch between Parliamentary intent and the words of the statute and the words of the statute cannot be interpreted to give effect to Parliamentary intent, then the words of the statute should prevail.

[76] In *Elim Housing Society v Canada*, 2015 TCC 282, [2015] TCJ No 214 (QL), Justice Woods noted that the words actually used in the provision were broad and did not include any reference to services provided by hospitals. To read in this requirement would be to “cross the line from judicial interpretation to impermissible legislative drafting.”³⁰

[77] Even if Parliament intended the Rebates to be available only where the books are not transferred permanently, the provision uses the phrase “supply by way of sale”. Supplying something, a legal concept, is crucial to the *Act* and Parliament must be presumed to have understood this at the time of drafting. I find that Athabasca’s purpose for acquiring the Books was to use them in providing the single supply of instructional services to its students. Since the Books were inputs, I find that Athabasca does not make a supply of Books by sale. It is of some import that the Test existed at the time of enactment of the rebate provision. I conclude that in acquiring the Books, it was for the ultimate purpose to use them as inputs in its single supply of exempt instructional services and since there is no separate supply of Books, there can be no supply of Books by way of sale.

VII. CONCLUSION

[78] Based on the foregoing, I conclude that Athabasca made only a single supply of exempt instructional services, that the Books are inputs/integral to the instructional services, and Athabasca did not make a supply of selling the Books because it acquired the Books for the purpose of its supply of instructional services. Consequently, Athabasca did not acquire the Books for the purpose of supply by way of sale and is entitled to the Rebates pursuant to subsection 259.1(2) of the *Act*.

[79] The appeal is allowed. Costs are awarded to the appellant on a party and party basis.

Signed at Vancouver, British Columbia, this 4th day of November 2016.

“K. Lyons”

Lyons J.

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- 1 Paragraph 4 of Respondent's Written Submissions.
 - 2 Pages 36 and 37, Transcript.
 - 3 Paragraph 6 of the Respondent's Written Submissions.
 - 4 Under the GST, Parliament designated goods and services as falling within three classes of supplies (taxable, exempt and zero-rated). As a consumption tax, GST is placed on the end consumer for a taxable supply but not for the other two classes. The purchaser of inputs to the taxable supply is entitled to recover ITCs for GST paid on the inputs.
 - 5 Subsection 259.1(2) was added by SC 1997, c. 10, s. 69.1 and includes an update of a printed book and circumstances not relevant to this appeal.
 - 6 Technical Note April 2012 and Federal Budget Supplementary Information March 2012.
 - 7 The definitions of "printed book" and "specified person" in subsection 259.1(1) read as follows:

259.1(1) Definitions - The definitions in this subsection apply in this section.

...

"printed book" does not include anything that is or the main component of which is

- (a) a newspaper;
- (b) a magazine or periodical acquired otherwise than by way of subscription;
- (c) a magazine or periodical in which the printed space devoted to advertising is more than 5% of the total printed space;
- (d) a brochure or pamphlet;
- (e) a sales catalogue, a price list or advertising material;
- (f) a warranty booklet or an owner's manual;
- (g) a book designed primarily for writing on;
- (h) a colouring book or a book designed primarily for drawing on or affixing thereto, or inserting therein, items such as clippings, pictures, coins, stamps or stickers;
- (i) a cut-out book or a press-out book;
- (j) a program relating to an event or performance;
- (k) an agenda, calendar, syllabus or timetable;
- (l) a directory, an assemblage of charts or an assemblage of street or road maps, but not including
 - (i) a guidebook, or
 - (ii) an atlas that consists in whole or in part of maps other than street or road maps;
- (m) a rate book;
- (n) an assemblage of blueprints, patterns or stencils;
- (o) prescribed property; or

(p) an assemblage or collection of, or any item similar to, items included in any of paragraphs (a) to (o).

...

“specified person” means

(a) a municipality;

(b) a school authority;

(c) a university;

(d) an organization that operates a post-secondary college or post-secondary technical institute

(i) that receives from a government or municipality funds that are paid for the purpose of assisting the organization in the ongoing provision of educational services to the general public, and

(ii) the primary purpose of which is to provide programs of instruction in one or more fields of vocational, technical or general education;

(e) a charity, public institution or qualifying non-profit organization that operates a public lending library; or

(f) a prescribed charity, or a prescribed qualifying non-profit organization, the primary purpose of which is the promotion of literacy.

8 Athabasca’s historical background, at paragraphs 4 to 9 of the Amended Notice of Appeal, was admitted by the respondent at trial.

9 An academic coordinator, albeit with some variation in activities and a lesser degree of responsibility, is similarly tasked with delivery, maintenance and development of assigned programs and courses of study.

10 The parties agreed in the pleadings it is an all-inclusive fee, even though the components are broken down separately, and is described interchangeably as “course fees” or “student fees” in various materials: Exhibit A-1, Tabs 6, 8 and 16.

11 Athabasca pled, but did not pursue, as an alternative argument that the Books were incidental to the instructional services and deemed, under section 138, to form a single supply with the instructional services.

12 The Tax Court considered whether Brown was making separate supplies of livestock (zero-rated supply) and a livestock purchasing service involving transportation, inoculation and branding (taxable supplies). In holding there was a single zero-rated supply of livestock, the Court held that the case turned on what Brown was supplying in return for the amount paid to Brown. The supply of livestock and all the elements in the service had to be provided together as there would be no value as separate supplies.

13 The Test was applied in *Blanche’s Home Care Inc. v Canada*, 2004 TCC 192, [2004] TCJ No. 125 (QL) [*Blanche’s*] involving section 256.2 and whether there was a supply of

- a “qualifying residential unit.” The Tax Court denied the operator of a licensed personal care home the new housing rebate because it did not make a supply of a “qualifying residential unit”, as defined in that section. The Court found Blanches to have made a single supply of personal care to residents rather than making an exempt supply of residential units (a requirement of a “qualifying residential unit”).
- 14 Subsection 33(3) of the *Interpretation Act* provides “Where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings.” Subsection 123(1) of the *Act* provides “... “supply” means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition;”
- 15 For example, subparagraph 298(4)(b)(iii) refers to fraud “in supplying, or failing to supply, any information under this Part” in filing a tax return. Here, it is clear that the failure to supply information is not used in the sense of a failure to make a “supply” (as defined in subsection 123(1)) of information.
- 16 *College of Estate Management v Her Majesty’s Commissioners of Customs and Excise*, [2005] UKHL 62, *Sterling Business Academy Inc. v Canada*, [1998] TCJ No. 1106 (QL) [*Sterling*], and *Avenue Business Campuses Ltd. v The Queen*, [2001] TCJ No. 696 (QL) [*Avenue Business*]. I disagree with Athabasca that *Sterling* and *Avenue Business* assists its position on this aspect. Both are private institutions and did not receive the rebate because they did not satisfy the requirement of a PSB. Also, in *Sterling*, the timing was problematic in that it involved a period that pre-dated the effective date of the printed book rebate. The courts had to determine whether books/materials used in providing educational services formed a single supply with the educational services, or whether the books/materials formed a separate supply.
- 17 Given the respondent’s concession, it is unnecessary to consider whether Athabasca made a single or multiple supplies. In *Sterling*, Justice Rip in answering the question used common sense and what is done in real life. It was found that the course (supply) and books (inputs) are interdependent and intertwined with each being an integral part of the whole course culminating in a single supply such that neither is incidental to other; the ITCs were denied. *Sterling* provided books but the purpose was for exempt activity, not a commercial activity. Unlike students in *Sterling*, in *Avenue Business* students were not compelled to buy books as they could share or borrow elsewhere.
- 18 Similar to subsection 136(2) where residential complexes are each deemed to be a separate property. Other examples include subsection 141(5) and 169(1.1).
- 19 Levying GST and receiving ITCs under subsection 169(1), for example, requires the purpose of commercial activities.
- 20 *Avis* used a bank loan in German currency to purchase a property in Canada and it subsequently wanted to sell the property, which required repayment of the loan. As the

Canadian dollar had depreciated, Avis incurred a foreign exchange loss when converting Canadian currency into German currency to repay the balance of the loan. The issue was whether this loss was deductible in calculating the capital gain from the sale of the property and the Court held it could not be deducted because the loss was incurred to repay the loan, not to make the disposition of the property (even though repayment of the loan was a contractual precondition to selling the property). This turned on whether the foreign exchange loss was “made or incurred...for the purpose of making the disposition” under subparagraph 40(1)(a)(i). At paragraph 52, Justice Rip states: “The words “for the purpose of” in subparagraph 40(1)(a)(i) mean “for the immediate or initial purpose of” and not the eventual or final goal which the taxpayer may have in mind. To give the words the latter meaning would permit the most indirect or most distantly related outlay or expense to reduce the amount of a gain. This could not have been Parliament’s intent. We are not dealing in subparagraph 40(1)(a)(i) with the computation of income from a business, which is of an ongoing nature, but, rather, expenses or outlays made or incurred to dispose solely of capital properties. The statutory provision under consideration sets out a rule to determine a taxpayer’s capital gain from the disposition of property and only expenses or outlays to be applied in reducing the gains are those incurred or made directly for the purposes of making the disposition.”

- 21 *See Imperial Oil Ltd. v Minister of National Revenue*, [1948] 1 D.L.R. 305 at 319-323.
- 22 Entitlement to ITCs in respect of the four-plex turned on whether it was an exempt supply under subsection 6(a) of Part I of Schedule V, which exempts “a supply ... of a residential complex ... by way of lease, license or similar arrangement for the purpose of its occupancy as a place of residence or lodging by an individual. ...” The taxpayer wanted to build a hotel but was required by the municipality to first construct a four-plex.
- 23 London leased office space and received tenant inducement payments from the landlord towards leasehold improvements. London remitted GST on the payments and claimed ITCs on the improvements. Since “commercial activities” excludes the making of exempt supplies, the Minister argued that the ITCs were unavailable because London’s business was supplying exempt “financial services”, and the leasehold improvements were made to further the “financial services” business. While the ultimate purpose in acquiring the improvements was to enhance London’s business, the Court separated the improvements from the financial services and held that the improvements were acquired to make a taxable supply of the improvements to the landlords.
- 24 The exceptions to the fee structure is that LRF and alumni relations do not apply to one credit courses and graduate studies. A component was also charged for out-of-country non-residents.
- 25 Effective September 1, 2011, a separate learning resource component was introduced.

- 26 The Court found “that the hulks were acquired by the appellant, not for the purpose of supplying scrap automobiles to third parties, but for the purpose of providing distinct exportable products ...”.
- 27 The comments with respect to *Budget Steel* equally apply to *Galcom International Inc. v Canada*, [2001] GSTC 50, [2001] TCJ No. 215 (QL) [*Galcom*]. Galcom was a charity that bought radio components and assembled them into radios for export. It sought a 100% rebate for the GST that it paid on its purchase of radio components under subsection 260(1) of the *Act*. Accepting the Minister’s argument, the Tax Court found that an initial supply that was consumed and converted became a different supply, thus does not assist Athabasca. Property bought by the charity (radio components) was not the same as that exported by the charity (assembled radios), and so the rebate was unavailable. It noted that “... [t]he evidence is clear that there was a consumption of the initial supply, i.e. the components, because there was a conversion of that supply from one form, being non-functioning, separate parts, to another property being a fully functioning radio ...” concluding that “[o]n the ordinary meaning of the term property, it cannot be said that the supply of property in respect of which the Appellant paid tax was the same property as that exported by it.”
- 28 Paragraph 80 states “in a case of a single composite supply of two or more non-ancillary elements, it may be appropriate to find that the character of the single supply is different from the character of any dominant element in the single supply.”
- 29 House of Commons, *Statement by the Honourable Paul Martin, Minister of Finance to the House of Commons Announcing Detailed Agreements on Sales Tax Harmonization with Nova Scotia, New Brunswick and Newfoundland and Labrador* (October 23, 1996)
- 30 The respondent had argued that Parliament intended the enhanced 83% rebate for facility operators under section 259 to be available only to a restricted group of entities that provide the same services traditionally provided by hospitals. The budget documents supported this.

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