Docket: 2016-1854 (GST)I

BETWEEN:

DR. BRIAN HURD DENTISTRY
PROFESSIONAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 25, 2017, at Hamilton, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Andrew Ball
Counsel for the Respondent:	Cecil S. Woon

JUDGMENT

The appeal with respect to an assessment made under Part IX of the *Excise Tax Act* for the period January 8, 2010 to December 31, 2012 is dismissed, without costs.

Signed at Summerside, Prince Edward Island, this 26th day of July 2017.

"Diane Campbell"

Campbell J.

Citation: 2017 TCC 142
Date: 20170726
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BETWEEN:

DR. BRIAN HURD DENTISTRY
PROFESSIONAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

Introduction:

[1] The tax treatment of orthodontic supplies under the *Excise Tax Act* (the "*Act*") is at the centre of this appeal. Specifically, the question is whether there is one supply of orthodontic treatment to a dental patient or two supplies, consisting of an orthodontic appliance and an orthodontic service. The characterization of the supply or supplies will determine whether any supply provided is to be exempt or zero-rated. The result of this characterization has an impact because if a supply is determined to be exempt there will be no tax charged to the patient on the supply of the good or service and the vendor of the supply, the Appellant, will not be able to claim income tax credits ("ITCs"). However, if it is zero-rated, there will again be no tax to the patient on the supply of the good or service but the vendor will be entitled to claim ITCs.

[2] The Appellant has appealed an assessment under Part IX of the *Act* for the period January 8, 2010 to December 31, 2012 (the "period"). By Notice of Assessment dated November 13, 2014, the Minister of National Revenue (the "Minister") denied ITCs of $17,357.00 claimed in respect of expenses and $5,083.00 claimed in respect of fixed assets for the period. The Minister disallowed those ITCs on the basis that the Appellant was providing a single exempt supply of health care services being orthodontic treatments pursuant to

sections 2 and 5 of Part II of Schedule V of the *Act*. Consequently, the Appellant was not entitled to claim ITCs under subsections 169(2) and 199(2) of the *Act*.

Facts:

[3] I heard evidence from two witnesses: Dr. Brian Hurd, the owner of the Appellant corporation during the relevant period and Jeffrey Ball, the Appellant's accountant.

[4] The Appellant is a professional health corporation licensed to practice dentistry in the Province of Ontario. Dr. Hurd is an orthodontic specialist who, through his corporation, supplied orthodontic services that are aimed at meeting specific oral health needs of a medical and reconstructive nature but not exclusively for cosmetic purposes. Those orthodontic treatments were used to treat and correct problems related to a patient's irregular alignment of teeth or problems with the jaw or occlusion.

[5] A patient's treatment process involved several steps. First, there is an initial examination which included taking and reading x-rays and digital images, preparing molds, individual case analysis and discussion on a treatment plan. If a patient wishes to proceed with the plan, appointments are established to place an appliance, commonly referred to as braces, on the patient's teeth. Generally, they are placed on the upper teeth only for technical and comfort reasons with the placement of the appliance on the lower teeth occurring at a later date. Following these installations, appointments at regular intervals are established for adjustments and maintenance of the orthodontic equipment or braces in order to achieve a specific dental result for that patient.

[6] Dr. Hurd also explained that in order to install those appliances, the brackets and bands are ordered from a dental supply company and then the individual brackets are glued separately on each tooth. Finally, the archwire is inserted into the brackets and secured with ligatures. It is the adjustment to the archwire that supplies the force that moves the patient's teeth over a period of time. Dr. Hurd testified that, if the archwire is not continually adjusted, the appliance will stop having any effect on the teeth.

[7] On cross-examination, Dr. Hurd agreed that the orthodontic appliance, without the other services, would not be useful on its own. It cannot be assembled, installed or adjusted and maintained without the expertise of a dental professional.

Dr. Hurd also agreed that the orthodontic services without the introduction of the appliance to the patient's mouth would not be useful.

[8] With the exception of the consultations, all of the services could only be performed by a licensed dentist or orthodontist, while patients were in the dental chair. Dr. Hurd testified that patients are not consulting him to purchase an orthodontic appliance but instead they are interested in the overall dental treatment to achieve specific goals. The Appellant does not "sell" dental appliances to patients and, according to the Guidelines of the Royal College of Dental Surgeons of Ontario, whatever products are "sold" to patients cannot be sold at a markup.

[9] Dr. Hurd provided several examples of patient contracts. A single contract was signed for the entire treatment and the total fee charged to a patient included the cost of the orthodontic appliance. The appliance cost was referred to in the contract as the "appliance portion… of the fee" and was calculated separately as 35 percent of the total fee in order to take advantage of Canada Revenue Agency ("CRA") administrative directive/policy (Exhibit "A"). It did not, however, represent the actual cost of the appliance and on cross-examination, Dr. Hurd confirmed that the amounts contained in the patients' contracts for the orthodontic appliance did not represent its actual cost. (Transcript, page 47). The CRA directive permits orthodontists to claim ITCs in respect of orthodontic appliances based on the assumption that multiple supplies, consisting of an exempt dental service and a zero-rated appliance, are being made. According to this directive, as long as dentists identify the provision as two separate supplies and the consideration related to the supply of the appliance is separated from the consideration for the exempt supply of the dental service, they could claim ITCs, in respect of the consideration for the supply of the appliance, based on 35 percent of the total fees charged to the patient for the treatment.

Issues:

[10] There are five issues but the last two will be determined largely through a resolution of the first three:

> (1) Whether the Appellant provided a single supply of orthodontic treatments to its patients or provided multiple supplies consisting of an orthodontic appliance and the accompanying orthodontic service;
>
> (2) If it is determined that a single supply was made, whether that supply is exempt or zero-rated;

(3) If it is determined that multiple supplies were made, whether those supplies are exempt or zero-rated;

(4) Whether the Appellant is entitled to ITCs of $17,357.00 with respect to the expenses incurred in providing the supplies;

(5) Whether the Appellant is entitled to ITCs of $5,083.00 with respect to the fixed assets used in providing the supplies.

Appellant's Position:

[11] The Appellant submits that the provision of orthodontic treatment to patients consists of two distinct supplies: the creation of the orthodontic appliance and the maintenance and adjustments of the appliance that a patient requires over a period of time. The Appellant relies on the CRA directive/policy to support its dual supply position as well as its position that appliances should be treated as a single zero-rated supply. Appliances are billed as a separate item from the adjustments as part of the total fees to the patient. As well, the appliance can only be manufactured by licensed dental professionals and assembled in a patient's mouth.

[12] The Appellant argued that, if the Respondent is correct in its position that the provision of the orthodontic appliance is part of a single exempt supply, then the term "orthodontic appliance" would not be specifically included in Schedule VI of the *Act* as a zero-rated supply. Therefore, the *Act* intends that some part of the orthodontic work is to be zero-rated.

[13] Alternatively, if the creation of the appliance and the maintenance and adjustments are found to be a single supply, it should be zero rated with the orthodontic adjustments being incidental to the creation of the appliance.

Respondent's Position:

[14] The Respondent contends that the Appellant provided a single supply of orthodontic treatments for a single consideration which consisted of the orthodontic appliance and the associated maintenance and continued adjustments. The provision of the appliance was incidental to the supply of the orthodontic treatment and the appliance and the orthodontic service were integral components of the overall supply of an orthodontic treatment. In addition, the orthodontic treatment is an exempt supply pursuant to section 5 of Schedule V, Part II because it is a supply of consultative, diagnostic treatment or other health care service rendered by a medical practitioner to an individual.

[15] Alternatively, if it is determined that the orthodontic appliance is a separate supply, then the Respondent submits that it is an exempt supply pursuant to section 2 of Schedule V, Part II and that the orthodontic services associated with the appliance would also be an exempt supply pursuant to Schedule V, Part II, sections 2 and 5. The Respondent further submits that section 34 of Schedule VI, Part II, does not zero-rate a supply of a service included in Schedule V, Part II, except for section 9. Consequently, the Appellant would not be entitled to claim ITCs in respect of expenses pursuant to subsection 169(1) as well as the definition of commercial activity in subsection 123(1) of the *Act* because the supply is exempt. In addition, since the fixed assets were used for the exempt supply of orthodontic treatments, the Appellant did not acquire the fixed assets for use primarily in the Appellant's commercial activities pursuant to subsection 123(1) of the *Act*. Therefore, the Appellant would not be entitled to claim ITCs in respect of the fixed assets pursuant to subsection 199(2).

Analysis:

Issue 1: Did the Appellant Provide a Single Supply or Multiple Supplies?

[16] The test to determine whether a transaction is a single supply or multiple supplies was established by Justice Rip (as he was then) in the case of *O.A. Brown Ltd. v The Queen*, [1995] TCJ No 678. At paragraphs 22 to 24, he made the following comments:

> **22** In deciding this issue, it is first necessary to decide what has been supplied as consideration for the payment made. It is then necessary to consider whether the overall supply comprises one or more than one supply. 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. The test was set out by the Value Added Tax Tribunal in the following fashion:
>
> > In our opinion, where the parties enter into a transaction involving a supply by one to another, the tax (if any) chargeable thereon falls to be determined by reference to the substance of the transaction, but the substance of the transaction is to be determined by reference to the real character of the arrangements into which the parties have entered.
>
> **23** One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply. This is not conclusive but is a

factor that assists in determining the substance of the transaction. The position has been framed in the following terms:

> What should constitute a single supply of services as opposed to two separate supplies, is not laid down in express terms by the value added tax enactments. It would therefore be wrong to attempt to propound a rigid and precise definition lacking statutory authority. One must, it seems to us, merely apply the statutory language, interpreting its terminology, so far as the ordinary meaning of the words allows, with the aim of making the statutory system of value added tax a practical workable system. For this purpose 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. Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered, but for the reasons given above are not conclusive. Taking the nature, content and method of execution of the services, and all the circumstances, into consideration against the background of the value added tax system, particularly its methods of accounting for and payment of tax, if the services are found to be so interdependent and intertwined, so much integral parts or mere components or items of a composite whole, that they cannot sensibly be separated for value added tax purposes into separate supplies of services, then Parliament, in enacting the value added tax system, must be taken to have intended that they should be treated as a single system, otherwise, they should be regarded a for value added tax purposes as separate supplies.
>
> **24** The fact that a separate charge is made for one constituent part of a compound supply does not alter the tax consequences of that element. Whether the tax is charged or not charged is governed by the nature of the supply. In each case it is useful to consider whether it would be possible to purchase each of the various elements separately and still end up with a useful article or service. For if it is not possible then it is a necessary conclusion that the supply is a compound supply which cannot be split up for tax purposes.

[17] In summary, the facts must be analyzed to determine the nature of what has been supplied for consideration and whether, in substance and reality, the alleged separate supply is such an integral component of the overall supply that it cannot be omitted or separated and still retain value and be a useful item on its own. If the individual parts are so intertwined or interconnected to the overall arrangement that they cannot be realistically separated, then they will be considered to be part of a single whole rather than regarded as separate and distinct parts or entities.

[18] The test from *O.A. Brown* was accepted by the Federal Court of Appeal in *Hidden Valley Golf Resort Association v The Queen*, [2000] FCJ No 869 and also endorsed by the Supreme Court of Canada in *City of Calgary v The Queen*, 2012 SCC 20, [2012] 1 SCR 689. In considering the issue of single supply versus multiple supplies the Supreme Court of Canada stated the following at paragraph 42:

> …According to the jurisprudence, if one supply is work of a preparatory nature to another supply (an "input" to that supply), then the input is a part or component of the single overall supply.

[19] The issue of whether elements of a transaction constitute a single supply or a multiple supply is a question of fact and the Courts have endorsed a common sense approach in this determination. At paragraph 18 of the decision in *Gin Max Enterprises Inc. v The Queen*, 2007 TCC 223, the Court stated:

> **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. It must be considered whether in substance and reality the collection and disposal service are so intertwined and interdependent that they must be supplied together. Justice Hershfield clarified these considerations in *1219261 Ontario Inc.*:
>
> > As recognized by the English authorities cited in *O.A. Brown Ltd.*, it would, lacking statutory authority, be wrong to attempt to propound a rigid and precise definition of a single (compound) supply. Factors include: the degree of interconnectedness of constituent elements of a supply; the extent of interdependence; and, whether each is an integral part or component of a composite whole. Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered but are not conclusive. How can they be? To so find would mean the Minister could never assess a separate taxable supply where it is coupled with a non-taxable supply under one contract at one price.

[20] The question in this appeal, to which the test in *O.A. Brown* must be applied, is whether in substance and reality, the alleged separate supply of an orthodontic appliance is an integral component of the overall supply of an orthodontic treatment. It is the Respondent's position that both the appliance and the services are components of a single supply of orthodontic treatment because only if the appliance and service are supplied together do they form a useful service of correcting or treating the irregular alignment of a patient's teeth, jaw or bite. The

Appellant's position is that the appliance is a distinct and separate supply from the services of maintenance and adjustments and in fact CRA policy is supportive of this position.

[21] The facts in this appeal fully support the Respondent's position. The orthodontic appliance on its own is not a useful item nor are the maintenance and adjustment services on their own without the appliance. Neither the appliance nor the service on their own can achieve the patient's goal or objective of correcting or treating their dental issues. To constitute a useful treatment for the patient, both appliance and services must be combined and supplied for the treatment to be successful. To use several of the descriptive adjectives employed in *O.A. Brown*, the appliance is so "interconnected" and "intertwined" with the services in the overall dental treatment that each are components necessary to the overall supply of orthodontic treatment. For the appliance to work properly and address each patient's dental issues, it requires the maintenance and adjustments devised specifically for that patient and administered by a dental professional over a period of time. An appliance on its own is of no value to a patient without the accompanying orthodontic services supplied by a dentist or orthodontist. If the appliance is attached to a patient's teeth without the subsequent adjustments, it will be of no benefit in correcting the dental problems. Therefore, it is interdependent on the maintenance and adjustments over a period of time otherwise it would remain a useless item to the patient. Likewise there can be no adjustments and corrections to the patient's problems without the prior installation of the appliance.

[22] In addition, the appliance and services were provided for and purchased together under a single contract for a single consideration. Although the orthodontic appliance was individually identified on the contracts for each patient, this was simply identified as 35 percent of the total fee in order to comply with CRA directive and for accounting purposes. Nothing else in a patient's contract informed the patient that they were in fact purchasing two separate supplies, that is, an appliance and the accompanying services. In fact, Dr. Hurd on cross-examination admitted that patients come to him to obtain treatment for their dental issues and not to purchase an appliance (Transcript, page 43).

[23] While components of the orthodontic treatment may be delivered at different times, each is an essential step in the objective of the overall treatment plan for each patient. Initially there may be a consultation, a diagnosis and a plan formulated. Then an appliance will be manufactured for that particular patient and subsequently installed in the patient's mouth. It will then be adjusted regularly on an ongoing basis depending on each patient's requirements until its removal.

Without the related ongoing adjustments, a patient would never purchase an appliance on its own because it is a useless item without those adjustments.

[24] The true nature of the transaction between the dental professional and the patient, based not only on the facts before me but also based on an application of common sense, is the supply of an orthodontic treatment, comprised of the interdependent components of an orthodontic appliance and the related adjustment services, for a single consideration. One without the other is of no use in achieving a patient's objectives.

[25] While it is impossible to separate the orthodontic appliance from the orthodontic adjustment services based on the facts before me, it is conceivable that they might be purchased separately leading to a different conclusion. For example, a patient may have reached the stage of having the appliance supplied and attached to their teeth by one orthodontist or dentist and because of a geographical move to another area, the ongoing adjustments are delivered by another dental professional in the area to which the patient has relocated.

[26] As the Respondent counsel pointed out there is a lack of jurisprudence relevant to these particular facts. In *Buccal Services Ltd. v The Queen*, [1994] TCJ No 928, a dentist claimed ITCs on taxable and zero-rated supplies, arguing that certain supplies fell within Schedule VI and were therefore zero-rated. The dentist argued that certain dental supplies being provided came under this Schedule because they could not be separated from those services related to installing, repairing or modifying the devices specified in the relevant sections of this Schedule. The ITCs were denied on the basis that the taxpayer supplied only health care services which were an exempt supply. The Court held that the taxpayer in *Buccal* had not met the onus of providing sufficient evidence to support that any services falling under Schedule VI had been provided.

[27] In the decision of Chief Justice Bowman (as he was then) in *Dr. James Singer Inc. v The Queen*, 2006 TCC 205, the issue before the Court was whether the supply of crowns, bridges and dentures by a dentist in delivering dental services was zero-rated, exempt or a taxable supply. The appeal was dismissed on the basis that there was no evidence adduced to describe the nature of the services that were being provided or to substantiate the figures being claimed by the taxpayer. However, Chief Justice Bowman went on to discuss the legal arguments before him, although he acknowledged that his comments were simply *obiter dictum*. His conclusion, at paragraphs 10 and 11, was that the supply and installation of an artificial tooth would be zero-rated pursuant to sections 11 and 34

of Schedule VI, Part II. As a result, he disagreed with the Crown's position that while the cost of an artificial tooth is zero-rated under section 11 of Schedule VI, Part II, the cost of installing it is not. Under my analysis of issue 3, I will address in more detail the above comments and why the Respondent asks that this Court not follow them.

[28] Finally, the Respondent provided a decision of the Supreme Court of Alabama, *Haden (Commissioner of Revenue) v. McCarty*, 275 ALA 76. The issue in that case was whether the supply of a dental prosthesis by a dentist to a patient was a sale of tangible personal property that was subject to tax. The Court held that the transfer of a dental prosthesis is not a sale and therefore not a taxable supply but is instead incidental to the overall treatment that is being rendered by the dentist. Although the Respondent urged me to follow this decision, I note that it is from another jurisdiction but more importantly the U.S. Court was dealing with an entirely different Act. The issue in *Haden* was whether the sale of the prosthesis was one of tangible personal property "within the meaning of the *Sales Tax Act*". It is the provisions of the *Excise Tax Act* that are before me. Some of the Court's comments, however, are noteworthy. The Court concludes that dentists were not traders in commodities engaged in a merchandising business but instead the relationship is one of doctor and patient, not merchant and customer. Supplying a dental prosthesis to a patient is therefore an inseparable part of the professional services being provided to a patient.

[29] In summary, I conclude that based on the facts before me, the answer to the first issue is that the Appellant supplied a single supply of orthodontic treatment to each patient for a single consideration or fee. This total fee was specified up front for the treatment. Some patients prepaid while others made payments over the period of the maintenance and adjustments or in some cases even longer. The provision of the orthodontic appliance was not distinguished or separated from the related services except for accounting purposes. The evidence supports my conclusion that the appliance and the associated adjustment and maintenance services were so dependant, one on the other, that the treatment goals could not be achieved except that both had to be engaged for the patient's dental issues to be addressed and rectified. In fact, on cross-examination of Dr. Hurd, he confirmed that patients are requesting orthodontic treatment and professional care when they seek him out and that they were not wanting to purchase an orthodontic appliance on its own. He also agreed that the fees charged to and paid by the patient were for the treatment he provided. Dr. Hurd also agreed with Respondent counsel's suggestion that the orthodontic services without the appliance would be useless and vice versa. There can be but one conclusion here and that is that both the appliance

and services are indispensable components of the single supply of orthodontic treatment to a patient.

[30] Finally, in respect to the Appellant's reliance on the CRA directive and policy in this regard, although it may be a guideline it is not binding on this Court. I believe it to be incorrect and misleading to taxpayers. Respondent counsel submitted a rather weak argument as to why the Appellant does not comply with the requirements of this policy. He contended that the Appellant's contracts with patients did not identify the cost of the dental service separately from the cost of the appliance. In fact, for accounting purposes in order to take advantage of this policy directive and be able to claim ITCs according to the directive in respect to the appliance, the consideration for the appliance was stated to be 35 percent of the total fees paid for treatment. Simple math and logic leads to the inevitable conclusion that the remaining 65 percent of the total fees related to the associated services without specifically stating that in the contract. In the end, the CRA policy statement is simply wrong and more importantly misleading and cannot be defended in the manner the Respondent would have me do. I simply reject it and I do not intend to follow it.

Issue 2: Is the Single Supply an Exempt Supply or a Zero-Rated Supply?

[31] The Respondent's position is that if a single supply of orthodontic treatments was made, as I have concluded they were, then they will be exempt because the Appellant's services and the dental practice fall under sections 2 and 5 of Schedule V, Part II of the *Act*. The Appellant's argument is that if the treatments are single supplies, then they were zero-rated because the ongoing adjustments are incidental to the creation of the appliance.

[32] Because I have characterized the supply as a single supply of an orthodontic treatment, it is an exempt supply rather than a zero-rated supply. According to the evidence, the Appellant operated a dental clinic that specialized in providing orthodontic treatments to patients. Dr. Hurd was a licensed orthodontist who provided the treatments and received remuneration for those services from the Appellant corporation.

[33] Section 5 of Schedule V, Part II of the *Act* exempts "a supply of a consultative, diagnostic treatment or other health care service that is rendered by a medical practitioner to an individual". The term "medical practitioner" is defined in section 1 to mean "a person who is entitled under the laws of the province to

practice the profession of medicine or dentistry." Therefore section 5 is applicable to dental services.

[34] The evidence was that the scope of the orthodontic treatments included consultations, diagnosis and treatment of medical or reconstructive problems related to the teeth, jaw or bite. The word "treatment" is not defined within the *Dentistry Act, 1991*, S.O. 1991, c. 24 or the Ontario *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 but section 3 of the *Dentistry Act* defines the scope of a dentist's practice which references "treatment" in the following manner:

> **3** The practice of dentistry is the assessment of the physical condition of the oral-facial complex and the diagnosis, treatment and prevention of any disease, disorder or dysfunction of the oral-facial complex.

"Treatment" is defined in the Oxford English Dictionary as: "Management in the application of remedies; medical or surgical application or service."

[35] As a licensed orthodontist in the Province of Ontario, Dr. Hurd is entitled to practice within the dentistry profession and he is therefore a medical practitioner under section 1 of Schedule V, Part II. The evidence of Dr. Hurd was that the appliances were used for treating and correcting problems related to a patient's teeth, jaw or occlusion. Consequently, a treatment was being rendered by a medical practitioner, Dr. Hurd, to individual patients of a dental clinic operated by the Appellant. According to the definitions of "health care facility" and "institutional health care service" contained in section 1 of Schedule V, Part II, the dental clinic was a facility that operated for the purpose of providing medical care and, according to (h) of the definition of institutional health care service, those services were rendered by Dr. Hurd who received remuneration from the Appellant, a professional corporation, which operated the facility. The supply of orthodontic treatments were dental services, consisting of a supply of consultative, diagnostic, treatment or other health care services rendered by a medical practitioner to patients and as such are exempt supplies within the parameters of section 5 of Schedule V, Part II. Further, the single supply of orthodontic treatment by the Appellant in its dental clinic was an exempt supply pursuant to section 2 of Schedule V, Part II of the *Act* because the supply was made by an operator of a health care facility in respect to institutional health care service rendered to a patient of the facility.

Issue 3: If they are Determined to be Multiple Supplies are they Exempt or Zero-Rated?

[36] This third issue became a non-issue when I determined that the Appellant made a single supply of orthodontic treatment and not multiple supplies. However, due to the considerable length of time Respondent counsel devoted to this issue in his oral submissions, I will briefly address some of the more pertinent points.

[37] There is no dispute between the parties that, pursuant to the clear wording in section 34 of Schedule VI, Part II, if this Court had determined that the Appellant was providing multiple supplies consisting of orthodontic services and orthodontic appliances (which it has not), the supply of the orthodontic services is an exempt supply, not a zero-rated supply.

[38] It is the Appellant's position that section 11.1 of Schedule VI, Part II, specifically zero-rates orthodontic appliances. Since the only way to assemble an appliance is by a licensed dental professional in the patient's mouth, it must be intended to be zero-rated.

[39] However, the Respondent submitted that even if the Appellant was found to be providing multiple supplies of orthodontic appliances and orthodontic services, the supply of the appliances would still be an exempt supply pursuant to section 2 of Schedule V, Part II and would not be zero-rated under section 11.1 of Schedule VI, Part II.

[40] The Respondent referred to a Department of Finance Goods and Services Tax Technical Paper (August 1989), issued by the Honourable Michael H. Wilson and submitted that Schedule VI zero-rated supplies are intended to target supplies in respect to manufacturers and producers of goods. The Technical Paper, at pages 86 to 88, lists "medical devices" as being tax free and "health care services" as tax exempt. The Respondent submitted that Parliament intended that the supply of an appliance or medical device by an orthodontist or medical practitioner to a patient would be an exempt supply under Part V, whereas the supply of an appliance or medical device by a manufacturer to a dentist is intended to be zero-rated under Part VI.

[41] The Respondent also canvassed whether an orthodontic appliance fell within the meaning of the term "medical prosthesis" in paragraph (b) of the definition of "institutional health care service". Since neither of the terms "medical prosthesis" nor "orthodontic appliance" is defined in the *Act*, the Respondent submits that these terms must be interpreted in their grammatical and ordinary sense. According to the definition of "prosthesis" as contained in the Merriam Webster's Medical Dictionary, the term includes an orthodontic appliance. Since this

prosthesis/appliance is assembled and installed in the dental chair at the dental clinic in connection with other diagnostic services, the installation of an appliance is an "institutional health care service", as defined in paragraph (b) of section 1 of Schedule V, Part II. In addition, the assembly of the appliance was rendered to patients of the clinic, making the supply of an orthodontic appliance an exempt supply under section 2 of Schedule V, Part II. Based on this conclusion and Parliament's intent to exempt the majority of health care services that are supplied by a health care facility or a medical practitioner and zero-rate medical devices when supplied by a manufacturer or producer, the Respondent submits that section 11.1 of Schedule VI, Part II, does not apply to a supply of an orthodontic appliance in this case as the Appellant is not a manufacturer or producer but rather an operator of a health care facility.

[42] The Respondent further contends that, even if both Schedules V and VI apply, Schedule V takes priority over Schedule VI or, stated another way, exempt status takes priority and no ITCs can be claimed. This is because the term "commercial activity" in subsection 123(1) excludes the making of exempt supplies. This interpretation is supported by the decision in *Buccal* at paragraph 12 where this Court held that exempt status takes precedence over zero-rated status.

[43] In the decision in *Singer*, Chief Justice Bowman (as he was then) stated in *obiter dictum* that the supply and installation of an artificial tooth was zero-rated pursuant to sections 11 and 34 of Schedule VI, Part II. The Respondent argued that the decision in *Singer* should be distinguished for several reasons, including the fact it was an informal decision and of little precedential value and that his comments were made in *obiter*. More specifically, the Respondent contends that the Court's conclusion in *Singer* is based on the specific wording in section 34 of Schedule VI, Part II, overruling the general wording in the brackets. However, the wording in section 34 is not in conflict. The Respondent relied on the decision in *Barrington Lane Developments Ltd. v The Queen*, 2010 TCC 388, for the principle that a specific provision will override a general provision when the two are in conflict. However, the Respondent contends that in order for this principle to operate there must first be a conflict between provisions. Relying on the reasoning in *Barrington*, the Respondent's view was that it was improper for the Court in *Singer* to use this analysis when one provision makes itself subject to another provision, as it does with section 34. It specifically states that if a service is exempt under Part II of Schedule V, it will not be zero-rated under section 34. Finally, the Respondent submits that if the reasoning in *Singer* is correct (that the wording outside the parenthesis in section 34 prevail over the wording inside the parenthesis), it would render the words in parenthesis, which is the exception,

meaningless in respect of installations. If it is correct that the words outside the parenthesis should prevail, it would mean that the exception would never apply and all services attached to medical devices would be zero-rated. Generally courts should avoid interpretations that render words in a provision meaningless. The Respondent contends that if the interpretation in *Singer* is accepted, then items such as the installation of an artificial hip would be zero-rated under sections 25 and 34 rather than being exempt. This result would be contrary to the intent of Schedule V which is meant to exempt the majority of health care services.

[44] I am of the view that if I had concluded that the Appellant provided multiple supplies, then applying a textual, contextual and purposive analysis as the decision in *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, [2005] 2 SCR 601 would have me do, the supply of the orthodontic appliance would be zero-rated pursuant to section 11.1 of Schedule VI, Part II of the *Act*. In my opinion, the term "medical prosthesis", as it is used in Schedule V of Part II, does not include an orthodontic appliance. The term "orthodontic appliance" appears in Schedule VI separate and apart from the word "prosthesis". It is not used anywhere in Schedule V. A medical prosthesis can be either an exempt or zero-rated supply depending on the circumstances. It can be an exempt supply if installed in conjunction with services rendered for remuneration (section 1, "institutional health care service", paragraphs (b) and (h) and section 2 of Schedule V, Part II). It may also be zero-rated pursuant to section 25 of Schedule VI, Part II. According to the decision in *Buccal Services*, Schedule V however takes precedence over Schedule VI in the event that a supply falls within either of those Schedules. The term "orthodontic appliance" appears only in Schedule VI and does not appear anywhere in Schedule V. While a prosthesis may, according to the medical definitions of "prosthesis, orthodontics and appliance" include an orthodontic appliance, the *Act* has set out the scheme for an orthodontic appliance entirely separate and apart from the provisions that apply to a prosthesis. In addition the evidence, which remained unchallenged, suggests that the only way to manufacture or assemble an orthodontic appliance is in the patient's mouth. Therefore, the supply of an orthodontic appliance, being a medical device assembled by a licensed dental professional in a patient's mouth, falls within the zero-rated scheme contained in Schedule VI. This interpretation is also consistent with the Department of Finance Technical Notes to section 11.1 of Schedule VI, Part II which unconditionally zero-rates an appliance.

Issues 4 and 5: Is the Appellant Entitled to the ITCs Claimed in Respect to Expenses and Fixed Assets?

[45] My conclusion respecting these issues follows from my determinations of issues 1 and 2 of the within reasons.

[46] The Appellant provided a single supply of orthodontic treatments consisting of an orthodontic appliance and associated orthodontic services. Furthermore, the orthodontic treatment is an exempt supply pursuant to section 5 of Schedule V, Part II because it is a supply of consultative, diagnostic, treatment or other health care service rendered by a medical practitioner to a patient at a dental facility.

[47] An ITC can be claimed when three requirements are met:

(a) the claimant is registered;

(b) the claimant has acquired the good or service for consumption, use or supply in the course of its commercial activity; and

(c) the claimant has paid or is legally required to pay GST/HST in acquiring the good or service.

Only the second requirement is at issue. The Appellant is not engaged in a commercial activity pursuant to the definition contained in subsection 123(1) by virtue of making exempt supplies.

[48] Consequently, the Appellant will not be entitled to claim ITCs with respect to expenses pursuant to subsection 169(1) and the definition of "commercial activity" contained in subsection 123(1) because the supply is exempt.

[49] Pursuant to paragraph 199(2)(a) of the *Act*, an ITC cannot be claimed in respect of personal property used as capital assets (the fixed assets) unless the property was acquired for use primarily in the registrant's commercial activities. Since the fixed assets were used for the exempt supply of orthodontic treatments, the Appellant therefore did not acquire those assets for use primarily in its commercial activities pursuant to the definition of "commercial activity" in subsection 123(1) of the *Act*. It will therefore not be entitled to claim ITCs in respect of the fixed assets pursuant to subsection 199(2) of the *Act*.

Conclusion:

[50] Based on my determinations that the Appellant made a single supply of orthodontic treatment which is an exempt supply, the appeal is dismissed. The Respondent did not request costs in this matter and so I am making no award of

costs. If I had determined that the Appellant had made multiple supplies consisting of an orthodontic appliance and an orthodontic service, it is my view that section 138 would not apply in those circumstances to deem that a single supply would have been made. A supply of an orthodontic appliance on its own would therefore be a zero-rated supply.

Signed at Summerside, Prince Edward Island, this 26th day of July 2017.

"Diane Campbell"

Campbell J.

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COURT FILE NO.:	2016-1854(GST)I
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PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	May 25, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	July 26, 2017

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