Docket: 2003-4234(GST)G

BETWEEN:

ROYAL BANK OF CANADA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 7, 2007, at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	James Warnock
Counsel for the Respondent:	Ronald MacPhee Michael Ezri

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act*, for the period from November 1, 1996 to October 31, 1999, notice of which is dated August 29, 2003 and bears number 11111111441, is dismissed, with costs to the Respondent, for the reasons set out in the attached Reasons for Judgment.

Signed at Winnipeg, Manitoba, this 12th day of September, 2007.

"J.E. Hershfield"

Hershfield J.

Citation: 2007TCC281
Date:20070912
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Appellant,

and

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REASONS FOR JUDGMENT

Hershfield J.

I. Introduction

[1] The Royal Bank of Canada ("RBC") appeals a Notice of Reassessment dated August 29, 2003, pursuant to which the Minister of National Revenue ("Minister") assessed the Appellant for $6,641,714.00 of Goods and Services Tax ("GST") for the period from November 1, 1996 to October 31, 1999. The appeal concerns payments made by RBC to Canadian Airlines International Ltd. ("CAIL"), a domestic and international airline, under an affinity credit card agreement. Pursuant to this agreement CAIL issued frequent flyer points to credit card holders using a RBC Visa Canadian Plus credit card (the "Affinity Card").

[2] Under the terms of the agreement between RBC and CAIL, RBC granted credit and provided credit card services to holders of the Affinity Card. Cardholders were also enrolled in CAIL's frequent flyer program and received frequent flyer points for card usage. Generally, under the Affinity Card program, for every dollar of qualifying spending on the Affinity Card, the cardholder received one frequent flyer point which could be redeemed for CAIL's travel services. RBC made payments to CAIL according to the number of frequent flyer points issued by CAIL to Affinity Card holders.

[3] The principal issue in this appeal is the proper characterization of the supply for which the RBC payments were made. The Appellant does not dispute the calculation of the GST amount, if the supply is taxable.

[4] The Minister argues that RBC is the recipient of a taxable supply of property made by CAIL, namely frequent flyer points, which is subject to GST under the *Excise Tax Act* (GST Portions) (the "*Act*").

[5] The Appellant argues that CAIL made a supply of services which formed part of a service being supplied by RBC to its credit card holders. On this basis, the Appellant contends that the payments to CAIL were made for the supply of exempt financial services in respect of which no GST is payable. In the alternative, the Appellant argues that if it acquired or was a recipient of the supply of frequent flyer points, such supply by CAIL was a supply of gift certificates and not subject to GST. In the further alternative, CAIL as supplier was liable to collect and remit any GST payable and was already assessed on that basis in respect of the same transactions at issue in the current appeal. The Appellant therefore argues that the assessment against CAIL has given rise to a tax liability and to find the Appellant liable for the same tax on the same supply would constitute double taxation.

II. Factual Background

[6] The underlying facts are set out by the parties in an Agreed Statement of Facts which is attached to these Reasons as an Appendix. The parties also submitted a Joint Book of Documents. No witnesses gave evidence at the hearing. Briefly, the facts are as follows.

[7] On March 1, 1994, RBC and CAIL entered into an Affinity Card Program Agreement (the "Agreement"). Under the Agreement, CAIL was to actively advertise, market, and promote the product including maintaining supplies of application forms. CAIL's obligations included displaying advertising material, advising current and prospective customers of the existence and availability of the Affinity Card program, accepting the credit card in payment for airline travel services, and engaging in periodic marketing and promotion activities such as direct mail campaigns. CAIL was also responsible for providing "ancillary services" (as set out in Schedule "G" of the Agreement) which included the awarding of frequent flyer points called "Canadian Plus" reward points ("Points") to cardholders. The Points were to be issued at the rate set out in Schedule "G" of not less than one Point for every dollar of qualifying credit card spending. The Points themselves had no assigned cash value but could be redeemed for travel services with CAIL.

[8] Under the terms of the Agreement, RBC was responsible for issuing Affinity Cards and providing and administering the credit card financing services to cardholders. RBC agreed to offer the Affinity Card with, at a minimum, the same credit financing information and terms and conditions as the RBC Visa Classic Card product. In accordance with the terms of the Agreement, CAIL did not participate in the screening, reviewing or submitting of Affinity Card applications to RBC.

[9] At the outset, each party bore its own costs and expenses in connection with their respective roles under the program. More specifically, section 1 of Schedule "H" of the Agreement provided that CAIL was to pay all costs and expenses incurred in connection with issuing Points. Under section 2 of Schedule "H", RBC was responsible for its costs and expenses incurred in administering the credit card services. Costs in respect of marketing and promotion were to be shared.

[10] Pursuant to an amending agreement dated May 1, 1994 (the "1994 Amended Agreement"), the cost sharing provisions for marketing and promotion expenses associated with the Affinity Card program were amended to set the maximum amount payable by CAIL in any year at $200,000.[1] The 1994 Amended Agreement covered joint marketing initiatives and the development of an annual marketing plan and an annual customer service plan for the program. The 1994 Amended Agreement also set out the procedure for CAIL to credit Points to cardholders and required RBC to make monthly reimbursements for the costs and expenses incurred by CAIL in issuing the Points to cardholders. The amount to be paid to CAIL was determined according to the rate set out in section 4.1 of the 1994 Amended Agreement. Section 4.1 reads as follows:

> 4.1 Notwithstanding Section 1. of Schedule "H" of the Agreement, the Bank agrees to reimburse Canadian for the costs and expenses Canadian has incurred relative to the issuance by Canadian of Points to Cardholders pursuant to Section 2.(a) of Schedule "G" of the Visa Agreement at the rate of $0.0085 per Point issued or at such other rate(s) as Canadian and Royal Bank have agreed to in writing.

This original rate of $0.0085 per Point was adjusted in subsequent amendments to $0.01 per Point issued.

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[1] This amount was increased by subsequent amending agreements to $300,000 for 1997 and 1998 and $350,000 for 1999.

[11] CAIL did not charge or collect GST from RBC on the payments made pursuant to section 4.1 of the 1994 Amended Agreement. Where Points were purchased by RBC for use in certain in-house promotions, GST was paid by RBC.[2]

[12] CAIL commenced proceedings under the *Companies Creditors Arrangement Act* ("*CCAA*") in March of 2000. Pursuant to these proceedings, a Plan of Compromise and Arrangement (the "Plan") was filed. The Plan released CAIL of its liabilities arising before March 24, 2000. The Plan was accepted by CAIL's creditors, including the Canada Revenue Agency (the "CRA"), and approved by the Alberta Court of Queen's Bench. The approval of the Plan led to the merger of CAIL with Air Canada. CAIL was not assessed for GST remittances in respect of the payments made to it by RBC pursuant to section 4.1 of the 1994 Amended Agreement until June of 2000.

[13] RBC was first assessed for GST payable in respect of such payments in January 2001. After a series of assessments and objections and adjustments, the Notice of Reassessment that is the subject of this appeal was issued in August 2003.

III. Issues

[14] The issues to be decided in this appeal are as follows:

A. Were the payments made by RBC to CAIL in consideration for taxable supplies or did CAIL supply a GST-exempt financial service?

B. In the alternative, did CAIL make a supply of non-taxable gift certificates in the form of the Points to RBC?

C. Does the prior assessment of CAIL for GST preclude the subsequent assessment of RBC for the same supply?

[2] An amending agreement dated August 8, 1996, contained provisions for the purchase of a specified number of Points by RBC in specific situations.

IV. Arguments and Analysis

A. The Supply of a Financial Service

[15] In addition to section 165 of the *Act* which provides that the *recipient* of a supply must pay the GST on the consideration paid for the supply, it is important to note that the term "recipient" is defined in section 123 of the *Act* to include:

> …
>
> (a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
>
> …
>
> and any reference to a person to whom a supply is made shall be read as a reference to the recipient of the supply;

[16] In this appeal, the Appellant does not dispute that pursuant to paragraph (a) of this definition, it is the recipient of a supply. It is not in dispute either that the Points are property capable of being a supply paid for under the 1994 Amended Agreement. The Appellant rather contends that the Points were not the supply for which consideration was paid. The threshold question then is whether the supply or the dominant element of the supply was the issuance of Points. If so and if such finding supports the further finding that the consideration paid by RBC to CAIL was for this supply, as a single supply, the Appellant's principal argument cannot prevail.

[17] The Appellant argues that the payments to CAIL fell under the definition of "financial service" as they were made not for Points but for services that were in the nature of "arranging for" the "granting of any credit". Under the *Act*, "financial service" includes:

> …
>
> (g) the making of any advance, the granting of any credit or the lending of money,
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> …
>
> (l) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (a) to (i), or
>
> …
>
> but does not include
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> …
>
> (t) a prescribed service;

[18] The Appellant argues that CAIL participated in the establishment and operation of the Affinity Card program, including either specifying or agreeing to specified terms and features of the credit card product. The Appellant argues that

such participation is sufficient to constitute "arranging for" the credit services made available by RBC and relies on the ordinary meaning of the verb "to arrange", which means "to plan or to provide for; to cause to occur."[3] The Appellant argues that the Affinity Card and its credit facility would not be available but for CAIL's role. As a matter of causation, CAIL's participation was essential.

[19] The Appellant relies on the English Court of Appeal decision in *Customs & Excise Commissioners v. Civil Service Motoring Association ("CSMA")*,[4] relating to a similar financial service exempting provision in the United Kingdom Value Added Tax legislation (VAT). In *CSMA*, the English Court of Appeal held that the participation of the automobile association in a credit card program fell within the VAT exemption for financial services because it was involved in the design and operation of that program and was paid commissions for credit card use. The Court found that it was not necessary for the automobile association to be involved in individual applications and credit approvals in order to meet the exemption of making arrangements for the granting of credit.

[20] The Appellant argues that CAIL, like the automobile association in *CSMA*, was involved in the design and operation of the subject credit card program and that CAIL was paid for credit card use. Payments by RBC to CAIL were set at a rate per dollar of credit extended by the use of the Affinity Card which should be seen as a commission for helping to arrange the credit line granted to Affinity Card holders. This reflects the true nature and character of the service for which CAIL was paid, namely its role in giving birth to and facilitating a credit granting business. The Appellant contends that the reference to the payments as reimbursements for the Points in the 1994 Amended Agreement should not be determinative of their nature and cites *Hidden Valley Golf Resort Association v. Her Majesty the Queen*[5] as authority for this principle.

[21] The Respondent's position is premised on the argument that the dominant element of the supply made by CAIL is the issuance of the Points and relies on the decision of this Court in *O.A. Brown Ltd. v. Her Majesty the Queen*,[6] which has been

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[3] See *Royal Bank of Canada v. Her Majesty the Queen,* 2006 G.T.C. 91 at paragraph 15, which cites the *Canadian Oxford Dictionary* definition of "arrange".

[4] [1998] BVC 21 (C.A.).

[5] [2000] F.C.J. No. 869 (F.C.A.).

cited as the seminal case for single and multiple supplies. The Respondent argues the present appeal is not about CAIL being paid for arranging credit, it is about acquiring a perk to enhance credit card use. While the Affinity Card program was a joint program under which CAIL was to promote the issue and use of the card by its customers and potential customers, the dominant service was promoting use of the card by the issuance of Points to card users. This is reflected by the fact that $200,000,000 in payments for Points dwarfed the cost of every other element in the contract. Whereas the Agreement, as amended, limits the cost to CAIL of providing non-monitored promotional services to no more than $350,000 per year, accounts for Points, in contrast, were issued and paid monthly.

[22] Further, while the original Agreement provided that each party was to pay its own expenses, the 1994 Amended Agreement provided that CAIL's costs and expenses incurred *relative to the issuance of Points* was to be reimbursed *at a rate per Point*. There was a legal obligation to pay consideration in respect of the issuance of the Points and the link between the payment and that supply is close enough for the payment to be regarded as having been made "for" that supply.[7]

[23] The Respondent relies on the fact that services provided by CAIL did not include responsibility for screening, reviewing or submitting applications for the Affinity Cards and could not thereby be considered to be services supplied in the course of "arranging for" the supply of credit. Only RBC reviewed and screened applications and granted the approvals necessary for the cards to be issued. The credit facility and services were established, provided and administered by RBC. In this sense they were wholly arranged by RBC. Accordingly, the Respondent submits that there was no supply of financial services by CAIL even if the dominant element of the single supply was not Points.

[24] In this regard the Respondent argues that the Appellant's services did not meet the threshold requirement for "arranging for the granting of credit" as set down in *Les Promotions D.N.D. Inc. v. Her Majesty the Queen*[8] and the administrative practice set out by the CRA in Policy Statement P-239.[9]

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[6] [1995] T.C.J. No. 678 at paragraphs 27 and 28 ("*O.A. Brown*").

[7] The Respondent relies on *Commission Scolaire Des Chênes v. Her Majesty the Queen*, 2001 CAF 264 at paragraphs 19 and 20 in support of this argument.

[8] 2006 G.T.C. 166 (Fr.), [2006] G.S.T.C. 10, 2006 TCC 63 ("*D.N.D. Promotions*").

[9] Policy Statement P-239 – Meaning of the Term *"Arranging For"* as Provided in the Definition of "Financial Service" (January 30, 2002).

[25] Finally, Respondent's counsel argues that paragraph (t) of the definition of "financial service" and subsection 4(2) of the *Financial Services (GST/HST) Regulations*, (the "*Regulations*") apply to exclude the services supplied by CAIL to the extent they might otherwise be regarded as financial services.

[26] I will first consider the decision of *O.A. Brown* which looked to the English VAT authorities. In his Reasons for Judgment, Rip J. considered such authorities and explained at page 2095:

> 21 In deciding this issue, it is first necessary to decide <u>what has been supplied as consideration for the payment made</u>. 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.
>
> [Emphasis added]

[27] The Appellant does not deny that it was the recipient of a single supply of which part of, or a component of, was Points. However, the Appellant asserts that this component was not *the* property or *the* supply for which payment was made by it to CAIL. I do not agree. Not only is that the most substantive aspect of the supply to which all else relates but there is in my view no substantive single supply of the financial services variety relied on by the Appellant.

[28] The substantive focus of the program was to promote use of the Affinity Card by the issuance of Points for such use. Everything CAIL did from being involved in establishing the terms of the credit facility to advertising the program was to promote the use of the card by the issuance of Points and that is what it was paid for – the issuance of Points. When the Appellant acquired Points for its own use, it paid the same price for the Points. As well, when there was a separate purchase for

promotional purposes, it paid the same price for the Points.[10] In all cases, CAIL was paid for issuing Points and not for its role in setting up the program. Paragraph 4.1 of the 1994 Amended Agreement says exactly that. That is, the sole dollar consideration forming the subject of this appeal was paid for the acquisition of Points. If no Points were issued, there was no consideration payable. Further, from CAIL's perspective, by selling Points, it was selling air travel services which was its business. While the consideration payable is referred to as cost recovery payments, it seems apparent that such cost was the cost of giving free air travel. Accordingly, I find that the subject payments are not payments for the supply of a financial service.

[29] In coming to this conclusion, I have not ignored the critical role CAIL played in the establishment of the Affinity Card program and the extent of credit use thereby generated for RBC. However, having considered the authorities cited by the parties and the meaning of the phrase "arranging for" in the definition of "financial service", I find there is no other perspective of this appeal that would change my conclusion that the consideration paid was for the issuance of the Points.

[30] The Appellant argues that the statutory language "arranging for" must be given a broad interpretation and that finding that CAIL's role in setting up the program was essential to the granting of credit under the program requires a finding that it arranged for the granting of credit. To support a broad interpretation of the language "arranging for", the Appellant relies on the ordinary meaning of the word "arrange" and on *D.N.D. Promotions* which accepted a fairly minimal threshold as to what would constitute "arranging for" the granting of credit.

[31] In *D.N.D. Promotions,* the taxpayer's business was promoting credit cards. The taxpayer's employees distributed the credit card applications in shopping centres. The employees would review the applications for completeness and then the taxpayer would send the applications to the credit card company for approval. The taxpayer had no decision making capacity or involvement in the granting of credit. The Minister denied the ITCs sought by the taxpayer on the basis that the taxpayer was providing the exempt financial service of arranging for the granting of credit pursuant to paragraph (l) of the statutory definition. This Court agreed with the

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[10] Paragraph 4 of a 1996 amending agreement charged RBC $8,560.00 for 1,000,000 Points for a contest RBC was to launch for cardholders. The price per Point for credit card use was virtually the same, namely $0.0085, until late 1997.

Minister and the decision of the Court formed the basis for the CRA's administrative practice, as set out in Policy Statement P-239.[11]

[32] Appellant's counsel argues that if checking an application for completeness was sufficient to constitute "arranging for" granting credit, then surely establishing the terms of the credit for cardholders must be seen as "arranging for" the credit granted under such terms. *CSMA* is a clear and persuasive authority for the view that that role overshadows the supply of property (Points). As well, the Appellant would rely on *D.N.D. Promotions* as authority for not invoking the exclusion in paragraph (t) of the definition of "financial service".

[33] Paragraph (t) of the definition of "financial service" excludes prescribed services and subsection 4(2) of the *Regulations* excludes as financial services the transfer, collection or processing of information and *any administrative service*. If reviewing credit card applications was not an administrative service excluding it from being a financial service, then surely establishing the terms of the credit for cardholders could not be excluded under paragraph (t) of the definition of "financial service".[12]

[34] While I agree with the Appellant's argument that *D.N.D. Promotions* supports a broad construction of the phrase "arranging for" and that arranging credit terms on behalf of cardholders goes well beyond any prescribed administrative exclusion set out in subsection 4(2) of the *Regulations*, these conclusions do not rescue the Appellant from my finding that what was paid for in the present appeal was so materially tied to another supply (the Points) as to be

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[11] Cited with approval in *Banque Canadienne Imperiale de Commerce v. R.*, 2006 G.T.C. 457 (Eng.), 2006 TCC 336, Policy Statement P-239 gives several examples dealing with when an intermediary service will be treated as "arranging for" the granting of credit. Examples No. 2 and 4 highlight the *D.N.D. Promotions* distinction. Where a marketing intermediary distributes credit application forms that are sent directly to the party providing the credit for review and acceptance, the intermediary does not meet the requirement of "arranging for" the credit. Where the credit card application forms distributed by the marketing intermediary are returned to that intermediary to be reviewed for completeness, the intermediary does meet the requirement of "arranging for" the credit.

[12] *D.N.D. Promotions* has been criticized for not applying the paragraph (t) prescribed exclusion and Respondent's counsel in the case at bar seemed reluctant to dispel such criticism as unfounded even as he advanced the argument that I should apply paragraph (t) to the case at bar. This leads one perhaps to a further criticism of the Respondent's practices in that it seems that the Minister wants to contain the impact of the decision of this Court in *D.N.D. Promotions* when collecting tax while expanding its impact when giving ITCs.

subsumed in that dominant supply. In my view, there was no severable consideration paid for "arranging" the terms of credit role served by CAIL. The entire consideration I have been addressing is clearly consideration paid for the Points. Establishing and promoting credit card use was a means to issue Points which as noted above was a form of selling air travel services. Ensuring competitive credit card terms was not done in an intermediary capacity as a service to RBC or credit card users nor was consideration paid for such a service; it was a condition of CAIL's participation in the program to encourage use of the Affinity Card in order to sell Points.

[35] This fact also distinguishes the present appeal from *CSMA*. The automobile association in *CSMA* played an active intermediary role in negotiating the terms of the credit facility being offered to its members. On behalf of its members, the automobile association designed a credit card arrangement for the specific purpose of granting credit to those members. Critical terms of the credit arrangement, such as interest rates, were negotiated for members. An arbitration process for members was put in place. The Court determined that the nexus between the intermediary's function and the credit granting process warranted a finding that the compensation paid was a commission for these credit arrangement services. Such services were the dominant aspect of the supply provided and paid for. The substantive element and real character of the supply in that case was to arrange favourable, special credit terms and benefits for its members from the financial institution granting the credit facility. Indeed, there was no other supply, like a supply of Points, made in *CSMA*.

[36] In the case at bar, there is no supply, other than the Points, to which the payments can be attributed. The major terms of the credit card contract are set out in the Agreement but there is no evidence of negotiations on behalf of cardholders. Listing RBC services and ensuring that the financing services to be provided by RBC were to be at least the same as those provided under RBC's Visa Classic Card, do not in themselves speak to an intermediary role on behalf of cardholders. An interest in the attractiveness of the terms of the cardholder contract speaks more to CAIL's financial interest in selling Points than to its role as an intermediary.

[37] A finding that CAIL was not a financial intermediary arranging for credit for cardholders is further supported considering its role in terms of risk. There are situations where the business of an intermediary might put that intermediary at material risk for credit failures or card service failures. Such cases go beyond the mere administration excluded under paragraph (t) of the definition of "financial service" and would more clearly be an exempt financial service under the

“arranging for” provisions. However, CAIL had no business risk in the credit granting process. The liability, indemnity and save harmless provisions in the Agreement sought to ensure that CAIL did not bear any risk in respect of the credit financing services provided by RBC. Its role was the provision of travel services, for a fee.

[38] Further, I do not accept the Appellant’s argument that the subject payments received by CAIL were made as commissions for credit card usage. Credit card usage was the yardstick used to measure the Points being bought and sold. Tools or reference points used to measure the amount of consideration payable for that supply should not be mistaken for the supply. Clearly CAIL could increase its revenue from this arrangement by promoting the Affinity Card and offering good value for the Points issued. Shared advertising and marketing costs then do not relate to promoting credit card use from a credit financing perspective but relate to increased sales revenue that result from increased card use. Promoting the use of a credit facility may have been good business for CAIL but is not to be seen as “arranging for” the granting of that facility.

[39] To conclude, I find that CAIL’s role in arranging the credit facility was incidental to its own business of selling Points. This follows as a matter of common sense and commercial reality. CAIL sold travel services. Selling Points was selling travel services. The Appellant purchased travel services as a reward for use of its Affinity Card which in turn increases its revenues. All else is incidental to this synergistic arrangement. It is simply not reasonable to find on the facts of this case that CAIL played any substantive role in arranging for the granting of credit by RBC.

[40] Before turning to the Appellant’s alternative arguments I note that while I have only made reference to one English case on this issue of “arranging for” the granting of credit (*CSMA*), I was referred to a number of other English cases. The cases referred to by the Appellant, like *CSMA*, involved non-financial organizations endorsing a particular credit card product.[13] The Respondent on the other hand relied on the case of *Tesco plc v. Commissioners for Customs and Excise*[14] which dealt with, and which cited other English cases dealing with, customer loyalty incentive programs. These cases were factually more comparable

[13] *Customs and Excise Commissioners v. BAA plc*, [2003] BVC 112 (C.A.); *Prudential Assurance Co. Ltd.*, [2006] BVC 2340 (VAT Tribunal).

[14] [2003] EWCA Civ 1367 (“*Tesco*”).

to the case at bar than the endorsement line of cases relied on by the Appellant. Unlike *CSMA*, *Tesco* involved the issuance of patronage reward points in a credit facility program and unlike *CSMA*, the point issuer (Tesco) was found to have supplied promotional services which could not be regarded as arranging credit.

[41] In *Tesco* there were a variety of programs considered. In very general terms, customer loyalty reward points were issued for vouchers for future purchases. The Court found that no part of the purchase price paid by consumers for goods was consideration for such rewards. Likewise, the Court held that assisting another party's business by issuing points for consideration to that other party or that other party's customers should be treated as a promotional service as opposed to a sale of property. While this latter conclusion does not accord with my findings in the case at bar, it does not assist the Appellant. Had I reached a similar conclusion on the facts as reached in *Tesco* and determined that the Appellant paid for promotional services from CAIL, the result, as in *Tesco*, would be that such services are not exempt financial services. Promotional services do not constitute "arranging for … the granting of any credit".

[42] Considering the authorities as a whole, it is apparent that there is no one principle that might apply to any given situation. It is always a question of fact as to how GST will be applied in the context of a particular affinity or loyalty program. While the contractual agreements relating to the program and the actual manner in which the program is conducted will generally dictate how GST will be applied, it is always open for a Court in each case to determine the substance of the supply for which consideration was paid. As stated, the express language in section 4.1 of the 1994 Amended Agreement identifies that payments were made for Points. In my view, it is clear that the substance of the supply in this case was the supply of Points.

B. Gift Certificates

[43] In the alternative, the Appellant argues that the purchase of the Points should not be subject to GST upon acquisition because the Points are gift certificates as described in section 181.2. The Appellant relies on section 181.2 to defer payment of tax until the Points are redeemed by the cardholder.

[44] Section 181.2 states:

> **181.2 Gift certificates** -- For the purposes of this Part, the issuance or sale of a gift certificate for consideration shall be deemed not to be a supply and, when given as consideration for a supply of property or a service, the gift certificate shall be deemed to be money.

[45] The Technical Notes to the section indicate that the sale of a gift certificate is not considered to be a supply (despite consideration) and therefore will not attract GST.[15] Only when a gift certificate is subsequently exchanged for goods or services is its redemption value to be treated as part of the consideration for those goods or services.

[46] At this point, in order to help put matters in perspective, a few preliminary observations need to be made:

- The term "gift certificate" is not defined in the *Act* so that the common understanding of what that term embraces will have to be considered. According to the CRA, a gift certificate must have a stated or face value. As the Points have no such stated or face value, administrative practice dictates that they cannot be gift certificates.

- There is another type of instrument dealt with in section 181 in an entirely different way. This instrument is called a "coupon" and is simply defined as a device other than a gift certificate. In general terms, unlike a gift certificate, a coupon is not treated on its use by a consumer as consideration paid by the consumer. That is, the ultimate consumer pays tax on the value of the consideration paid for the services or goods acquired *net* of the coupon reduction amount. Respondent’s counsel argues that the sale of Points is a sale of coupons which, unlike the sale of gift certificates, is a taxable supply. On that basis when credit card holders redeem Points for air travel, no GST is payable pursuant to section 181 which reflects the CRA’s current assessing practices.

- To help distinguish between the two instruments, the CRA has conveniently (or arguably necessarily) prescribed characteristics to them that are not prescribed in the *Act*. The CRA has administratively prescribed that a gift certificate must have a stated value and that it must be acquired for an amount equal to that stated value.[16] Coupons may or may not have a

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[15] Technical Notes to 181.2 (February 1993). See also Technical Notes to subsection 157(2) (May 1990).

[16] The CRA sets out characteristics of a gift certificate in Policy Statement P-202. According to the Department, a gift certificate refers to a “device” such as a voucher, receipt or ticket that has

> stated value and, generally at least, would offer a discount as opposed to a free supply and would be issued without consideration.[17]

[47] Dealing firstly with the Respondent's argument that the Points cannot be gift certificates for want of a stated or face value, I find no support in the *Act* or case law for such position. Still, the Respondent argues that because a gift certificate is deemed under the *Act* to be "money" there is an implicit requirement in the legislation for a stated value when section 181.2 is read together with the definition of "money" in subsection 123(1):

> **"money"** includes any currency, cheque, promissory note, letter of credit, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and other similar instrument, whether Canadian or foreign, but does not include currency the fair market value of which exceeds its stated value as legal tender in the country of issuance or currency that is supplied or held for its numismatic value;

[48] This definition certainly imports a necessity that "money" have a stated value. Respondent's counsel then in effect asks: "How can section 181.2 deem something to be that which it cannot be given that it lacks a fundamental characteristic of what it is deemed to be?" Of course that is exactly what a deeming provision does. Respondent's counsel then argues that deeming the certificate to be money without requiring it to have stated value makes the deeming provision unworkable. How can it operate as money when it lacks the very feature that it needs to operate as money? This argument presupposes a limited definition of what a gift certificate is. Such presupposition is not warranted based on case authorities or any provision of the *Act*.

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the following features: it has a stated monetary value; it can be redeemed on the purchase of property or a service from a particular supplier; the supplier agrees to accept it as consideration, or a part hereof, in respect of the purchase of property or a service; it is acquired for consideration in the amount of the stated value; and it has no intrinsic value.

[17] While the distinction between certain types of coupons and gift certificates is not obvious, according to the CRA, a coupon has the following features as identified in the Revenue Canada Q&A Database (6D, Q.36, 1991): it may or may not have a stated monetary value; it offers the consumer a discount on the purchase price of a specific product or service, and no consideration has been paid. While the coupon provisions were amended since this statement, the criteria set out were never contained in section 181 (or in section 174 where predecessor provisions had been set out). In any event, these criteria do not necessarily reflect the current views of the CRA at least as advanced by Respondent's counsel. He took the position that coupons could be for free goods or services and that consideration could well be paid for their issuance. Such position seems more in line with the express terms of the *Act*.

[49] As to a common understanding of what a gift certificate is, perhaps it is presumptuous to think that there is such a thing. Respondent's counsel's argument that I read in an implicit requirement for a stated value for an instrument to be a gift certificate might have merit if, for example, the common understanding of a gift certificate is that it affords its user some discretion as to its use as money does. If that is the case, a certificate for a "basic exterior car wash" at Joe's Car Wash which has no stated value would not be a "gift certificate" regardless that it might say that on its face and that I acquired it as such. As the purchaser of such a certificate my understanding would be that I had acquired a gift certificate. On the other hand, the user of such a certificate might expect that such a certificate is GST prepaid which is to say that the common understanding of the user in this case may be that the car wash certificate is not a "gift certificate" as that term is used in the *Act*.[18]

[50] While it may be presumptuous to suggest that the term "gift certificate" means one thing or another, it is not presumptuous to think that pronouncements of this Court as to how to interpret the term, will not be ignored. A clear statement has been made by this Court that a gift certificate as used in section 181.2 does not have to have a stated value and may be for identifiable goods or services. In *Canasia Industries Limited v. Her Majesty the Queen*[19], while noting that the term "gift certificate" is a colloquial term that may be applied in a variety of forms and transactions, then Chief Justice Garon provided a description of the constituent elements of a gift certificate:

> What is essential is that the bearer of the certificate who could be anyone to whom the certificate was transferred by the original purchaser of the certificate or by a subsequent bearer, is entitled to receive free of charge from the issuer of the certificate either a product or a service or the stated value towards a product or service. I do not think it is important that the bearer of the certificate may have paid something or given consideration for securing the gift certificate from the original

[18] Another example of the uncertainty of the meaning of the term "gift certificate" is a recent "coupon" I received from a large retailer. The coupon offered $100 off the purchase of a $399 camera. This appeared clearly to be a section 181 coupon. If I bought the camera I would expect to pay GST on the $299 net amount that I would have to pay. However, the coupon said I would have to pay GST on the price before the coupon discount. Does this mean the retailer sent me a "gift certificate"? Could the retailer instead of acquiring the cameras at a discount have actually bought the discount from the manufacturer for $100 and thereby met the CRA's requirement to make the coupon a gift certificate?

[19] [2003] G.S.T.C. 38 (TCC Informal Procedure) ("*Canasia*").

> purchaser of the certificate or some subsequent intermediary. In my view, the concept of “gift certificate” in the context of a situation contemplated by section 181.2 of the *Excise Tax Act* necessarily implies that the product or service referred to in the certificate is provided free of charge to the certificate holder when the certificate is redeemed by its issuer. Otherwise, the reference to the “gift” portion in the phrase “gift certificate” is meaningless.[20]

[51] This passage does not suggest that a gift certificate must have a stated value on its face to be a gift certificate. It says that a gift certificate must be for free goods or services *or* have a stated value toward a product or service. If the certificate entitles the holder to an identifiable supply, it can still be a gift certificate. As well, in *Canasia*, then Chief Justice Garon notes that the consideration paid to purchase the gift certificate need not be equal to the stated value “*if* one appears on the certificate since the requirement in the latter section is simply that there must be a consideration.”[21] The “if” clearly suggests that a stated value need not appear on a gift certificate as a condition of it being a gift certificate. Further, I note that there is no reference to the need for a gift certificate to have a stated value in either of the Technical Notes to section 181.2 or subsection 157(2).

[52] While I appreciate the Respondent’s position - that this Court should recognize that section 181.2 requires that a gift certificate be treated like money which requires it to have “money” attributes - I am faced with what appears to me to be a sensible analysis by this Court which comes to a different conclusion in allowing that a gift certificate could include an instrument entitling the bearer to an identifiable supply at no charge. I am not prepared then, nor is it necessary on the facts of this case, to undermine such jurisprudence which puts emphasis on giving the word “gift” some meaning. In this regard, *Canasia* stands for the principle that a gift certificate would *not* include an instrument that only gives the bearer conditional rights. This qualification imports both a common and legal understanding of what a gift is.

[53] In *Canasia*, this Court was asked to determine whether travel certificates which were redeemable for round-trip airfare to vacation resort destinations were gift certificates. They were held not to be gift certificates as the bearer was *not* entitled to anything unless both a processing fee was paid and at least seven nights accommodation at specific hotels at the destination were paid for. The Court noted

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[20] *Canasia* at paragraph 33.

[21] *Canasia* at paragraph 32. This statement that the consideration need not equal the value of the certificate is not reflective of the CRA’s position set out in Policy Statement P-202.

that by ordinary usage and a common understanding, a gift certificate would not include an instrument that required a substantial outlay before it could be used. The travel certificates were not gift certificates under section 181.2 because they did not entitle the holder to unconditional free goods and services.

[54] Similarly, the purchase of the Points in the case at bar was only one step in the midst of a series of requirements and events – credit card use, payments by RBC as Points are issued, continued credit card use as necessary to permit accumulations of Points, the reward program not being cancelled, and a surrender of such number of Points regarded at the time of surrender as sufficient to secure a particular air travel service at no cost. No single step, including the purchase or issuance of Points, gives unconditional rights to anything.

[55] As well, making what I believe to be the same point, the Respondent argues that the Points cannot be considered to be a gift certificate under a common understanding of that term as there is no fixed correlation between the Points issued and their use. Travel rewards are subject to change. The value of the Points ultimately depends on the number of Points accumulated over time and the number of Points required at the time of conversion in order to receive travel rewards. Further, CAIL can cancel the Points at any time so there is no right or entitlement to anything at the time of their issuance.[22] There is no identifiable gift of or right to anything at that time. I concur with this reasoning.[23]

[22] Section 13 of the Agreement sets out the conditions for termination of the reward program.

[23] The Respondent argued that the Points were not capable of being valued at the time of issuance due to these uncertainties. This harps on the stated value argument. However, from that perspective, the argument has no merit. If the Points are gift certificates governed by section 181.2, the absence of a face or stated value on issuance is not problematic as the Points can be valued at the time of surrender for travel when the GST is payable. The Appellant relies on the case of *Fred Mommersteeg and John Giffen v. Her Majesty the Queen* 96 D.T.C. 1011 where this Court found that the air travel service received for reward points could be valued for income tax purposes on redemption. As well, counsel for the Appellant points to one of the Department's own Interpretation Bulletins (Canada Revenue Agency Interpretation Bulletin IT-470R (Consolidated) – *Income Tax Act*: Employees' Fringe Benefits ("IT-470R") at paragraph 14) setting out the CRA's policy to impute the fair market value of the flight ticket obtained upon redemption of reward points for income tax purposes. Counsel argues that the attribution of value should be equally valid for GST purposes when surrendered as consideration for the supply of travel services.

[56] These conclusions are sufficient to support a finding that the Points are not gift certificates. As such, there is no provision deeming the supply of Points not to be a supply.

[57] While nothing further need be said about this alternative argument, some observations concerning the Respondent's argument that the Points be considered to be section 181 "coupons" seem necessary.

[58] The Respondent argues that the Points should be considered as a "coupon" as defined in section 181 of the *Act*. Under the *Act*, unlike a gift certificate which is treated as a right to have the price payable for goods or services satisfied in whole or in part, with GST payable when the certificate is redeemed, a coupon is treated as a right to obtain a particular good or service at a reduced price. When the coupon is redeemed, it reduces the taxable value to the consumer of the particular good or service acquired with the coupon to the net amount paid.

[59] The relevant subsections of section 181 provide as follows:[24]

> **181 (1) Definitions --** The definitions in this subsection apply in this section.
>
> **"coupon"** includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit (within the meaning of section 181.3).
>
> ...
>
> **(4) Acceptance of other coupons --** For the purposes of this Part, if a registrant accepts, in full or partial consideration for a supply of property or a service, a coupon that may be exchanged for the property or service or that entitles the recipient of the supply to a reduction of, or a discount on, the price of the property or service and paragraphs (2)(a) to (c) do not apply in respect of the coupon, the value of the consideration for the supply is deemed to be the amount, if any, by which the value of the consideration for the supply as otherwise determined for the purposes of this Part exceeds the discount or exchange value of the coupon.

[60] While a principal feature of a coupon is that it is a discount vehicle, section 181 does not preclude by its language a discount equal to the full price of goods or services on redemption of the coupon. The consideration that is taxable under the foregoing provision is the amount “if any” by which the price of the goods or services exceeds the discount. That there could be a nil excess of the price

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[24] There are different scenarios dealt with in section 181. Subsection (2) describes a case where the supplier takes a coupon from a customer and recognizes the terms of the coupon (contemplated to be either a free supply or a price reduction) on the basis that the supplier will be able to redeem the coupon for money from a third party (such as a manufacturer). In this case there are two persons paying the consideration received by the supplier – i.e. two recipients – so the GST to the consumer is only on what is paid by the consumer net of the coupon value. The supplier must however remit both the tax payable on the portion of the consideration paid by the consumer and the tax payable on the portion of the consideration paid by the third party. However, the supplier does not collect that tax from the third party – instead the supplier gets an input tax credit for the same amount. This covers the case where the supplier will get money from a third party for the coupon used by the consumer. Where the only money to the supplier comes from the consumer (i.e. there is no third party that pays an amount on the return of the coupon) there are two prescribed scenarios. One scenario is where the coupon is for a fixed value or percentage specified on the face of the coupon. That is the case described in subsection (3) and in that case the supplier has a choice to either treat the consideration for the supply as the net amount payable by the consumer or go through the cycle of remitting tax on the coupon value and claiming an input tax credit for like amount. That leaves the case described in subsection (4) which, according to Respondent’s counsel, includes the Points since it is a device that meets the requirements of that subsection as opposed to those described in either subsection (2) or (3). The GST on the use of this type of coupon is on the price paid if any for the supply by the consumer net of the coupon value. Coupons then, from the perspective of the consumer who uses them, are not taxable consideration in this (or any other section of 181) scenario.

payable after the discount illustrates that the Points can indeed be coupons even though they can only be used in fixed blocks that are sufficient to ensure that the taxable excess is always nil.

[61] Accordingly, I agree with the Respondent that it is not inconsistent with terms of the *Act* to treat the Points as coupons. However, that said, it is important that I add that I have reservations about appearing to give a general endorsement of CRA's administrative practises relating to the application of section 181 and the distinctions it seeks to make between coupons and gift certificates. In my view, the provisions are not easily applied as the CRA seeks to apply them. This leaves the state of the law uncertain – a situation that begs for legislative clarification. Without such clarification, the *Act* will impose collection and remittance obligations on suppliers who will have little guidance as to the outcome of a dispute relating to such obligations should one arise.

C. Double Taxation

[62] As to the third and final issue, the Appellant claims that it cannot be assessed for GST in January 2001 because CAIL was assessed in June 2000 in respect of the same transactions. Both assessments were confirmed. The assessment against CAIL has not been vacated, varied nor otherwise dealt with. Therefore, there are two assessments outstanding in respect of the same taxable supply which could result in double taxation.

[63] Counsel for the Respondent maintains that the law is clear that the Minister is permitted to assess both the supplier and recipient in respect of the same supply pursuant to subsection 296(1) of the *Act*. Under paragraph 296(1)(a), the Minister can assess the supplier for net tax and under paragraph 296(1)(b) he can assess the recipient for the tax payable. The relevant portions of subsection 296(1) read as follows:

> **296 (1) Assessments** -- The Minister may assess
>
> (a) the net tax of a person under Division V for a reporting period of the person,
>
> (b) any tax payable by a person under Division II, IV or IV.1,
>
> (c) …
>
> (d) … and

(e) …

[64] Paragraph 296(1)(a) permits the Minister to assess net tax under Division V which pursuant to section 225 includes amounts that suppliers must collect pursuant to subsection 221(1). CAIL was required to collect GST payable in respect of the taxable supply to the Appellant and is assessable on this basis. The net tax amount must be remitted to the Receiver General pursuant to section 228.

[65] Paragraph 296(1)(b) permits the Minister to assess any tax payable under subsection 165(1) of the *Act*. Subsection 165(1) requires the Appellant as the recipient of a taxable supply to pay GST and is assessable on this basis.

[66] It is apparent that the "and" after paragraph (d) in subsection 296(1) must be read adjunctively to permit the Minister dual assessment power under the express terms of the *Act*. To read it otherwise would undermine the scheme of the *Act*. If someone is liable to pay and someone else is liable to remit, dual liability is essential. Furthermore, such dual liability is not dependant on an assessment having been made. Subsection 299(2) makes that abundantly clear:

> **(2) Liability not affected** -- Liability under this Part to *pay or remit* any tax, penalty, interest or other amount is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made. [Emphasis added]

The emphasis added highlights two co-existent liabilities. However, the nature of each liability is different. The liability of the *recipient* is a liability to "pay" tax that arises as a consequence of being a recipient of a taxable supply. The liability of the supplier is to "remit" to the Receiver General the amount of tax collected *or collectable* from the recipient to whom the supplier has made a supply. The remittance liability is a gun to the supplier's head – "collect and remit or remit the tax yourself and then seek reimbursement from the recipient as provided in section 224".[25] A failure to remit results in the supplier being assessed pursuant to paragraph 296(1)(a).

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[25] Section 224 confirms a supplier's recourse against the recipient of supplies provided GST has been invoiced as required in section 223. That is, the supplier's right to collect GST has seemingly been divorced from its obligation to collect it. While the recipient is liable for GST under section 165, irrespective of being invoiced and may be subject to an assessment (and, according to the Crown's position in the case at bar, to collection action by the Crown) irrespective of being invoiced, the authorized collector may have lost the right to collect if no timely invoice was rendered. This anomaly seems hard to justify unless the Crown must collect

[67] This was how the course of events unfolded in the present case at least until the Appellant was assessed. At that point an interesting question arises: Is it arguable that there are two parties to whom the Appellant is liable to pay GST – the Receiver General and its agent CAIL?

[68] I believe it should go without saying that it is untenable to think that recipients would be liable to pay two collectors for GST on the same transactions. To prevent this, the limitation on collection would be on the Crown. Subsection 278(2) provides that amounts collectable by the Crown from a recipient cannot be paid to the Crown if the supplier is liable to collect the tax from the recipient. That subsection reads as follows:

> **(2) Place of payment** -- Every person who is required under this Part to pay or remit an amount shall, except where the amount is required under section 221 to be collected by another person, pay or remit the amount to the Receiver General.

[69] It is not enough then that an assessment has been issued against the Appellant. As long as CAIL as supplier has an obligation under section 221 to collect tax from the Appellant as agent of Her Majesty in the right of Canada, the Crown cannot collect the tax payable by the Appellant as recipient of a supply except on behalf of CAIL. That subsection 315(1) requires an assessment before collection action can be taken by the Crown does not in itself, in light of subsection 278(2), suggest that collection action by the Crown requires that payment be made

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on behalf of its agent or, more likely, unless the supplier has expressly warranted to the recipient that the supply is tax included or tax free. Otherwise, recourse for suppliers requires a broad construction of the invoicing requirement given that the scheme of the *Act* is to make suppliers liable to remit tax meant to be paid by recipients even if the supplier has yet to invoice and collect that tax. The supplier is required to collect and that should be sufficient to give it a right to collect after the fact. Such right also ensures that the supplier is the only person who can collect from the recipient even to the exclusion of the Crown (as per subsection 278(2)). That is, to ensure that the supplier can be made whole and recover the tax from the recipient, a late or amended billing of the GST payable by the recipient would have to be permitted or a common law recovery action would have to be recognized. Indeed, latitude as to the invoicing requirement in sections 224 and 223 and common law recovery rights were recognized in the only Appellate Court decision that considered the issue; *OCCO Developments Ltd. v. McCauley*, [1996] G.S.T.C. 16 (N.B.C.A.). While not all subsequent cases have followed that decision, it seems they might be limited to cases where the Court found that the supply contract prohibited a subsequent GST billing making the supplier the guarantor of the taxability of a supply. See *Deep Six Developments v. Kassam*, [1998] G.S.T.C. 36 (B.C. Sup. Ct.); and *Villa Nova Developments v. Hunter*, [1998] G.S.T.C. 74 (Nfld. Prov. Ct.). See also GST Policy Statement P-118R *Assessments on a Tax Extra or Tax Included Basis*.

to the Crown when an assessment is issued if there is a supplier liable to collect the tax. That subsection 313(2) permits collection proceedings in Court by the Crown where an assessment *may* be issued does not in itself, in light of subsection 278(2), suggest that collection proceedings in Court by the Crown requires that payment be made to the Crown where a supplier is liable to collect the tax. Regardless of such actions or proceedings, subsection 278(2) requires that the payment of recipient tax debts be made to the supplier who is liable to collect it.

[70] The anomaly here is that the agent (the supplier) is required to collect tax from the recipient of a taxable supply and remit that tax before the principal is authorized to collect it.[26] However, such state of affairs is much less of an anomaly if one considers that the *Act* provides no rules governing the possibility of collections by two persons of an amount owed by two persons.[27] Section 278 appears then to be no accident - there can only be one authorized tax collector/payee at a time.

[71] Such proposition has not been tested in the courts to my knowledge. In *Carlson & Associates Advertising Ltd. v. The Queen*[28] there is the suggestion that although the Minister can assess a recipient for GST, the Minister cannot directly collect tax yet unpaid by the recipient from the recipient where the CRA was of the view that the supplier would never be able to collect the tax.[29] However, that case

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[26] The Minister requires an assessment to collect pursuant to subsection 315(1) or, prior to an assessment, a court order pursuant to subsection 313(2).

[27] In other situations, such as where the *Act* makes persons jointly and severally liable for the same tax, rules are set down as to the discharge of the parties so as to avoid double tax collections. See for example sections 323 and 325 dealing with joint and several liability of directors and non arms length transferees of property and section 266 dealing with suppliers and receivers where a supplier has been put into receivership.

[28] [1997] G.S.T.C. 32 (T.C.C.), aff'd [1998] G.S.T.C. 25 (F.C.A.) ("*Carlson Advertising*").

[29] In *Carlson Advertising,* on running into financial difficulties the taxpayer had not paid GST to suppliers. When the taxpayer was assessed pursuant to paragraph 296(1)(b) for tax payable, the taxpayer appealed on grounds that it was already liable to pay outstanding accounts including GST to its creditor suppliers. Since the tax was already payable by the Appellant to its suppliers, and the suppliers were required to collect and remit GST, the taxpayer argued that the assessment could lead to double taxation. The appeal was dismissed. Hamlyn J. noted in that case that in addition to the supplier having a defence to a collection action, the question of double taxation was premature as there was only a potential for double taxation and as such the assessment could not fail on the grounds that it imposed double taxation.

may well have side-stepped the issue of payment to the Receiver General in that no "payments" were necessary. The GST liability was paid by offsetting ITCs pursuant to section 318.

[72] There is also the question as to how subsection 313(1.1) of the *Act* interacts with subsection 278(2).[30] While this provision stipulates that any tax debt owed to Her Majesty is collectable, it is clear in my view that the direct beneficiary of any action or proceeding can only be the supplier pursuant to subsection 278(2). That is, a strict construction of subsection 278(2) dictates that the Crown can only be the direct beneficiary of collection activity when the obligation of the supplier to collect *ceases* regardless of the financial circumstances of either of the recipient or the supplier. However, the *Act* is silent on when such obligation ceases.

[73] In the case at bar, CAIL filed the Plan under the *CCAA* which released it of its liabilities arising before March 24, 2000. As the Plan was accepted by CAIL's creditors, including the CRA, and approved by the Alberta Court of Queen's Bench, it may necessarily follow that CAIL's collection obligation under section 221 was terminated so as to lift the limitation in subsection 278(2). But in the absence of provisions in the *Act* spelling out when such limitation is lifted, such finding is best left for another day – perhaps in a collection forum.[31]

[74] Returning to the Respondent's double taxation argument, the point that continues to stand out is the need for rules governing the potential duality of liability to the Crown for GST of suppliers and recipients in respect of the same supply.[32] That potential may be of concern but it does not amount to the type of double taxation that offends general principles of taxation.[33] As to the recipient, RBC

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[30] Since the years under appeal this subsection has been added. Formerly, the relevant reference would have been to subsection 313(1).

[31] Subsection 313(1) (now 313(1.1)) acknowledges that other courts deal with the recovery of tax debts and that would include jurisdiction to determine the applicability of subsection 278(2). As noted in footnote 25, there is a distinction between a supplier's right to collect and its obligation to do so. While other courts have considered the the former question, none to my knowledge have considered the latter question.

[32] The *Act* affords suppliers no credit for remittances for payments made by the recipient directly to the Crown.

[33] In *Prosperous Investments Ltd. v. MNR* (1992) D.T.C. 1163 (T.C.C.) at page 1167, Bowman, J. now Chief Justice of this Court noted that double taxation was a "red herring" at least where the same amount was not being taxed twice in the same taxpayer's hands. Those words are all

in this case, there should be no concern that it could be subject to double taxation. The foregoing analysis of subsection 278(2) hopefully gives some comfort in this regard. Whether it is the Crown or the supplier that is the direct beneficiary of a collection action against a recipient, there can only be one payment obligation. If that comfort is not sufficient, case authorities confirm, in any event, that there is no real likelihood that this Court or any other would require a recipient to pay the same tax twice.[34]

[75] Regardless of these observations, the resolution of collection issues does not impact on the correctness of the assessment against the Appellant. It has received a taxable supply and may be assessed under section 296. The prior assessment of CAIL does not preclude the subsequent assessment of RBC for the same supply.

[76] As well, I note that the issue of the *potential* for double taxation violating a rule against double taxation, was dealt with in *Carlson Advertising* where the Court of Appeal did not interfere with this Court's judgment that *potential* for double taxation is not double taxation. In dismissing the appeal, Hamlyn J. held:

> 32 … It must be noted that the concern is to prevent the *incidence* of 'double taxation' where not specifically intended to occur, not the *potential* of 'double taxation'. [Emphasis added]

[77] While the potential for double taxation is at an advanced stage in the case at bar relative to the situation in *Carlson Advertising* (where only the recipient had been assessed), the dual assessments in the case at bar do not in my view in themselves invoke double taxation. That there are collection issues arising from the dual assessments is not sufficient to support a finding that the present assessment should

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the more compelling where as in the case at bar the nature and character of the two tax liabilities differ.

[34] The Federal Court of Appeal in *Carlson Advertising* had no problem upholding (on a review basis) Hamlyn J. of this Court who was not concerned about the duality of liability of a recipient to a supplier and the Crown. That Hamlyn J. saw no problem is reflected in his observation at paragraph 34: "Once the tax is paid, tax is no longer payable and this fact would be a complete defense to any other procedure for collection brought against the Appellant or any other person". As well, in *Airport Auto Ltd. v. R.*, [2003] G.S.T.C. 151, 2003 TCC 683, this Court held that the Minister could not assess (i.e. collect) from a recipient where the recipient had paid the tax to the supplier.

fail on the grounds that it violates a rule against double taxation. Accordingly, I find this alternative argument of the Appellant insufficient to warrant this Court's intervention.

[78] Before concluding I need mention that the Notice of Appeal asserted that the amounts paid to CAIL in respect of the subject supplies were GST included. This position was not pursued at trial and on the evidence could not have succeeded. As well, the Appellant raised concerns that CAIL had a GST credit of approximately $12,400,000 available to the Minister that was not applied against the assessment. The Respondent replied that section 318 of the *Act* and section 155 of the *Financial Administration Act* allow Her Majesty in the right of Canada to set off indebtednesses to the Crown against amounts payable by the Crown and that this was done without reducing the tax payable in respect of the subject supply of Points as authorized by these provisions.

[79] I was provided so little in the way of particulars of the Appellant's argument on this point that I can only speculate as to its weight and relevance. That is not sufficient to satisfy the Appellant's burden to dissuade me from accepting the Respondent's position on the point. Further, if the issue concerns the quantum of tax payable I am satisfied that I need not address it given that Appellant's counsel conceded at the hearing that the quantum of tax assessed was not in dispute.

V. Conclusion

[80] For all these reasons, the appeal is dismissed with costs to the Respondent.

Signed at Winnipeg, Manitoba, this 12th day of September, 2007.

"J.E. Hershfield"

Hershfield J.

2003-3234(GST)G

TAX COURT OF CANADA

BETWEEN:

ROYAL BANK OF CANADA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS

For the purposes of this proceeding only, the following facts are agreed to by the Appellant and the Respondent:

1. The Appellant is a registrant under the *Excise Tax Act* (hereinafter the "Act") and carries on business as a financial institution.

   Appellant's Notice of Appeal, at paragraph 4.

2. Canadian Airlines International Ltd. (hereinafter CAIL) was also a registrant under the Act, and operated a domestic and international air transportation business.

   Appellant's Notice of Appeal, at paragraph 5.

3. By Agreement dated March 1, 1994, the Appellant and CAIL entered into a joint marketing and promotion program (the Affinity Card Program) relating to the Visa "Canadian Plus" Affinity credit card. The Agreement was amended on May 1, 1994, November 20, 1995, September 30, 1996 and October 1, 1997.

   Copies of these contracts, which are relied upon by both the Appellant and the Respondent are included in Exhibit A2, Joint Book of Documents.

4. The Affinity Card Program was to be provided and operated by the Appellant in association with CAIL in accordance with the provisions of the Agreement.

   Agreement dated March 1, 1994, Exhibit A2, Tab 1, paragraph 2(a).

5. Under the Agreement, the Appellant was responsible for, among other things, issuing credit cards and providing and administering the financial services offered to cardholder members pursuant to the Affinity Card Program.

   Agreement dated Mar. 1, 1994, Exhibit A2, Tab 1 at paragraphs 3 and 5.

6. The Appellant also agreed with CAIL that the credit financing services to be provided and operated by the Appellant for cardholders and the banking and banking related services to be provided by or made available to Cardholders through the Appellant under the Affinity card program would be the services as set out in paragraph 1 of Schedule "G" to the Affinity Card Program.

   Agreement dated March 1, 1994, Exhibit A2, Tab 1 at paragraph 5(a)(iv) and Schedule "G".

7. CAIL was responsible for advertising, marketing and promoting the Affinity Card Program to its customers and potential customers by various means including supplying advertising material, maintaining card application forms and actively advertising and promoting the program. CAIL was required to develop an advertising, marketing and promotional program with the Appellant.

   Agreement dated March 1, 1994, Exhibit A2, Tab 1 at paragraph 4(h).

8. CAIL was also responsible for services identified in paragraph 2 of Schedule "G", of the March 1, 1994 Agreement. Schedule "G" required CAIL to provide points under its "Canadian Plus" frequent flyer point system to cardholder members for certain types of qualifying transactions. Generally, points were to be provided by CAIL to cardholder members on the basis of one point for every dollar of qualifying purchases by a cardholder member made using the Affinity credit card. In addition, CAIL was obligated to provide initial enrolment and subsequent renewal bonus points to cardholder members and to provide certain other ancillary awards or services to cardholder members as agreed between CAIL and the Appellant from time to time.

Agreement dated Mar. 1, 1994, Exhibit A2, Tab 1, Schedule "G".

9. Points issued to cardholder members by CAIL were redeemable with CAIL for travel services.

Transcript of Discovery of Respondent's Nominee, Angelo Bertolas, page 28, q. 121.

10. As per the terms of the Agreement CAIL had no responsibility for screening, reviewing, or submitting applications for Affinity credit cards to the Appellant for credit approval.

Agreement dated Mar. 1, 1994, Exhibit A2, Tab 1, at paragraph 1(c), 3(a) and (b).

11. Schedule H of the Agreement provided that both CAIL and the Appellant were responsible for the payment of their respective costs and expenses incurred in performing their responsibilities in respect of the Affinity Card. CAIL and the Appellant agreed to share promotional expenses for the Affinity Card Program as agreed from time to time.

Agreement dated March 1, 1994, Exhibit A2, Tab 1, Schedule "A", paragraphs 1, 2 and 3.

12. The May 1994 amendment and subsequent amendments adjusted the formula to determine the amount payable by the Appellant and CAIL for advertising and promotion.

Agreement dated May 1, 1994, Exhibit A2, and tab 2.

13. The May 1994 amendment required, in part, that the Appellant make payments to CAIL. That amendment provided as follows:

> 4.1 Notwithstanding Section 1 of Schedule "H" of the Agreement, the Bank agrees to reimburse Canadian for the costs and expenses Canadian has incurred relative to the issuance by Canadian of Points to Cardholders pursuant to Section 2.(a) of Schedule "G" of the Visa agreement at the rate of $0.0085 per Point issued or at such other rate(s) as Canadian and Royal Bank have agreed in writing.

Agreement dated Mar. 1, 1994, Exhibit A2, Tab 2, par. 4.1

The amount payable under the Agreement was ultimately increased by subsequent amendments to $0.01 per point. The payments were only calculated with respect to points provided by CAIL to cardholders for usage of the Affinity credit card. CAIL provided initial enrollment and renewal points to cardholders at no cost. The Appellant was required to pay for purchases of points made on its own account, for example, for points to be awarded by the Appellant, under a cardholder member contest.

See amending agreements at Exhibit A2, Tabs 3 and 4.

14. The points had no assigned cash value.

Transcript of Discovery of Appellant's nominee, Lawry A. Mitchell, at pages 47 to 50, q. 108 to 110, and page 55 Q. 120 to 121.

15. As per paragraph 16 of the March 1, 1994 Agreement, the Appellant and CAIL were not working together in a partnership, a joint venture or in an agency relationship.

Agreement dated Mar. 1, 1994, Exhibit A2, Tab 1, Par 16.

16. CAIL did not charge or collect GST on the payments made pursuant to section 4.1 of the May 1994 amendment, except for points acquired by the Appellant for its own use.

Appellant's Undertaking Brief, item 15, Exhibit A4.

17. On March 24, 2000, CAIL commenced proceedings under the Companies' Creditors Arrangement Act (the "CCAA"). On April 25, 2000, CAIL filed a Plan of Compromise and Arrangement proposing to pay its creditors, including the CCRA, 14% of the amount owing to such creditors as of March 24, 2000 (the "CCAA Plan"). The CCAA Plan was approved by CAIL's creditors and sanctioned by the Alberta Court of Queen's Bench.

18. On June 2, 2000, CAIL was assessed for GST in the amount of $14,608,235.02 (plus penalty and interest) for payments made pursuant to section 4.1 of the May 1994 amendment, totaling $215,064,538.58, received from the Appellant during the period from May 1996 to April 2000.

See notice of assessment at Exhibit A-2, tab 6.

19. On January 3, 2001, RBC, as recipient, was assessed for the GST payable on the amounts referred to in paragraph 18 above paid to CAIL. The total amount assessed was $6,988,813.00 net of certain input tax credits. Following the filing of a notice of objection, a notice of reassessment dated August 29, 2003 was issued deleting the amounts assessed in respect of certain statute barred periods and reducing the amount owing to $6,641,714.00 The amount of the reassessment is not in dispute.

See notices of assessment at Exhibit A2, tab 11, and notice of reassessment, at tab 15.

20. The Parties agree that they shall be entitled to ask the Tax Court of Canada to draw inferences from the evidence presented, provided that such additional evidence or inferences are not inconsistent with this Agreed Statement of Facts.

21. The Appellant and Respondent agree to file copies of the following documents with the Court as exhibits for the purposes of this proceeding:

A1. This Agreed Statement of Facts;

A2. Joint Book of documents containing the following Items:

Tabs 1 to 15:	Items 1 to 15 in Appellant's List of Documents;
Tabs 16 and 17:	Items 10 and 13 in Respondent's List of Documents;
Tab 18:	Thoseportions of the transcript for discovery of the Appellant and Respondent held November 18, 2005 as served by each party pursuant to practice note 8 of the Tax Court of Canada shall be taken as read by the Tax Court;
Tab 19:	Answers to Undertakings Item, 4, 8, 9, 13, 15, 21, 22, 23;

Tab 20:	Sample promotional material and cardholder agreement from Appellant's undertakings brief at tab 2 of Undertaking Brief;
Tab 21:	Sample billing memo from RBC from Appellant's Undertakings at tab 3 of Undertaking Brief;
Tab 22:	Information re operation of CAIL Frequent Flyer Program from Archived CAIL web site.

DATED at the City of Ottawa, Ontario, March 6, 2007.

Ronald MacPhee
Ronald MacPhee
Michael Ezri
Counsel for the Respondent

DATED at the City of Toronto, Ontario, March 6, 2007.

James Warnock

CITATION:	2007TCC281
COURT FILE NO.:	2003-4234(GST)G
STYLE OF CAUSE:	ROYAL BANK OF CANADA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 7, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF JUDGMENT:	September 12, 2007

APPEARANCES:

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Counsel for the Respondent:	Ronald MacPhee Michael Ezri

COUNSEL OF RECORD:

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