Docket: 2018-1216(GST)G

BETWEEN:

DAVILLE TRANSPORT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 3 and 4, 2020, at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	Sébastien Budd

JUDGMENT

The appeal of the assessment raised February 15, 2017 under the federal *Excise Tax Act* by the Minister on National Revenue (Minister) regarding the Appellant's claim for HST monthly reporting periods from January 1, 2014 to June 30, 2016 is allowed, with costs fixed at $4,000. The assessment is referred back to the Minister for reconsideration and redetermination on the bases that:

1. assessed HST in respect of the 76 cents per mile chargebacks for supplies of diesel is to be reduced 69%, and

2. assessed HST in respect of the 8 cents per mile chargebacks for supplies of vehicular maintenance is to be reduced 95%.

Signed at Halifax, Nova Scotia, this 29th day of July 2021.

"B. Russell"

Russell J.

Citation: 2021 TCC 47
Date: 20210729
Docket: 2018-1216(GST)G

BETWEEN:

DAVILLE TRANSPORT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Introduction:

[1] The appellant, Daville Transport Inc. (DTI) of Brampton Ontario, at all material times carried on a trucking and logistics business, operating in the U.S. and Canada. DTI appeals an assessment raised February 15, 2017 under the *Excise Tax Act* (Act) for harmonized sales tax (HST) of $118,301 pertaining to monthly reporting periods January 1, 2014 through June 30, 2016.

[2] The respondent Crown pleads that the Minister of National Revenue (Minister) raised that assessment on the basis that DTI (re)supplied diesel to its contract truckers, and also supplied them vehicular maintenance for the DTI truck/trailers they used. Both types of supplies were assessed at a 13% HST rate.[1]

II. Issues:

[3] The issues in this appeal are:

(a) were the purported taxable supplies zero-rated?

[1] Reply, paras. 5, 18.

(b) did DTI receive taxable supplies of diesel?

(c) did DTI make taxable supplies to its contractor truckers of the service of access to the "T-Chek" payment system for diesel refuelling?

(d) did DTI make taxable supplies of diesel to its contractor truckers, and if so were those supplies "made in Canada"?

(e) did DTI make taxable supplies of services of vehicular maintenance to its contractor truckers, and if so were those supplies made in Canada?

III. Evidence:

[4] Two witnesses testified - DTI safety and compliance officer R. Dickson and Canada Revenue Agency (CRA) Appeals officer E. Wang. Mr. Dickson's evidence in pertinent summary was that during the two and half year relevant period DTI hauled freight throughout North America – both interline freight and freight for its own customers. DTI owned several truck/trailer units and contracted with ten or so experienced truck/trailer operators to transport freight utilizing DTI vehicles. Contract truckers driving for DTI had come through a difficult economic period (2008 - 2012) in the trucking industry, resulting for many in personal financial reversals including loss of their own truck/trailer units, nevertheless retaining some customers.

[5] DTI entered into an "independent contractor agreement", with its respective contract truckers. Per these agreements the parties were, "co-equals, independent business enterprises". As well, "[t]he parties are not employees, agents, joint ventures [*sic*] or partners of each other for any purpose . . .". Further, the contract truckers were, "responsible for . . . all costs and expenses of doing business, including . . . fuel . . . repairs . . . and maintenance."[2]

[6] Prior to each freight haulage trip, DTI and the contract trucker entered into an agreement specifying the "trip fee" DTI would owe and pay the contract trucker upon trip completion. For trips involving DTI freight, DTI waived rent for the contract trucker's use of a DTI truck/trailer, even if also the trip involved freight carriage for a customer of the contract trucker. DTI charged vehicle rental only if a trip that did not at all involve DTI freight carriage, which with one exception never occurred.

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[2] Exhibit A-1; "Independent Contractor Agreement", at clauses 6.1, 7.1.

[7] DTI and the contract truckers agreed also that at each trip's conclusion the contract trucker would reimburse DTI for fuel (diesel) at the rate of 76 cents per mile travelled and for vehicular maintenance at the rate of 8 cents per mile travelled. These amounts would be deducted from the trip fee DTI owed the contract trucker. Such payments were commonly termed, "chargebacks".

[8] The chargeback amounts for diesel and for vehicular maintenance had been inaccurately identified in DTI records as payments for rental of DTI truck/trailers. This was clarified with CRA at the notice of objection stage.

[9] Additionally, DTI offered each contract trucker (who all accepted) use of a T-Chek card, commonly used in the trucking industry, particularly for payment of en route refuelling. Periodically DTI deposited significant sums into its T-Chek account. That pre-funded account was accessible by each of the T-Chek cards DTI distributed. DTI did not permit use of these cards for any segments of a trip not pertaining to DTI freight carriage.

[10] Through the T-Chek system DTI had arrangements for acceptance of its T-Chek cards in Canada at Shell Canada fuel stops, and in the U.S. at fuel stops including Flying J, Petro and Travel Center of America.

[11] DTI provided these T-Chek cards to better ensure "seamless" carriage of DTI freight – avoiding en route delays due to challenges contract truckers might face in personally paying for refuelling.[3] Each such card was identifiable as to the contract trucker carrying it.

[12] Payments via T-Chek cards for diesel purchased from fuel suppliers located in Canada of course included HST/GST. Mr. Dickson testified that during the relevant period approximately 69% of DTL's total T-Chek card fuel payments were for diesel purchases from fuel suppliers in the U.S. - the remainder being payments for diesel purchased from fuel suppliers in Canada.[4]

[13] DTI did not include in chargeback amounts the $1.50 per T-Chek transaction administrative charge that it was charged by the U.S.-based T-Chek management entity. DTI absorbed this cost. Nor did DTI add any mark-up in calculating chargeback amounts.

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[3] Transcript, Nov. 3, 2020, p. 24, ll. 6–12; p. 30, ll. 20-24.
[4] *Ibid*., p. 38, ll. 19-21.

[14] DTI claimed input tax credits (ITCs) for GST/HST paid through its T-Chek cards. Mr. Dickson testified that at a meeting CRA advised DTI that contract truckers should claim available ITCs and if they did not, because for example they were not registrants under the Act, then DTI should claim the available ITCs. This testimony was not challenged by Ms. Wang of CRA when she testified. Apparently only one contract trucker was a registrant under the Act, and he did not claim available ITCs, thus DTI did.

[15] Ms. Wang testified that she was the CRA Appeals officer assigned to DTI's notice of objection in this matter. She said she had heard Mr. Dickson's testimony and that none of it was new to her.[5] Her evidence included reference to the Minister's January 12, 2018 notice of confirmation[6] which states the respondent Crown's view that DTI's charging of contract truckers amounts specified for fuel and vehicular maintenance constitutes separate supplies to them of these items. She testified that the Minister concluded DTI purchased the diesel and then resupplied same to its contract drivers for consideration equivalent to the fuel chargebacks the latter paid DTI.[7]

[16] DTI asserts that it "demolished" the following four ministerial assumptions pleaded in the respondent Crown's Reply:[8]

> - [DTI] claimed ITCs in respect of the fuel charged on the fuel cards by the subcontractors (para. 14(j));
>
> - [DTI] supplied fuel and truck/trailer to its subcontractors in Canada (para. 14(l));
>
> - fuel and truck/trailer supplied to the subcontractors were subject to HST at the rate of 13% (para. 14(m)); and
>
> - [DTI] supplied fuel and truck/trailer to its subcontractors in the amount of $910,003.54 (para. 14(n)).

[17] DTI counsel states that the first of these assumptions provides that ITCs were claimed for all fuel purchased using the T-Chek cards; not just fuel purchased in Canada. I do not consider the respondent Crown intended this pleading to be so interpreted. Certainly ITCs are only claimable in respect of GST/HST payable,

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[5] *Ibid.*, p.82, ll. 27-8; p. 83, ll. 1-2.
[6] Exhibit A-7.
[7] *Ibid*., pp. 74-5.
[8] Appellant's written submissions, para. 8.

which of course only arises in Canadian jurisdictions, as Canada's GST/HST regimen does not apply in the U.S.

[18] DTI objects to the latter three of the above-cited ministerial assumptions on the basis that each asserts that DTI had supplied fuel to its contract truckers. Whether DTI supplied fuel to its contract truckers is a conclusion of law or of mixed fact and law, as addressed below. None of these three pleaded assumptions is purely a statement of assumed fact, as a ministerial assumption should be. In any event Mr. Dickson's testimony adequately established the essentially undisputed basic facts pertaining to this appeal. The parties differ little if any as to the facts but significantly as to legal conclusions arising therefrom.

IV. Parties' positions:

[19] DTI asserts that any property or service supplied in relation to its interline business, including diesel and vehicular maintenance, would be zero-rated. DTI asserts also that it was not supplied diesel, so it could not have resupplied diesel to its contract truckers. DTI states that legislation does not provide for supplies being made through use of a credit card or like means to secure fuel, and that there is no evidence as to pre-arrangements for DTI to secure a "block of fuel".[9]

[20] DTI submits also that it provided the T-Chek cards on its own account and not as provision of a service.[10] Further, DTI asserts that the appealed assessment wrongly applied HST to chargebacks respecting diesel and maintenance obtained in the U.S. at U.S.[11]

[21] The respondent Crown's position is that fuel suppliers supplied DTI with diesel and DTI then (re)supplied that diesel to its contract truckers. The respondent says these diesel supplies by DTI all were made in Canada because that was where, at the end of the haulage trips, invoices were exchanged and the chargebacks calculated based on miles driven.[12] The respondent Crown asserts that the subject supplies of diesel and vehicular maintenance are inputs to DTI's interline business and are not zero-rated.[13]

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[9] *Ibid.*, paras. 9, 10.
[10] *Ibid.*, para. 11.
[11] *Ibid.*, para. 21.
[12] Transcript, Nov. 4, 2020, p. 46, ll. 7-15; p.76, ll.3-5.
[13] *Ibid.*, p. 45, ll.15-24.

[22] The respondent asserts also that DTI also supplied a service to its contract drivers, being the use of its T-Chek payment system to facilitate refuelling en route.

V. Analysis:

Are the asserted supplies zero-rated?

[23] DTI asserts that any supplies it made are zero-rated, rather than taxable at the assessed HST rate of 13%. Schedule VI of the Act provides for "Zero-Rated Supplies". Part VII of that Schedule, headed "Transportation Services", enumerates various types of transportation services as being zero-rated.

[24] In particular, section 11 of Part VII – the only Part VII provision cited by either party as potentially allowing for zero-rating on these facts – identifies as being zero-rated the supply of a "freight transportation service" made by one carrier to another in the context of a continuous freight movement. The term "freight transportation service" (FTS) is defined in subsection 1(1) of Part VII as, in relevant part:

> . . . a particular service of transporting tangible personal property and, for greater certainty includes…(b) any other property or service supplied to the recipient of the particular service by the person who supplies the particular service, where the other property or service is part of or incidental to the particular service, whether there is a separate charge for the other property or service . . .

[25] Here, it appears that each contract trucker supplied to DTI "a particular service of transporting tangible personal property", i.e., an FTS. Would this FTS include the supplies of diesel and vehicular maintenance DTI presumably made to each contract trucker, being the basis for the chargebacks the contract truckers paid to DTI? Speaking generally, supplies of diesel and vehicular maintenance could be construed as "part of or incidental to" the supply of "a particular service of transporting tangible personal property".

[26] However, the FTS definition requires that the supply of "part of or incidental to" supplies be made and received by the same respective entities as supplied the "particular service of transporting tangible personal property". And, that is not here the case, where the supplies at issue are presented as having been made by DTI to the contract truckers. That is the reverse of the supply made to DTI by each contract trucker of a "particular service of transporting tangible personal property", for which DTI paid "trip fees" to the contract truckers.

[27] As the makers and recipients of the "particular service of transporting personal property" supplies and the potential "part of or incidental to" supplies do not align, the subject supplies cannot be said to be FTSs. Thus, the supplies at issue are not zero-rated.

Did DTI receive taxable supplies of diesel?

[28] DTI emphatically submits that it was not the recipient of supplies of diesel, and accordingly that it could not have (re)supplied such diesel to the contract truckers as premised by the appealed assessment.

[29] Subsection 165(1) of the Act imposes liability for tax on "every recipient of a taxable supply made in Canada . . . calculated at the rate of 5% on the value of the consideration for the supply". Subsections 221(1) and 228(2) require that the supplier collect such tax from the recipient, for remittance.

[30] Also pertinent are the following subsection 123(1) definitions:

> "supplier", in respect of a supply, means the person making the supply;
>
> "supply" means, subject to sections 133 (agreement as supply) and 134 (transfer of security interest), the provision of property or services in any manner, including sale, transfer, barter, exchange, license, rental lease, gift or disposition;
>
> "taxable supply" means a supply made in the course of a commercial activity;
>
> "property" means any property, whether real or personal, moveable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money;
>
> "service" means anything other than (a) property, (b) money and (c) anything that is supplied to an employer by a person who is or agrees to become an employee of the employer. . .
>
> "recipient" of a supply of property or a service [includes], where consideration for the supply is payable, the person who is liable…to pay that consideration;
>
> "consideration" includes any amount that is payable for a supply by operation of law.

[31] The contract truckers used DTI's T-Chek cards to facilitate DTI purchasing diesel. The term "supply" means, "provision of property . . . in any manner including sale". Diesel is tangible personal property. The diesel was sold by the fuel suppliers.

[32] Accordingly, each refuelling constituted "provision of property", i.e. the making of a "supply" of diesel by the particular fuel supplier. Further, these supplies were "taxable supplies", as made in the course of the fuel suppliers' commercial activities.

[33] As above, "recipient" of a supply means the person who is liable to pay consideration for the supply where, as here, consideration is payable. The fuel suppliers' accepted mode of payment for purchase of their diesel was electronically swiped T-Chek cards for which DTI was liable.

[34] Upon these DTI cards being swiped, the fuel suppliers' pumps opened, and commenced pumping the required diesel. At this point DTI became the defined "recipient" of the fuel suppliers' taxable supplies of diesel, being the person liable to pay the consideration for same.

[35] DTI utilized its T-Chek card payment system intending that it, rather than the contract truckers, would purchase diesel required en route. As noted, DTI desired this so as to alleviate risk of trip delays due to financial inability of any contract trucker. DTI sought to be, and was accepted by fuel suppliers as the entity liable for payment of the diesel supplied by those fuel suppliers.

[36] Also, it is to be recognized that in so doing, DTI was acting on its own accord and not as agent for its contract truckers. DTI and each contract trucker had contracted that vis-à-vis each other they were independent business entities, and not an agent. Neither party saw fit to submit that, regardless of the non-agent contractual provision, DTI had acquired diesel simply as agent.

[37] The respondent Crown asserts that DTI was the recipient of taxable supplies of diesel made by fuel suppliers for the further reason that DTI claimed ITCs in respect of the GST/HST portion it had paid for diesel through its funded T-Chek account, for diesel purchased from Canada-based fuel suppliers.

[38] In support the respondent cites *Vanex Truck Service Ltd. v. Canada*, 2001 FCA 159. In *Vanex*, contract drivers of the appellant trucking company (VTS) used VTS credit cards to pay for refuelling on freight haulage trips. The drivers were contractually obliged to reimburse VTS for same at the conclusion of their trips.

VTS claimed ITCs for the GST/HST it had paid through usage by contract drivers of VTS credit cards in the purchasing of diesel from Canada–based fuel suppliers. In this context the Federal Court of Appeal per Malone, JA wrote (para. 20):

> Moreover, by claiming [ITCs] on the oil and fuel which it purchased [VTS] was acknowledging that it purchased these items, not as agent, but on its own behalf, and was re-supplying these items to the owner–operators whom it charged. Therefore, in my analysis it was required to collect GST on that re-supply.

[39] However, I do not particularly rely upon this submission regarding ITCs, in view of Mr. Dickson's testimony that CRA had advised DTI to claim the ITCs in the event the contract drivers had not done so.

[40] Taking all the foregoing into consideration, I conclude that the Act and contract law well establish that DTI was the recipient of supplies of diesel made by fuel suppliers variously located in Canada and in the United States, accepting payment via swiped DTI T-Chek cards.

Was there a supply of service of utilizing the T-Chek system?

[41] Respondent's counsel in oral submissions asserted that DTI had supplied to its contract truckers a service of utilizing the T-Chek system.[14] This purported supply was not pleaded in the respondent's Reply. Nor was it referenced in the Minister's notice of confirmation of the assessment herein appealed. Nor at the hearing was it referenced by respondent's counsel in any opening remarks. Thus, in fairness to the appellant, I am disinclined to treat this submission.

[42] Should I have erred in not addressing this submission, I make the following observations. The evidentiary record is clear that DTI's distribution of T-Chek cards was intended to serve DTI's own purposes, of helping ensure timely pick-up and delivery of customers' freight.

[43] Moreover, it is not apparent that there would have been any consideration for this now claimed supply. It would have been a gratuitous supply to the contract truckers. DTI absorbed the $1.50 per T-Chek transaction charge it itself was required to pay. The only payments the contract truckers made to DTI were the chargebacks specifically relating to diesel and vehicular maintenance supplies; there has been no mention of these chargebacks in whole or part being in respect of T-Chek card usage.

[14] Transcript, Nov. 4, 2020, p.75, ll.17-23.

[44] Further, accessing the T-Chek system was done in conjunction with diesel that fuel suppliers supplied to DTI; not in conjunction with diesel that DTI subsequently (re)supplied to contract truckers. Thus, it does not seem that DTI's purported supplying to contract drivers of access to the T-Chek system would or could have been incidental to or otherwise in conjunction with its supplying of diesel to those truckers.

Did DTI make (re)supplies of diesel to contract truckers, and if so, in Canada?

[45] Did DTI in turn (re)supply i.e., make taxable supplies of the diesel it had been supplied, to its contract truckers? Such (re)supplies of diesel are the supplies presumed by the Minister and upon which the appealed assessment is based.

[46] As above, a "supply" is "the provision of property . . . in any manner", thus including possession or use. Here, the contract truckers were put in actual possession of the diesel (i.e., property), for their immediate use.

[47] This obviously was as DTI intended; the whole point of this exercise being to best enable that contract truckers "seamlessly" carried on with their freight haulage trips, with non-problematic refuelling en route. The refuelled diesel obviously was expected to be used, i.e. expended, commencing virtually immediately upon departure from the fuel supplier's location.

[48] Were these "taxable" supplies made by DTI to the contract drivers? Yes they were, having been made in the course of DTI's commercial activities, with DTI striving to ensure non-delay in carriage of customers' freight.

[49] Were the contract truckers "recipients" of these taxable supplies? Again, a recipient of a supply is one who is liable for consideration (if any) for the supply. Here, there was consideration for these supplies, being each trucker's commitment to pay DTI an amount for same, based on the agreed calculation of 76 cents per mile logged. The contract truckers being liable to pay that consideration were accordingly recipients of the diesel supplies made by DTI.

[50] Were the taxable supplies of diesel from DTI to the recipient contract drivers "made in Canada" as required by subsection 165(1) of the Act, for tax to be exigible. Section 142 specifies the Act's "place of supply rules". Paragraphs 142(2)(a), (b) and (g):

> For the purposes of this Part, a supply shall be deemed to be made outside Canada if
>
> > (a) in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available outside Canada to the recipient of the supply;
> >
> > (b) in the case of a supply of tangible personal property otherwise than by way of sale, possession or use of the property is given or made available outside Canada to the recipient of the supply;
> >
> > (g) in the case of a supply of any other service [than prescribed or in relation to real property], the service is, or is to be, performed wholly outside Canada.

[51] Thus, per paragraph 142(2)(b) which addresses supplies of tangible personal property otherwise than by way of sale, the question is, where was "possession or use" of the property (diesel) "given or made available" to the recipient contract truckers?

[52] The logic seems clear that possession of the refuelled diesel was given to contract truckers at the point the refuelling diesel being pumped by fuel suppliers, freshly acquired by DTI, flowed into the fuel tanks of the contract trucker operated vehicles. Specifically, such possession was given at the various fuel suppliers' premises both in Canada and in the U.S., closely followed by commencement of usage, i.e. consumption, of the (re)supplied diesel.

[53] These (re)supplies of diesel from DTI to the contract truckers cannot sensibly be said to have occurred at any later time, such as hours or days later, when back in Ontario at the conclusion of the haulage trips. After all, by then the diesel, substantially if not completely, would no longer even exist – having in the meantime been expended through operation of the contract truckers' vehicles.

[54] Thus, the respondent Crown is mistaken that the taxable supplies of diesel that DTI made to the contract truckers occurred in Canada, at the end of the respective haulage trips, when the consideration for such supplies, being the chargebacks, were calculated and paid at DTI's Ontario location.[15]

[55] The conclusion that supplies of diesel were made to the contract truckers at the various fuel suppliers' locations, is supported by language of my colleague

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[15] Transcript, Nov. 4, 2020, p.70, ll.3-8.

Justice D'Arcy in *Roberge Transport Inc. v. Canada*, 2010 TCC 155. In that matter the appellant (RTI) was a Saskatchewan-based interprovincial and international transporter. RTI engaged "lease operators" to drive haulage trips and provided them with credit cards for which RTI was liable, used to purchase fuel.[16] The lease operators reimbursed RTI for fuel and other items at the end of each trip.

[56] In *Roberge*, while not the lead issue, a question similar to herein was spoken to, being whether GST/HST was exigible on chargebacks for fuel purchased variously at U.S. and Canada location truck stops utilizing RTI credit cards carried by the lease operators. The Court observed, evidently approvingly, that, "I have assumed that the GST was not collected on the reimbursements relating to the fuel purchases in the United States . . . on the basis that the underlying supplies were made outside of Canada."[17]

[57] Respondent's counsel urged that there was significance in the fact that chargebacks for diesel were not simply 100% reimbursement of amounts expended on diesel through use of the T-Chek cards, but rather were calculated based on 76 cents per mile travelled. This does not change, in my mind, where the underlying supplies were made, being at the locations of the fuel suppliers. It is within the realm of DTI and the contract truckers to negotiate what constitutes satisfaction of the latter's contractual obligations to pay fuel charges. Neither party asked Mr. Dickson to explain why 76 cents per mile logged was the agreed upon basis for determining quantum of fuel related reimbursements/chargebacks.

[58] The key factual point is Mr. Dickson's uncontested evidence that during the relevant period approximately 69% of fuel costs through use of the T-Chek cards were incurred at U.S. located truck stops, the remainder being incurred at Canada-based truck stops.

[59] Paragraph 142(2)(b) makes clear that DTI supplies of diesel given or made to the contract truckers at U.S. fuel supply locations were not "made in Canada".

[60] Thus, I conclude it is appropriate that the quantum of appealed assessment re diesel supplies of HST at the one rate of 13% be reduced by 69%. Given that 69% of fuel charges were incurred in the U.S., it would appear that such supplies

[16] *Roberge*, para. 23.
[17] *Ibid*., para. 66.

reasonably relate to 69% of total mileage and hence to 69% of the chargeback amounts pertaining to diesel supplies.

[61] Likewise I observe, should I have erred in rejecting the unpleaded assertion that DTI supplied to contract truckers the service of access to the T-Chek system, that usages of the T-Chek cards presumably occurred 69% of the time at fuel supplier locations in the U.S. As such, per paragraph 142(2)(g) the asserted supplies of service reasonably would not have been "made in Canada" in respect of 69% of the total of fuel chargebacks.

[62] Additionally, it seems that to the extent diesel was resupplied to contract truckers at fuel supplier locations in various jurisdictions of Canada, other than Ontario, such diesel supplies ought not be taxed at Ontario's 13% rate. Rather, pursuant to subsection 165(2) of the Act they should be taxed at rates pertaining to those other Canadian jurisdictions – in particular Quebec, Manitoba, Alberta and British Columbia. I quite doubt that Ontario's 13% should be applied across the board, as assessed. This aspect was not referenced at the hearing, and I do not think the evidence before the Court is sufficient to conclusively address it here. Therefore it is a question left for another day.

[63] In opposing the assertion that DTI was supplied and then (re)supplied diesel, DTI cites Bowie, TCJ in *Drug Trading Company Limited v. The Queen*, [2001] TCJ No. 214, referenced by Sheridan, TCJ in *613259 Saskatchewan Ltd. v. Canada*, 2007 TCJ No. 273, that the Minister should have considered on a common sense basis, "what did the supplier supply?"[18]

[64] I accept here that the Minister did consider, of course within the parameters of the Act, what DTI actually did supply. DTI (re)supplied that for which it had, per its T-Chek cards, paid the fuel suppliers – being the diesel that fuel suppliers pumped into the fuel tanks of the contract truckers' vehicles. DTI specifically had not acted as their agent. Hence, DTI was supplied the diesel not on their behalf but on its own account, for it then to supply to them in turn, for virtually immediate commencement of consumption by those vehicles. These (re)supplies triggered the liability of the contract truckers for chargeback payments re diesel to DTI.

[65] DTI cited *Maritime-Ontario Freight Lines Ltd. v. Canada* [2009] T.C.J. No. 359. Here, the appellant freight transporter (MO), was assessed for failure to collect GST from independent contractors who drove for it. MO had provided each

[18] Appellant's written submissions, para. 15.

a credit card for fuelling with a particular fuel supplier with which MO had an arrangement. MO was liable for all charges made to the cards. Contractors were to reimburse MO for what it paid in respect of fuel charges to the card. MO claimed ITCs in respect of GST paid as part of the fuel charges. MO claimed the assessment was wrong as the fuel was being acquired for its own use, not each contractor's use. The Crown asserted MO had resupplied fuel to its contractors.

[66] The appeal was allowed. The Court found in the agreement between each contractor and MO, wording indicating the contractors were providing their trucking vehicles to MO for its use and operation.[19] The Court drew from this that MO and the contractors intended to operate as joint venturers, or that MO was assuming responsibility for use of the contractors' vehicles, and that accordingly fuel was used by MO on its own behalf rather than the contractors'. Thus the contractors had not been supplied the fuel. It was assumed the parties' relationship was not one of agency.

[67] *Maritime–Ontario* is distinguished on the basis that it turned on the judicial findings that the parties were joint venturers and that MO was to take over the use and operation of the vehicles from the contractors. Neither is the case here, regardless that the vehicles leased (with waived rent) to the contract truckers happen to be owned by DTI. The contract truckers are left with full operating responsibility for the vehicles for the duration of the haulage trips. And, DTI and the contract truckers had explicitly contracted that they were not joint venturers vis-à-vis each other, but rather were independent contractors.

[68] DTI also cited *McDavid v. Canada*, 2014 TCC 112. There, a T-Chek card was utilized by appellant (M) being a contract driver for company QCI. M was responsible to QCI for all fuel purchased via QCI's T-Chek card, by deduction from M's pay.

[69] The respondent Crown's resupply argument was not pleaded. M had appealed to support his ITC claims, and to do so he had to show he had paid GST to QCI. QCI and M's agreement provided for a chargeback. M argued he, not QCI, acquired the fuel from fuel supplier and QCI at most had acted merely as a conduit.

[70] At paragraph 47 the Court found M to have been liable for payment of all fuel purchases made with the T-Chek card, as he would have been for payment of fuel purchases made with any card. There was no evidence QCI claimed ITCs and QCI

[19] *Maritime-Ontario*, reasons for judgment, para. 35.

did deduct GST from M's pay. The contract between QCI and T-Chek was not in evidence and reference to an escrow account indicated that M was liable for T-Chek as a debit card. A letter from QCI advised it did not claim GST rebates on fuel purchases - that was left to individual drivers should they wish.

[71] *McDavid* is distinguishable from the present case wherein the contract truckers, unlike M in *McDavid*, were not seeking to claim ITCs, and had not themselves paid GST/HST – rather, DTI did. Further, DTI intended that it would be the recipient of the diesel supplied by the fuel suppliers (by arranging to pay for same), which diesel it promptly resupplied to the contract truckers as concluded above.

Were taxable supplies of vehicular maintenance made, and if so, in Canada?

[72] Finally to be addressed are the supplies of vehicular maintenance made by DTI to the contract drivers contractually responsible for the costs of same. We heard relatively little evidence and few submissions about this.

[73] As noted the agreed charge-back rate for vehicular maintenance/repair services was 8 cents per mile. Mr. Dickson testified, without objection or evidence otherwise, that 95% of maintenance/repair charges DTI paid during the relevant period was in respect of such services supplied in the U.S.[20] DTI paid for such services as and when supplied, including en route during contracted haulage trips. Mr. Dickson said garages doing maintenance/repair work wished to look to a company such as DTI for payment rather than to an individual driver.[21]

[74] I take from Mr. Dickson's evidence that DTI accepted a general responsibility to keep its vehicles well maintained, to comply with regulatory obligations for operation in numerous U.S. and Canadian jurisdictions. In addition there would be maintenance/repairs expenses that could well arise in the course of a DTI vehicle being operated by a contract trucker for freight carriage. In this overall context DTI viewed the 8 cents per mile chargeback as an appropriate contribution to the total of maintenance/repair charges DTI paid. Mr. Dickson stated:

> . . . [the cost of maintenance is] only passed to [the contract drivers] by virtue of an eight cent per mile charge. So, if we had on a number of occasions had larger

[20] Transcript, Nov. 3, 2020, p. 60, ll. 4-9.
[21] *Ibid.*, p. 36, ll. 10-12.

> repairs, then we would not be charging that larger fee to the operator. It's simply an eight cent per mile charge. That's called cost of doing business. [22]

[75] Were these supplies of maintenance services being made by DTI to contract drivers being recipients? The answer is yes. Maintenance is necessary to vehicle operation, as is diesel. The contract drivers were contractually obligated to pay for repair and maintenance required on trips. The 8 cents per mile chargeback was the agreed upon quantum and means by which contract truckers discharged that obligation.

[76] Further, these were "taxable" supplies, being made by DTI in the course of its commercial activities.

[77] Were these taxable supplies of maintenance services "made in Canada" as required by subsection 165(1) of the Act? Paragraph 142(2)(g), set out above, provides that a supply of any service not in relation to real property and not prescribed is deemed to be made outside Canada if the service is performed wholly outside Canada.

[78] Based on Mr. Dickson's evidence that 95% of DTI's maintenance/repair expenses was for maintenance/repair provided, i.e., supplied in the U.S., I conclude that 95% of such services were not "made in Canada".

[79] Regarding the remainder 5% of maintenance/repair costs that were incurred in Canada, there is the question of how tax on that percentage amount under the Act should be determined, in view of subsection 165(2) regarding exigible tax respecting a supply made in a "participating province" or otherwise. I quite doubt that Ontario's 13%, as assessed, should be applied to maintenance services supplied in, for example, Alberta (not a "participating province") where we heard that substantial maintenance and repair of DTI vehicles does occur. This aspect was not referenced at the hearing, nor is the evidence sufficient to conclusively address it here. Therefore it also is a matter left for another day.

VI. Conclusion:

[80] In conclusion the appeal will be allowed, and the assessment referred back to the Minister for reconsideration and reassessment on the bases that the assessed HST attributable to the 76 cents per mile chargeback should be reduced by 69% and likewise the assessed HST attributable to maintenance/repair costs should be

[22] *Ibid.*, p. 36, ll. 2-6.

reduced by 95%. For those respective percentages of (re)supplied diesel and supplied maintenance/repair services, the supplies were not “made in Canada” as subsection 165(1) requires.

Signed at Halifax, Nova Scotia, this 29th day of July 2021.

“B. Russell”

Russell J.

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COURT FILE NO.:	2018-1216(GST)G
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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 3 and 4, 2020
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