Docket: 2021-1465(GST)G

BETWEEN:

MEDSLEEP INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on February 3, 4, 5 and 6, 2025, at Toronto, Ontario

Before: The Honourable Justice J. Scott Bodie

Appearances:

Counsel for the Appellant:	Timothy Fitzsimmons Paul Casuccio Puyang Zhao
Counsel for the Respondent:	John Chapman Vameesha Patel

JUDGMENT

The appeals of the reassessments under the *Excise Tax Act* for the 35 monthly reporting periods beginning on January 1, 2016 and ending on November 30, 2017 and beginning on January 1, 2018 and ending on December 31, 2018 (collectively the "Reporting Periods"), are allowed with costs, and referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant did not make taxable supplies to sleep physicians and was not required to collect and remit Goods and Services Tax/Harmonized Sales Tax in respect of supplies to sleep physicians during the Reporting Periods.

Signed this 6th day of May 2025.

"J. Scott Bodie"

Bodie J.

Citation: 2025 TCC 70
Date: 20250506
Docket: 2021-1465(GST)G

BETWEEN:

MEDSLEEP INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Bodie J.

I. INTRODUCTION

[1] MedSleep Inc. ("MedSleep") operates sleep clinics in various provinces throughout Canada through which it, in tandem with various physicians specializing in sleep disorders ("Sleep Physicians"), provides diagnostic sleep studies to patients.

II. ISSUE

[2] The issue before this Court is whether:

a. MedSleep and the Sleep Physicians work together to provide patients with integrated medical sleep services which constitute exempt medical services under the *Excise Tax Act* (the "Act"), as maintained by MedSleep; or

b. MedSleep provides separate taxable supplies of administrative and other services to the Sleep Physicians in respect of which MedSleep is required to collect and remit Goods and Services Tax/Harmonized Sales Tax ("GST/HST") from the Sleep Physicians under section 221 of the Act, as maintained by the Respondent.

All statutory references herein are to the Act, unless otherwise indicated.

III. FACTS

[3] This issue arises from a set of facts which are generally agreed upon by both parties. The salient facts are set out below.

[4] MedSleep operates sleep clinics in British Columbia, Alberta, Ontario, Nova Scotia and New Brunswick. It hires administrative staff, registered practical nurses, registered polysomnographic technicians, scoring technicians, a director of education and medical directors. Additionally, MedSleep contracts with Sleep Physicians. Typically, each of MedSleep's clinics throughout the country has three or four Sleep Physicians. MedSleep offers services to patients in the areas of clinical sleep consultations, diagnostic sleep testing, sleep education, corporate fatigue management and clinical research trials. Generally, the medical sleep test that is relevant to the issue in this appeal is the diagnostic sleep test, which is known as a "Level 1 Sleep Study" or an "overnight polysomnographic examination" (a "Sleep Study").

[5] In the various Provinces, third party medical doctors (generally family physicians) refer their patients to MedSleep as may be necessary, for a Sleep Study to diagnose any conditions or abnormalities in respect of a patient's sleep health. These family physicians are not Sleep Physicians. Every patient referred to MedSleep is required to complete a medical questionnaire form. The form includes demographic information, height, weight, neck circumference, medication history, injury history, medical treatment history etc. MedSleep employees review the intake information to ensure that the information is complete. Based on this information, MedSleep then allocates the patient to an appropriate Sleep Physician, based on the patient's needs and the Sleep Physician's field of specialty. The Sleep Physician so allocated then reviews the patient's file, meets with the patient either via video or in person, and determines an initial course of treatment. The overnight component of a Sleep Study is conducted at a MedSleep clinic, which typically contains three to five beds and utilizes MedSleep's medical equipment. Such Sleep Studies are conducted in accordance with MedSleep's policies and procedures.

[6] A registered polysomnographic technician then prepares the patient for the Sleep Study and collects the data accumulated during the overnight study. A Sleep Physician is "on-call" for this portion of the overnight data collection. The on-call Sleep Physician can be any Sleep Physician on MedSleep's roster, and is not necessarily the Sleep Physician assigned to the patient undergoing the overnight study on the particular night. The next morning, a MedSleep employee arranges for the patient to complete a post study questionnaire. A scoring technician employed

by MedSleep reviews the pre- and post-sleep questionnaires and scores the overnight data. The purpose of the scoring is to identify data that is indicative of a sleep disorder. Once the scoring is completed, the overall report is prepared for the assigned Sleep Physician, who then reviews the report, edits or revises it as necessary, and then signs off on the content and recommendations. MedSleep then communicates the patient's complete medical record back to the referring family physician.

[7] There are two separate types of fees payable for Sleep Studies:

a. a technical fee, which relates to the overnight study itself conducted at a MedSleep facility. 100% of this fee is received and retained by MedSleep, regardless of whether it is paid by a Provincial Health Insurance Plan, as it is in British Columbia and Ontario, by a private insurer or, in rare cases by an individual patient, as is the case in Alberta, New Brunswick and Nova Scotia. This fee is not in controversy in this appeal; and

b. a professional fee, which relates to those parts of the process outlined above which are performed by the Sleep Physicians such as the initial file review, patient consultations, review of results from the overnight sleep studies, diagnosis and treatment recommendations.

[8] In all Provinces, the applicable Provincial Health Insurance Plan covers the professional fee component. It is the professional fee that is at the centre of this appeal. Under the Agreements described below, a portion of the professional fee that in all Provinces is paid by the applicable Provincial Health Insurance Plan, is retained by the applicable Sleep Physician, while a portion is paid to MedSleep.

[9] When billing to a Provincial Health Insurance Plan, such as the Ontario Health Insurance Plan (“OHIP”) or the BC Medical Services Plan, MedSleep and the Sleep Physician coordinate the billing, as both the Independent Health Facility Code, which belongs to MedSleep, and the Sleep Physician’s individual billing code, are required for the billing, and the necessary fee details that are submitted to the relevant Province’s electronic billing and data system. Generally, the fee for the technical component and the fee for the professional component are billed at the same time. In those Provinces where the technical fee is covered by the applicable Provincial Health Insurance Plan, once the Province approves the technical and the professional fees billed, the cash is deposited into a single bank account. As a practical matter, MedSleep generally prefers to perform all billing activities with respect to a Sleep Study regardless of the party to which the fees are billed.

MedSleep is of the view that this results in fewer stale bills or rejected claims. The evidence indicates that despite this preference, some Sleep Physicians choose to bill the applicable Provincial Health Insurance Plan for the professional fee component themselves.

[10] MedSleep and the Sleep Physicians work together to perform the above-described services pursuant to one of four general types of agreements (collectively, the "Agreements"). The type of Agreement used for each Sleep Physician varies, depending upon such things as the time the Sleep Physician joined MedSleep and the Province in which an individual Sleep Physician practices. While the recorded terms differ between the various types of Agreements, it is MedSleep's view that the overall arrangement between it and each Sleep Physician is generally the same. As discussed above, in each case, regardless of whether the technical fee component of a Sleep Study is covered by the applicable Provincial Health Insurance Plan, the full amount of the technical fee component is retained by MedSleep. The professional fee component, on the other hand, is allocated between MedSleep and the Sleep Physician pursuant to the terms of the applicable Agreement.

[11] Each type of Agreement contains the term "Fee Sharing" in the heading of the section that governs the allocation of the professional fee. Three of the four types of Agreements contain similar wording with respect to the nature of the allocation between MedSleep and the Sleep Physicians. Under these Agreement types, MedSleep and the applicable Sleep Physician acknowledge and agree that the parties will be "jointly entitled" to the professional fees in agreed to proportions. A fourth type of Agreement uses different terminology to describe the allocation of the professional fee. It says that the Sleep Physician will retain a certain percentage of all professional fees received by or payable to the Sleep Physician.

[12] The allocation under all four types of Agreements is typically 80% allocated to the Sleep Physician and 20% to MedSleep, although the evidence shows that the allocation can vary, depending on a number of factors such as the particular Sleep Physician's reputation in the community, level of experience and expertise.

A. The Assessments Appealed

[13] MedSleep is appealing assessments issued by the Minister of National Revenue (the "Minister") for GST/HST under subsection 221(1) for the reporting periods beginning on January 1, 2016, and ending on November 30, 2017 and beginning on January 1, 2018 and ending on December 31, 2018 (collectively the "Reporting Periods") on the basis that:

a. MedSleep made a separate taxable supply of services to the Sleep Physicians; and

b. did not collect any tax from the Sleep Physicians as required by subsection 221(1).

[14] Accordingly, the first issue which must be examined is whether MedSleep makes separate taxable supplies to the Sleep Physicians.

IV. ANALYSIS

A. Does MedSleep make separate taxable supplies to the Sleep Physicians?

[15] It is MedSleep's position that the services that it provides are to its patients and are exempt medical services. It says that the component parts of those services cannot be separated from the whole. MedSleep is not in the business of providing administrative or other services to any doctors including the Sleep Physicians. Accordingly, MedSleep is of the view that it did not make any taxable supplies of services to the Sleep Physicians. In furtherance of that view, MedSleep contends that the parties entered into genuine arrangements to share the professional fees that are payable for certain components of the services which they provide to their patients. These fee sharing agreements reflect the actual commercial arrangements between the parties and should be respected for determining the results for tax purposes.

[16] In contrast, it is the Respondent's position that MedSleep provides the Sleep Physicians with administrative services including referral intake, scheduling and rescheduling appointments, billings and communications services. In addition, the Respondent contends that MedSleep engages in extensive marketing efforts giving the Sleep Physicians the benefit of its brand recognition, referral networks and patient base. These services increase the number of patients available to each Sleep Physician, and decrease the time spent on each patient, allowing each Sleep Physician to generate more billings and earn more profit. In consideration for these services, the Respondent asserts that the Sleep Physicians pay MedSleep a percentage of all professional fees they earn in providing services to patients as determined by the Agreements.

[17] I will first set out the applicable law.

[18] Section 165 provides that the "recipient" of a "taxable supply" is subject to pay GST/HST. Subsection 165(1) states:

> **165(1) Imposition of goods and services tax -** Subject to this Part, every recipient of a taxable supply made in Canada shall pay to His Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

[19] Subsection 221(1) imposes a collection obligation on a person who makes a taxable supply to such a recipient. It provides as follows:

> **221(1) Collection of tax -** Every person who makes a taxable supply shall, as agent of His Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

[20] Hence, it is necessary to determine whether MedSleep makes taxable supplies. Secondarily, the issue of whether the Sleep Physicians could be considered recipients for purposes of subsection 221(1), will be considered.

[21] In *River Cree Resort Limited Partnership v Her Majesty The Queen* 2022 TCC 45, Justice Graham, of this Court, set out a test resulting from the assimilation of various tests that had developed in the case law to that point, for the purpose of determining the nature of a supply or supplies in situations, such as in the case at bar, where a service or services are composed of more than one element.

[22] At paragraph 103 of that decision, Justice Graham wrote the following:

> [103] The courts have set out tests to use in these circumstances to determine the nature of supplies. The following is an attempt to assimilate those tests into a comprehensive step-by-step test:
>
> > (1) What was provided: Determine what goods and/or services the supplier provided for the consideration received (*O.A Brown Ltd. v The Queen*; *Global Cash Access (Canada) Inc. v The Queen*; *Great-West Life Assurance Co. v The Queen*; *SLFI Group v The Queen*; *CIBC v The Queen*).
> >
> > (2) Single compound supply or multiple supply: Determine whether the goods and/or services provided should be characterized as a "single supply comprised of a number of constituent elements or multiple supplies of separate goods and/or services" (*O.A. Brown Ltd.*; *Hidden Valley Golf Resort Association v The Queen*; *City of Calgary v the Queen*; *SLFI Group*; *Global Cash Access*; *CIBC v The Queen*).
> >
> > (3) Determine how the resulting supply should be treated: Determine whether that supply was, or those supplies were taxable supplies or exempt supplies:

> (a) Single Compound Supply: For a single compound supply, determine what the predominant element of the supply was. This analysis should focus on the purchaser's perspective of the supply. The supply will be taxed in the same manner as that predominant element. (*Global Cash Access*; *Great-West Life*; *SLFI Group*).
>
> (b) Multiple Supply: For multiple supplies, determine whether each of those individual supplies was a taxable supply or an exempt supply.
>
> i. If one of the multiple supplies was, itself, a single compound supply, apply the test in paragraph (a) to that supply (*Jema International Travel Clinic Inc. v The Queen*).
>
> ii. If there was a single consideration paid for the multiple supplies, consider whether sections 138 (incidental supplies) or 139 (financial services in mixed supply) apply to nonetheless deem there to have been a single compound supply (*Camp Mini-Yo-We Inc. v The Queen*; *9056-2059 Québec v The Queen*; *Canada Trustco Mortgage Co v The Queen*; *Maritime Life Assurance Co. v The Queen*; *Jema International*; *CIBC v The Queen*).

[Footnotes omitted].

[23] I will examine each of the elements of this test in turn.

a. What Services were Provided for the Consideration Received?

[24] At this stage of the analysis, the task of the Court should be to determine what goods and/or services were supplied by MedSleep for the consideration received. In *The Great-West Life Assurance Company v Her Majesty The Queen* 2016 FCA 316 at paragraph 47, the Federal Court of Appeal wrote:

> The first question is simply to determine what services were provided for the consideration received. At this stage, the services should include all services and not just the predominant elements. This is clear in *Global Cash* in which the first step included some services that were not predominant elements (ie. clerical services and access to premises).

[25] Justice Graham took a similar approach in both *River Cree* and *Toronto Dominion Bank v His Majesty The King* 2024 TCC 50. In both cases, he started his analysis by listing the various goods and services provided by the taxpayer.

[26] In considering the question of what services are provided for the consideration received, MedSleep takes a global view. It is MedSleep's position that the consideration it receives, being the full amount of the technical fee and an allocation of the professional fees, is for the various components of the overall "end-to-end sleep study journey" experienced by patients.

[27] In contrast, the Respondent's answer to this first question concentrates only on the portion of the professional fees received by MedSleep. In the Respondent's view, the technical fee should be considered separately as it is exclusively billed by and paid to MedSleep. It is conceded by the Respondent that the technical fee is exempt from GST/HST under the Act. Similarly, the portion of the professional fee retained by the Sleep Physicians should also be considered separately in the Respondent's view, as it is exclusively billed by, or on behalf of, the Sleep Physicians and paid to the Sleep Physicians by the applicable Provincial Health Insurance Plan. The Respondent acknowledges that such professional fees paid to the Sleep Physicians are exempt from GST/HST under the Act.

[28] However, it is the Respondent's position that the portion of such professional fees received by MedSleep are for services, which in the Respondent's view, are provided by MedSleep exclusively to the Sleep Physicians. The Respondent submits that MedSleep provides the Sleep Physicians with a package of administrative, technical, marketing, referral and corporate services. These services include billing services, scheduling and communication services, the collection and preparation of patient information, marketing and branding services and the provision of facility access. It is the position of the Respondent that this suite of services (the "Back-end Services") allows the Sleep Physicians to spend less time on each patient, enabling the Sleep Physicians to see more patients in less time, increasing both their billings and profits.

[29] A fundamental difference between MedSleep and the Respondent in describing the services which MedSleep provides for the consideration it receives, is in how each party characterizes the portion of the professional fees allocated to MedSleep. As mentioned above, it is MedSleep's position that such fees are allocated pursuant to a fee sharing arrangement as set out in the Agreements. The portion of such fees received by MedSleep is part of its agreed upon fee to which it is entitled for fulfilling its role in the patient's end-to-end sleep study journey.

[30] In contrast, the Respondent argues that under provincial health care laws and regulations, MedSleep has no legal entitlement to any amount paid by a Provincial Health Insurance Plan in respect of fees for professional services. Only the Sleep

Physicians are entitled to receive payment for those services. Therefore, the Respondent maintains that while provincial health care laws and regulations may allow physicians to direct payment for their services to another person, that direction is only a billing direction, and does not change the physician's legal entitlement to the underlying payment.

[31] Accordingly, the Respondent argues that since MedSleep has no entitlement to the fees in its own right, it can only receive those fees if given them by the Sleep Physicians. To the extent that a Sleep Physician is sharing a fee with MedSleep, the Sleep Physician is paying over his or her fee to which MedSleep is not otherwise entitled. This fee payment is therefore consideration. Accordingly, in answering the first question of the *River Cree* tests, it is the Respondent's position that the services being provided by MedSleep for the consideration received should be restricted to the Back-end Services.

[32] There are two issues with the Respondent's position. First, it is not consistent with the case law which has considered the tax results of a fee sharing arrangement between a physician and a third party. Secondly, it is not consistent with the terms of the Agreements.

[33] Subsection 16(1) of the *Ontario Health Insurance Act* provides that any payment made by OHIP pursuant to an account submitted in the name of a physician is deemed to have been paid to and received by the physician personally. Subsection 16.1(3) of the *Ontario Health Insurance Act* provides that entitlement to payment for services performed by a physician is that of the physician and not the person the physician directed payment be made to.

[34] The *British Columbia Medicare Protection Act* similarly provides that it is only the practitioner who renders benefits to a beneficiary who is eligible to be paid for the practitioner's services. Under subsection 13(4) of the *British Columbia Medicare Protection Act* "[p]ayments for benefits performed in an approved diagnostic facility must be paid to the practitioner who was responsible for rendering the benefit".

[35] However, notwithstanding these statutory provisions case law suggests that physicians are free to enter into fee sharing arrangements and that once a physician gives up his or her right to payments from a Provincial Health Insurance Plan, payments so made, need not be considered payments made to the directing physician for tax purposes.

[36] In *R v Campbell*, [1980] 2 S.C.R. 256, the issue before the Supreme Court of Canada was whether fees for surgical services performed by a taxpayer was income attributable to the taxpayer or to the licensed private hospital that was assigned fees which belonged to the taxpayer under the applicable provincial legislation. The hospital employed support staff, nurses and two full-time surgeons, including the taxpayer. Initially, the hospital billed patients for medical services provided by its salaried doctors. With the establishment the Ontario Medical Services Insurance Plan that later became OHIP, that process changed to meet the governing regulations which required that fees for medical services needed to be billed separately to the provincial insurer in the name of the doctor who provided the services. When the taxpayer received cheques from the provincial insurer he endorsed them to the hospital. The hospital included its receipt of payments in its income.

[37] The respondent in that case, argued that the taxpayer's contract with the hospital was invalid, so that the taxpayer, and not the hospital, should be subject to tax on the fees for the medical services he performed. Holding in favor of the taxpayer, the Supreme Court of Canada wrote at page 261:

> […] [I]f [the taxpayer] is to be assessed for tax in respect of the fees [for the medical services he performed][…], fees which he assigned to the hospital, it would be because under the taxing statute the fees are properly part of his income and not the income of the hospital to which they were assigned pursuant to his contract with the hospital. […]

And at page 264:

> […] In my view, the Federal Court of Appeal correctly held, on the particular facts here, that it was the [taxpayer] and not the hospital who was practicing or endeavoring to practice medicine. Moreover, that did not inevitably require the conclusion that, in assigning his fees to the hospital, [the taxpayer] was assigning his own money rather than carry out an arrangement under which the fees belonged to the hospital. That billing procedure was required by provincial regulations and cannot be the controlling element in determining to whom the fees belong where there was a valid arrangement for the provision of a salary to [the taxpayer] and for the accounting of fees to the hospital as employer.

[38] In *West Windsor Urgent Care Centre Inc v Her Majesty The Queen* 2005 TCC 405, affirmed by the Federal Court of Appeal 2008 FCA 11, the taxpayer operated a medical clinic which provided urgent care medical services ("the Centre"). The taxpayer had 14 shareholders, who were all physicians that worked at the Centre as independent contractors. The physicians and the Centre entered into agreements that provided that the physicians would provide medical services to patients of the

Centre. The agreements made it clear that the parties intended the Centre to be regarded as the service provider to its patients. The taxpayer would retain 40% of the billings and the physicians would receive 60%. The Respondent argued that the physicians supplied medical services to the patients and that the physicians received a taxable supply of access to facilities, office space, equipment and support staff.

[39] In considering the effect of the fee sharing arrangement for tax purposes, Justice Hershfield of this Court wrote:

> 28. The *Campbell* decision recognizes that transfer of income is systematically possible in our health care system notwithstanding that the insurer (OHIP) will only pay medical doctors. That is, it is possible as between the parties, the Centre and its contacting physicians, that the transfer of rights to income has occurred in this case as recognized in *Campbell* notwithstanding all the regulatory and systemic third-party denials of this occurrence. The transfer is a capital transaction at the outset — at the time the agreement is entered into. That the payor's insurer does not recognize the transfer is not relevant. That the physicians were required to give their billing number on the basis that coverage applied to them does not contradict their own acceptance of the contractual transfer of their right to the income.
>
> 30. A finding that the Appellant, not the physicians, is the beneficial recipient of OHIP payments (as was found in *Campbell* for income tax purposes) goes a long way in undermining the Respondent's argument as to the direction of the flow of funds. That is, *Campbell* establishes the Centre's entitlement to funds deposited which makes its obligation under the agreement to pay physicians a legally effective one and undermines any argument of constructive receipt.

[40] Accordingly, notwithstanding that under provincial health care legislation and regulations payments for services performed by physicians must be made by the Provincial Health Insurance Plan to physicians only, case law indicates that fee sharing arrangements between a physician and a third party, can be effective for tax purposes. Where such arrangements are effective, the physician is not required to account for the portion of a fee received from a Provincial Health Insurance Plan that has been transferred by a physician to a third party.

[41] Accordingly, I do not accept the Respondent's position that in considering the first question of the *River Cree* test, the services considered should be restricted to services that could be provided only to the Sleep Physicians by MedSleep because the fees received by MedSleep could only have been paid to MedSleep by the Sleep Physicians under provincial health care legislation and regulations. The case law indicates that fee sharing arrangements can be effective for tax purposes.

[42] Therefore, I agree with MedSleep's position that in considering what services are provided for the consideration received, it is necessary to look to the full suite of services provided to patients in their end-to-end sleep study journeys for the total consideration paid, by or on behalf of the patients, regardless of the source of payment. In order to understand the end-to-end sleep study journey taken by each patient, it is necessary to understand the relationships between MedSleep, the Sleep Physicians and the patients.

[43] One of the witnesses who appeared for MedSleep was Kosta Tsambourlianos who is a shareholder and the Chief Executive Officer of MedSleep. I found Mr. Tsambourlianos to be a reliable and credible witness. He testified that over the years of MedSleep's existence, he and his team at MedSleep had worked hard to build a brand and a reputation for MedSleep as being a leader in the provision of medical sleep services in Canada, particularly amongst the family physicians in the communities in which MedSleep operates. It is from these family physicians that MedSleep gets its patients. Mr. Tsambourlianos made it clear that, in his view, the family physicians refer their patients to MedSleep and not to the Sleep Physicians.

[44] He testified that a referral from a family physician comes to MedSleep generally by fax. It is MedSleep employees who complete the initial patient intake procedures. The patient then goes on what Mr. Tsambourlianos refers to as an "end-to-end sleep study journey". Because of the way the healthcare system in Canada works, it was Mr. Tsambourlianos' testimony that the journey can only be completed by MedSleep and the Sleep Physicians working together both in operations and in the billing and allocation of fees for the services they jointly provide to patients. He testified that MedSleep provides the patients with those services which it can best provide and which the Sleep Physicians have no interest in providing. The Sleep Physicians provide the patients with those services which they, as physicians, can provide best and which MedSleep cannot provide under the law.

[45] Accordingly, MedSleep employees communicate with the patients, arrange appointments for the patients, coordinate with them to complete the required intake forms, based on the information contained in the intake forms, allocate the appropriate Sleep Physician to the particular patient, prepare the patient for the overnight sleep study, collect data during the overnight study using equipment owned by MedSleep in the facility owned and operated by MedSleep, arrange for the patient to complete a post-study questionnaire, score the data, prepare the initial report for the Sleep Physician's review and ultimately communicate back to the referring family physician.

[46] He testified that a Sleep Physician, on the other hand, meets with the patient after they review the intake information coordinated by MedSleep employees and, along with the patient determines an initial course of treatment. Following an overnight sleep study the Sleep Physician reviews the report prepared by MedSleep employees, edits it as necessary and signs off on the content and recommendations. If necessary, a Sleep Physician may meet with the patient in a follow-up appointment to go over the recommendations before a final report is sent to the referring family physician.

[47] For taking the patient on this end-to-end sleep study journey, Mr. Tsambourlianos said that MedSleep and the Sleep Physicians split the two fees discussed earlier as follows:

a. The technical fee is fully retained by MedSleep; and

b. The professional fee is allocated between MedSleep and the Sleep Physician in accordance with the terms of the Agreements.

[48] Mr. Tsambourlianos testified that the mechanics of implementing this fee arrangement are complicated because of the healthcare system in Canada. MedSleep's facilities are licensed Independent Health Facilities. As such in British Columbia and Ontario, MedSleep has its own billing code and bills the applicable Provincial Health Insurance Plan directly. In Alberta, New Brunswick and Nova Scotia, MedSleep typically bills a patient's private insurer, or in rare cases the patient directly.

[49] The professional fee is, in all provinces, billed to the applicable Provincial Health Insurance Plan. In all cases the bill must be submitted by, or on behalf of the Sleep Physician using the Sleep Physician's billing code. When paid, such professional fee is allocated between MedSleep and the Sleep Physician in accordance with the Agreements. According to Mr Tsambourlianos' testimony, it is through these two fees, paid by or on behalf of the patients by way of these mechanics, that MedSleep and the Sleep Physicians are compensated for delivering the Sleep Study services to patients.

[50] The Respondent acknowledges that the business relationship between MedSleep and the Sleep Physicians is governed by the Agreements. It is the Respondent's position that while the Agreements do not specifically identify the services that MedSleep provides, MedSleep and the Sleep Physicians intended, and understood that MedSleep would provide all non-medical services associated with

the Sleep Studies, which according to the Respondent were comprised of the Back-end Services, as in the Respondent's view the services associated with the technical fee can be separated from the Back-end Services. The Respondent further contends that each Sleep Physician paid for those Back-end Services by paying a fee to MedSleep calculated as a percentage of the professional fee determined under the Agreements.

[51] The issue with this position is that it is inconsistent with the terms of the Agreements. The Agreements simply do not contemplate that MedSleep will provide the Back-end Services to the Sleep Physicians. There is no evidence which would indicate that the parties to the Agreements intended something other than what was written in the Agreements. None of the Agreements list the Back-end Services. None of the Agreements characterizes the amounts payable to MedSleep under the Agreements as a fee payable by the Sleep Physicians to MedSleep as consideration for the Back-end Services or any other services. Rather they all indicate that MedSleep is entitled to a portion of the professional fees received by or payable in connection with the provision of clinical services payable to the Physician. The evidence shows that both MedSleep and the three Sleep Physicians who testified at trial, all characterized this arrangement as a fee sharing arrangement. At trial, Dr. Terrance Paul, Dr. Frank Ritacca and Dr. David Klein all testified on behalf of MedSleep. All three are Sleep Physicians that work on a part-time basis out of a MedSleep facility. All three have very impressive professional credentials. I found the testimony of all three Sleep Physicians who testified to be both credible and reliable.

[52] Case law from the Supreme Court of Canada indicates that courts should be very cautious about recharacterizing commercial arrangements entered into by private parties.

[53] In *Shell Canada Ltd v Canada*, [1999] 3 S.C.R. 622, the Supreme Court of Canada wrote:

> 39. This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form […]. But there are at least two caveats to this rule. First, this court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not reflect its actual legal effect.

[54] There was no evidence introduced at trial to indicate that MedSleep or the Sleep Physicians acted deceptively in entering into the Agreements. From the testimony of both Mr. Tsambourlianos and the three Sleep Physicians who testified, both parties appear to have acted on, and benefited from the relationships indicated by the clear wording of the Agreements. Further as discussed above, case law has upheld the effectiveness of fee sharing arrangements between physicians and third parties for tax purposes. Therefore, the legal relationships indicated in the Agreements should be respected. Both the Agreements and the testimony at trial indicate that MedSleep and the Sleep Physicians agreed to share the professional fee component of the consideration for the provision of Sleep Studies which were supplied by MedSleep and the Sleep Physicians, working jointly, to patients. In contrast, neither the Agreements nor the testimony presented at trial indicate that MedSleep provided services to the Sleep Physicians.

[55] In his testimony, Mr. Tsambourlianos described the relationship between MedSleep and the Sleep Physicians as follows in the following exchange:

> Q. Okay. Mr Tsambourlianos, under these agreements, all four types, are — in-in MedSleep's opinion is — are Sleep Physicians paying for something supplied by —
>
> A. No.
>
> Q. Why is that?
>
> A. Because they are my patients. I have the infrastructure and the facility and the staff and leased space to do everything I need to do in order to see patients. And I engage in a revenue-share agreement with the physician to do those pieces that only a licensed, accredited and affiliated sleep doctor can do that I cannot. They're like the last missing piece. And in order to fill it, we share revenue. The physician wins because they're far more productive and they can make more money, they can see more patients. I can make money. The taxpayer wins too.

[56] Later, Mr. Tsambourlianos said the following:

> So MedSleep is doing that because MedSleep, we have entered into an agreement with the sleep docs to provide the services together, in the most efficient way possible to maximize the benefit to the taxpayer and to the healthcare system.

[57] Mr. Tsambourlianos' characterization of the relationship between MedSleep and the Sleep Physicians is consistent with the wording of each of the four types of Agreements used to govern the relationship between MedSleep and the Sleep

Physicians. The Agreement types which were referred to during the trial as Type A and Type B, each contain the following statement in their preamble:

> AND WHEREAS the Physician and MedSleep wish to memorialize their agreement to work together to provide healthcare services in the nature of consultations and sleep study interpretation to patients of the Clinics.

[58] The Agreement type which was referred to during the trial as Type C which is in the form of a letter agreement, contains the following introductory paragraph:

> This letter outlines the primary terms of your fee sharing arrangement with MedSleep, effective from [Date] in respect of the professional services that you and MedSleep jointly provide to patients of MedSleep.

[59] The Agreement type which was referred to during the trial as Type D contains the following statement in its preamble:

> WHEREAS the Contractor [the Sleep Physician] wishes to provide consultation services and sleep study interpretation to patients of the Clinics

[60] Following the decision of the Supreme Court of Canada in *Shell* referred to above, absent a statutory provision which requires a certain contrary characterization or evidence of a sham, neither of which apply in this case, the characterization of legal relationships as determined by the parties to that relationship, memorialized in a written agreement, and implemented through the actions of the parties, must be respected in tax cases. In this case the Agreements, the testimony of the Chief Executive Officer of MedSleep and three of its Sleep Physicians and the evidence of their actions, all indicate that MedSleep and the Sleep Physicians worked together to provide a service to patients for consideration which they agreed to share.

[61] Therefore, I disagree with the Respondent's position that the portion of the professional fee payable to the MedSleep is only for the provision of Back-end Services provided by MedSleep to the Sleep Physicians. Rather, the payment of the professional fee and the payment of the technical fee, allocated between MedSleep and the Sleep Physicians pursuant to the Agreements, is for the various components of the overall end-to-end sleep study journey supplied to patients by MedSleep and the Sleep Physicians, working jointly together. The specific services provided by MedSleep and the Sleep Physicians cannot be usefully or realistically separated for purposes of applying the *River Cree* tests. Each had an essential role to play, without which, patients would not be able to obtain the services requested by their family physicians. As Mr. Tsambourlianos stated above, the Sleep Physicians were the

"missing piece" in the provision of the sleep diagnostic and consultation services required by the patients referred to MedSleep.

[62] Therefore, for purposes of applying the first of the *River Cree* tests, all of the services provided by MedSleep and the Sleep Physicians for the consideration received must be listed. The evidence shows that those services include:

a. use of MedSleep's premises, facilities and equipment;

b. clerical and support services performed by MedSleep's staff, including receiving the initial referrals from family physicians, collecting and recording a patient's medical history, answering phones and booking appointments;

c. medical sleep services, including the assignment of Sleep Physicians to patients for consultations, pre-Sleep Study consultations with Sleep Physicians, overnight Sleep Studies, the preparation of draft Sleep Study reports by registered scoring technicians employed by MedSleep, arranging for the availability of on-call Sleep Physicians during overnight Sleep Studies, interpretation of data collected from Sleep Studies, preparation of final reports which include recommended treatment plans, reviewing and where necessary editing and signing off on final reports by Sleep Physicians and arranging for follow up appointments, where necessary and reporting back to the patients' family physicians.

b. <u>Single Compound Supply or Multiple Supplies?</u>

[63] It is the Respondent's position that MedSleep does not make a single supply to patients of an exempt medical service, as MedSleep maintains. Rather, the Respondent contends that MedSleep makes two separate supplies:

a. the entire technical component of the Sleep Study, which is an exempt supply for purposes of the Act, such that MedSleep is not required to collect or remit GST/HST on that supply; and

b. the Back-end Services to the Sleep Physicians, which is a taxable supply for purposes of the Act, such that MedSleep is required to collect and remit GST/HST on that separate supply.

[64] I disagree. The case law makes it clear that when individual components of an overall supply are interdependent and intertwined to such an extent that they cannot

be sensibly separated, for GST purposes, such components should be considered a single compound supply. In this case, the medical sleep services provided by MedSleep, in tandem, with the Sleep Physicians, should be considered a single compound supply made to patients.

[65] In *Drug Trading Co v Her Majesty The Queen* [2001] G.T.C. 382 Justice Bowie emphasized the importance of using common sense to determine the nature of a supply, saying the following:

> [16] In an early value-added tax case Lord Denning pointed out the importance of asking, and answering, the question "what did the [supplier] supply in consideration of the £1.50 they received?" Soon after, Lord Widgery C.J. added this:
>
> > I would only wish to repeat what I said in one of the earlier cases, and that is to hope when answering Lord Denning MR's question in the future in this type of case people do approach the problem in substance and reality. I think it would be a great pity if we allowed this subject to become over-legalistic and over-dressed with legal authorities when to my mind, once one has the question posed, the answer should be supplied by a little common sense and concern for what is done in real life and not what is, as Cumming-Bruce L.J. put it, too artificial to be recognized in context.
> >
> > In the present case, the assessor seems not to have asked, or answered, Lord Denning's question. Nor did either the oral or the written arguments of counsel provide an answer. This is unfortunate because, in my view, when the question is asked the answer is, as Lord Widgery suggests, supplied by the application of a little common sense.

[66] In *O.A. Brown Ltd v Her Majesty the Queen*, [1995] G.S.T.C 40, the main issue what was whether the taxpayer made a zero-rated single compound supply of livestock or multiple supplies. Justice Rip at paragraph 22 stated that the test is "whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply". Justice Rip stated that, when considering whether a supply is a single compound supply, courts can consider whether the alleged separate supply can realistically be omitted from the overall supply and whether it would be possible to purchase each of the individual elements of the supply and end up with something useful.

[67] In *Calgary (City) v Canada* 2012 SCC 20, the City of Calgary constructed municipal transit facilities for use by the public. Under the *City Transportation Act*, the Province of Alberta was authorized to share the cost of the transit system with

Calgary. Alberta and Calgary entered into funding agreements for the construction. Calgary paid GST for its purchases related to the construction. The provision of a "municipal transit service" to the public is an exempt supply under the Act, and input tax credits cannot be claimed for purchases of inputs. Calgary argued that it made two separate supplies to recipients:

a. operating the transit facilities for the Calgary public; and

b. constructing, acquiring, and making the facilities available for Alberta under its contract with Alberta.

[68] The Supreme Court of Canada found that nothing in the relevant statutes or agreements indicated that there was a separate supply made by Calgary to Alberta. The Court held Calgary made a single supply of a municipal transit system to the public and that fulfilling its obligations under its agreements with Alberta was not a separate supply. The alleged separate supplies were so interconnected that it would be difficult to identify distinct components.

[69] In *Manship Holdings Ltd. v The Queen* 2009 TCC 75, affirmed by the Federal Court of Appeal at 2010 FCA 58, the taxpayer operated massage parlours and engaged independent contractor masseuses to perform massages on customers. The taxpayer employed a manager at each parlour. The rates for massages were set by the taxpayer. The taxpayer would keep half of the rate charged for massages and the masseuses would keep the other half. The taxpayer argued that it was only responsible to remit GST/HST on half of its fees as there were multiple supplies made:

a. access to use the facilities of the massage parlour supplied by the taxpayer to the masseuses; and

b. massage services supplied by the masseuses to the customers.

[70] The Respondent argued that the taxpayer was the supplier of a taxable supply of massage services to the ultimate customer, and thus was required to collect GST/HST on the entire amount of the fees.

[71] The Federal Court of Appeal affirmed the Tax Court of Canada's judgment that the taxpayer made a single compound supply of massage services to its customers. Justice Angers of this Court found that it would not be possible or realistic for the taxpayer to offer massage services without the use of the premises.

Both elements were interconnected. It would be impossible to purchase each of the elements separately and still end up with a useful service. The Federal Court of Appeal said that when examining this issue, it is important to look at it from the customer's perspective. The Federal Court of Appeal wrote at paragraph 7 of its decision, "[F]rom the customers perspective, the contractual relationship was with the appellant and not the masseuses".

[72] In *Dr. Brian Hurd Dentistry Professional Corp. v R* 2017 TCC 142 [Informal Procedure], Justice Campbell of this Court had to determine whether there was one supply of orthodontic treatment to a dental patient, as maintained by the respondent in that appeal, or two supplies, consisting of an orthodontic appliance and an orthodontic service.

[73] In holding that there was one supply, Justice Campbell wrote:

> 21. The facts in this appeal fully support the Respondent's position. The orthodontic appliance on its own is not a useful item nor are the maintenance and adjustment services on their own without the appliance. Neither the appliance nor the service on their own can achieve the patient's goal or objective of correcting or treating their dental issues. To constitute a useful treatment for the patient, both the appliance and service must be combined and supplied for the treatment to be successful. To use several of the descriptive adjectives employed in *O.A. Brown*, the appliance is so "interconnected" and "intertwined" with the services in the overall dental treatment that each are components necessary to the overall supply of orthodontic treatment. For the appliance to work properly and address each patient's dental issues, it requires the maintenance and adjustments devised specifically for that patient and administered by a dental professional over a period of time. An appliance on its own is of no value to a patient without the accompanying orthodontic services supplied by a dentist or orthodontist. If the appliance is attached to a patient's teeth without subsequent adjustments, it will be of no benefit in correcting the dental problems. Therefore, it is interdependent on the maintenance and adjustments over a period of time otherwise it would remain a useless item to the patient. Likewise, there can be no adjustments and corrections to the patients' problems without a prior installation of the appliance…
>
> 24. The true nature of the transaction between the dental professional and the patient, based not only on the facts before me but also based on the application of common sense, is the supply of an orthodontic treatment, comprised of the interdependent components of an orthodontic appliance and the related adjustment services, for a single consideration. One without the other is of no use in achieving a patient's objectives.

[74] In the case at bar, the Respondent is arguing that there are separate supplies made first, by MedSleep of the technical services to the patients, secondly, of the

Back-end Services made by MedSleep to the Sleep Physicians and thirdly, of the consultative and interpretation services supplied by the Sleep Physicians to the patients. For the reasons I have set out above the Agreements and the evidence before me simply do not support the Respondent's contention that the Back-end Services were supplied by MedSleep to the Sleep Physicians for the percentage of the professional fees allocated by the Agreements.

[75] As indicated by this Court in the *Drug Trading Co.* case, when considering the nature of supplies, it is necessary to apply common sense. When examining the relationship between MedSleep, the Sleep Physicians and the patients, common sense dictates that MedSleep and the Sleep Physicians work together to provide a single compound service to the patients referred to MedSleep by the family physicians of the patients. This is consistent with the wording of the Agreements.

[76] The patients referred by their family physicians come to MedSleep for consultation with respect to their sleep issues. Without the facilities, equipment, communication services, data collection and data scoring supplied by MedSleep the Sleep Physicians would not be able to perform consultative and interpretative services. Without those services, MedSleep would not be able to deliver the final reports and recommendations required by the referring family physicians. Without each of MedSleep and the Sleep Physicians working together to supply that which they can each supply to the patients referred to MedSleep, the patients could not receive the diagnostics and recommendations they require to resolve their sleep issues.

[77] In this sense, the services supplied by MedSleep and the services supplied by the Sleep Physicians to patients are all interconnected and intertwined. A patient would not be able to usefully acquire the patient intake and communication services, access to facilities and equipment, data collection and scoring services provided by MedSleep on their own and receive the diagnosis and treatment plans they require to properly treat their sleep issues. Similarly, patients would not be able to obtain the data interpretation and consultative services provided by the Sleep Physicians without the services supplied by MedSleep. Accordingly, together MedSleep and the Sleep Physicians combine to provide one single compound supply to patients.

c. How Should the Single Compound Supply of the Medical Services be Treated?

[78] It is MedSleep's position that where an overall service is comprised of a number of components which, together make a single compound supply, it is

necessary to identify the predominant element of that supply. It is MedSleep's view that such supply will then be taxed in accordance with that predominant element.

[79] In the case at bar, it is MedSleep's position that from the patient's perspective, the predominant element of the single compound supply is the supply of medical sleep services. Therefore, the single compound supply must be taxed in the same manner as such predominant element.

[80] I agree.

[81] As set out above, in his *River Cree* decision, Justice Graham wrote at paragraph 103:

> For a single compound supply, determine what the predominant element of the supply was. This analysis should focus on the purchaser's perspective of the supply. The supply will be taxed in the same manner as that predominant element (*Global Cash Access*; *Great-West Life*; *SLFI Group*).

[82] In order to determine what is the predominant element of any single compound supply, it is necessary to determine what gives the arrangement commercial efficacy ie. what is at the heart of the transaction. (See *Prospera Credit Union v His Majesty The King* 2023 TCC 65 at paragraph 29). In *Great-West Life Assurance Company v Her Majesty The Queen* 2016 FCA 316 at paragraph 50, the Federal Court of Appeal determined that the proper test is to decide which element of the supply was the part that resulted in payment to the supplier.

[83] As described above the evidence showed that what is at the heart of the transaction from the patient's perspective, or what part of the supply results in payment to the MedSleep (and the Sleep Physicians in accordance with the terms of the Agreements) is the overall medical sleep consultative services provided to patients, namely the diagnosis, testing and treatment of the sleep disorders that triggered the patient's referral to MedSleep by the patient's family physician.

[84] One issue in this case is that because of the integrated nature of the joint delivery of that medical sleep service, as discussed above, it is difficult to determine which exemption under the Act is the proper exemption to test for purposes of determining the proper treatment of the predominant element of the single compound supply provided jointly by MedSleep and the Sleep Physicians to patients.

[85] Subsection 123(1) defines an "exempt supply" as "a supply included in Schedule V". There are various potential exemptions available in Schedule V, each one intended to apply to a different set of circumstances or scenarios. For example, both sections 2 and 5 of Part II of Schedule V set out exemptions that, on first look, may apply in this case. Section 5 applies to a service rendered by a medical practitioner. Section 2 applies to a service made by the operator of a health care facility. Although MedSleep and the Sleep Physicians work in tandem to supply a single compound medical service, since the assessment at issue relates only to MedSleep, I have decided to test the applicability of the exemption that is potentially most applicable to MedSleep, which is the exemption available under section 2 of Part II of Schedule V. Only one exemption need apply for the single compound supply provided by MedSleep to be considered an exempt supply for purposes of the issue that is at the heart of this appeal.

[86] Section 1 of Part II, Schedule V states in part, as follows:

> ***health care facility*** means
>
> (a) a facility, or a part thereof, operated for the purpose of providing medical or hospital care, including acute, rehabilitative or chronic care, […]
>
> ***institutional health care service*** means any of the following when provided in a health care facility:
>
> (a) laboratory, radiological or other diagnostic services,
>
> (b) drugs, biologicals or related preparations when administered, or a medical or surgical prosthesis when installed, in the facility in conjunction with the supply of a service included in any of paragraphs (a) and (c) to (g),
>
> (c) the use of operating rooms, case rooms or anaesthetic facilities, including necessary equipment or supplies,
>
> (d) medical or surgical equipment or supplies
>
> (i) used by the operator of the facility in providing a service included in any of paragraphs (a) to (c) and (e) to (g), or
>
> (ii) supplied to a patient or resident of the facility otherwise than by way of sale,
>
> (e) the use of radiotherapy, physiotherapy or occupational therapy facilities,
>
> (f) accommodation,

> (g) meals (other than meals served in a restaurant, cafeteria or similar eating establishment), and
>
> (h) services rendered by persons who receive remuneration therefore from the operator of the facility;

[87] In *Riverfront Medical Evaluations Ltd v The Queen* [2001] G.S.T.C. 80, affirmed by the Federal Court of Appeal 2002 FCA 341, Justice Bell held that to determine whether a supply is exempt under section 2 of Part II, Schedule V of the Act, a court should consider whether the supply:

1. is a supply of an institutional health care service;

2. is made by the operator of a health care facility; and

3. is made to a patient of the facility.

[88] In *Riverfront*, the taxpayer operated an independent medical evaluation clinic and provided independent medical evaluation reports to insurance companies and lawyers. The taxpayer paid physicians to conduct patient examinations in the taxpayer's premises. The taxpayer's premises included examination rooms and all necessary equipment for examinations. The taxpayer's administrative personnel prepared patients' medical files.

[89] Justice Bell held at paragraph 28 of the decision, that the taxpayer supplied an institutional health care service because: "from paragraph (a) [of the definition of institutional health care service] diagnostic services were provided; from paragraph (c) the use of case rooms including necessary equipment or supplies was provided; from paragraph (h) services were rendered by physicians who received remuneration therefor from the operator of the facility, namely, the Appellant".

[90] Next, Justice Bell had to determine whether the supply was made by an operator of a health care facility. Justice Bell found that independent medical evaluations were medical care because the physicians followed the same examination process that they would have taken to treat ill patients, and the purpose of the examination of patients was to diagnose and evaluate them. Justice Bell held that the taxpayer operated a health care facility for the purpose of providing medical care because performing independent medical evaluations was the taxpayer's source of income. Further, at paragraph 27, Justice Bell held that "the patient of a physician practising in a clinic is regarded as a patient of that clinic. It is possible that both that physician and that clinic could be liable in a negligence action commenced by a

patient". Therefore, Justice Bell held that the supply made by the taxpayer to the patients was tax-exempt under section 2 of Part II, Schedule V of the Act.

[91] Applying the three tests set out by Justice Bell to the situation at hand:

1. MedSleep, in tandem with the Sleep Physicians supplied institutional health care services for purposes of the Act under both paragraphs (a) and (c) of the definition of institutional health care service. The medical sleep services supplied by MedSleep include diagnostic services to patients. Additionally, as part of the supply of medical sleep services, MedSleep provides patients with access to case rooms, including the necessary equipment and supplies owned by MedSleep.

2. The clinics owned by MedSleep in which the services at issue are supplied are health care facilities because the medical sleep services so supplied constitute "medical care". The medical sleep services provided by the administrative staff and technicians employed by MedSleep and the Sleep Physicians are supplied in a similar manner as they would have been provided in a hospital setting. The purpose of these medical sleep services is to diagnose and evaluate for medical treatment patients referred to MedSleep by their family physicians because they suffer from sleep related ailments. Further, MedSleep is the operator of these health care facilities. It owns or leases these facilities, and the equipment used inside of them. It employs the staff that communicates with the patients, organizes their end-to-end sleep study journeys, conducts their overnight stays and collects and scores their data. The technical fees and the portion of professional fees it earns as a result of the supplies it makes in its health care facilities are its source of income.

3. The patients who receive treatment at MedSleep's facilities are patients of MedSleep. The evidence shows that they are referred to MedSleep by their family physicians. MedSleep staff lead the patients through their end-to-end sleep study journeys and all services supplied to such patients during such journeys are supplied either at the clinics owned and operated by MedSleep or by video conference. Further it should be noted that in the Agreements between MedSleep and the Sleep Physicians, it is acknowledged by the parties that the patients treated by the parties under such Agreements are patients of MedSleep.

[92] Accordingly, the single compound service at the heart of this appeal, the provision of a medical service qualifies as an exempt supply pursuant to section 2 of Part II of Schedule V.

[93] If such service is an exempt supply, it cannot be a taxable supply for purposes of the Act. Subsection 123(1) defines "taxable supply" as:

> "taxable supply" means a supply that is made in the course of a commercial activity.

[94] Subsection 123(1) defines a "commercial activity" broadly as a business carried on by a person, except to the extent to which the business involves making exempt supplies.

[95] Accordingly, since the provision of the medical service by MedSleep is made in the course of making exempt supplies under section 2 of Part II of Schedule V, the provision of such service cannot be considered to be a taxable supply. The single compound service made by MedSleep, in tandem with the Sleep Physicians is an exempt supply.

[96] The answer to the first issue therefore is that MedSleep does not make separate taxable supplies of Back-end Services to the Sleep Physicians. Rather, MedSleep in tandem with the Sleep Physicians, makes a single compound supply of a medical service to the patients referred to MedSleep by the patient's family physicians. MedSleep is not required to collect GST/HST in respect of such services it so provides as such services constitute an exempt supply for purposes of the Act.

B. Are the Sleep Physicians Recipients?

[97] Secondarily, and in any event, the Sleep Physicians are not recipients for purposes of subsection 221(1). Therefore, MedSleep does not have an obligation to collect GST/HST from the Sleep Physicians under such provision.

[98] Subsection 123(1) defines "recipient" as follows:

> "**recipient**" of a property or a service means
>
> (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,
>
> (b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration, and

> (c) where no consideration is payable for the supply,
>
> > a. in the case of a supply of property by way of sale, the person to whom the property is delivered or made available,
> >
> > b. in the case of a supply of property otherwise than by way of sale, the person to whom possession or use of the property is given or made available, and
> >
> > c. in the case of a supply of a service, the person to whom the service is rendered,
>
> and any reference to a person to whom a supply is made should be read as a reference to a recipient of the supply.

I will examine each element of this definition in turn.

a. Are the Sleep Physicians Recipients under paragraph (a) of the Definition?

[99] The first issue is whether the Sleep Physicians are liable to pay consideration to MedSleep under the Agreements for a supply. It is the Respondent's position that the Sleep Physicians are so liable and therefore are recipients of services under paragraph (a) of the definition set out above. In the Respondent's view, MedSleep provides the Sleep Physicians with the Back-end Services and makes extensive marketing efforts which benefit the Sleep Physicians by increasing the number of patients the Sleep Physicians can see and decreasing the amount of time spent on each patient. This allows each Sleep Physician to operate more profitably. The Respondent says that under the Agreements, the Sleep Physicians paid for these services through payments calculated as a percentage of the professional fees paid to the Sleep Physicians for each consultation, Sleep Study interpretation or follow-up appointment. In the Respondent's view, this payment takes one of two forms. If the Sleep Physician receives his or her professional fees directly from a Provincial Health Insurance Plan, he or she pays MedSleep the agreed to percentage directly. If, on the other hand, MedSleep receives the professional fees from the Provincial Health Insurance Plan on behalf of the Sleep Physician, MedSleep withholds its agreed to percentage prior to transferring the remainder to the Sleep Physicians. Under the Respondent's characterization of the obligations under the Agreements, the Sleep Physicians are "recipients" under paragraph (a) of the definition of that term.

[100] I disagree with this characterization. First, as stated above, it is my view that MedSleep makes a single compound supply, in tandem with the Sleep Physicians to

patients. There is no separate supply made by MedSleep to the Sleep Physicians. Logic dictates that if MedSleep does not make supplies to the Sleep Physicians, then the Sleep Physicians cannot be expected to pay consideration for supplies that are neither provided nor owing to them.

[101] Secondly, the Agreements simply do not support an interpretation that the percentage of professional fees allocable to MedSleep represent consideration for supplies. The Agreements do not list any services or supplies to be made by MedSleep to the Sleep Physicians. Moreover, there is no language in the Agreements that would indicate that the professional fees allocable to MedSleep can be considered fees or any other form of consideration for unspecified services. Rather, as described above the clear wording of the Agreements indicate that such amounts are allocable to Med Sleep as part of fee sharing arrangements.

[102] In *Canadian Imperial Bank of Commerce v Her Majesty the Queen* 2021 FCA 96, the Federal Court of Appeal, following its decision in *Global Cash Access (Canada) Inc. v Her Majesty the Queen* 2013 FCA 269, confirmed that written agreements play a dominant role in determining the tax consequences under the Act. At paragraph 57 of that decision, Justice Webb wrote:

> To suggest that the agreement between the parties under which the consideration for the supply is payable should not play a dominant role in the determination of the tax implications arising under the Act is not consistent with the Act.

[103] Further at paragraphs 60 and 61 of his decision, Justice Webb reiterated that a taxpayer's *bona fide* legal relationships will be respected absent evidence of contrary legislation, deceit or sham, none of which are present in the case under consideration.

[104] In this case the wording of the Agreements does not support the Respondent's position. In the absence of a limited number of conditions such as deceit or sham, agreements must be interpreted in accordance with the actual wording of such agreements and not in accordance with what the parties may wish the wording to be. The Respondent did not produce any evidence to indicate that the parties either believed that the Agreements operated differently from the wording in such Agreements or acted in a manner that would indicate that the Agreements did not accurately capture their intentions. To the contrary each of Mr. Tsambourlianos and the Sleep Physicians who testified at trial indicated that the Agreements accurately set out their understanding of a fee sharing arrangement between MedSleep and the Sleep Physicians for the joint provision of services to patients. Accordingly, the

Sleep Physicians are not recipients under paragraph (a) of the definition of that term for purposes of the tax collection and remittance obligations in subsection 221(1).

b. Are the Sleep Physicians Recipients under paragraph (b) of the Definition?

[105] Paragraph (b) of the definition of the term "recipient" provides that where paragraph (a) does not apply and consideration is payable for the supply, the recipient is the person who is liable to pay that consideration. I have found that MedSleep does not make a supply to the Sleep Physicians. Rather, MedSleep makes a single compound supply to patients in tandem with the Sleep Physicians. There is consideration payable to MedSleep for such supply. There are two forms of such consideration. First, it is in the form of the technical fee payable by the applicable Provincial Health Insurance Plan on behalf of patients in British Columbia and Ontario and usually by private health insurance plans in the other Provinces in which MedSleep operates, in both cases, paid on behalf of patients in those Provinces. Secondly, consideration for the services supplied by MedSleep is in the form of the agreed upon allocation of professional fees payable by the applicable Provincial Health Insurance Plan on behalf of patients. Consideration for the single compound service supplied by MedSleep in tandem with the Sleep Physicians to patients, is not payable by the Sleep Physicians.

[106] It is true that there are situations where the Sleep Physicians receive the professional fees directly from the Provincial Health Insurance Plan and then pay the agreed upon percentage to MedSleep. However, since I have found that MedSleep does not provide services to the Sleep Physicians, such payment cannot logically be characterized as consideration. The Agreements provide that in such situations the Sleep Physicians collect such percentage of fees as agent for MedSleep. As discussed above, *bona fide* arrangements between parties that are not contrary to law and are not otherwise a sham must be respected. As previously discussed, the case law indicates that for tax purposes, a fee sharing arrangement as purported to have been entered into by MedSleep and the Sleep Physicians pursuant to the Agreements is effective for tax purposes.

[107] Accordingly, the Sleep Physicians are not recipients under paragraph (b) of the definition of that term for purposes of subsection 221(1). Consideration for the supply of the services provided jointly by MedSleep and the Sleep Physicians is neither paid nor payable by the Sleep Physicians to MedSleep.

c. Are the Sleep Physicians Recipients under Paragraph (c) of the Definition?

[108] Paragraph (c) of the definition of the term "recipient" is not applicable, as consideration is payable for the single compound supply made by MedSleep in tandem with the Sleep Physicians, as discussed above.

[109] Since the Sleep Physicians are not recipients of a taxable supply made by MedSleep, MedSleep is not required under subsection 221(1) to collect GST/HST from the Sleep Physicians.

V. CONCLUSION

[110] Accordingly, this appeal is allowed with costs, and referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that MedSleep did not make a taxable supply to the Sleep Physicians and was not required to collect and remit GST/HST in respect of supplies made to the Sleep Physicians during the Reporting Periods.

[111] The parties shall have until June 6, 2025 to reach an agreement as to costs, failing which MedSleep shall file submissions by June 30, 2025 and the Respondent shall file a written response by July 31, 2025. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received by these dates, then costs shall be awarded to MedSleep in accordance with the appropriate Tariff.

Signed this 6th day of May 2025.

"J. Scott Bodie"

Bodie J.

CITATION:	2025 TCC 70
COURT FILE NO.:	2021-1465(GST)G
STYLE OF CAUSE:	MEDSLEEP INC. v. HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 3, 4, 5 and 6, 2025
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DATE OF JUDGMENT:	May 6, 2025

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