Federal Court of Appeal | Cour d'appel fédérale

Date: 20250428

Docket: A-67-24

Citation: 2025 FCA 83

CORAM: **WEBB J.A.**
RENNIE J.A.
BIRINGER J.A.

BETWEEN:

NORTHBRIDGE COMMERCIAL INSURANCE CORPORATION

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on December 17, 2024.

Judgment delivered at Ottawa, Ontario, on April 28, 2025.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Northbridge Commercial Insurance Corporation (Northbridge) issued insurance policies to trucking companies that operated in Canada and the United States. The policies provided insurance coverage for accidents and other insurable events. Northbridge claimed input tax credits (ITCs) in relation to a portion of the GST/HST (which for ease of reference will be

referred to as GST) that it paid in respect of its general head office and overhead costs on the basis that it was making zero-rated supplies in relation to such policies.

[2] Section 2 of Part IX of Schedule VI of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA) prescribes that a supply made by a financial institution of a financial service related to an insurance policy will be a zero-rated supply to the extent that such policy relates to "risks that are ordinarily situated outside Canada" (paragraph 2(*d*)).

[3] The Tax Court of Canada found that "risks", for the purposes of paragraph 2(*d*) of Part IX of Schedule VI of the ETA, means the objects of the insurance, *i.e.*, the trucks in this case (2020 TCC 132) (the First TCC Decision, at paragraph 58). The Tax Court Judge also found, in paragraph 72 of his reasons, that Northbridge "should have made a separate apportionment for each policy on a vehicle-by-vehicle basis for the vehicles covered by that policy". Since the only evidence presented at the Tax Court hearing was global evidence, the Tax Court Judge found that Northbridge was only making exempt supplies and dismissed its appeals.

[4] The First TCC Decision was appealed to this Court. The only issue that was raised in that appeal was the meaning of "risks" for the purposes of paragraph 2(*d*) of Part IX of Schedule VI of the ETA. This Court found that risks, for the purposes of that paragraph, means the risks of claims arising from an accident or other insurable event (2023 FCA 211) (the First FCA Decision, at paragraph 45). The issue of how the ITCs should be determined was not raised in that appeal.

[5] Northbridge's appeal was allowed and the Judgment that was rendered included the following:

> The matter is referred back to the Tax Court to determine the amount of input tax credits that Northbridge is entitled to claim for each reporting period that is under appeal.

[6] Following the decision of this Court, the Tax Court Judge rendered a second decision (2024 TCC 10) (the Second TCC Decision). In paragraphs 8 and 9 of his reasons, the Tax Court Judge stated:

> [8] As I stated at paragraph 73 of my original decision, "[a]ll of the evidence presented at trial was global evidence. I do not have any specific evidence regarding the individual policies in issue...Without this evidence, it is impossible for me to determine whether the supply of any given policy was partly zero-rated. This lack of evidence is a sufficient basis for me to dismiss the appeals and I do so on that basis."
>
> [9] My conclusion on this point has not changed. The appeals are dismissed.

[7] In essence, the Tax Court Judge concluded that in order to determine the amount of ITCs to which Northbridge is entitled with respect to the GST paid in relation to its general head office and overhead costs, the extent to which each and every policy is zero-rated would have to be determined.

[8] The Tax Court Judge, in rendering this decision, stated:

> [7] The FCA was clear that that analysis does not involve looking at each insured vehicle individually, but rather at each insurance policy.

[9] In a footnote, he referred to paragraph 48 of the First FCA Decision:

> [48] Since "risks" means the perils covered by an insurance policy, the relevant question is to what extent does such policy relate to accidents (and other insurable events) that are usually situated or occur outside Canada. The insurance policy is for a fleet of trucks. The analysis is not a vehicle-by-vehicle analysis as proposed by the Tax Court Judge. Rather, it is an analysis of the policies issued by Northbridge.

[10] This paragraph is to be read in the context of the issue that was raised in the appeal from the First TCC Decision. The issue was the meaning of "risks" for the purposes of paragraph 2(*d*) of Part IX of Schedule VI of the ETA. The first sentence of paragraph 48 addresses how "risks" is to be interpreted for the purposes of paragraph 2(*d*) of Part IX of Schedule VI of the ETA which refers to a "supply … that relates to an insurance policy … to the extent that [such policy] relates to risks that are ordinarily situated outside Canada". The determination of the ITCs for the general head office and overhead costs was not an issue in the First FCA Decision. This paragraph does not stand for the proposition that the only means by which the ITCs could be determined would be by examining each and every policy and determining the extent to which each such policy was zero-rated.

[11] Northbridge has appealed this Judgment and for the reasons that follow I would allow this appeal.

I. Issue and Standard of Review

[12] The issue in this appeal is whether, to determine the amount of ITCs to which Northbridge is entitled with respect to the GST paid in relation to its general head office and overhead costs, it is necessary to determine the extent to which each policy is zero-rated.

[13] This is a question of statutory interpretation as it relates to the interpretation of certain provisions of the ETA. The standard of review is therefore correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

II. Analysis

[14] The supply of a particular insurance policy can, in part, be an exempt supply and a zero-rated supply. Section 2 of Part IX of Schedule VI provides, in part, that the following financial services are zero-rated supplies:

2 A supply made by a financial institution of a financial service that relates to an insurance policy issued by the institution (other than a service that relates to investments made by the institution), to the extent that	**2** La fourniture par une institution financière d'un service financier lié à une police d'assurance établie par l'institution, à l'exception d'un service lié aux placements de l'institution, dans la mesure où :
…	[…]
(*d*) [the policy] relates to risks that are ordinarily situated outside Canada.	***d*)** […] la police concerne des risques qui sont habituellement situés à l'étranger.
[Emphasis added.]	[Non souligné dans l'original.]

[15] To the extent that an insurance policy issued by Northbridge related to risks that were ordinarily situated outside Canada, Northbridge made a zero-rated supply. Generally, the characterization of a particular supply is relevant in determining whether tax will be imposed under the ETA on that particular supply when it is made. Tax is imposed under subsection 165(1) of the ETA on the recipient of a taxable supply and therefore the determination of whether tax is imposed is based on the particular property or service that is acquired by or provided to the recipient.

[16] However, whether the issuance of a particular insurance policy is an exempt supply, a zero-rated supply or, in part, an exempt supply and a zero-rated supply, the recipient of the supply of the policy does not pay any tax under the ETA. An exempt supply is not a taxable supply and therefore no tax is payable under subsection 165(1) of the ETA in relation to the supply of a policy, or the part thereof, that is an exempt supply. While a zero-rated supply is a taxable supply, the tax rate applicable to a zero-rated supply is 0% (subsection 165(3) of the ETA) and therefore no tax is payable by the recipient on the supply of the portion of the policy that is zero-rated. It should be noted that the comments concerning the tax arising on the issuance of an insurance policy are limited to the tax imposed by the ETA. Certain provinces, under provincial legislation, may impose a provincial sales tax on the supply of an insurance policy.

[17] While the tax payable by a recipient is determined based on the particular supply made to the recipient, the entitlement to an ITC for the GST payable on an acquisition of a particular property or service by a supplier is determined based on the business being carried on by that supplier.

[18] The general rule related to a claim for ITCs is set out in subsection 169(1) of the ETA. As noted by the Tax Court Judge in the First TCC Decision, subsection 141.02 of the ETA will also be relevant for the determination of the ITCs for Northbridge, a financial institution.

[19] In the Canada Revenue Agency (CRA) Bulletin B-106 — Input Tax Credit Allocation Methods for Financial Institutions for Purposes of Section 141.02 of the *Excise Tax Act* dated August 2011, the CRA provides a general overview of the interaction of sections 169 and 141.02 of the ETA:

> *Section 169 generally provides that when a person acquires property or a service, and tax in respect of the supply becomes payable or is paid without becoming payable at any time when the person is a registrant, the person may claim an ITC for the tax paid or payable to the extent that the property or service was acquired for consumption, use or supply in the course of the person's commercial activities where all of the other conditions for claiming an ITC are met.*
>
> *Section 141.02 provides clarification on determining the extent to which property or a service is for use in making taxable supplies for consideration, and includes provisions that apply to financial institutions that are qualifying institutions, provisions that apply to financial institutions that are not qualifying institutions, and provisions that apply to all financial institutions.*

[20] The relevant parts of the general rule in subsection 169(1) of the ETA are as follows:

169 (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the	**169 (1)** Règle générale — Sous réserve des autres dispositions de la présente partie, un crédit de taxe sur les intrants d'une personne, pour sa période de déclaration au cours de laquelle elle est un inscrit, relativement à un bien ou à un service qu'elle acquiert, importe ou transfère dans une province participante, correspond au résultat du calcul

amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:	suivant si, au cours de cette période, la taxe relative à la fourniture, à l'importation ou au transfert devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable :
A × B	A × B
where	où :
A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and	A représente la taxe relative à la fourniture, à l'importation ou au transfert, selon le cas, qui, au cours de la période de déclaration, devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable;
B is	B :
…	[…]
(*c*) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.	***c*)** dans les autres cas, le pourcentage qui représente la mesure dans laquelle la personne a acquis ou importé le bien ou le service, ou l'a transféré dans la province, selon le cas, pour consommation, utilisation ou fourniture dans le cadre de ses activités commerciales.

[21] In this appeal, the "A" in the formula in subsection 169(1) of the ETA would be the tax payable by Northbridge on its general head office and overhead costs (which would include the rent that it paid for its offices). There is no dispute concerning the tax payable by Northbridge on its general head office and overhead costs.

[22] The amount to be determined for "B" is a percentage based on the extent to which Northbridge acquired a particular property or service for consumption, use or supply in the course of its commercial activities.

[23] "Commercial activity" is defined in subsection 123(1) of the ETA. The relevant part of this definition is as follows:

commercial activity of a person means	***activité commerciale*** Constituent des activités commerciales exercées par une personne :
(*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,	***a)*** l'exploitation d'une entreprise (à l'exception d'une entreprise exploitée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées;
…	[…]

[24] A commercial activity is a business, except to the extent that the business involves the making of exempt supplies. Therefore, to the extent that Northbridge is making zero-rated supplies it is carrying on a commercial activity.

[25] There may, in some cases, be a certain property or service that is acquired for consumption, use or supply in relation to a supply of only one insurance policy. In that event, the extent to which that particular policy is zero-rated would be relevant in determining the amount

of the ITCs available in relation to the acquisition of that particular property or service for the purposes of subsection 169(1) of the ETA.

[26] However, the general head office and overhead costs are incurred as part of the overall business being carried on by Northbridge. Any property or service acquired as part of the general head office and overhead costs is not acquired solely to be consumed in relation to a particular insurance policy, but rather such property or service is acquired to be consumed or used in relation to all insurance policies issued by Northbridge.

[27] A simple example will illustrate the problem of trying to apply the general rule concerning ITCs to the individual policies issued by Northbridge. Northbridge stated that it issues approximately 5,000 policies each year. Assume that the GST that it pays for a particular reporting period for the property or services acquired for which it incurred its general overhead and office costs is $10,000. Assume that the extent to which a particular policy relates to risks that are ordinarily situated outside Canada is 30%. Therefore, even though the extent to which the supply of that particular policy is zero-rated is known, since it is only one out of 5,000 policies, examining that policy in isolation does not assist in determining, of the $10,000 of GST paid in relation to its general head office and overhead costs, what amount Northbridge is entitled to claim as an ITC.

[28] As such, it is far from clear why a determination of the extent to which each individual policy is zero-rated would have to be made to determine the ITCs to which Northbridge is

entitled in relation to its general head office and overhead costs. Since there are approximately 5,000 policies, this would mean that 5,000 separate determinations would have to be made.

[29] While examining each policy individually could lead to a determination of the extent to which Northbridge's overall business involves the making of exempt supplies and the extent to which it involves the making of zero-rated supplies, it is far from clear why this determination could not also be made based on "global evidence" concerning the overall business of Northbridge for the purpose of determining its ITCs on the property and services acquired in relation to its overall business.

[30] As a result, I do not agree that a determination of the ITCs to which Northbridge is entitled for the GST it paid on its general head office and overhead costs can only be made if there is a determination of the extent to which each and every policy issued by Northbridge is zero-rated.

[31] Since the Tax Court Judge in both the First TCC Decision and the Second TCC Decision dismissed Northbridge's appeal on the basis that it had not established that it was making any zero-rated supplies, he did not consider section 141.02 of the ETA.

[32] The Crown, in its memorandum in this appeal, submitted that the Tax Court Judge did not err in not considering section 141.02:

> 44. Without knowing which individual policies were partially zero-rated, the Appellant cannot succeed in demonstrating its commercial activity. Without the Appellant establishing what its commercial activity was, the Tax Court judge

> could not weigh in on the appropriateness of the Appellant's methodology. As such, the Tax Court judge made no error in dismissing the appeal without considering whether the 33.3% allocation complied with the Act, ss. 141.01(5) and 141.02.

[33] As noted above, a "commercial activity" is a business, except to the extent that the business involves the making of exempt supplies. Since Northbridge insured risks that were ordinarily situated outside Canada, it has demonstrated that it was carrying on a commercial activity. The only remaining question is the determination of the amount of ITCs to which Northbridge is entitled in relation to the GST payable on its general head office and overhead costs.

[34] Section 141.02 of the ETA applies to financial institutions. There are four types of inputs for the purposes of section 141.02 — direct inputs, excluded inputs, exclusive inputs and non-attributable inputs — informing the appropriate allocation method that is to be used by a financial institution in calculating its ITCs. In this appeal, the parties do not agree on the classification of the general head office and overhead costs. In particular, the Crown submits that rent is a direct input, but Northbridge submits that it is a non-attributable input.

[35] The classification of the property or service acquired by Northbridge as part of its general head office and overhead costs as direct inputs, excluded inputs, exclusive inputs or non-attributable inputs is an important step in applying section 141.02 of the ETA. Since the Tax Court Judge did not consider section 141.02 of the ETA, there is no decision with respect to the classification of the various property and services acquired by Northbridge as direct inputs, excluded inputs, exclusive inputs or non-attributable inputs. This classification is a matter for the

Tax Court to determine in considering the entitlement of Northbridge to ITCs under the ETA. Once this classification is done, the provisions of section 141.02 of the ETA that prescribe the methodology to be used to determine the extent to which the various inputs are consumed or used in making taxable supplies can be applied.

[36] As a result, I would allow this appeal with costs and set aside the Judgment of the Tax Court. I would remit the matter to the Tax Court to determine the amount of ITCs to which Northbridge is entitled in relation to the GST it paid on the acquisition of the property and services for which it incurred its general head office and overhead costs.

"Wyman W. Webb"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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