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Federal Court of Appeal decides that Visa services to CIBC are exempt financial services, not administrative services for GST/HST purposes

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On January 22, 2021 the Federal Court of Appeal (FCA) released its reasons in *Canadian Imperial Bank of Commerce v. The Queen*, 2021 FCA 10, overturning the decision of the Tax Court of Canada (the "TCC") and finding that services provided by Visa to CIBC were exempt from the GST/HST as financial services. The decision has important implications for what constitutes an exempt financial service under the *Excise Tax Act*, especially as this definition applies to issuers of credit cards.

The facts

CIBC, an issuer of Visa credit cards, sought rebates for tax paid in error on fees it paid to Visa for the supply CIBC received as a participant in the Visa payment system. CIBC sought these rebates on the basis that the supply that it received from Visa was an exempt supply of a financial service. The Minister of National Revenue denied the rebate claims.

In a typical transaction under the Visa payment system, a cardholder presents a Visa card to a merchant for payment, the merchant transmits an authorization request to an acquirer, the acquirer transmits the request to Visa, and Visa transmits the request to the card issuer (CIBC). The authorization process is nearly instantaneous. The system also provides for settlement of amounts owing by CIBC to Visa, Visa to the acquirer, and the acquirer to the merchant (net of interchange fees and chargebacks) on a daily basis. Visa provides a dispute resolution mechanism and also indemnifies its customers and cardholders against a variety of risks.

The TCC found that Visa's services "form an essential part of the ability for CIBC to offer credit card based services to their clients," and that they "[give] CIBC customers the ability to purchase goods and services anywhere in the world without CIBC having to individually contact each merchant to set up payment arrangements with them."

The TCC then characterized the supply as "the facilitation of the transactions between CIBC, CIBC customers, merchant acquirers and participating merchants," or "the providing of a payment platform and facilitating payments on that platform." As a result, the TCC concluded that paragraphs (a) and (l) or paragraph (i) of the definition of "financial service" applied.

However, the TCC also characterized the supply as "quintessentially administrative in nature" because "the benefit that Visa offered CIBC was cost saving and logistical simplification". As a result, the TCC concluded that the supply was excluded by paragraph (t) of the definition of

"financial service" and was therefore taxable.

The Court's analysis

At the FCA, the parties agreed that the services fell within the inclusionary paragraphs of the "financial services" definition (as the TCC had found). Thus, the case turned on whether the TCC had correctly found the services to be excluded from that definition as mere "administrative services", and if so, whether Visa was a "person at risk."

The FCA overturned the decision of the TCC on the basis that the trial judge made contradictory and irreconcilable findings concerning the nature and impact of the services Visa provided to CIBC. The FCA agreed with the trial judge, based on the evidence, that the services provided by Visa were linked to the financial services provided by CIBC to allow CIBC to offer credit card-based services to its clients. This finding was inconsistent with the trial judge's finding that the benefit that Visa offered CIBC was cost saving and logistical simplification. As a result, the FCA concluded that the trial judge made a palpable and overriding error by making contradictory and irreconcilable findings. Based on the factual findings, as properly understood, the FCA concluded that Visa provided CIBC with exempt financial services and not administrative services.

The Court also distinguished an earlier case, *Great West Life*, on the basis that the service provided by Visa had altered the very nature of CIBC's business in a way that the service provided in the *Great West Life* case had not. In coming to this conclusion, the Court rejected the Crown's argument that there is nothing unique about a credit card because "a loan is a loan is a loan". In the view of the Court, "to treat a credit card as no different from a line of credit is to ignore the fundamental attributes of a credit card – that it is a widely accepted method of payment that permits the cardholder to obtain virtually instantaneous access to credit, and to use that credit at the point of sale to purchase goods and services."

Given that the services were clearly not administrative services, the Court declined to consider whether Visa was a "person at risk" within the meaning of the regulations to the *Excise Tax Act*.

Conclusion

This case is a significant taxpayer win, confirming that the services provided by credit card networks such as Visa are financial services and not taxable. It also recognizes the fundamental importance of such services to financial institutions' credit card lines of business, as distinct from the lending of money more generally.