CITATION: CANADIAN MEDICAL PROTECTIVE ASSN. *v.* CANADA, 2009 FCA 115, [2010] 2 F.C.R. 368 A-243-08

Her Majesty the Queen (*Appellant*)

v.

The Canadian Medical Protective Association (*Respondent*)

INDEXED AS: CANADIAN MEDICAL PROTECTIVE ASSN. V. CANADA (F.C.A.)

Federal Court of Appeal, Desjardins, Nadon and Blais JJ.A.—Toronto, December 2, 2008; Ottawa, April 16, 2009.

Customs and Excise — Excise Tax Act — Appeal from Tax Court of Canada decision investment management fees paid by respondent exempt from GST, services falling under definition of "financial service", Excise Tax Act, s. 123(1) — Respondent retaining services of investment managers — Investment managers purchasing, selling securities through trading desks, brokers — Canada Revenue Agency holding services provided by investment managers not falling within definition of "financial service", fees thus not exempt from taxation — Tax Court of Canada reversing that decision, finding services exempt, constituting the "arranging for ... the transfer of ownership ... of a financial instrument", according to "financial service" definition, paras. (d),(l) — Investment managers analytical stock pickers, paid for know-how, ability to read market — "Arranging for" transfer of ownership of financial instrument not dominant activity — "Cause to occur", "give instructions", "make preparations for" equivalent terms — Research, analysis dominant character of investment managers' services, but purposeless if investment managers cannot give order to buy, sell, hold — Services provided by investment managers cannot be divided, end result thereof to "cause to occur a transfer of ownership ... of a financial instrument" — Consequently, investment managers' services exempt financial services — Appeal dismissed.

This was an appeal from a Tax Court of Canada decision finding that fees paid by the respondent to investment managers were exempt from GST because the services provided fell under the definition of "financial service" at subsection 123(1) of the *Excise Tax Act*.

The respondent retained the services of investment managers in order to invest its capital. The investment managers purchased and sold securities on behalf of the respondent either through their trading desks, or through brokers. In 2004, the respondent's rebate applications to recover GST on the fees charged by the investment managers were refused by the Canada Revenue Agency, which held that the services provided by the investment managers did not fall within the meaning of the definition of "financial service", and thus were not exempt from taxation. However, on appeal, the Tax Court of Canada concluded that those services were exempt from taxation because they constituted the "arranging for ... the transfer of ownership ... of a financial instrument", according to paragraphs (*d*) and (*l*) of the definition of "financial service".

The issue herein was whether fees paid by the respondent were exempt from GST because the services provided by the investment managers fell under the definition of "financial service" found in subsection 123(1) of the Act.

The Court examined the nature of the services delivered by the investment managers and the legal meaning of the term "arranging for".

Held, the appeal should be dismissed.

It is the nature of the services delivered by the investment managers that is at stake, not that of the investment managers and of the brokers. The investment managers are analytical stock pickers and are paid for their know-how and their ability to read the market. Although "arranging for" the transfer of ownership of a financial instrument is essential to investment managers, it is not the dominant activity. In determining the legal meaning of the words "arranging for", policy statements and other documents are too general to help. The equivalent terms "cause to occur", "give instructions" and "make preparations for" found in dictionaries are acceptable and

are as wide and as elastic as one wishes them to be. On the one hand, the dominant character of the investment managers' services is the research and analysis aspect of the trade. On the other hand, the research and analysis is purposeless if the investment managers cannot give an order to buy, sell or hold. Considered as a whole, the services provided by the investment managers cannot be divided. The end result of their services is to "cause to occur a transfer of ownership … of a financial instrument". Consequently, the investment managers' services are exempt financial services.

STATUTES AND REGULATIONS CITED

Bank Act, S.C. 1990, c. 46.

Excise Tax Act, R.S.C., 1985, c. E-15, ss. 123(1) "commercial activity" (as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10; 1997, c. 10, s. 1) "financial instrument" (as enacted by S.C. 1990, c. 45, s. 12; 1997, c. 10, s. 1), "financial service" (as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10; 1997, c. 10, s. 1; 2000, c. 30, s. 18; 2006, c. 4, s. 136), "taxable supply" (as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10), 165 (as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 31; 1997, c. 10, ss. 17, 160; 2006, c. 4, s. 3; 2007, c. 18, s. 7, c. 35, s. 184), Sch. V, Part VII, s. 1 (as enacted by S.C. 1990, c. 45, s. 18).

Financial Services (GST) Regulations, SOR/91-26, s. 4 (as am. by SOR/93-242, s. 2(F); 2001-61, s. 3).

R.R.O. 1990, Reg. 1015, s. 99.

Securities Act, R.S.O. 1990, c. S.5, s. 25 (as am. by S.O. 1994, c. 11, s. 359; 1999, c. 9, s. 199).

CASES CITED

CONSIDERED:

Royal Bank of Canada v. Canada, 2007 FCA 72, [2007] G.S.T.C. 18, affg 2005 TCC 802, [2005] G.S.T.C. 198, 2006 G.T.C. 91.

REFERRED TO:

General Motors of Canada Limited v. The Queen, 2008 TCC 117, 67 C.C.P.B. 290, [2008] G.S.T.C. 41, 2008 G.T.C. 256; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] W.W.R. 1.

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Goods & Services Tax: Notice of Ways and Means Motion, December 19, 1989: Canadian Tax Reports, Special Report No. 263: *Canadian Goods & Services Tax Reports No. 4*, Don Mills, Ont.: CCH Canadian Ltd., 1989.

Goods & Services Tax Technical Paper, August 8, 1989: Canadian Sales Tax Reports, Special Report No. 259, *Canadian Goods & Services Tax Reports No. 1*, Don Mills, Ont.: CCH Canadian Ltd., 1989.

GST/HST Policy Statement P-239, "Meaning of the term 'arranging for' as provided in the definition of 'financial service'", January 30, 2002, online: <http://www.cra-arc.gc.ca/E/pub/gl/p-239/p-239-e.pdf>.

GST Policy Statement P-119, "Trailer Commission Servicing Fees", February 22, 1994, online: <http://www.cra-arc.gc.ca/E/pub/gl/p-119/p-119-e.pdf>.

Merriam-Webster's Collegiate Dictionary, 11th ed. Springfield, Mass.: Merriam-Webster, 2003, "arrange".

Statement of Investment Policy for the Government of Canada. Ottawa: Department of Finance, January 2008, online: <http://www.fin.gc.ca/efa-cfc/SIP08_e.pdf>.

APPEAL from a decision of the Tax Court of Canada (2008 TCC 33, [2008] G.S.T.C. 88) ruling that fees paid by the respondent for investment management services are exempt from GST because those services fall under the definition of "financial service" found in subsection 123(1) of the *Excise Tax Act*, R.S.C., 1985, c. E-15. Appeal dismissed.

APPEARANCES

Bonnie F. Moon for appellant.

Ian S. MacGregor, Q.C. and *D'Arcy A. Schieman* for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Osler, Hoskin & Harcourt LLP, Toronto, for respondent.

The following are the reasons for judgment rendered in English by

[1] DESJARDINS J.A.: This appeal of a decision of Bowman C.J. of the Tax Court of Canada (the Tax Court Judge) reported at 2008 TCC 33, [2008] G.S.T.C. 88, was heard consecutively with appeal A-136-08, *General Motors of Canada Ltd. v. Canada*, 2008 TCC 117, 67 C.C.P.B. 290, rendered by Campbell J., also of the Tax Court of Canada. The appeal in the above case was the first of the two appeals heard by this Court.

[2] The issues are related but since variations exist between the two cases, separate reasons for judgment are rendered in each appeal.

[3] At issue in the case at bar is whether fees paid by the respondent, the Canadian Medical Protective Association (the CMPA), to certain investment managers for the periods ranging from October 15, 2001 to October 15, 2003 and from January 1, 2002 to March 31, 2004, are exempt from GST [Goods ans Services Tax] because they are a "financial service" [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10; 1997, c. 10, s. 1; 2000, c. 30, s. 18; 2006, c. 4, s. 136] under the definition found in subsection 123(1) of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the Act).

THE FACTS

[4] The facts are not in dispute and can be found in the reported decision. For the purpose of this appeal, the salient facts follow.

[5] CMPA is a not-for-profit body corporate that is engaged in, among other things, providing professional liability protection to licensed medical practitioners in Canada as a mutual defence organization. The amounts received by CMPA from its member physicians form part of its reserve for claims.

[6] CMPA retains the services of investment managers who, on a fully discretionary basis, invest these amounts in two types of accounts: segregated funds and pooled funds.

[7] About 75% to 80% of the funds are segregated. Segregated funds are those that are not commingled with the funds of other investors. The remaining funds are pooled with those of other investors. A "segregated fund" does not refer to the placement of monies by an investment manager

in a separate legal entity such as a trust fund/ mutual fund, etc. On the other hand, the "pooled funds" consist of certain mutual fund trusts in which the CMPA invests capital and receives units of the mutual fund. The investment managers are either the trustee of the fund or a management entity related to the trustee.

[8] The investment managers are afforded full discretion to manage the funds. They purchase and sell securities on behalf of the CMPA, although they are guided by certain prudential investment guidelines referred to as a Statement of Investments, Policies and Goods (SIP&G). The SIP&G is a governance document which addresses the manner in which the fund assets are to be invested and defines the management structure and procedures to be adopted for the ongoing operation of the fund.

[9] The execution of the trades is arranged through either the trading desks of the investment managers or through brokers.

[10] A trading desk was thus described (evidence of Anthony Gage, A.B., Vol. 4, Tab 9, pages 221–222):

Q. Could you explain to the Court what a trading desk is.

A. A trading desk, and here I will use the fixed income side; it is made up of nine individuals who in fact trade the portfolios on various mandates and they are responsible for, in their particular case, interestingly enough, both the selection and execution function. So it is built into one individual.

[11] Transaction fees on the purchase and sale of securities are included as part of the cost of acquiring the security or as a deduction from the proceeds of disposition of the security.

[12] The fees earned by the investment managers are not based on the number or volume of transactions. Fees are set by references to the size of the portfolio under management and are payable even if fee transactions took place in a billing period. For these services, investment managers' fees and GST are charged and effectively paid by the CIBC Mellon, as custodian trustee, with trust money, once CMPA authorizes the payments.

[13] Pursuant to Ontario's *Securities Act*, R.S.O. 1990, c. S.5 (OSA), a discretionary investment manager is required to register with the Ontario Securities Commission as an "adviser", a term defined in section 25 [as am. by S.O. 1994, c. 11, s. 359; 1999, c. 9, s. 199] therein. By virtue of section 99 of Regulation 1015, R.R.O. 1990, "advisers" are classified into particular categories to include (i) "investment counsel" and (ii) "portfolio manager". The "investment counsel" category is applicable for a person or company "engaged in giving continuous advice as to the investment of funds on the basis of the particular objectives of each client." The "portfolio manager" category is applicable for a person or company "registered for the purpose of managing the investment portfolio of clients through discretionary authority granted by one or more clients."

[14] The investment managers with whom the CMPA contracted were registered under the "portfolio manager" category.

THE DECISION UNDER APPEAL

[15] On May 6, 2004, CMPA filed two rebate applications to recover GST on the fees charged by the investment managers. The first claim covered the period from October 15, 2001, to October 15, 2003. The second claim covered the period from January 1, 2002, to March 31, 2004.

[16] Both claims were disallowed by the Canada Revenue Agency (CRA). The CRA ruling held that:

The supply is primarily one of providing professional investment advice and funds management.… The services provided by the investment service provider do not fall within any of the paragraphs of the definition of 'financial services' in subsection 123(1) of the *Excise Tax Act*.… Accordingly, the registrant [CMPA] was the recipient of a taxable supply and was correctly charged GST pursuant to subsection 165(1) of the *Excise Tax Act*. (J11)

[17] CMPA appealed.

[18] The issue before the Tax Court Judge was whether the fees paid by CMPA to investment managers were exempt from GST because they are "financial service[s]" under the definition of subsection 123(1) of the Act.

[19] At paragraph 42 of his reasons, the Tax Court Judge stated:

The question is where, if anywhere, the services performed by the IMs for CMPA fall in the definition of financial services in subsection 123(1) of the *ETA*. The initial question is one of fact: what service the IMs perform to earn the fees? Once that question is answered, the ultimate question becomes one of law: does that activity fall within the definition?

[20] The Tax Court Judge concluded that the services performed were an exempt supply because they came under the definition of "financial service" of paragraphs 123(1)(*d*) and (*l*) of the Act, and under paragraphs 123(1)(*c*) and (*l*) in the case of securities lending. He based his conclusion on a finding that the investment management services were provided under full discretionary powers, that no advice was sought by or given to under paragraph 123(1)(*p*) of the definition of "financial service", that the service supplied by the investment managers was not the expertise and that the discretionary purchase and sale of securities did not come under paragraphs 123(1)(*q*) or (*t*) of the definition of "financial service".

[21] The Tax Court Judge distinguished the decision of Campbell J. in *General Motors of Canada Ltd. v. Canada* (the GMCL case) mentioned above, a decision which had just been released prior to the delivery of his own judgment. According to him, the GMCL case was "factually far more complex" and there was a great deal of control exercised by General Motors of Canada Ltd. in that case as opposed to the finding in the case at bar where investment managers had full discretion to operate.

[22] The most relevant paragraphs of Bowman C.J.'s reasons for judgment are the following (at paragraphs 43–44, 46–49):

My factual determination is this: the IMs are retained to buy and sell on behalf of the appellant, in their unfettered discretion, a particular group of securities, whether fixed income or Canadian or U.S. equities. They are expected to do so with skill and expertise. The IMs are carefully chosen, taking into account their experience, past performance and expertise. They are terminated if their performance does not meet the appellant's expectations. They are given full discretion within the limits of the group of securities comprising their mandate and within the constraints of the appellant's SIP&G.

They are not paid to give advice and do not do so except in the very limited circumstances where they may suggest that the appellant's SIP&G be modified to permit a greater flexibility in investment, for example to change the percentage of a portfolio that can be held in provincial bonds. They report to the appellant on a monthly basis with respect to purchases and sales they have made. They do not seek the appellant's prior approval for purchases and sales that they make. Their fees are based upon a percentage of the value of the securities in the portfolio. They are not brokers. They execute the trades in securities by instructing brokers to do so. The securities are held in the name of the custodian whose role is essentially passive.

…

There are two points that I think should be made at this juncture. I can see no justification for drawing a distinction between the services performed by the IMs in respect of segregated funds and those performed in

respect of pooled funds. Segregated funds are not commingled with the assets of other investors. They are kept separate and the IMs buy and sell them in accordance with the discretionary powers given them under the Investment Management Agreement. The pooled funds were funds in which the IMs invested the appellant's funds that were pooled with other investors' funds. The properties in which the appellant invested in the pooled funds were of two types: interests in limited partnerships and units of mutual fund trusts.

Second, I think it is essential to distinguish between the quality of the service provided and the nature of the service. Counsel for the respondent put great emphasis upon the skill, expertise and experience of the IMs that the appellant retained. I do not question that the IMs were skilful and expert. Nonetheless, it is inaccurate to say that the appellant was buying and paying for skill and expertise. One does not buy these qualities in the abstract, divorced from the service that is being provided. When one retains the services of a physician, a lawyer, an engineer, a stockbroker or an accountant, each of these professionals provides a service that is defined by their particular area of expertise — medical services, financial services, legal services and so on. The services may be provided skilfully and expertly or their supply may be made incompetently. Whether they supply the particular professional service badly or well the nature of the service remains the same.

I think the services performed by the IMs for CMPA fall within the definition of financial services by reason of paragraphs (d) and (l) of the definition because they constitute "the arranging for … the transfer of ownership … of a financial instrument". See *Royal Bank v. R.*, at paragraphs 9 and 12. There was some evidence that the appellant also engaged in securities lending. To the extent that it did the fees also fall within paragraphs (c) and (l).

Since I have concluded that the services fall within paragraphs (c) or (d) and (l), I turn to the second part of the analysis, the exclusion in paragraphs (p), (q) and (t). [Emphasis added.]

[23] The Tax Court Judge, at paragraph 48 of his reasons, did not indicate what definition of the words "arranging for" he adopted. He simply relied on a decision of this Court in *Royal Bank of Canada v. Canada*, 2007 FCA 72, [2007] G.S.T.C. 18, a decision I will comment on in my analysis.

THE LEGISLATIVE SCHEME

[24] Section 165 [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 31; 1997, c. 10, ss. 17, 160; 2006, c. 4, s. 3; 2007, c. 18, s. 7, c. 35, s. 184] of the Act imposes GST on a "taxable supply". A "taxable supply" [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10] is defined in subsection 123(1) of the Act to be a supply made in the course of commercial activity. "Commercial activity" [as enacted by S.C. 1990, c. 45, s. 12; 1993, c. 27, s. 10; 1997, c. 10, s. 1] of a person in turn is defined in subsection 123(1) to exclude the making of exempt supplies by the person.

[25] Exempt supplies are set out in Schedule V of the Act. Section 1 [as enacted by S.C. 1990, c. 45, s. 18] of Part VII of Schedule V exempts from taxation "[a] supply of a financial service".

[26] A "financial service" is defined, in part, in subsection 123(1) of the Act as follows:

123. (1)…

"financial service" means

(*a*) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,

(*b*) the operation or maintenance of a savings, chequing, deposit, loan, charge or other account,

(*c*) the lending or borrowing of a financial instrument,

(*d*) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,

(*e*) the provision, variation, release or receipt of a guarantee, an acceptance or an indemnity in respect of a financial instrument,

(*f*) the payment or receipt of money as dividends (other than patronage dividends), interest, principal, benefits or any similar payment or receipt of money in respect of a financial instrument,

…

(*l*) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (*a*) to (*i*), or

…

but does not include

…

(*p*) the service of providing advice …

(*q*) the provision, to an investment plan (as defined in subsection 149(5)) or any corporation, partnership or trust whose principal activity is the investing of funds

…

(*t*) a prescribed service; [Emphasis added.]

[27] The relevant regulatory provisions of the *Financial Services (GST) Regulations*, SOR/91-26, for the purposes of paragraph (*t*) of the definition of "financial service" in subsection 123(1) of the Act, are as follows [s. 4 (as am. by SOR/93-242, s. 2(F); 2001-61, s. 3)]:

4. …

(2) Subject to subsection (3), the following services, other than a service described in section 3, are prescribed for the purposes of paragraph (*t*) of the definition "financial service" in subsection 123(1) of the Act:

(*a*) the transfer, collection or processing of information, and

(*b*) any administrative service, including an administrative service in relation to the payment or receipt of dividends, interest, principal, claims, benefits or other amounts, other than solely the making of the payment or the taking of the receipt.

(3) A service referred to in subsection (2) is not a prescribed service for the purposes of paragraph (*t*) of the definition "financial service" in subsection 123(1) of the Act where the service is supplied with respect to an instrument by

(*a*) a person at risk,

(*b*) a person that is closely related to a person at risk, where the recipient of the service is not the person at risk or another person closely related to the person at risk, or

(*c*) an agent, salesperson or broker who arranges for the issuance, renewal or variation, or the transfer of ownership, of the instrument for a person at risk or a person closely related to the person at risk. [Emphasis added.]

[28] If the service supplied by the investment managers falls within any of paragraphs (*a*) to (*m*) of the definition of "financial service", it is an exempt supply, unless it is excluded by any of paragraphs (*n*) to (*t*). On the other hand, if the service does not fall within any of paragraphs (*a*) to (*m*), it is a taxable supply.

[29] The term "financial instrument" [as enacted by S.C. 1990, c. 45, s. 12; 1997, c. 10, s. 1] is also defined in the Act, but nothing turns on this definition.

THE STANDARD OF REVIEW

[30] The key issue at stake is the meaning to be given to the word "arranging" in paragraph 123(1)(*l*) of the Act. This is essentially a question of law. The standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8 ff.).

THE ISSUE—THE CONTENTION OF THE PARTIES

[31] Both parties recognize that the service of arranging for the purchase and sale of securities is a service included in paragraphs 123(1)(*d*) and (*l*) of the Act which refers to "arranging for … the transfer of ownership … of a financial instrument"; "*prendre les mesures en vue d'effectuer … le transfert de propriété … d'un effet financier*".

[32] Hence, as a minimum, both parties agree that no GST is payable on brokers' fees because the service brokers supply is a financial service.

[33] The matter which is in dispute is whether the term "arranging for" ("*prendre les mesures*") in paragraphs 123(1)(*d*) and (*l*) of the Act covers the service supplied by investment managers.

[34] The appellant says it does not. She claims that Parliament treated the services supplied by the investment managers differently from those supplied by the brokers. She claims that the Tax Court Judge over-expanded the meaning of the words "arranging for" which, she submits, should be read according to its ordinary grammatical meaning and no more. She cites as authority the *Concise Oxford Dictionary of Current English*, 9th ed., Oxford: Clarendon Press, 1995, at page 68, which gives the following meaning to the word "arrange", namely "cause to occur", and "give instructions".

[35] The respondent submits that the Tax Court Judge gave to the word "arranging for" the meaning consistent with the jurisprudence of this Court in (*Royal Bank of Canada v. Canada*, above). CMPA argues that under the *Royal Bank* case, more than one person or group of persons can be "arranging for" the supply of a "financial service". At paragraph 57 of its memorandum of fact and law, CMPA argues the following:

> This Court's decision in *Royal Bank* clearly contemplates a finding that two parties may be "arranging for" the transfer of the same security. In *Royal Bank*, the Bank (party #1) was found to have made an exempt supply by "arranging for" Royal Mutual Funds Inc. ("RMFI") (party #2) to "arrange for" the sale of securities of various Royal Bank Mutual Fund Trusts and Corporations (party #3) to retail investors (party #4). In other words, both the Bank and RMFI were "arranging for" the selling of securities by the Mutual Fund Trusts and Corporations to retail investors.

ANALYSIS

[36] Three points should be made at the outset.

[37] Firstly, I accept the Tax Court Judge's remark that there is no justification for drawing a distinction between the services performed by the investment managers in respect of segregated funds and those performed in respect of pooled funds (reasons for judgment, at paragraph 46).

[38] Secondly, the term "expertise" should be clarified.

[39] In her amended reply to the notice of appeal, at subparagraph 6(*a*) the appellant says that:

… the over-arching purpose of hiring an investment manager ("IM") related to the IM's expertise in selecting profitable investment products and determining when to trade or sell these products.

[40] The term "expertise" does not relate to the individuals themselves. It relates to their training or specialty as a professional group. There is no question that CMPA has retained the services of highly competent investment managers, but whether, as individuals, they are competent or not is irrelevant to the issue at stake. What needs to be determined is the nature of the service supplied. To put it another way, we must understand what kind of services investment managers, with their special training or specialty, have to offer that attracts others, individuals and corporations, to retain their services.

[41] The Tax Court Judge understood well, in my view, the distinction between individual expertise and professional training when he stated at the end of his paragraph 52:

The service is not the expertise. The service is whatever it is, whether it be provided expertly or inexpertly. The degree of skill with which a particular service is provided does not determine the nature of the service.

[42] Thirdly, at paragraph 48 of his reasons the Tax Court Judge relies on the decision of this Court in *Royal Bank*, above, as the basis for his conclusion that the services provided by the investment managers are "financial services" under paragraphs 123(1)(*d*) and (*l*) of the Act.

[43] A close look at the *Royal Bank* decision is in order.

[44] In that case (as explained in 2005 TCC 802, [2005] G.S.T.C. 198, Bowie T.C.J.), the Royal Bank (the Bank) entered into contracts with Royal Mutual Funds Inc. (RMFI), the Royal Trust Company and the Royal Trust Corporation of Canada whereby the Bank provided to RMFI what was called "branch services" in order to assist RMFI in carrying out functions of distribution and management of mutual funds securities within certain limits defined by the regulators. RMFI was required to be and was licensed by the provincial securities commissions to carry out such activity. As noted at paragraph 6 of the decision, the distribution of mutual fund securities was a highly regulated activity. Banks were precluded from distributing them by the provisions of the *Bank Act*, S.C. 1991, c. 46.

[45] The "branch services" in question were thus defined in the Master Servicing Agreement (MSA) signed between RMFI, the Bank and the other signatories (see *Royal Bank*, 2005 TCC 802, at paragraph 7):

"Branch Services" means the provision of Personnel, branch offices, computer services and other necessary services of the [Bank] to permit the sale of Royal Trust Mutual Funds and RoyFunds and continuing customer service.

[46] The Bank had consistently taken the position that the branch services were taxable supplies. GST was collected and input tax credits (ITCs) were claimed. It was not in dispute that if the branch services were financial services, they were exempt services. The tax would have been paid in error by the Bank and the ITCs would also have been claimed in error.

[47] The Minister assessed the Bank on the basis that the branch services fell within paragraphs (*d*) and (*l*) of subsection 123(1) of the Act. The Bank's position was that the services supplied to RMFI were administrative services excluded from the definition of "financial service" by paragraph (*t*) ("prescribed service").

[48] Bowie T.C.J., at 2005 TCC 802, rejected the Bank's argument. He accepted the *Canadian Oxford Dictionnary*'s [2nd ed. Toronto: Oxford University Press, 2004] definition of "arrange" ("plan or provide for"; "cause to occur") and concluded that the service that the Bank provided to

RMFI "was that of arranging for the distribution of mutual funds, together with providing ongoing customer service, including responding to customers' inquiries and completing surrender documents for customers when requested to do so". He said at paragraph 15 of his reasons:

> There is no basis in the evidence upon which I could apportion the consideration between arranging for sale of units and the continuing customer service; nor did either party suggest that there was anything other than a single supply involved. To the extent that the evidence dealt with it at all, it suggests that arranging for sale of mutual funds was the dominant element of the activity. [Emphasis added.]

[49] This Court at 2007 FCA 72 paragraph 12 confirmed by saying:

> The services provided by the Appellant were much more than clerical in nature and advice. It was agreed by the parties that the services should be treated as a single supply of services and not be broken down. It is obvious that the dominant and, we would say essential, characteristic of this supply of services by personnel duly licensed in conformity with the regulatory scheme was the selling of securities on behalf of RMFI, i.e. the distribution of the units of the Funds. [Emphasis added.]

[50] The Bank personnel had, in effect, two masters: the Bank and the RMFI. The Court was called upon to determine the nature of the services the Bank personnel delivered. Both parties agreed that the services should be treated as one single supply and not be broken down. Moreover, the evidence suggested that the selling of securities was the dominant character of the service supplied.

[51] In the case at bar, it is the nature of the service delivered by the investment managers which is at stake, not that of the investment managers and of the brokers. There is no agreement between the parties in the case at bar that the two services should not be broken down. The dominant character of the investment management services is also in dispute.

[52] I find that the *Royal Bank* case is of no assistance.

[53] I will therefore examine the nature of the services delivered by the investment managers.

[54] I will begin with the facts.

[55] The trading desk of the investment managers called by CMPA at trial consisted of individuals who would select the securities to be acquired or disposed of and execute the trading. Other investment managers issue instructions to buy and sell and the broker would execute the order. The evidence shows that investment managers are hired to think smart, to read the market and to beat the market in both good and bad times. They are analytical stock pickers, burrowing through financial statements and engaged in laborious research in relevant fields in order to discover hidden gems and detect poor stocks. It is on account of their know-how in the selection or selling of securities that they are paid, somewhat generously, on a percentage basis by reference to the size of the portfolio under management. The more successful they are in their choice of securities, the better the result. And if the value of the portfolio increases, the amount of money they receive increases. Investment management services entail a special training and the exercise of judgment in order to successfully deal with complex and ever-changing market conditions.

[56] The transfer of ownership of financial instruments is the end result of the exercise. "Arranging for" the transfer of ownership of a financial instrument, i.e., give instructions, cause to occur or issue buying and selling orders to the brokers is infinitesimal in terms of skill and time involved. The issuance of the order represents, however, an essential and vital part of the investment managers' activity but it is not the dominant one. The skill shown in the pick, i.e., the research necessary for the preparation of the buying or selling order, is the core of the investment managers' activity and the *raison d'être* of their being hired. The quality of the pick is the trademark of their profession.

[57] The legal question is the following: How should this activity as a whole be classified under subsection 123(1) of the Act?

[58] What legal meaning is to be given to the words "arranging for" of paragraph 123(1)(*f*) ("*prendre les mesures* [*pour*]") and to the words "the service of providing advice" ("*les services de conseil*") in paragraph 123(1)(*p*) of the Act?

[59] I find that the policy statements and various other documents referred to by the respondents, namely GST Policy Statement P-119 – Trailer Commission Servicing Fees, dated February 22, 1994; GST/HST Policy Statement P-239 – Meaning of the term "arranging for" as provided in the definition of "financial service", dated January 30, 2002; Michael Wilson, Department of Finance, "Goods and Services Tax: Notice of Ways and Means Motion", *Canadian Goods and Services Tax Reports No. 4*, (December 19, 1989); Michael Wilson, Department of Finance, "Goods and Services Tax Technical Paper", *Canadian Goods and Services Tax Reports No. 1*, (August 8, 1989), are not useful: either they are too general or the examples described are not those of the case at bar, or they assert propositions without demonstrating their well-foundedness.

[60] The *Concise Oxford Dictionary of Current English* lists equivalent terms as "cause to occur", "give instructions". The *Merriam-Webster's Collegiate Dictionary* [11th ed. Springfield, Mass.: Merriam-Webster, 2003] refers to "make preparations for", "plan". The French phrase "*prendre des mesures*" refers to "*prendre les dispositions, les mesures pour*".

[61] I find that the words "give instructions", "make preparations for", "*prendre les dispositions pour*" are all acceptable and are as wide and as elastic as one wishes them to be.

[62] On the one hand, there is the world of a difference between the services of the investment managers and those of a broker who generally accomplishes a more mechanical type of work. If I were to retain the dominant character of the investment managers' services, the research and analysis aspect of the trade would be the dominant character of the services they supply.

[63] On the other hand, the research and analysis aspect of the trade will be purposeless if it does not end with a buy or sell order or a "hold" decision. The final order is an essential characteristic of the management of the funds by the investment manager. Otherwise, the investment manager does not manage at all.

[64] I find that, considered as a whole, the services performed by investment managers cannot be divided. It is a mix. They do not provide advice, since there is no one to provide advice to except themselves. The end result of their services is to "cause to occur a transfer of ownership … of a financial instrument". They fall within paragraphs 123(1)(*d*) and (*l*) of the Act.

[65] As a result, the services they provide are exempt financial services.

[66] I would dismiss this appeal with costs.

NADON J.A.: I agree.

BLAIS J.A.: I agree.