



[2022] 2 F.C.R. D-14

CUSTOMS AND EXCISE

EXCISE TAX ACT

Appeal from Tax Court of Canada decision (2021 TCC 25) determining respondent entitled to deduct input tax credits (ITCs) incurred with respect to orthodontic appliances provided to patients — Issue whether provision of orthodontic appliances separate supply for purposes of Act (eligible for ITCs) or component of supply of orthodontic services (not eligible for ITCs) — Appellant submitting appliances, services are single supply of orthodontic services as previously determined in *Dr. Brian Hurd Dentistry Professional Corporation v. The Queen*, 2017 TCC 142 — In *Hurd*, Tax Court had applied *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40 (T.C.C.) to come to that conclusion — Tax Court in present matter not adopting this line of reasoning, instead undertaking textual, contextual and purposive interpretation of relevant provisions of Act, concluding orthodontic appliances, orthodontic services clearly intended by Parliament to be separate supplies — Before Tax Court, appellant argued appliances, services intertwined, single supply of orthodontic service — Whether Tax Court erred in concluding *O.A. Brown* test not applicable — Supply of orthodontic appliance listed in Act, Sch. VI, thus qualifying supply for zero-rating by virtue of definition of “zero-rated supply” in Act, s. 123(1) — Supply of orthodontic service included in Act, Sch. V, thus qualifying supply as exempt under definition of “exempt supply” in Act, s. 123(1) — Respondent entitled to recover ITCs with respect to zero-rated supplies but not exempt supplies — While courts routinely apply *O.A. Brown*, Parliament’s intent must override *O.A. Brown* where legislative intent clear, as it is in this case — In the case of a supply of orthodontic appliances and orthodontic services, which are typically supplied together, the fact that one has zero-rated status and the other has exempt status strongly suggests that this was intentional and that a supply of an orthodontic appliance is intended to be zero-rated even when accompanied by orthodontic services — Here, Tax Court undertook detailed textual, contextual and purposive interpretation of provisions at issue, concluded that Parliament intended that provision of orthodontic appliance is separate zero-rated supply, thus eliminating any need to apply *O.A. Brown* test — Tax Court did not err in so finding — Appeal dismissed.

CANADA V. DR. KEVIN L. DAVIS DENTISTRY PROFESSIONAL CORPORATION (A-117-21, 2023 FCA 76, Woods J.A., reasons for judgment dated April 12, 2023, 15 pp + 3 pp.)