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	September 01, 2023		
	01 septembre 2023		
Court		File No.:	
		Kyla Chisholm	
TOR		1	

**FEDERAL COURT OF APPEAL**

B E T W E E N:

**AMEX BANK OF CANADA**

Appellant

and

**HIS MAJESTY THE KING**

Respondent

**NOTICE OF APPEAL**

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

September 1, 2023

Issued by: \_\_\_\_\_  
(Registry Officer)

Address of local office: 180 Queen Street West, Toronto, Ontario, M5V 3L6

TO: Attorney General of Canada  
Department of Justice  
Tax Law Services  
120 Adelaide Street West, Suite 400  
Toronto, ON  
M5H 1T1

**APPEAL**

**THE APPELLANT APPEALS** to the Federal Court of Appeal from the Judgment of the Honourable Justice R. Hogan of the Tax Court of Canada dated June 27, 2023, in the matter of *Amex Bank of Canada v. His Majesty the King*, Court File No. 2019-871(GST)G.

In dismissing the appeal with respect to the input tax credits claimed by the Appellant in respect of supplies by the Appellant under its membership rewards program (the “MRP”) in the period January 1, 2002 through December 31, 2012, the Tax Court Judge failed to follow this Court’s guidance in *Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 96 (the “CIBC Decision”). The Tax Court Judge failed to properly consider the relevant agreement between the parties under which the consideration for the supplies is payable and consequently erred in characterizing the supplies made by the Appellant for the purposes of the *Excise Tax Act* (Canada) (the “Act”) and therefore, entitlement to input tax credits thereunder.

The Tax Court Judge misconstrued the relevant agreements, considered irrelevant factors, referred to agreements that were not in the trial record, and considered the perspective of the wrong recipient of the supply at issue. This caused the Tax Court Judge to err in characterizing the supplies made to cardmembers under the MRP as a single supply of the extension of credit (which is an exempt supply of a financial service under the Act).

**THE APPELLANT ASKS** that this Honourable Court:

1. allow this appeal with costs in this Court and the Tax Court of Canada;
2. set aside the Tax Court's Judgment; and,
3. grant such other relief as it considers appropriate.

**THE GROUNDS OF APPEAL** are as follows:

1. the Tax Court Judge erred in law by failing to apply the relevant legal test as set out by this Court in the CIBC Decision as regards to the characterization of a supply for the purposes of the Act, and more specifically erred by:
  - (i) misinterpreting the relevant agreements and referring to agreements that were not before him;
  - (ii) characterizing the supplies made to the cardholders (*i.e.* the relevant recipient) by considering the perspective of the supplier (*i.e.* the Appellant) and parties who were not recipients under the relevant agreement (*i.e.* merchants accepting the charge card); and
  - (iii) introducing a financial statement analysis test to displace the contractual agreements between the relevant parties;
2. the Tax Court Judge erred in law and fact in his application of the common law test from *Calgary (City) v. Canada*, 2012 SCC 20, to determine whether the supplies at issue constituted a separate taxable supply from the tax-exempt supply of the extension of credit to the cardmember;
3. the Tax Court Judge erred in law in determining that the Appellant was not entitled to input credits by ignoring taxable supplies made by the Appellant and misapplying the input tax credit allocation rules in the Act;
4. the Tax Court judge erred in law by ignoring certain uncontested evidence of the Appellant's first trial witness without actually assessing the witness' credibility;

5. in finding that none of the purposes of the Appellant's activities was to promote the endeavours of the participants in the MRP, the Tax Court Judge made a palpable and overriding error;
6. in finding that payments made by cardmembers for enrolment in the MRP and for the purchase of MRP points was "nominal", the Tax Court Judge made a palpable and overriding error; and
7. such other grounds as counsel may advise and this Honourable Court may allow.

**THE APPELLANT RELIES, *inter alia*, on:**

1. *Federal Courts Act*: subsection 27(1.1); and
2. *Excise Tax Act*: subsection 123(1) "business", "commercial activity", "exempt supply", "financial service", "supply", "taxable supply"; sections 141.01, 169 and 181.

September 1, 2023

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