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Via email: [Lalith.kottachchi@fin.gc.ca](mailto:Lalith.kottachchi@fin.gc.ca)

Lalith Kottachchi  
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Finance Canada  
140 O'Connor Street  
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Dear Mr. Kottachchi

**Re: Proposed changes to the GST/HST provisions of the *Excise Tax Act***

We write on behalf of the Commodity Tax, Customs and Trade Law Section of the Canadian Bar Association (CBA Section) in response to the 2014 Budget announcements, and Finance Canada's request for views on the proposed changes to the GST/HST provisions of the *Excise Tax Act* (ETA).

The CBA is a national association representing over 37,500 jurists, including lawyers, Québec notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The CBA Section comprises lawyers from across Canada who deal with law and practice issues relating to commodity tax, customs and trade remedy matters.

**Section 156 Proposals**

*Filing Requirements for Existing Elections* – Under the proposals to the closely related groups provisions in section 156 of the *ETA*, we are concerned that the limited window for filing existing elections (namely the 2015 calendar year) is too short.

Further, as currently worded, the new provisions are ambiguous in their application to late-filed existing elections, or indeed, the application of section 156 relief itself for any periods *prior to* filing the section 156 election. For example, would the current section 156 proposals provide complete section 156 relief for the 2015 calendar year if a closely related group filed an existing election in December 2015?

The effective date language in proposed section 156 is different from the 1991 effective date language, and from the effective date language in the current section 150 election. The English and

French language versions of proposed subsection 156(4)(a) are significantly different, with the English version appearing to connote a “prospective election” only:

“(4) An election under subsection (2) ... shall (a) be made in prescribed form ... and specify the day (in this subsection referred to as the “effective day”) on which the election or revocation is to become effective; ...”

This same connotation does not appear to exist in the French version:

« (4) Le choix conjoint fait par un membre déterminé donné d’un groupe admissible et un autre membre déterminé du groupe et la révocation du choix par ceux-ci:  
(a) d’une part, sont faits en la forme déterminée par le ministre, contiennent les renseignements requis par celui-ci et précisent la date de leur entrée en vigueur (appelée « date d’entrée en vigueur » au présent paragraphe); »

Similarly, if an election was valid under the old rules but was not filed under the new rules (i.e., by January 2016), could the parties to the election be assessed for failing to charge and collect GST/HST in the past (e.g., in 2013)? If that is in fact intended, the CBA Section believes this would not be a fair tax policy result.

Assuming this retroactive effect of the new rules can be adequately clarified in the context of existing section 156 elections filed under the new rules, the CBA Section proposes that the filing window for existing section 156 elections be extended to the period between the announcement date and December 31, 2016. Finance Canada should also clarify that if these elections are filed within that window, they are deemed to have been filed on January 1, 2015.

*Legislative Gap* – The current wording of subsection 6(7) of the Notice of Ways and Means Motion may leave a legislative gap. Subsections 6(6) and 6(7) use different language. For example, subsection 6(6) says “Subsections (1) and (3) come into force on January 1, 2015”, and subsection 6(7) says “Subsection (2) applies to any supply made after 2014.” The intent of the different wording is unclear. The coming into force language should be uniform.

*Minister’s Power to Accept Late Filed Elections* – While seeming to allow the Minister the power to accept a late-filed election, we request some clarification in the wording of subparagraph 156(4)(b)(ii). It currently provides (for the Minister’s discretionary powers) that an election shall be “filed with the Minister in prescribed manner on or before ... any day after the particular day that the Minister may allow”. What is the rationale for departing from similar language in subsection 167(1.1) of the *ETA*? It may be more economical to say: “filed with the Minister in prescribed manner on or before ... any day that the Minister may allow”.

*Multiple Filing Requirements* – As currently worded, the section 156 election appears to require multiple filed elections in single closely held corporate groups. The CBA Section proposes that Finance Canada amend the wording of the election to allow for a single election to be executed by multiple members of a closely held group, for filing by a single member of that group. This approach would reduce the administrative burden and reduce the chances of technical non-compliance.

*Joint and Several Liability* – The CBA Section does not believe the proposed extension of joint and several liability to persons acting on the basis of an invalid election, in proposed paragraph 156(5)(b), is good tax policy. These persons should be in no worse tax position than any other supplier or purchaser operating in non-compliance with the *ETA* provisions.

*Hastened Application of Enhanced Access to Section 156* –The enhanced access to the section 156 election in the proposed rules is generally a welcome development. The CBA Section suggests that Finance Canada explore whether there is any way to accelerate the enhanced availability of same to a date prior to January 1, 2015, and ideally beginning with the announcement date.

### **Section 241 Proposals (Intent to Register Provisions)**

The proposals do not provide an appeal right, and without commenting on the appropriate court for resolving this matter, the CBA Section suggests that a full right of appeal on facts and law be afforded to persons registered on an involuntary basis under these provisions.

### **Joint Venture Proposals**

The CBA Section proposes that the Joint Venture (JV) rules clarify that the election can apply to the initial acquisition of property by the JV (e.g., real property, tangible property, intangible property), as well as the ongoing operation of the JV. This is critical to the effective operation of a JV for GST/HST purposes as it will avoid requiring the beneficial owners of such property (in bare trust situations, for example) to register for purposes of the acquisition when registration would not be required of the beneficiaries for purposes of the ongoing operation of the JV under the expected new rules. The CBA Section recommends that the new JV rules apply broadly and expressly include application to the acquisition of all property underlying a proposed joint venture such that the GST/HST applicable to the transaction is reportable by the operator and not the co-venturers.

The CBA Section welcomes further discussions on these and other related points (e.g., application and expansion of the JV rules to expressly permit operators that are bare trusts and nominee corporations).

The CBA Section appreciates the opportunity for dialogue with Finance Canada and looks forward to continuing to provide input.

Yours truly,

*(original signed by Noah Arshinoff for Cyndee Todgham Cherniak and Robert G. Kreklewetz)*

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