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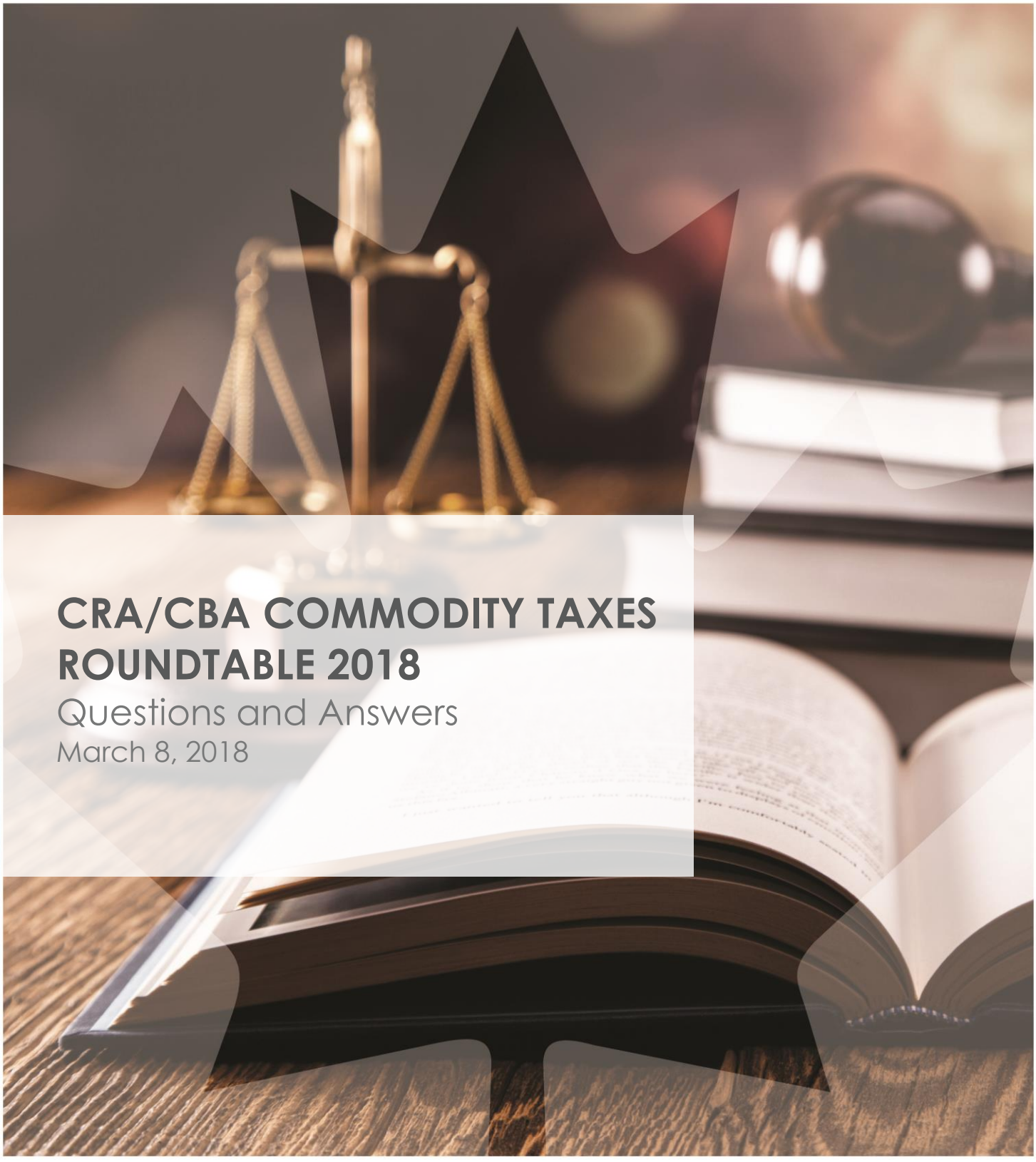

CRA/CBA COMMODITY TAXES ROUNDTABLE 2018

Questions and Answers

March 8, 2018

Canada

The Canada Revenue Agency (CRA) always welcomes the opportunity to discuss commodity tax issues with representatives of the Canadian Bar Association (CBA).

The following comments provided during our meeting represent our general views with respect to the subject matter and do not replace the law found in the Excise Tax Act (ETA) and regulations. These general comments are provided for your reference and do not bind the CRA with respect to a particular situation. Since our comments may not completely address a particular situation, you may wish to refer to the ETA and regulations, or contact any CRA GST/HST rulings centre for additional information. All references to legislative provisions in our comments are references to the ETA unless otherwise noted.

A ruling should be requested for certainty in respect of any particular GST/HST matter. For more information on making a ruling request, refer to GST/HST Memorandum 1-4, Excise and GST/HST Rulings and Interpretations Service. To make a technical enquiry on the GST/HST by telephone, call 1-800-959-8287.

CBA members located in the province of Quebec, who wish to make a technical enquiry or request a ruling related to the GST/HST, may contact Revenu Quebec by calling 1-800-567-4692.

Exception: The CRA administers the GST/HST and the QST for listed financial institutions that are selected listed financial institutions (SLFIs) for GST/HST or QST purposes, or both, whether or not they are located in Quebec. If you wish to make a request for a ruling related to the application of the GST/HST or QST to these listed financial institutions, refer to GST/HST Memorandum 1-4, Excise and GST/HST Rulings and Interpretations Service, for more information. To make a technical enquiry related to these listed financial institutions by telephone, call 1-855-666-5166.

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1. Actor and Director Registration for GST/HST Purposes

Facts/Background

It is common for U.S. and foreign actors and directors (that is, non-residents) to film at locations in Canada. The actors and producers are often paid large sums of money (that is, in excess of $30,000) in respect of the services performed in Canada – which are provided on an independent contractor basis.

Questions

a) What is the Canada Revenue Agency's (CRA's) position with respect to whether the actors and directors must register for GST/HST purposes?

b) If the recipient of the supply is a non-resident, would the actors/producers be required to register?

c) What carrying on business factors would result in the CRA taking the position that an actor must register for GST/HST purposes and charge, collect and remit GST/HST from a Canadian recipient? How would the CRA determine the consideration paid or payable with respect to the services performed in Canada on which GST/HST must be charged, collected and remitted?

CRA Comments

a) Non-resident actors and directors making taxable supplies in Canada in the course of carrying on business in Canada who are not small suppliers are required to register for GST/HST purposes.

   Whether a non-resident person such as a non-resident actor or director is carrying on business in Canada and required to be registered for GST/HST purposes is a question of fact that requires consideration of all relevant facts.

b) The residency of the recipient is not a relevant factor in determining whether the director or actor is carrying on business in Canada and required to be registered for GST/HST purposes.

c) GST/HST Policy Statement P-051R2, Carrying on Business in Canada identifies various factors that are considered when determining whether a non-resident person is carrying on business in Canada for GST/HST purposes in a particular situation. The importance or relevance of a given factor in a specific case depends upon the nature of the business activity under review and the particular facts and circumstances of each case.

   With respect to the supply of a service, factors that are of particular relevance are whether the service is performed in Canada, and whether the service is being performed by the supplier in Canada through its agents or employees. P-051R2 includes several examples that involve supplies of services.

The determination of the value of consideration on which a GST/HST registrant non-resident actor or director must charge, collect and remit the GST/HST for a taxable (other than zero-rated) supply of a service made in Canada would be made based on a thorough review of all relevant facts, including the agreements between the parties.

2. Section 268

Facts/Background

We asked this question last year (Q. 25): "In section 268 of the Excise Tax Act (ETA), does "settle" include a gift made after the trust was first settled? For example, X settles a trust in 2013 with property, then in 2015 X contributes more property to the trust. The case law on trusts is unclear as to whether this second contribution is "settling", and thus it is unclear whether section 268 will apply. Please advise whether section 268 will apply to the second and any subsequent contributions of property to the trust."

The response given was unclear. It stated that section 268 applies "at any time a settlor settles property on an inter vivos trust". However, the CRA did not directly answer the question, since it used the word "settles", which is the very word we are trying to interpret.

Questions

If X settles a trust in 2013 with property and then in 2017 X contributes more property to the trust, is the contribution in 2017 considered to fall under the word "settles"?

If X settles a trust in 2013 with property, and then in 2017 Y contributes property to the trust, is the contribution by Y considered to fall under the word "settles", and is Y considered a "settlor"?

CRA Comments

Section 268 of the ETA provides for GST/HST purposes that where a person settles property on an inter vivos trust, the person is deemed to have made and the trust is deemed to have received a supply by way of sale of the property, and the supply is deemed to have been made for consideration equal to the amount determined under the Income Tax Act to be the proceeds of disposition of the property.

Any transfer of assets into the trust by the original settlor (such as X in the question) upon its establishment or at a subsequent point in time, would be considered to fall within the meaning of the term "settles" and be subject to section 268.

We are currently reviewing the issue of whether contributions made by another person (such as Y in the question) would fall within the meaning of the term "settles" and be subject to section 268. With respect to the meaning of "settlor", section 268 does not refer to a "settlor".

3. In Vitro Diagnostic Kits

Facts/Background

It has been the CRA's position that supplies of in vitro diagnostic test kits designed for laboratory use are subject to GST/HST. However, the Tax Court of Canada (TCC) decided in Centre Hospitalier Le Gardeur et al v The Queen, 2007 TCC 425, that certain in vitro diagnostic test kits are zero-rated pursuant to paragraph 2(a) of Part I of Schedule VI to the Excise Tax Act (ETA). In GST/HST Notice 248, Application of the GST/HST to Supplies of In Vitro Diagnostic Test Kits (December 2009), the CRA indicated:

> The CRA is currently reviewing the impact of the TCC decision, which is dated July 20, 2007. In the interim, the CRA has adopted an administrative position which is in keeping with the TCC decision. This position applies from the date of the TCC decision until such time as the CRA review in this matter is completed.

Question

It is now over 10 years since the TCC decision. Has the CRA's review been completed?

CRA Comments

The TCC decided in Centre Hospitalier Le Gardeur et al v The Queen 2007 TCC 425 (Le Gardeur) that certain in vitro diagnostic test kits are zero-rated pursuant to paragraph 2(a) of Part I of Schedule VI to the ETA. In Le Gardeur, the CRA's position was that the supply of an IVDD must be defined by the sum of its components. The sum of the components of an IVDD results in a single or unique supply of a new product. The CRA's position was also that an IVDD was a composite supply of a product that had both a drug component and a device component, as such it would not be a drug specifically included in Schedules C or D to the Food and Drugs Act. The TCC did not agree and concluded that the supply was a single supply of the main ingredient in the mixture.

Further to the TCC decision, the CRA adopted an interim administrative position, described in GST/HST Notice 248, Application of the GST/HST to Supplies of In Vitro Diagnostic Test Kits (Notice 248), whereby the supply of an in vitro diagnostic test kit is zero-rated pursuant to paragraph 2(a) of Part I of Schedule VI to the ETA if it is for use in the diagnosis of a disease in humans and it contains one or more of the following substances (which were listed in the TCC decision):

- monoclonal and polyclonal antibodies;
- blood and blood derivatives;
- snake venom; and
- micro-organisms that are not antibiotics.

Notice 248 indicates that the CRA's administrative position is temporary and that the CRA will announce its decision with respect to the application of the GST/HST to in vitro diagnostic products once an in-depth review of the matter has been completed. The CRA has issued rulings that applied the TCC's decision for these products while the review of the matter has been underway.

The Le Gardeur decision used the definition of "drug" from the Food and Drugs Act (FDA) when determining what was being supplied in that case. The FDA was amended in 2014 and one of the changes made was to the definition of "device" in section 2 of the FDA. This definition was amended to include in vitro reagents. The Le Gardeur decision concluded that the supply of a mixture of substances is characterized as a supply of the main substance (paragraph 60) in the mixture. The change to the definition of "device" in the FDA may impact the tax status of IVDDs where the main ingredient is an in vitro reagent, which is now defined as a device in the FDA.

As we have already noted, the application of the definition of "drug" from the FDA to section 2 of Part I of Schedule VI to the ETA was an important part of the Le Gardeur decision. There have been other cases since Le Gardeur that have also addressed the definition of "drug" in respect of the zero-rating provisions in section 2 of Part I of Schedule VI to the ETA. These cases are Hedges v. The Queen, 2014 TCC 270 (Hedges) and Patterson Dental Canada Inc. v The Queen, 2014 TCC 2443 (Patterson).

Hedges involved the tax status of the supply of cannabis. In this case, the TCC concluded that for purposes of section 2 of Part I of Schedule VI to the ETA, "drug" has the same meaning as the definition of "drug" in the FDA. This case was appealed to the Federal Court of Appeal (FCA). In its decision, the FCA discussed the legal versus illegal sales of cannabis and did not address the issue of the definition of "drug".

Patterson is currently before the TCC and the appellant is arguing the application of the Le Gardeur decision. This case does not involve the supply of IVDDs but it centers on the classification of the supply of a drug that contains a zero-rated active ingredient. More specifically, the question is whether the supply of an anaesthetic solution containing epinephrine is a supply of epinephrine and is therefore zero-rated pursuant to subparagraph 2(e)(x) of Part I of Schedule VI to the ETA. The decision in this case may have an impact either limiting or expanding the decision from Le Gardeur.

Since the Le Gardeur decision, the FDA has changed, and the Patterson case that is building its argument on the reasoning of Le Gardeur has been ongoing for the last 6 years. That case was heard in September 2017 and we are awaiting the decision. We anticipate that the decision might bring some clarification to the extent of the application of the principle stated in Le Gardeur and could allow the CRA to finalize its administrative decision.

4. Application of Paragraph 168(3)(c) to P3 Projects

Facts/Background

For "P3" infrastructure projects (public private partnerships), the application of paragraph 168(3)(c) of the Excise Tax Act (ETA) causes difficulty.

Typically, the project agreements are long term (for example, 35 to 40 years) and include the design, construction, financing and ongoing maintenance of a public facility such as a hospital, prison, bridge, highway, or similar significant public infrastructure.

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Paragraph 168(3)(c) appears to require a supplier to charge "accelerated" GST/HST for the value of consideration applicable to the service of the construction of real property. But for such infrastructure projects, the value of consideration for the service of construction is rarely charged as a distinct amount from the other services provided.

We are aware of CRA audits that have challenged the amounts of GST/HST that parties have collected in good faith in their attempt to comply with paragraph 168(3)(c). Parties have applied for rulings to the CRA, which have taken years to obtain and some of the advice obtained from the CRA has been contradictory or difficult to reconcile from project to project. The result causes unfairness and uncertainty at the expense of taxpayers.

Questions

a) Does the CRA have plans to publish clear guidance in the near future to the industry on how to apply paragraph 168(3)(c) to infrastructure projects?

b) If not, what guidance can the CRA provide at this time for projects where the project agreements do not specify any particular amount as payable in consideration for the service of constructing real property, but where real property construction is an element of the supply?

CRA Comments

a) P3 agreements are diverse and complex in nature, and as a result, the application of section 168 of the ETA to a particular P3 agreement does not necessarily apply to another P3 agreement.

   Generally, the diversity and complexity among P3 agreements does not lend itself to the CRA publishing clear guidance on how to apply paragraph 168(3)(c) to P3 projects. That being said, we will keep this request in mind, and as we review P3 agreements as part of the GST/HST rulings process we will look for common patterns and factors that influence our decision to take one position as opposed to another with respect to the application of section 168. If this lends itself to publishing clear guidance in the future, then we will certainly undertake to do so at that time.

   The parties to a P3 agreement are encouraged to seek a GST/HST ruling in the early stages to obtain certainty as opposed to waiting until the construction is substantially completed.

b) Generally, paragraph 168(3)(c) can be said to "accelerate" the payment of GST/HST for the supply of a construction service in respect of real property where all or any part of the consideration for the supply has not been paid or become due by the last day of the calendar month immediately following the calendar month in which the construction is substantially completed. For simplicity in responding to this question, we will refer to that time as the substantial completion date. However, where the value of the consideration (or the part) that has not been paid or become due at the substantial completion date is not ascertainable, subsection 168(6) provides that the payment of GST/HST on that consideration (or that part) is deferred until such time as the consideration (or part) becomes ascertainable.

P3 agreements may provide for monthly service payments that are payable over the course of decades, and that typically include an amount that is consideration for the supply of the construction service. However, instead of specifying a fixed dollar amount or fixed percentage that is the amount of the consideration for the supply of the construction service, such P3 agreements may use a complex formula to calculate that amount. The formula often relies on a fixed dollar amount as a base, but then applies one or more variable factors or amounts that cannot be determined until the time the monthly service payment is calculated and becomes payable. From a GST/HST perspective, the fact that these variable factors or amounts may not be known until several years later when the calculations are made raises the question as to whether the value of the consideration (or part) for the supply of the construction service is ascertainable (or unascertainable) at the substantial completion date.

In some cases, the nature of the formula is that the unknown variable factors and amounts have an impact on calculating the part of the monthly service payment that is consideration for the supply of the construction service. Generally, paragraph 168(3)(c) would not apply with respect to the part of the monthly service payment that is consideration for the supply of the construction service where that part of the consideration is not ascertainable. At the time each monthly service payment is calculated and becomes payable (that is, at the time the part of the monthly service payment that is consideration for the construction service is ascertainable), the supplier must account for GST/HST on the monthly service payment and the amount included therein that is consideration for the supply of the construction service in accordance with subsection 168(6).

In other cases, it is possible that the unknown variable factors and amounts have no impact on calculating the part of the monthly service payment that is consideration for the supply of the construction service. Instead, it is possible that said unknown variable factors and amounts may be adjustments to the consideration (or part) or relate to amounts that are not in respect of the supply of the construction service. Generally, if this is the case, the consideration (or part) that is the consideration for the supply of the construction service is ascertainable and that GST/HST is payable on the substantial completion date.

These are the types of things we are currently looking for when we review P3 agreements. Although we appreciate the industry wanting clear guidance with respect to applying paragraph 168(3)(c), it is not always possible to apply a single position to such a diverse and complex range of agreements.

5. 35% ITCs for Orthodontists

Facts/Background

Dr. Brian Hurd Dentistry Professional Corporation v. The Queen, 2017 TCC 142, highlights a problematic situation, where the CRA had reached an administrative "agreement" with the Canadian Dental Association (CDA) to permit input tax credits (ITCs) for orthodontists at a rate of 35% in certain circumstances, but did not publish the agreement or the circumstances where such ITCs were permitted, in any publication. Rather, the CRA apparently relied on the CDA to disseminate the information that was issued by GST/HST Rulings to its membership.

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When CRA auditors determined that orthodontists were not following the agreement, orthodontists (like Dr. Hurd) were assessed and denied ITCs. When tax advisors requested copies of the agreement from the CRA, they learned that in fact no documented agreement could be found, but there was a CDA newsletter reporting that an agreement had been reached, and the CRA relied on that newsletter as the basis for the agreement.

In Dr. Brian Hurd Dentistry Professional Corp., the Tax Court of Canada (TCC) determined that the CRA's administrative agreement was not compliant with the current state of the law. We understand that the CRA now intends to follow the Dr. Brian Hurd Dentistry Professional Corp. case.

Questions

a) Will the CRA be following the decision in Dr. Brian Hurd Dentistry Professional Corp., and denying all ITCs to orthodontists? Or will the CRA ignore this decision as being under the Informal Procedure and continue its policy of allowing 35% ITCs? If the latter, will auditors be clearly instructed to adhere to this policy, since if a similar case is appealed it is likely the TCC will reach the same decision and deny all ITCs?

b) Will the CRA publish a notice to the orthodontic industry explaining the current rules following the case, and also explaining exactly what the agreement was? Will the current rules include a complete set of grandfathering rules for ITCs for the past?

c) Considering its past published administrative position, will the CRA allow orthodontists and dentists to comply with this decision only on a go forward basis?

CRA Comments

The CRA agrees with the conclusions reached by the TCC in the case of Dr. Brian Hurd Dentistry Professional Corporation v. The Queen, 2017 TCC 142.

The CRA had previously concluded that the above-referenced administrative arrangement was no longer appropriate for various reasons, including:

- There is a growing body of case law relating to the characterization of supplies confirming that a transaction should be looked at as a whole rather than broken out into separate components or constituent elements;
- The GST/HST legislation does not contain any provisions for the separation of the elements of what constitutes a single supply so as to provide different tax treatment to each element as described in the administrative arrangement;
- While an artificial tooth or orthodontic appliance is an important aspect of dental treatment, the diagnostic, assessment and treatment services provided by dentists are not accessories or incidental, nor are they separate supplies. Any property provided is integrally connected to, and an input into, the provision of a treatment service;
- The administrative arrangement frustrates the GST/HST legislation, which provides that health care services are exempt supplies. Further, the administrative arrangement is an anomaly and is not in keeping with the CRA's approach with respect to other health care services and professions;

- The administrative arrangement, which permits dentists to claim ITCs based on a percentage of general operating expenses, is contradictory to the ITC provisions of the Excise Tax Act (ETA). Generally, ITCs are only available for the GST/HST paid or payable on property and services acquired, imported or brought into a participating province for consumption, use, or supply in the course of a commercial activity. A commercial activity excludes the making of an exempt supply. Also, the ETA does not provide for a fixed percentage rate to be applied/used in determining the ITCs claimable on GST/HST paid or payable.

The CRA agrees with the TCC that to constitute a useful treatment for a patient, both the orthodontic appliance and orthodontic services must be combined and supplied together. The combination of the orthodontic appliance and treatment is a single supply of an orthodontic treatment (that is, a service), rather than a zero-rated supply of an orthodontic appliance, or multiple supplies. In this case, the supply of the orthodontic treatment was rendered to an individual by a medical practitioner and the supply was exempt pursuant to section 5 of Part II of Schedule V to the ETA (and not excluded from exemption by virtue of sections 1.1 and 1.2 of Part II of Schedule V to the ETA).

As to the consequences of the decision, the Excise and GST/HST Rulings Directorate has informed other CRA stakeholders (including officials with the Domestic Compliance Programs Branch) that the administrative arrangement will remain in effect until further notice. The administrative arrangement will continue to apply where a dentist or dental corporation follows the terms of the arrangement: the dentist identified the two separate supplies, for example, the invoice issued to the patient identifies the consideration for the supply of the orthodontic appliance or artificial tooth separately from the consideration for the supply of the dental service, and the ITC claim relates to mixed-use purchases (to make both taxable and exempt supplies) such as overhead and general operating expenses and certain direct expenses or inputs (for example, personal property such as arch wires used exclusively to fabricate orthodontic appliances). The administrative arrangement does not include ITCs for capital property.

However, because it is an administrative arrangement, if a dentist has not followed the terms of the administrative arrangement; for example, the dentist considered their supplies to be exclusively zero-rated orthodontic appliances when in fact dental treatments were provided, did not separately identify on the invoice to the patient the consideration for the supply of the orthodontic appliance or artificial tooth and the consideration for the supply of the dental service in order to determine the extent of the dentist's commercial activity as well as perform a year-end reconciliation based on actual figures to support its ITC claim, the CRA will not find itself bound by the arrangement. Therefore, no ITCs will be allowed based on the principles of that arrangement.

The CRA intends to apply the Hurd decision on a prospective basis. The CRA recognizes that given the circumstances, it will be necessary to communicate appropriate guidance to affected stakeholders (including CRA officials), and to provide a period of time allowing industry to transition away from the administrative arrangement. The CRA is currently preparing a publication in keeping with the principals set out in the Hurd decision which will explain the application of the GST/HST to the services rendered by dentists and orthodontists and which will discuss the ITC entitlement of dentists and orthodontists in a general manner. As a result, the current administrative arrangement will continue to apply until further notice and stakeholders will be provided with advance notice so they can prepare accordingly.

6. Filing GST/HST Notices of Objection

Facts/Background

GST/HST Notice of (Re) Assessment packages are being issued by the CRA with multiple pages where the "Period Covered" indicates "Refer to Summary". The results are summarized on a cover page titled "Results". Each subsequent page of the Summary refers to a specific reporting period and contains its own "Reference Number". For some audits, several Notice of (Re) Assessment packages like this are issued, covering the same issues, but with different periods covered.

Form GST159, Notice of Objection, contains the following instruction: "If possible, enclose a copy of the notice of assessment or notice of reassessment that you are objecting to, otherwise, give the following information." One of the pieces of information requested is the "Notice No.".

Questions

a) If a taxpayer is objecting to multiple Notices of (Re) Assessment, where the same issues are raised, please confirm that the CRA will accept a single Form GST159 with the relevant Notices of (Re)Assessment that are being objected to and the applicable facts and reasons and exhibits all enclosed? This would be a simple and efficient way to file a Notice of Objection in these circumstances, because it avoids having to file multiple GST159 forms and related documentation when the CRA issues multiple Notices of (Re) Assessment for the same issues that arise from the same audit.

b) The "Notice No." referred to in the Form GST159 appears to be the same as the "Reference Number" on each Summary page of the Notice of (Re)Assessment. These numbers are very long and they are sometimes issued for each month that is assessed, and there is no room on the form to include many such numbers. How should the taxpayer reference the "Notice No." on Form GST159 in cases where the Notice of (Re) Assessment contains a large number of "Reference Numbers"? Can they be included instead on a separate attached sheet, for example, with the statement of facts and reasons?

CRA Comments

a) The CRA confirms that it will accept a single Form GST159 to be filed for multiple assessments under objection. To enable us to determine the validity of the objection, it is important that the periods covered and the information on the assessments (notice number and date) be properly identified on the Notice of Objection. If there is insufficient space on the form, a separate sheet can be attached. It is also important that you include applicable facts and reasons for your objection, as well as include any additional supporting documents. This will ensure your objection is processed in a more timely fashion.

b) Whenever there is insufficient space on the Notice of Objection form to provide facts and reasons for the objection or the assessment information, you can always attach a separate sheet(s). If additional documents are available to support your objection, those can also be included with the objection.

7. Bitcoins

Facts/Background

The price of Bitcoins has increased dramatically since 2010, yet certain tax implications of Bitcoin transactions remain unclear. In 2013-051470117, the CRA said the following:

> "Virtual currencies, such as Bitcoins, are not considered to be a currency issued by a government of a country… . Therefore using Bitcoins to purchase goods or services would be treated as a form of barter transaction … ." (emphasis added)

This suggests that the CRA views Bitcoins for GST/HST purposes to be intangible property and not "money" as the term is defined in subsection 123(1) of the Excise Tax Act. In that case, the conversion of Canadian dollars into Bitcoin would generally be subject to GST/HST. However, the definition of "money" in subsection 123(1) is non-exhaustive and includes specifically, "any currency … and other similar instrument", which could potentially encompass Bitcoins.

Questions

a) Please confirm if this remains the CRA's current position or whether the CRA considers the purchase and sale of Bitcoins and/or other crypto-currencies to be an exempt supply of a financial service (specifically the supply of money)?

b) Please summarize the CRA's analysis of the definition of "money" in support of its position.

c) If the CRA does not consider transfers of Bitcoins to be exempt supplies of "money", if a GST/HST registrant makes a supply of a taxable service in Ontario worth $1,000 to another GST/HST registrant and is paid with $1,000 of Bitcoins, how will the CRA treat this transaction? Assume both registrants are engaged 100% in commercial activities.

CRA Comments

a) The CRA is presently considering its position regarding the GST/HST treatment of Bitcoin and similar crypto-currencies given the increasing use of crypto-currencies. The CRA would welcome the Canadian Bar Association's views on this issue.

b) "Money" is defined in subsection 123(1) of the ETA as follows:

> "money" includes any currency, cheque, promissory note, letter of credit, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and other similar instrument, whether Canadian or foreign, but does not include currency the fair market value of which exceeds its stated value as legal tender in the country of issuance or currency that is supplied or held for its numismatic value;

Very briefly, the CRA has previously taken the position that, to qualify as "currency", a medium of exchange must be issued by a country as legal tender. Furthermore, to qualify as a "cheque, promissory note, letter of credit, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and other similar instrument", an instrument must be issued to pay a debt or to transfer funds upon the credit of the issuer. Based on these positions, bitcoins are not a currency, and they are not a

cheque, promissory note, letter of credit, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance or other similar instrument for the purpose of the definition of "money".

c) If bitcoins are not characterized as "money" for GST/HST purposes, then they would likely be characterized as IPP. In such circumstances, a supply of a bitcoin in exchange for a supply of property or a service would be regarded as a barter transaction. If both parties to the transaction are GST/HST registrants, and if both supplies are made in the course of a commercial activity, both parties would be required to charge and collect the GST/HST on their respective supplies. The value of the consideration for the supplies would be equal to the fair market value of the supplies at the time the supplies are made, in accordance with paragraph 153(1)(b) of the ETA.

8. Executive Recruitment Firm – Candidate Reimbursements

Facts/Background

An executive recruitment firm received a mandate from a client to find a candidate for a position in Toronto. Within the contract with this client, all travel expenses incurred by candidates are to be charged to the client. The executive assistant who coordinates meeting times will make a request to the candidate, by email or phone that he/she keeps all receipts for expense he/she may have incurred during travel. These expenses are typically related to hotels, taxis and meals.

The firm identifies a potential candidate for a position. This potential candidate lives in Los Angeles. This candidate is required to travel to meet the consultants from the executive firm or client in Toronto and will incur travel and meal expenses.

Airfares are directly reserved and paid directly by the executive recruitment firm.

Upon completion of his/her trip, the candidate is required to submit receipts along with the candidate reimbursement claim form. This form and the receipts are sent to the accounting department for validation and processing. The reimbursement is paid directly to the candidate via cheque, wire or draft.

The expenses reimbursed to the candidate will be invoiced to the client of the firm.

Question

The candidate is not an employee of the firm, however, will the CRA view these candidates as volunteers for the purpose of section 175 of the Excise Tax Act (ETA) since they do not receive any remuneration from the firm?

CRA Comments

Based on the information provided, it does not appear that we would identify these individuals as volunteers with the required nexus to the firm that would satisfy the conditions established in section 175 of the ETA.

In order for section 175 to apply, the candidate must be an individual who is employed by the person providing the reimbursement, be a member of a partnership that is providing the reimbursement, or be a volunteer who gives service to a charity or a public institution

that is providing the reimbursement. Although it has not been established whether the firm is a bona fide charity or public institution, the candidate is not a volunteer giving service to the firm. Based on the information provided, the only connection between the firm and the candidate appears to be the seeking of a future employment opportunity.

9. Section 142 Whether a Supply is Made in Canada – Modified Incoterms®

Facts/Background

Company A, a GST/HST registered corporation, sells taxable tangible personal property (the Property) to Company B, another GST/HST registered corporation, using the Incoterms® 2010 EXW Company A's premises Halifax, Nova Scotia (the First Sale).

Pursuant to the First Sale contract, delivery and transfer of title occurs when the Property is placed at the disposal of Company B at Company A's premises in Halifax.

Company B does not acquire the Property for consumption or use in Canada and intends to export the Property outside of Canada as soon as is reasonable after delivery. The Property is not further processed, transformed or altered in Canada by Company B.

Company B immediately resells the Property to Company C, a non-resident purchaser not registered for GST/HST purposes, using the Incoterms® 2010 DAP Port of Liverpool, U.K. (the Second Sale).

Pursuant to the Second Sale contract, delivery of the Property occurs when it is ready for unloading from the arriving conveyance at the named place of destination in the U.K. Transfer of title would occur outside of Canada at the place of destination in the U.K.

Pursuant to the contract of sale, for commercial reasons, Company B and Company C decide to modify the Incoterms® 2010 DAP Destination and provide for a specific commercial indemnity from Company C to Company B in the event the Property is lost or damaged during transit from Halifax to Liverpool. This is the only modification made to the Incoterms®.

The Property is then loaded onto Company C's vessel at the Port of Halifax and is immediately exported outside of Canada.

Import documentation required by the U.K. customs authorities, where the Property is imported, is provided to Company B and then Company A.

Questions

a) Please confirm that for the purpose of paragraph 142(2)(a) of the Excise Tax Act (ETA), the supply of the Property between Company B and Company C (the Second Sale) will be deemed to be made outside of Canada.

b) Would the answer to (a) be the same if Company C's affiliate (and not Company C itself) provided the commercial indemnity in a side agreement?

c) Please confirm that pursuant to section 1 of Part V of Schedule VI of the ETA, the First Sale is zero-rated for GST/HST purposes.

CRA/CBA Roundtable – March 8, 2018

Discussion

Delivered At Place, or DAP, is an international trade term that was introduced in the International Chamber of Commerce's 8th publication of the Incoterms® in 2010. Under the DAP Destination Incoterms®, the seller bears all risks of loss of or damage to the goods until they have been delivered to the place of destination. In the case at hand, pursuant to the contract of sale, the Property is still delivered or made available by Company B to Company C outside of Canada. However, even if the seller normally bears all risks of loss or damage until delivery, in this instance, a commercial indemnity was granted by Company C for the pre-delivery period during transit. In other words, the parties used a "modified" Incoterms® in connection with the Second Sale.

As stated by the CRA in GST Headquarters Interpretation Letter No. 103662, Supply of xxx in Canada by a non-resident person (November 26, 2008):

> The place where the TPP is delivered or made available may be determined by reference to the place where the TPP is considered to have been delivered under the law of the sale of goods applicable in that case. However, if delivery terms are specified in a contract, then generally, subject to any evidence to the contrary, the place where the TPP is delivered or made available can be determined by reference to the terms of that contract. When an Incoterm has been used in an agreement/purchase order/contract (not necessarily contained within a specific "delivery" clause) in accordance with its intended circumstances (such as set out under Incoterms 2000), that Incoterm will generally, subject to any evidence to the contrary, be used to dictate where the TPP is delivered or made available for the purposes of section 142 of the ETA.

In the case at hand, despite the fact that Company B and Company C used a modified Incoterms®, one could argue that the Property was still delivered or made available by Company B outside of Canada. As a consequence, pursuant to paragraph 142(2)(a), the supply of the Property by Company B to Company C should be deemed to have been made outside of Canada. As an alternative, Company C's affiliate could provide the indemnity to Company B for no consideration so that the parties to the contract of sale would not use a modified Incoterms®.

To the extent that the supply of the Property by Company B to Company C is deemed to be made outside of Canada, the First Sale should therefore be zero-rated pursuant to section 1 of Part V of Schedule VI of the ETA, considering that the Property was not acquired by Company B for consumption, use or supply in Canada before export.

CRA Comments

a) Although we are unable to conclusively determine the place of supply of the supply of the Property by Company B to Company C under the Second Sale without a thorough review of all the relevant facts, including the agreements between the parties, it appears, based on the fact that Company C acquires physical possession of the Property in Canada pursuant to the terms of the agreement, that paragraph 142(2)(a) of the ETA would not apply to deem the supply to be made outside Canada.

b) Our response in Part (a) would not change if it were established that Company C's affiliate (and not Company C itself) provided the commercial indemnity in a side agreement.

c) As in the response to Part (a), we are not able to conclusively determine the GST/HST status of the supply by Company A to Company B under the First Sale without reviewing all the relevant information. However, if it is determined, based on a thorough review of all the agreements, that Company B is making a supply of the Property to Company C where delivery of the Property to Company C occurs in Canada, it appears that the supply by Company A to Company B would not be considered to be a zero-rated supply under section 1 of Part V of Schedule VI to the ETA.

10. SLFIs and the SAM Formula

Facts/Background

Please consider this simple hypothetical for the purposes of answering the questions below: a Canadian financial institution makes a taxable supply of services (Services) to an unrelated Canadian selected listed financial institution (SLFI), but in error, fails to invoice and collect any GST/HST in respect of this taxable supply. Cash consideration was paid by the SLFI in due course.

Under subsection 225.2(2) of the Excise Tax Act (ETA), the SLFI is required to determine its net tax under the formula [(A-B) x C x (D/E)] - F + G (SAM Formula). Element A is defined as the total of "(a) all tax… that became payable under any of subsection 165(1) and sections 212, 218 and 218.01 by the financial institution during the particular reporting period or that was paid by the financial institution during the particular reporting period without having become payable" (emphasis added). Subsection 168(1) of the ETA indicates that the GST/HST would have become payable in respect of this supply no later than the date that the consideration was actually paid.

Subsection 228(2.3) of the ETA addresses the filing of final returns by SLFIs and provides that "where a person who is a [SLFI] is required to file a final return … (a) the person shall calculate … the net tax … (b) where the net tax of the person… is a positive amount, the person shall remit that amount to the Receiver General on or before the day the final return for the reporting period is required to be filed."

By contrast, subsection 278(2) of the ETA provides, in respect of remittance obligations, that "[e]very person who is required under this Part to pay or remit an amount shall, except where the amount is required under section 221 to be collected by another person, pay or remit the amount to the Receiver General." (emphasis added).

Questions

a) Please confirm if the CRA interprets these provisions as requiring the SLFI in this example to include the tax payable in respect of the Services when calculating its net tax under the SAM formula for its final return, notwithstanding that the tax was not invoiced by, or paid to, the supplier.

b) Please confirm that notwithstanding the CRA's answer to question (a), above, that subsection 278(2) would still act to prevent the SLFI in our example from having to remit any tax in respect of the Services, on the basis that the supplier should have collected and remitted such tax under section 221 of the ETA.

c) Please provide any available guidance with respect to how this scenario should actually be reported by the SLFI in this example.

CRA Comments

Our comments are based on our understanding that tax is payable on the Services under subsections 165(1) and (2) of the ETA.

(a) and (c)

As part of calculating net tax for a reporting period, a person that is an SLFI is required to use the special attribution method (SAM) formula in subsection 225.2(2) of the ETA to calculate the SLFI's tax liability for the provincial part of the HST for the participating provinces.

As a recipient of a taxable supply, the SLFI generally would be required to include the GST/HST with respect to the supply in certain elements of their SAM formula calculation for a particular reporting period, such as elements A, B and F.

Element A of the SAM formula includes all the GST or federal part of the HST (other than a prescribed amount of tax[1]) that became payable under any of subsection 165(1) and sections 212, 218 and 218.01 of the ETA by the SLFI during the particular reporting period or that was paid by the SLFI during the particular reporting period without having become payable.

Element B of the SAM formula includes all input tax credits (ITCs) for the GST and federal part of the HST (other than ITCs for a prescribed amount of tax referred to in paragraph (a) of element A) claimed for the current or preceding reporting periods in the SLFI's return for the particular reporting period.

Element F of the SAM formula includes all tax (other than a prescribed amount of tax[2]) under subsection 165(2) that is the provincial part of the HST in respect of a supply made to the SLFI in the participating province or under section 212.1 of the ETA that is calculated at the tax rate for the participating province, that became payable or was paid without having become payable by the SLFI during the particular reporting period, or under certain conditions any other reporting period that precedes the particular reporting period where the particular reporting period ends within two years after the fiscal year that includes the other reporting period.

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[1] A prescribed amount of tax for purposes of element A of the SAM formula is an amount described in section 40, subsection 55(2) and paragraphs 60(a) and 63(a) of the *Selected Listed Financial Institution Attribution Method (GST/HST) Regulations* (SLFI Regulations).

[2] A prescribed amount of tax for purposes of paragraph (a) of element F is an amount described in section 40 and subsection 55(2) of the SLFI Regulations.

Tax would have become payable by the SLFI under subsection 168(1) of the ETA on the earlier of the day the consideration for the supply was paid and the day the consideration for the supply became due. Under subsection 152(1) of the ETA the consideration, or a part thereof, for a taxable supply is deemed to become due on the earliest of:

- the earlier of the day the supplier first issues an invoice in respect of the supply for that consideration or part and the date of that invoice;
- the day the supplier would have, but for an undue delay, issued an invoice in respect of the supply for that consideration or part; and
- the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.

Under subsection 238(2.1) of the ETA, a person that is an SLFI that has a monthly or quarterly reporting period is required to file an interim return and a final return for the reporting period.

According to subsection 228(2.1) of the ETA, where an SLFI is required to file an interim return (for example, Form GST34) for a reporting period, the SLFI is required to calculate its interim net tax which is the amount that would be the net tax of the SLFI for the reporting period if the description of element C in the SAM formula in subsection 225.2(2) were read as "is the lesser of the financial institution's percentage for the participating province for the taxation year and the financial institution's percentage for the participating province for the immediately preceding taxation year, each determined in accordance with the prescribed rules that apply to financial institutions of that class". Where the interim net tax for the reporting period is a positive amount, the SLFI must pay that amount, on account of its net tax that it is required to remit under paragraph 228(2.3)(b), on or before the day that the interim return is required to be filed.

Under subsection 228(2.3), where an SLFI is required to file a final return (for example, Form GST494) for a reporting period, the SLFI is required to calculate its net tax for the reporting period. Where the net tax of the SLFI for the reporting period is a positive amount, the SLFI is required to remit that amount to the Receiver General on or before the day on or before which the final return for the reporting period is required to be filed and the SLFI is required to report the positive amount, if any, that the SLFI paid on account of its net tax for the period in the interim return or the negative amount, if any, that the SLFI claimed in the interim return for the period. Where the SLFI claimed an interim net tax refund for the reporting period, if the interim net tax refund exceeds the amount that would be the net tax refund for the period payable to the SLFI if the SLFI had not claimed that interim net tax refund, the SLFI is required to pay an amount equal to the excess to the Receiver General on or before the day on or before which the final return for the reporting period is required to be filed. If the SLFI's net tax for the period is a positive amount, the SLFI is required to pay an amount equal to the interim net tax refund to the Receiver General on or before the day that the final return for the reporting period is required to be filed.

Although in your example there is insufficient information to determine when tax was payable under subsection 168(1) and subsection 152(1), we can confirm that the SLFI would generally be required to include the tax payable in respect of the Services in its net tax calculation and interim net tax calculation, where applicable, for the particular reporting period during which the tax became payable. Specifically, in your example, the amount of tax payable in respect of the Services by the SLFI in that reporting period would

be included in its SAM formula calculation[3] which is used to determine the SLFI's tax liability for the provincial part of the HST for the participating provinces and which is an adjustment to the SLFI's net tax calculation and interim net tax calculation where applicable. This would be the case whether the SLFI has a monthly, quarterly or annual reporting period.

(b)

Under subsection 278(2) of the ETA, a person is required to pay or remit an amount (that is, any amount required to be paid or remitted under Part IX of the ETA) to the Receiver General except where the amount is required under section 221 of the ETA to be collected by another person. In your example, the supplier of the Services is required to collect the HST payable by the SLFI under subsection 221(1) and include the HST in the supplier's net tax calculation. If the supplier's net tax is a positive amount, the supplier will remit that amount to the Receiver General. However, this does not have an impact on the SLFI's net tax calculation or its SAM formula calculation.

In a particular reporting period, an SLFI includes an amount of tax payable, or paid without having become payable, by the SLFI during the reporting period in its SAM formula calculation in order to determine its tax liability for the provincial part of the HST for the participating provinces which could result in the net tax or interim net tax for a reporting period being a positive amount that is required to be remitted to the Receiver General. In your example, any amount of tax payable by the SLFI in a particular reporting period with respect to the Services will be included in the SLFI's SAM formula calculation for that reporting period and consequently, its net tax or interim net tax calculation. If the SLFI's net tax or interim net tax amount is a positive amount, the SLFI will remit that amount to the Receiver General in accordance with subsection 278(2).

11. Joint Ventures

Facts/Background

It appears that the CRA, upon audit, may not accept in all circumstances that a person who has a small financial interest in a joint venture is a "participant" as defined by the CRA for purposes of section 273 of the Excise Tax Act (ETA).

The CRA defines the term "participant" in GST/HST Policy Statement P-106, Administrative Definition of a "Participant" in a Joint Venture, to mean:

a) a person who, under a joint venture agreement evidenced in writing, makes an investment by contributing resources and takes a proportionate share of any revenue or incurs a proportionate share of the losses from the joint venture activities; or

[3] The tax payable would not be included in element B of the SAM formula even if the SLFI would generally be eligible to claim an ITC with respect to the Services as the ITC documentation requirements in respect of the tax payable would not be met.

b) a person, without a financial interest, who is designated as the operator of the joint venture under an agreement in writing and is responsible for the managerial or operational control of the joint venture.

Question

Please confirm that a nominee title holder of the joint venture property that makes a small financial contribution to the joint venture, in exchange for a small co-ownership interest in the property of the joint venture and an entitlement to share in the profits (or losses) of the joint venture in proportion to its co-ownership interest, is a "participant" as defined by the CRA in paragraph (a) above.

Discussion

Note that the nominee is a corporation that holds legal title to the joint venture property in trust for the other co-owners of the joint venture property (and for itself). The corporation reports its share of the income or loss from the joint venture for income tax purposes on its corporate income tax return. The corporation does not file a trust return for income tax purposes.

We understand that the CRA will be issuing a publication confirming the CRA's position that where an agreement is a joint venture at law, it is a joint venture for purposes of the election under section 273, notwithstanding any provision in the particular agreements governing the joint venture which may state otherwise. Please provide an update as to when such a publication will be issued, and more generally, if it will cover any other issues in connection with joint ventures.

CRA Comments

Yes, the nominee with a financial contribution to the joint venture in exchange for a co-ownership interest and proportionate share of profit (or losses) is a "participant" as defined in paragraph (a) above.

Regarding a future publication, we will confirm the position that a joint venture at law is considered to be a joint venture for purposes of the joint venture election under section 273 in a planned publication. Where particular joint venture agreements contain provisions that cause us to question the status of the joint venture, the agreements will be examined.

12. Application du paragraphe 296(2.1)

Les Faits

La question 9 de la table ronde de 2015 portait sur l'application du paragraphe 296(2.1) de la Loi sur la taxe d'accise (LTA).

Nous voulons explorer de nouveau une situation qui se présente régulièrement en pratique et déterminer s'il est possible d'utiliser le paragraphe 296(2.1) plutôt que de procéder avec une divulgation volontaire (autre solution envisagée).

CRA/CBA Roundtable – March 8, 2018

Question posée en 2015, RÉSUMÉ DES FAITS ANNÉE 1:

- Une société non inscrite en TPS construit un triplex et signe son premier bail à des fins résidentielles.
- La société ne s'est pas autocotisée sous le paragraphe 191(3) de la LTA.
- La société n'a réclamé ni CTI, ni de remboursement à titre d'immeuble d'habitation locatif neuf.

Question posée en 2015, RÉSUMÉ DES FAITS ANNÉE 2:

- La société envoie à l'ARC, dans une même enveloppe, les documents suivants:
  - une déclaration de TPS afin de remettre la taxe sur la fourniture à soi-même d'un immeuble d'habitation en vertu du paragraphe 191(3);
  - une demande de remboursement de la taxe payée lors de la construction de l'immeuble en vertu de l'article 257 de la LTA;
  - une demande de remboursement de taxe pour un immeuble d'habitation locatif neuf en vertu du paragraphe 256.2(3) de la LTA;
- La société est en situation de remboursement.

Question posée en 2015:

- Quelle est la politique de l'ARC dans un tel cas, si le contribuable demande que le paragraphe 296(2.1) soit appliqué? Va-t-elle accepter d'appliquer ce paragraphe, ce qui aurait pour effet d'éviter le paiement d'intérêts (article 280 de la LTA) et de pénalité (article 280.1 de la LTA) suite à la production tardive de la déclaration.

Réponse reçue en 2015

- Le paragraphe 296(2.1) ne s'appliquera pas…
- En général, selon les renseignements fournis, il semblerait que le paragraphe 228(6) de la LTA s'appliquerait dans ce cas…
- Lorsque la société a envoyé les demandes de remboursement avec la déclaration afin de compenser le montant de la taxe nette qui est due conformément au paragraphe 228(6), le montant de ces remboursements serait alors seulement compensé par le montant de la taxe nette qui est due, et la taxe nette serait donc considérée avoir été versée au moment où la déclaration a été produite.
- Conséquence: la « pénalité pour défaut de produire » de l'article 280.1 et les intérêts au taux prescrit au paragraphe 280(1) vont s'appliquer.

Notre question en 2018

- Utilisant le même exemple qu'en 2015: si la société, au lieu d'envoyer dans une même enveloppe sa déclaration et ses demandes de remboursement, procède de la façon décrite ci-après, quelle sera la position de l'ARC, si le contribuable demande que le paragraphe 296(2.1) soit appliqué?

- NOUVELLE FAÇON DE PROCÉDER
  - La société envoie à l'ARC, dans une même enveloppe, les documents suivants:
    - une déclaration de TPS afin de remettre la taxe sur la fourniture à soi-même d'un immeuble d'habitation en vertu du paragraphe 191(3);
    - des documents (contrats, factures) démontrant que la société a droit à un remboursement de la taxe payée lors de la construction de l'immeuble en vertu de l'article 257;
    - des documents (contrats, factures) démontrant que la société a droit à un remboursement de taxe pour un immeuble d'habitation locatif neuf en vertu du paragraphe 256.2(3);
    - une lettre expliquant que
      - 1- la société envoie sa déclaration TPS en retard,
      - 2- la société n'a pas demandé de remboursements, mais elle envoie des documents pour que l'ARC puisse constater lors de l'examen de la déclaration produite en retard que le droit au remboursement existe, et
      - 3- la société demande à l'ARC d'appliquer le paragraphe 296(2.1).

Commentaires

La situation que nous vivons en pratique est la suivante. Lors de discussions avec un client, nous découvrons qu'une autocotisation n'a pas été faite (la situation décrite ci-haut étant une des possibilités….). Notre réaction première est de tenter de remédier à la situation le plus rapidement possible. Mais voici les choix que nous avons:

1. Le client procède comme dans l'exemple de 2015 et il doit payer pénalité et intérêts.
2. Le client ne fait rien. Si un vérificateur de l'ARC vient le vérifier et découvre l'erreur, il devra appliquer le paragraphe 296(2.1). Pas de pénalité ou intérêts si nous utilisons l'exemple de 2015.
3. Le client fait une divulgation volontaire.

Commentaires de l'ARC

En général, si la société soumis ses documents comme décrit ci-dessus, notre réponse resterait la même que celle fournie en 2015. Il semblerait que le paragraphe 228(6) de la LTA s'appliquerait dans ce cas.

Pourvu que la société réponde à toutes les exigences d'admissibilité, la société peut présenter une demande en vertu du programme de divulgation volontaire pour demander une réduction de l'application des pénalités et des intérêts.

13. CRA Service Standards

Customer service in the last year at the CRA has been declining. Agents often seem to lack training and, therefore, do not appear to understand simple requests and faxes/documents seem to get lost. For example, a non-resident client who makes payments by wire transfer and follows the CRA's instructions (as per CRA's website

which suggests sending a fax to the Revenue Processing Section to confirm payment), still receives an assessment for non-payment. Can you comment? Which CRA department should be contacted to address these issues?

CRA Comments

The Payment Processing section at the CRA should be contacted if you encounter any difficulties making a wire transfer payment to the CRA. The Call Centre Services Directorate can be contacted regarding any issues with agents on the telephones.

The CRA receives approximately 400 wire transfers per day and strives to process them as accurately and efficiently as possible.

Unfortunately, many of the wire transfers that the CRA receives do not include an account number. The wire transaction may have had an account number when it started out but by the time it goes through intermediary banks and is received at the CRA, the information is no longer included in the file.

Wire transfers are sent through the banking system based on the originating bank. Intermediary banks often have a limit on the number of characters allowed in the transaction, so this can result in some essential information being cut off.

Currently, the best way to ensure that a wire transfer is successful is to also send a fax with the account information. The fax should be sent to the attention of the CRA's Revenue Processing Section at fax number 204-983-0924.

With the launch of the new ISO 20022 standard (expected in 2019), the information on a wire transfer will be fixed information and we will be able to ensure the "fixed field" is at the front of the data stream instead of the end. Additionally, there will be additional characters allowed. We expect this will resolve the current payment allocation challenges for these wire transfers.

14. Section 186

Faits/Contexte

Au cours des dernières années nous comprenons que l'ARC a suivi une position stricte relativement à l'application de l'article 186 de la Loi sur la taxe d'accise (LTA). Plus précisément, en ce qui concerne la question de savoir si il est raisonnable de considérer que la personne morale mère a acquis, importé ou transféré dans un province un bien ou un service pour consommation ou utilisation relativement à des actions du capital-actions d'une autre personne morale qui lui est liée ou à des créances contre cette autre personne. En effet, la position retenue par l'ARC était à l'effet qu'un lien direct devait exister entre l'utilisation ou la consommation du bien et du service et les actions du capital-actions de la personne morale liée de sorte que les présomptions prévues au paragraphe 186(1) ne pouvaient pas s'appliquer pas aux services tel que:

- Les services de préparation de documents divers pour le conseil d'administration de la personne morale mère;
- Les dépenses liées aux discussions concernant le remplacement des membres du conseil d'administration de la personne morale mère;

- Les services de mise à jour du registre des actions de la personne morale mère.

Question

Pourriez-vous nous confirmer que l'ARC a assoupli sa position et que dans la mesure où une personne morale mère a comme unique activité la détention des actions du capital-actions d'une autre personne morale que les présomptions prévues au paragraphe 186(1) pourront s'appliquer aux services décrits ci-dessus (dans la mesure que toutes les autres conditions sont rencontrées) et ce tel que décidé dans la cause Miedzi Copper Corp Inc. v. R 2015 TCC 26.

Facts/Background

In recent years we understand that the CRA has taken a strict position on the application of subsection 186(1) of the Excise Tax Act (ETA); more specifically, with respect to the question of whether it is reasonable to consider that a parent corporation acquired or imported property or a service for consumption or use in respect of shares of the capital stock of another related corporation. Indeed, the position adopted by the CRA was that a direct link must exist between the use or consumption of the good and the service and the shares of the capital stock of the related corporation such that subsection 186(1) would not apply to services such as:

- document preparation services for the board of directors of the parent corporation;
- expenses related to discussions regarding the replacement of members of the board of directors of the parent corporation;
- update services of the share register of the parent legal entity.

Question

Could the CRA confirm that it has accepted the jurisprudence and that, to the extent that a parent corporation has as its sole activity the ownership of shares of the capital stock of another corporation, the parent corporation will be entitled to claim ITCs, pursuant to subsection 186(1), in respect of the services described above (to the extent that all other conditions are met) and as decided in Miedzi Copper Corp. v. R, 2015 TCC 26.

CRA Comments

Our position on the interpretation of section 186 of the ETA has not changed. It is a question of fact whether subsection 186(1) would apply in a particular situation. With respect to the court decision mentioned in the question, we would, for example, apply the Court's decision in the Miedzi case (Miedzi Copper Corporation v. The Queen, 2015 TCC 26) where a particular situation has the same facts as Miedzi. Although the facts presented in the question appear to be similar to those in Miedzi, they are not the same. However, if you have a question about the application of subsection 186(1) to a particular situation, you may request a written GST/HST ruling and provide us with all of the relevant facts and documents.

15. ITC Documentation: Time for Supplier's Registration Number to be Valid

Facts/Background

Subsection 169(4) of the Excise Tax Act (ETA) provides that a registrant may not claim an ITC unless it has first "obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed". The Input Tax Credit Information (GST/HST) Regulations and Information Necessary for a Claim for Input Tax Refund specify that the registration number of the supplier is prescribed information. The Federal Court of Appeal's (FCA's) decision in Systematix Technology Consultants, 2007 GTC 1541 (affirming 2006 TCC 277), has confirmed that the ITC documentation requirements are mandatory, with the FCA confirming that a GST/HST registrant was not entitled to claim an ITC that was paid to a number of suppliers who, for various reasons, did not have valid GST/HST registration numbers. In this decision, the FCA did not discuss the relevant time for the GST/HST number to be valid; however, the TCC provided some discussion on what point in time the supplier's registration number must be valid, noting that it must be valid at the time of the supply or, at the latest, at the time the return is filed, as follows:

> The next question is what point in time is to be considered in determining whether there is a number assigned in conformity with section 241? The Regulations are silent as to the time that is relevant. Is it when the number was assigned originally or when the supply was made? It should be noted that the Regulations do not say assigned "originally" under section 241 or the number "that had been" assigned under section 241, as Sherman argues. Nor does it say the number that has been assigned under section 241 "and is still valid at the time that the GST is being paid to the supplier". Therefore, in my view, we have here a situation where the provision is unclear and ambiguous and several different interpretations could be adopted.
>
> … It makes more sense that the relevant time for the purpose of determining whether there is a registration number assigned in conformity with the Act should be the time the supply is being made, which should correspond to the time that the GST is being collected. Another possibility could be the time at which a GST return is filed, because it is at that time that one must have all the relevant and prescribed information. However, one thing is clear: if the registration number was issued after the filing of the GST return, one cannot have met the requirement that the registrant have all the prescribed information "before filing the return in which the credit is claimed" laid down in subsection 169(4) of the Act. So, any interpretation suggesting that a valid registration number issued after the filing of the GST return may meet the requirement must also be rejected.
>
> In Joseph Ribkoff Inc. v. The Queen, 2003 TCC 397, 2003 GTC 845, [2003] GSTC 104, a number of analogies were drawn to help in resolving the issue before this Court. So I will venture one of my own. If one wants to make a phone call to a particular person and has to look up the person's number in the phone book, it is not very useful to have an assigned telephone number that has been validly issued to that person by the phone company if the company has since discontinued service for that number. To my mind, the relevant time at which an assigned phone number is useful is the time the phone call is being made. I accordingly conclude that, from the standpoint

> of compliance with subsection 169(4) of the Act and with the Regulations, the relevant time at which there must be a registration number assigned to the supplier in conformity with subsection 241(1) is the time of the supply or, at the latest, the time of the filing of the return. When the Minister is provided with the GST return, he would have all the relevant information showing that the GST has been paid, collected by the supplier, and hopefully remitted to the supplier's principal, i.e., the Minister.
>
> (emphasis added)

In SNF L.P., 2016 TCC 12, the TCC held that an ITC cannot be claimed for GST/HST that was paid to a supplier in situations where the supplier's registration number was cancelled by the CRA as of the date of the sale. In this decision, the TCC allowed the ITCs that were claimed for GST/HST that was payable on sales occurring prior to the supplier's registration number being cancelled suggesting that the relevant time for having a valid number may be the time of sale or payment.

Question

What is the CRA's view on the exact date the registration number must be valid?

CRA Comments

Generally, the registration number assigned to the supplier must be valid at the time the tax in respect of the supply becomes payable by the recipient or is paid by the recipient without having become payable. This is consistent with when the ITC of the recipient first arises under subsection 169(1) of the ETA, and when the tax becomes collectible or is collected by the supplier. The requirement under paragraph 169(4)(a) and the Input Tax Credit Information (GST/HST) Regulations to obtain the GST/HST registration number assigned to the supplier is intended to substantiate that the supplier is validly registered for purposes of claiming the ITC.

The CRA provides a GST/HST Registry on the Canada.ca website which enables a person to verify if a particular supplier that is charging the GST/HST in respect of a supply is registered for GST/HST purposes. As indicated on the GST/HST Registry webpage, this will help ensure that a recipient's claims for ITCs only include GST/HST that is charged by someone who is registered for GST/HST.

The determination of a registrant's entitlement to an ITC under subsection 169(1) and whether the ITC documentary requirements under subsection 169(4) have been met is subject to verification by the CRA at the time of audit. However, under subsection 169(5), the Minister is given discretionary power in certain circumstances to exempt a specified registrant, a specified class of registrants, or registrants in general from the documentary and information requirements stated in subsection 169(4), if the Minister is satisfied that there is, or will be, sufficient evidence to establish the particulars of a supply and the tax paid or payable in respect of the supply. The Minister may also specify the terms and conditions for applying such an exemption.

16. Section 211 Elections

Facts/Background

A public service body may make an election under section 211 of the Excise Tax Act (ETA), the effect of which generally will make supplies of real property by that body taxable (thereby generally entitling the body to claim ITCs). It is not uncommon for charities to make such an election where all or a portion of real property owned by the charity is or will be leased to other entities.

Questions

a) Can a charity with no other commercial activities register for GST/HST prior to filing its section 211 election (on the basis of the future taxable supplies it will make once it files its section 211 election)? Or must the section 211 election accompany the charity's registration?

b) Often, charities have a high turnover of accounting staff and record keeping is somewhat wanting. How can a charity or other public service body determine if it has previously filed a section 211 election?

CRA Comments

a) Generally, where a charity files an election under section 211 of the ETA that would result in the charity making taxable supplies of real property for GST/HST purposes, the charity may be eligible to voluntarily register for GST/HST purposes before the effective date of the election if paragraph 141.1(3)(a) of the ETA applies to deem something done by the charity (other than making a supply) in connection with the acquisition or establishment of a commercial activity to be done in the course of a commercial activity of the charity.

   In order for paragraph 141.1(3)(a) to apply, the charity would have to demonstrate a clear intention to engage in a commercial activity. For example, consideration would be given to the date on which the charity intends to start making taxable supplies; the existence of proposed contracts for the supply of the property; and other evidence that would support the charity's intention to make taxable supplies. Such a demonstration would be required regardless of whether the charity is, before the effective date of the election, not making any supplies or only making exempt supplies in respect of the real property included in the election.

   Although a charity may be eligible to voluntarily register for GST/HST purposes before the effective date of the election, any ITC eligibility would be determined based on the purpose for which a particular input is acquired, imported or brought into a participating province. In addition, consideration would have to be given to whether an ITC is eligible under the net tax calculation method for charities in subsection 225.1(2) of the ETA.

We would like to clarify that:

- The election under section 211 is applied on a property-by-property basis (that is, the election applies to the entire legal description and not just to a portion of the real property).
- The deeming rules in paragraphs 211(2)(a) and (b) do not apply where the charity:
  - acquires the real property on the day the election takes effect; or
  - becomes a registrant on the day the election takes effect.

b) Generally, a GST/HST registrant or its authorized representative can sign-in to the registrant's My Business Account and select the "view elections" feature in order to access information about certain elections that have been processed for the account. However, information about an election filed under section 211 (that is, Form GST26, Election or Revocation of an Election by a Public Service Body to Have an Exempt Supply of Real Property Treated as a Taxable Supply) is not available under this feature.

To find out if an election under section 211 has been filed in the past, authorized persons can submit an enquiry through the "enquiries service" feature in My Business Account/Represent a Client. If the charity or public service body does not have access to My Business Account they can contact the CRA at 1-800-959-5525.

17. Emergency Repair Services

Facts/Background

Section 6.1 of Part V of Schedule VI to the Excise Tax Act (ETA) zero-rates certain supplies, made to an unregistered non-resident of an "emergency repair service", in respect of certain railway rolling stock. In the industry, orders generally are tracked as either scheduled maintenance or "bad orders"; the latter are generally any orders for repair services of railway rolling stock other than regularly scheduled maintenance. Many of such bad orders arise where required repairs to rolling stock cannot be completed at facilities in the United States on a timely basis.

Question

Would all "bad orders" qualify as an emergency repair service? What factors are relevant in considering whether repair services constitute emergency repair services?

CRA Comments

As described in GST/HST Memorandum 4-5-3, Exports - Services and Intellectual Property, an "emergency" is an unforeseen event or combination of events that calls for immediate action. The repairs must be of an urgent nature, such that if not immediately undertaken, the existing conditions could seriously affect the safety of the conveyance, the property or passengers being transported, or the people working on or about the conveyance. Whether a particular repair service referred to as a "bad order" would qualify as an emergency repair service for purposes of section 6.1 of Part V of Schedule VI to the ETA would depend on the facts of each situation.

18. Place of Supply and Consigned Goods

Facts/Background

At the 2016 Round Table, a question was posed (Q. 23) regarding how the place of supply rules would apply to a consignment arrangement involving a non-resident vendor. The CRA indicated that it was unable to conclusively determine the place of supply in the example given, because it was not provided with sufficient information.

The purpose of the question was to determine whether the place of supply rules in consignment situations should be based on the rules set out in sections 142 and 143 of the Excise Tax Act (ETA) with respect to the delivery of the goods by the consignee or whether the place of supply would be determined at the time title in the goods is transferred by the consignor to the consignee (that is, at the time the goods are sold by the consignee to a third party triggering the sale by the consignor to the consignee). We have revised the question to include the additional facts set out below.

VendorCo (VCo) is a non-resident who is a GST/HST registrant. VCo sells goods to PurchaserCo (PCo) on consignment. The goods are shipped under the Incoterm® "Free Carrier" (FCA) VCo's warehouse in the United States, such that the goods are considered to be delivered to PCo at VCo's warehouse in the United States. PCo assumes all risks regarding the goods once delivery takes place at VCo's warehouse. PCo is responsible for the cost of shipping the goods from VCo's warehouse to wherever PCo will sell the goods. PCo is also responsible for all risk of loss regarding the goods (despite not having title) once it takes delivery in the United States.

Under the consignment arrangement, once PCo finds a customer, there will be a flash sale of the goods by VCo to PCo and a subsequent sale by PCo to its customer. Six months after the date of delivery of the goods, PCo must either agree to purchase any remaining unsold goods at a 60% discount or destroy the remaining goods, in which case it would pay no consideration to VCo.

Questions

Given the above facts, would the CRA consider the place of supply to be outside Canada in the following scenarios:

a) PCo imports the goods into Canada after it takes delivery in the United States, acts as the importer of record, and pays the applicable tax on importation. PCo then sells the goods in Canada and charges the customer the applicable GST/HST. Under the consignee agreement, VCo is considered to sell the goods to PCo, and title transfers to PCo immediately prior to PCo's sale of the goods to its customer in Canada.

b) Under the above arrangement, if VCo was not registered for GST/HST and has no other presence in Canada other than this consignment arrangement (that is, no employees or agents in Canada, no bank account in Canada, payment by PCo to VCo takes place outside Canada), would VCo be considered to be "carrying on business in Canada" and required to register for GST/HST purposes.

c) The same facts as in (a) above, but under the agreement between PCo and VCo, PCo can return any unsold goods to VCo for a re-stocking charge equal to 50% of the original price payable by PCo for the goods.

Discussion

The above supplies by VCo to PCo should be considered to be made outside of Canada because notwithstanding title did not transfer to PCo until after the goods were imported into Canada, under the terms of the agreement between PCo and VCo, the goods were delivered and made available to PCo in the United States and, are thus considered to be made outside of Canada under paragraph 142(2)(a). It should not matter whether or not PCo can return the goods to VCo. In addition, based on the additional facts included in (b), VCo should not be considered to be "carrying on business in Canada" and should not be required to register for GST/HST.

CRA Comments

As indicated in the background section of the question, the issue of determining the place of supply of goods made by a non-resident supplier pursuant to a consignment arrangement was raised by the CBA in Q23 of the 2016 Round Table meeting. The CRA response to Q23 was:

> There are insufficient facts in the question for the CRA to conclusively determine the place of supply of the goods in the two scenarios described. Additional information, including the specific terms of the arrangement between the two parties would be necessary for us to make a place of supply determination.

Although there are additional facts in this request, we are not in a position to provide a conclusive determination of the place of supply or the carrying on business determination for the non-resident supplier (VCo in this instance) that would substantially differ from the responses to Q13 of the 2008 CBA, Q13 of the 2012 CBA or Q23 of the 2016 CBA.

However, if it is determined, based on all the relevant facts, including the terms of their agreement, that PCo acquires ownership of the goods that remain unsold 6 months after taking delivery of them outside Canada by virtue of their obligation to either purchase them at a 60% discount or destroy them, then the supply of the goods by VCo to PCo would likely be considered to be made outside Canada pursuant to paragraph 142(2)(a) of the ETA. Where this is determined to be the case, and VCo has no other presence in Canada as indicated in Question (b), VCo would not be considered to be carrying on business in Canada for GST/HST purposes and would therefore not be required to register for GST/HST purposes.

As has been discussed in previous meetings, should certainty be required with respect to the place of supply determination and whether a particular non-resident supplier is carrying on business in Canada and required to be registered for GST/HST purposes, a GST/HST ruling may be requested. The CRA would issue a determinative ruling with respect to a particular situation provided all the facts and relevant information, including the relevant agreements, are provided.

19. Fast Track ITC Claims

The CRA previously allowed, through an administrative policy, a "Fast track" ITC procedure. This procedure allowed a registered recipient, in specific circumstances, to obtain an ITC directly from the CRA in order to remit the GST/HST to the supplier, without having to wait for its refund. As this procedure was only aimed at transactions with a significant amount of GST/HST involved, the main objective was to prevent cash flow issues arising from the payment of a significant amount of GST/HST that will subsequently be refunded to the recipient.

While the CRA suspended the "Fast track" procedure, Revenu Québec currently now accepts "Fast track" requests, when various criteria are met, including:

- the requested refund is over $500,000 of net tax;
- the GST/HST and QST filing frequency of the recipient and the supplier is monthly;
- the recipient's file at Revenu Québec is fully compliant, that is, there are no late returns or payments in any tax account; and
- there is no agent relationship between the recipient and the supplier.

Question

Does the CRA intend to reinstate its administrative policy in respect of "Fast track" procedures? If so, would it apply the same criteria as Revenu Québec?

CRA Comments

The CRA had, until a few years ago, an informal process, however, no requests were received and the service was discontinued. At this time, there is no intention to put in place an administrative policy in respect of "Fast track" procedures for ITCs. In our current risk assessment model, high dollar claims are highlighted and prioritized for screening thus alleviating the need for a supplementary fast track process.

20. Splitting a Single Supply

Facts/Background

The Federal Court of Appeal's (FCA's) decision in Club Intrawest v. Her Majesty the Queen, 2017 FCA 151, dealt with the application of GST/HST to annual resort fees paid by members, which were characterized as service fees that were in respect of real property situated both inside and outside of Canada. The FCA held that the supply consisted of a single supply of services that were "inextricably intertwined". While recognizing that paragraphs 142(1)(d) and 142(2)(d) of the Excise Tax Act (ETA) contemplate a single supply of services being made either in Canada or outside of Canada, the FCA concluded that the single supply could be split for purposes of applying the place of supply rules in the circumstances, stating:

> In this circumstance, I see no reason in principle that precludes splitting up the supply so that the supply is treated as two supplies in order to recognize that ultimately the services are inherently distinct in one important respect: the services relating to the

operation of the vacation homes located in Canada are services in relation to real property situated in Canada and hence are a taxable supply—the services relating to the operation of the Intrawest vacation homes situated outside of Canada are services related to real property situated outside of Canada and hence are a non-taxable supply.

Questions

a) Please confirm the CRA will apply the FCA's decision regarding services relating to real property (that is, splitting up a single supply of services in relation to real property) to all similar situations where a single service is made in relation to real property situated inside and outside Canada for purposes of the place of supply rules. If so, does the CRA have any guidelines for determining when it will consider that services are "inherently distinct in one important respect"?

b) Does the CRA accept that, in appropriate circumstances, a single supply can be broken down into "inherently distinct" parts for purposes other than the place of supply rules; such as for example, if (i) parts are exempt and parts are taxable, or (ii) parts are subject to 13% HST and parts are zero-rated, in situations where specific deeming rules in the ETA (for example, sections 163, 138 or 139) do not address the situation?

CRA Comments

The CRA will apply the FCA's decision regarding services relating to real property (that is, splitting up a single supply of services in relation to real property) to similar situations where a single supply of a service is made in relation to real property situated inside and outside Canada for purposes of the place of supply rules in section 142 of the ETA only.

We note that the end result of the FCA decision is generally consistent with the CRA's position (as set out in GST/HST Technical Information Bulletin B-103, Harmonized Sales Tax - Place of supply rules for determining whether a supply is made in a province) regarding the application of the place of supply rules in section 142 to services in relation to real property, pursuant to which only the proportion of the service that relates to the real property that is situated in Canada is considered to be made in Canada and subject to GST/HST.

21. Supplies by a Condo Corporation or Bare Trustee

Facts/Background

A condo corporation retains the services of a property management company to manage its condo corporation. A fire occurs in a condominium and there is a property damage claim made to the insurer. The contractor performing the work charges GST/HST on its restoration services supplied to the condo corporation. The insurer denies coverage for the GST/HST portion on the basis the condo owner is able to claim an input tax credit (ITC).

Pursuant to paragraph 13 of Part I of Schedule V to the Excise Tax Act (ETA), a supply of a service made by a condo corporation to a resident is an exempt supply when the service "relates to the occupancy or use of the unit".

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Questions

a) In this scenario, does the CRA consider that the restoration services are a supply that falls within this provision? Or does the CRA consider the condo corporation to be a bare trustee for and on behalf of all residential unit owners and therefore that the supply of the restoration services is made directly to each of the owners or the particular owner whose unit sustained the damage?

b) Finally, is there any merit to the insurer's position that an ITC is available in this scenario and, therefore, that it need not indemnify the condo corporation for such GST/HST?

CRA Comments

The condo corporation's declaration, the condominium act of the province in which the condominium complex is located, and the insurance policy held by the condo corporation will help determine who is responsible for restoring a residential condominium unit back to its original state where the unit has sustained damage due to a fire.

Generally, insurance policies covering property damage contain provisions under which the insurer agrees to indemnify the insured person for damage to property by:

- making a cash settlement with the insured person;
- paying the cost of replacing the property; or
- paying the cost of repairing the property.

Under the principle of indemnity, an insurer is required to pay an insurance claim to the extent of the actual loss suffered by the insured person in accordance with the terms of the insurance policy. The net-of-GST/HST method adheres to the principle of indemnity in the settlement of insurance claims under the GST/HST. If the insurer uses the net-of-GST/HST method, the amount paid by the insurer to settle the insurance claim generally does not include that part of the GST/HST that the insured person is entitled to claim as an ITC or rebate. Please refer to GST/HST Memorandum 17-16, GST/HST Treatment of Insurance Claims for further information relating to the treatment of insurance claims for GST/HST purposes.

For the insured person to be eligible to claim an ITC in respect of the GST/HST payable on the acquisition of property or services (for example, restoration services) all requirements for claiming an ITC must be met. Specifically, the insured person must be a GST/HST registrant, the property or services must be acquired for consumption, use or supply in the course of the insured person's commercial activities, and it must be the insured person who is legally liable to pay the consideration and the GST/HST on the acquisition of the property or services (that is, the insured person must be the recipient of the supply of the property or services).

To the extent that the insured person is not eligible to claim an ITC or a rebate, the amount paid by the insurer to the insured person to settle the insurance claim generally includes the amount of GST/HST that the insured person is not entitled to claim as an ITC or rebate.

Where a condo corporation is the insured person and is responsible for restoring a residential condominium unit back to its original state where the unit has sustained damage due to a fire, it is likely the condo corporation that is legally liable to pay the consideration

and the GST/HST for the restoration services. Therefore, in order to be eligible to claim an ITC with respect to the acquisition of the restoration services, all conditions for claiming an ITC must be met, including that the condo corporation be a GST/HST registrant and the restoration services be acquired for consumption, use or supply in the course of the condo corporation's commercial activities.

Section 13 of Part I of Schedule V to the ETA exempts a supply of property or a service, made by a corporation or syndicate established upon the registration, under the laws of a province, of a condominium or strata lot plan or description or similar plan or description, to the owner or lessee of a residential condominium unit described by that plan or description, if the property or service relates to the occupancy or use of the unit.

Generally, a condo corporation's supply, to a resident, of a service of restoring a residential condominium unit back to its original state where the unit sustained damage due to a fire would relate to the use or occupancy of the unit. As such, the condo corporation's supply of the service to the resident would be exempt under section 13 of Part I of Schedule V to the ETA. Any restoration services acquired by the condo corporation for the purpose of making such a supply to a resident would not be acquired for consumption, use or supply in the condo corporation's commercial activities. As such, the condo corporation would not be eligible to claim an ITC for the GST/HST payable on the acquisition of the restoration services from the contractor.

We would encourage CBA members to request a GST/HST ruling if they are uncertain about the application of section 13 of Part I of Schedule V to the ETA to their particular situation.

22. Franchise Business Involving Exempt Supplies

Facts/Background

A franchisor operates a business through franchises of an educational service that is an exempt supply. The franchisor charges a franchise fee payable for a right to operate such business and then charges ongoing royalties based on a fixed percentage of the revenues from the exempt business.

Question

Given that the essence of the contractual relationship is the operation of a business involving the making of exempt supplies, are the franchise fees and ongoing royalty payments incidental to the exempt educational services and therefore also exempt supplies?

CRA Comments

The determination of whether single or multiple supplies are being made depends on a complete set of facts, as well as consideration of the criteria outlined in P-077R2, Single and Multiple Supplies. Where multiple supplies are made, the conditions of section 138 of the Excise Tax Act, such as a particular property or service being supplied together with other property or service for a single consideration, would also need to be met. Further information on whether one supply is incidental to another for GST/HST purposes is available in P-159R1, Meaning of the Phrase "Reasonably Regarded as Incidental" and

P-160R, Meaning of the Phrase "Where a Particular Property or Service is Supplied together with any other Property or Service".

To conclusively respond to the question would require consideration of all relevant facts. A GST/HST ruling may be requested from the CRA if a conclusive response with respect to a particular situation is required.

23. Rebate for Printed Books

Facts/Background

The definition of "specified property" in subsection 259.1(1) of the Excise Tax Act (ETA) and in section 2 of each Schedule to the Deduction for Provincial Rebate (GST/HST) Regulations, lists "an audio recording all or substantially all of which is a spoken reading of a printed book". What happens if there is no printed book of which the recording was made, but it is a recording of a spoken reading of a book that was published electronically, such as a book published only on Kindle?

Question

Will the rebate be allowed?

If not, what if the publisher keeps one copy of the book so that a "printed book" does exist, although it is not sold to the public?

CRA Comments

Section 259.1 of the ETA, in part, provides for the rebate of the GST or the federal part of the HST payable by specified persons on the acquisition of "an audio recording all or substantially all of which is a spoken reading of a printed book". Under provincial legislative authority, the participating provinces of Ontario, Nova Scotia, New Brunswick, Newfoundland and Labrador, and Prince Edward Island, provide for a rebate of the provincial part of the HST payable on the acquisition of such property, in their respective provinces, by all persons. The Deduction for Provincial Rebate (GST/HST) Regulations is part of the administrative framework that allows the CRA to administer the provincial rebates on behalf of the provinces.

Under subsection 259.1(2), a rebate is generally not available where an audio recording all or substantially all of which is a spoken reading of a printed book, is acquired for the purpose of sale or is to be given away. However, specified persons that are prescribed charities or prescribed qualifying non-profit organizations, whose primary purpose is the promotion of literacy, are not subject to this restriction. In contrast, the provincial rebates are provided without restriction.

Electronically published written works are not printed books and thus, when an audio recording is made that is a spoken reading of an electronically published written work, neither of the aforementioned rebates would be allowed. However, if it is established based on the facts, that a printed book pre-exists the "audio recording all or substantially all of which is a spoken reading of a printed book" it would appear that the audio recording would qualify for both rebates (subject to the noted restrictions). The

determination as to whether a printed book exists in a particular situation is a question of fact requiring consideration of all relevant facts.

24. Interaction between Wash Transaction Policy and Subsection 296(2)

Facts/Background

We would like to clarify the calculation of interest in a situation involving the Wash Transaction Policy and ITCs per subsection 296(2) of the Excise Tax Act (ETA) and how these rules interact. Consider the following factual situation as an example:

There are two closely-related corporations: ABC Drilling Inc. and ABC Mining Corp.

Both ABC Drilling Inc. and ABC Mining Corp. are registrants who are monthly filers and are involved exclusively in commercial activities.

XYZ Consultants Inc. provided taxable consulting services to ABC Drilling Inc. and issued an invoice for $100,000, plus $13,000 in GST/HST on December 3, 2015. This invoice satisfies the requirements of subsection 169(4) of the ETA.

XYZ Consultants Inc. provided taxable consulting services to ABC Mining Corp. and issued an invoice for $50,000 plus $6,500 in GST/HST on December 3, 2015. This invoice satisfies the requirements of subsection 169(4).

During the preparation of their monthly GST/HST return for the period ending December 31, 2015, the staff at ABC Drilling Inc. erroneously claimed ITCs of $6,500 belonging to ABC Mining Corp. Likewise the staff at ABC Mining Corp. erroneously claimed ITCs of $13,000 belonging to ABC Drilling Inc. The ITCs claims were "swapped" in error.

On October 1, 2017, the CRA commenced an audit of ABC Mining Corp. for the monthly reporting period ending December 31, 2015 and discovered the above-noted error.

All the conditions necessary for the application of the Wash Transaction Policy have been met.

All the conditions necessary for the application of subsection 296(2) of the ETA have been met (for example, the ITCs had not been claimed in a subsequent return, the requirements of subsection 169(4) have been met, etc.)

Questions

a) How would the CRA assess ABC Mining Corp. with respect to this issue for the monthly period ending December 31, 2015?

b) How does the Wash Transaction Policy apply to the above-noted assessment of ABC Mining Corp. in the circumstances? More specifically, does the Wash Transaction Policy result in the waiver/cancellation of interest in excess of:

   i. 4% of the ITCs disallowed (that is, $13,000 as shown in Column "A")?

   ii. 4% of the difference in net tax (that is, $6,500 as shown in Column "B")?

Wash Transaction Calculation for ABC Mining Corp.	------ A ------	------ B ------	Notes:
Total Denied ITCs	$ 13,000	$ 13,000	a = Given
Subsection 296(2) Credits	$ 6,500	$ 6,500	b = Given
Increase in Net Tax	$ 6,500	$ 6,500	c = a - b
Wash Transaction Base	$ 13,000	$ 6,500	d = ???
4% Wash Transaction Factor	$ 520	$ 260	e = d x 4%

CRA Comments

a) The examiner or auditor would assess $6,500 as over-claimed ITCs. They would then flag this amount as the "wash base amount". The amount of interest waived or cancelled would be based upon this particular amount.

b) The system automatically calculates the amount of penalty/interest based upon the wash base amount identified by Audit. The system will compare the 4% flat calculation on the wash base amount to the statutory interest/penalty calculation on that same wash base amount. It will then apply the lower of the two.

   i. If the 4% is less than the statutory penalty/interest amount, we will use the 4% amount and post that amount to the period.

   ii. If the 4% is greater than the statutory penalty/interest amount, we will ignore the 4% and post the statutory penalty/interest amount.

Note that the 4% is interest bearing and accrues interest from the date of the Notice of Assessment until the balance is paid in full. The statutory prescribed interest has an effective date equal to the balance due date (reporting period).

25. CRA Web Registry

Facts/Background

On the CRA's website, the CRA states, "Use the GST/HST Registry only to validate the GST/HST number of a business" and "Any commercial reproduction of the registry results is strictly prohibited".

Question

Can the CRA please confirm that third parties are permitted to use the GST/HST Registry to confirm, on behalf of their clients, the GST/HST registration status of their respective suppliers and to provide a written report to their client which summarizes the results that were obtained from the respective search?

CRA Comments

Creating any kind of database or commercial product that would sell the information that is available on the registry, would not be acceptable. In other words, it is ok for a lawyer to charge a fee for their time searching the registry – that is a service provided to their client. What is not ok is the creation of a database or listing of all the information from the registry and the charging of a fee for access to that information.

26. Voluntary Disclosure Program

Facts/Background

The new revised GST/HST Memorandum 16-5 "Voluntary Disclosures Program" (Memo 16-5), dated December 15, 2017, states at paragraph 15 that the Limited Program provides relief for applications that disclose non-compliance where there is an element of "intentional conduct".

Paragraph 17 of Memo 16-5 states that, "Generally, applications by corporations with gross revenue in excess of $250 million in at least two of their last five taxation years, and any related entities, will be considered under the Limited Program."

Paragraph 18 of Memo 16-5 includes additional factors that the CRA will consider when determining under which category a taxpayer will be considered, including dollar amounts involved, the number of years of non-compliance, the sophistication of the registrant and how quickly the registrant took corrective measures to address their non-compliance upon its discovery.

Paragraph 19 of Memo 16-5 allows that the existence of a situation or a single factor may not be determinative and, goes on to indicate that a sophisticated registrant, for example, may still correct a reasonable error under the General Program.

We also note that the new Voluntary Disclosures Program does not have a "no names" period where taxpayers can approach the CRA to determine what treatment they will be afforded. This ambiguity in the CRA's guidelines may have the effect of deterring taxpayers from making voluntary disclosures.

Questions

a) Large, sophisticated corporations may be involved in "wash" transactions that involve large dollar amounts over long periods of time. Are wash transactions entitled to presumptive relief under Category 1, rather than Category 3? Under what circumstances would wash transactions fall under Category 3?

b) Paragraph 17 of Memo 16-5 appears to make a strong link between $250M of gross revenues and Category 3 treatment. Should large corporations always assume that they will only be considered under Category 3, or does the flexibility afforded in paragraph 19 of Memo 16-5 for "reasonable errors" soften this connection?

   If "reasonable errors" (that is, not intentional conduct) will be allowed under Category 2 for all taxpayers, including large corporations, the guidelines should be clearer about this, because paragraph 17 of memo 16-5 appears to provide a strict

guideline for front line CRA Voluntary Disclosure officers to include large corporations in Category 3 only.

c) The criteria in paragraphs 17 – 19 of Memo 16-5 go far beyond the stated purpose of paragraph 15 of Memo 16-5 of dealing with "intentional conduct" or "gross negligence" and, appear intended to include taxpayers who the CRA thinks "should have known better", which is a much lower standard. Please comment on whether this is an accurate statement and whether it was intended.

CRA Comments

a) Generally, large corporations and their related entities who make applications for relief involving GST/HST wash transactions that are eligible for a reduction of penalty and interest under the policy set out in GST/HST Memorandum 16-3-1, Reduction of Penalty and Interest in Wash Transaction Situations will be eligible for relief related to the wash transactions submitted under the General Program ("Category 1"). For examples of eligible wash transactions, please see this memorandum. Wash transactions not eligible for relief under the policy set out in GST/HST Memorandum 16-3-1, will normally be treated under the General Program ("Category 2").

b) While striving for consistency in approach to the administration of applications received from large corporations and their related entities for income tax and GST/HST (and Excise taxes), we recognize that the transactional basis of GST/HST and Excise taxes can result in reasonable errors. VDP officers responsible for reviewing applications for relief made by large corporations and their related entities will make referrals to a program specialist responsible for large case audits in order to fully analyze the application.

c) Generally, relief under the Limited program (Category 3) provides limited relief for applications that disclose non-compliance where there is an element of intentional conduct on the part of the registrant or a closely related party. While the primary driver for determining the program (category) under which relief will be granted is the existence or absence of an element of intentional conduct on the part of the registrant or a closely related party, in all cases, the following factors may be considered as either contributing or mitigating factors when determining under which category a VDP application should be processed:

- the dollar amounts involved;
- the number of years of non-compliance;
- the sophistication of the registrant; and
- how quickly the registrant took corrective measures to address their non-compliance upon its discovery.

27. Update on Audit Issues

A verbal update was provided.

28. Update on Court Cases/Objections

A verbal update was provided.