



1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
202.638.5601
tei.org

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Mr. Gervais Coulombe
Acting Director General, Sales Tax Division
Department of Finance, Canada
Tax Policy Branch Finance Canada
90 Elgin Street,
Ottawa, Ontario K1A 0G5

Via Email: Consultation-Legislation@fin.gc.ca

Re: New GST/HST Joint Venture Election Rules

Dear Mr. Coulombe

In the November 21, 2023 Fall Economic Statement, (“FES”), the Government of Canada (“GOC”) together with the Department of Finance (“Finance”) announced its intention to seek stakeholder views and comments on proposed new joint venture election rules under the *Excise Tax Act* (Canada) (“ETA”)¹, as first announced in Budget 2014. With this announcement, GOC released draft legislative proposals for review and comments. Tax Executives Institute, Inc. (“TEI”) welcomes the efforts of Finance to expand the election and looks forward to participating in Finance’s consultation process. While recognizing the positive steps forward, TEI’s Canadian Commodity Tax Committee would like to provide TEI’s views and comments that follow.

ABOUT TAX EXECUTIVES INSTITUTE, INC.

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 56 chapters in North and South America, Europe, and Asia, including four chapters in Canada. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies in the world. Approximately 15 percent of TEI’s members are

¹ All references are to the *Excise Tax Act* unless otherwise stated.

resident in Canada and many of our non-Canadian members' companies do business in Canada.

SUBMISSIONS

With careful consideration, discussions and engagement with TEI members, TEI submits the following:

Preserve existing section 273

The legislative proposals relating to the new Goods and Services Tax/Harmonized Sales Tax (“**GST/HST**”) joint venture election rules were released as new section 273.01 with the direction that the ETA would be amended to add the new section 273.01 after the existing section 273 that has been in place since January 1, 1991.² TEI is supportive of the preservation of the existing section 273 for joint ventures engaged in the exploration or exploitation of mineral deposits or any activities that are currently prescribed pursuant to the *Joint Venture (GST/HST) Regulations* (the “**JV Regulations**”). The prescribed activities in paragraphs 3(a) to 3(p) in the Regulations have been in place since 1991, and maintaining the consistency of application that has been developed by those engaged in the prescribed activities is an important factor to retain as Finance moves forward in the expansion of the GST/HST joint venture election to include commercial joint ventures.

JV Election and Consistency

The existing section 273 joint venture election provisions (the “**JV Election**”) is widely used in the real property and oil and gas industry. In the oil and gas industry alone, the JV Election is used in virtually all of the thousands of oil and gas joint ventures currently active in Canada. It is a rare occurrence that participants in a joint venture chose to not elect to use the JV Election. In many cases, operators do not allow participant(s) the option to opt out of electing to use the JV Election as this would create additional administrative burden for the operator. Operators and participants alike rely on the JV Election provisions in their underlying joint venture agreements to declare the parties' intention to elect to adhere to the JV Election approach. It is common practice that participants in a joint venture utilize standard industry agreements, putting into effect the *Canadian Association of Petroleum Landmen's Operating Procedure* and the *Petroleum Accountants Society of Canada's Accounting Procedure*. The standardized accounting procedures and contractual terms utilized by the industry all contain procedures and language that incorporates the current practice relating to the JV Election, and this practice has withstood the test of time since its introduction in 1992.

² Non substantive revisions were made in 1993 and 1997.

JV Election and Administrative Burden

It is common practice in the oil and gas sector for joint venture participants (and to a certain degree, operators) to change on a regular basis. If the JV Election were required to be filed for all existing joint ventures that currently benefit from the use of the JV Election, the administrative burden associated with a change in the filing requirement would not be a one-time upfront cost as operators of joint ventures would be required to update each JV Election every time a participant is replaced or removed. New participants are bound by the terms of the underlying joint venture agreement in place which would specify the intention of the operator and the participants regarding the JV Election.

The *Six-Point Plan to Simplify the GST*³ introduced by the Minister of National Revenue in 1992 included the elimination of the requirement to file certain GST/HST election forms, including the section 273 JV Election. One of the key objectives to eliminating the requirement to file the JV Election was to reduce the burden on business and government employees. This focus was refreshed by GOC in its *Red Tape Reduction Action Plan* in 2014. The oil and gas industry has grown and changed significantly since the GST came into force in 1991, and the administrative burden that would be associated with requiring existing joint ventures to file and maintain the JV Election would be excessive on industry and far outweigh the perceived benefits of requiring the election to be filed with the Canada Revenue Agency (“CRA”). What is critical to the success of the JV Election is that the parties’ intentions are specifically addressed in the underlying joint venture agreement, and the parties act consistently with the intention listed.

Restrictive Nature of Proposed section 273.01

TEI has reviewed proposed section 273.01 (“**New JV Election**”) for new commercial joint ventures that do not fall within the ambit of existing section 273. Overall, TEI appreciates the distinction between oil and gas, currently prescribed activities under existing JV Regulations, and the new type of joint ventures referred to as a Commercial Joint Venture (“**Commercial JVs**”). However, TEI is of the view that the proposed legislation appears to be too restrictive and may not be of use to Commercial JVs not already covered under and preserved by existing section 273.

Specified Person

Newly proposed section 273.01 introduces the term “specified person” as it pertains to an operator or a joint venture participant to be a person that is a GST/HST registrant and must be engaged exclusively in commercial activities.

³ “The Six-Point Plan of GST Simplification, Revenue Canada Customs and Excise Fact Sheet April 27, 1992.

Whether a participant is engaged exclusively in commercial activities and registered for GST/HST purposes should not be factors in determining whether a participant qualifies for the New JV Election. Where the operator is registered and the parties elect under proposed 273.01, the operator would report the “net tax”⁴ on behalf of the joint venture participants. Take, for example, a person in Canada who only contributes money to a joint venture project in return for an interest in the joint venture or a non-resident, who is not registered for GST/HST purposes who intends to do same. From the operator’s perspective, it is administratively manageable to require that all participants either elect under the New JV Election or all participants adopt the general rule for the joint venture that requires each participant to report its proportionate share of net tax for the joint venture.

More likely than not, these participants as new registrants would file nil returns where the election is in place, and the Canada Revenue Agency (“CRA”) will be required to expend resources to facilitate the processing of the increased (but redundant) compliance obligations. More importantly, such a requirement may discourage foreign investments to Canada, which certainly should not be the policy intent.

Moreover, the stringency of the definition of a “specified person” may not be commercially achievable. As proposed, the stringency surrounding “specified person” effectively requires every participant in the joint venture to represent and warrant to the other participants that it meets all of the criteria set-out in the definition (including ensuring that all participants are exclusively engaged in commercial activity). TEI is of the view that this is not achievable because each participant would be required to provide certain financial disclosure or competitive know-how to the others, which may impede fair competition. Participants would be compelled to rely on statements made by other participants regarding their commercial activities, introducing the possibility that the election may be deemed invalid if these statements are inaccurate. In such cases, all participants would bear financial risks, as the operator and elected participants are jointly and severally liable for a criterion beyond their control. This places an undue burden on participants and underscores the need for a more nuanced approach to align liability with controllable parameters.

Qualifying Participant

The proposed definition of “qualifying participant” means a specified person that is a participant in the joint venture that contributes resources (other than nominal resources) to a joint venture in exchange for an interest in the underlying property of the joint venture.

TEI believes that the restriction to require a qualifying participant to have an interest in the joint venture may not be an effective requirement. For example, in

⁴ As set forth the in ETA.

the real property construction industry, certain joint ventures may utilize “contract operators” to manage the day-to-day operations, management and accounting of joint ventures. Typically, these property or asset managers, who act as operators of a joint venture, have the experience, knowledge, processes, systems, etc. in place to manage joint ventures, including accounting for GST/HST. There are instances where such contract operators may not have any interest in the particular joint venture. In these cases, it would be in Finance’s interest to allow for such arrangements, since these contract operators have the tools and resources to administer GST/HST, and further, would be liable to CRA on a joint and several basis under proposed subsection 273.01(7). Such an arrangement is already accepted by CRA as outlined in Example 2 of CRA’s Publication P-106 – *Administrative definition of a “participant” in a joint venture*.

Qualifying Operator Requirements

New JV Election provisions define a qualifying operator to be both a “specified person” and “qualifying participant” as defined in proposed subsection 273.01(1).

For reasons set out above, TEI is of the view that, for the purposes of proposed section 273.01, the “operator” remains undefined except to the extent that the operator is the person appointed as operator, similar to existing section 273.

TEI believes that the test to qualify for the New JV Election should be based on the proposed definition “qualifying joint venture,” such that the emphasis should be that “all or substantially all of the activities...are commercial activities.” The underlying test would be whether the joint venture itself is engaged exclusively in commercial activities. The proposed definitions outlined above bring in a level of complexity and burdens to both CRA and registrants and brings in a multitude of registrants into the GST/HST realm (*i.e.*, where they will continue to simply file nil returns).

TEI submits that the policy intent and goal for expanding the New JV Election is to simplify taxpayer compliance and enforcement (*i.e.* audits by CRA). For example, absent an election, it will result in each participant accounting for its own GST/HST and ITCs and accounting for its proportionate revenue and expenses, etc. However, with certain proposed restrictions (as discussed below), the proposed New JV Election may be of limited use. If, in a particular joint venture, certain participants qualify with the qualifying operator, while other participant(s) do not qualify, it is questionable whether certain qualifying participants and qualifying operator will execute the proposed New JV Election. This is because while GST/HST accounting relief may be experienced by certain qualifying participants, it doesn’t simplify GST/HST accounting for the qualifying operator. In fact, in this particular example, it increases the administrative burden for the qualifying operator as it effectively would have to have separate GST/HST accounting, likely leading to this particular joint venture



deciding not to make the election. From an enforcement perspective and expanding on the aforementioned example, assume that the joint venture has 5 participants (including the qualifying operator) (each with 20% joint venture interest), and 3 out of 5 of the participants are qualifying participants. In this case, not only is the qualifying operator required to maintain 2 separate accounting ledgers/books, CRA would be required to execute 3 or more separate audits concurrently for completeness.

Respectfully, TEI is of the view that such restrictions defeat the purpose of the proposed New JV Election as they do not simplify administration and enforcement, for either CRA or registrants. Tax leakage, etc. is mitigated with proposed subsection 273.01(7), the joint and several liability provision. In addition, with the above example, it is likely that errors will occur, leading to ITCs being inappropriately claimed, resulting in undetectable leakage when such joint ventures and/or participants are not audited.

Single Operator of Joint Ventures

The restrictive requirement under proposed subsection 273.01(2) may not reflect the commercial realities of certain joint ventures. It is not unheard of for certain large scale joint venture projects, that a particular participant with relevant expertise is designated the operator of a particular aspect of the joint venture, while another participant with different skillsets is appointed the operator of another aspect of the joint venture. Such designations will be evidenced in single, joint venture agreement.

Filing Requirement for the New JV Election

Under proposed paragraph 273.01(5)(c), Finance intends to introduce filing requirements. Currently, when a participant and an operator wish to make a joint election, Form GST21 is not submitted to CRA but is instead individually retained by each involved party (including the operator). TEI proposes that it should not be mandatory to file the election directly with CRA for each joint venture wishing to elect under the proposed New JV Election rules. Participants should keep a copy of the duly completed form in their records, aligning with the current practice or evidence in joint venture agreements that the participants, together with the operator, intend to operate under the joint venture rules. Currently, the process of individual record-keeping by each participant and operator is effective and allows for proper management in the event of an audit without requiring systematic filing with CRA. TEI believes this additional requirement could significantly increase administrative burdens for both government and registrants.

CRA Audit Practices – Section 156 Elections

TEI notes that our members have observed that despite the requirement to file the form for the election pursuant to section 156, CRA auditors routinely

continue to request that registrants provide physical copies of form RC4616⁵ during audits. This practice raises questions about the added value of the filing requirement if, in any case, auditors request the form during their audits. This observation has also been shared during the 2023 TEI Canadian Commodity Tax Committee Liaison meeting with CRA, where registrants raised concerns regarding form RC4616. Despite the possibility for CRA auditors to access form RC4616, they continue to request the form from taxpayers during audits or examinations.

While TEI understands that the new rules aim to enhance transparency and traceability, TEI believes that maintaining the form in individual records, with the option to present it to CRA upon request, would be sufficient to ensure tax compliance.

TEI submits that Finance reconsider its position on the filing requirement and instead consider retention of the form by each participant and mirror existing subsection 273(4). This would reduce administrative burdens while maintaining the integrity of the tax system.

CONCLUSION

In conclusion, TEI appreciates that, based on Legislative Proposals, it is Finance's intention to preserve existing section 273 for oil and gas joint ventures and existing prescribed activities.

While TEI welcomes new GST/HST joint venture elections for Commercial JVs pursuant to proposed section 273.01, TEI is of the view that the proposed legislation is too restrictive, cumbersome and administratively burdensome.

In Finance Consolidation Explanatory Notes to section 273, it states that section 273 provides flexibility in the operation of the GST/HST for joint ventures and "[t]he most significant changes are the removal of the requirement to file the election." These measures were introduced after extensive consultations with industry and the policy intent at the time was to "streamline procedures" and "make it easier to comply with the tax system."⁶

In Economic Action Plan 2014 of Budget 2014, Government asserted (with emphasis added) that "[t]he joint venture election simplifies GST/HST accounting obligations by allowing the joint venture participants to elect one person to be responsible for accounting for the GST/HST on the supplies,

⁵ Form RC4616 - *Election or Revocation of an Election for Closely Related Corporations and/or Canadian Partnerships to Treat Certain Taxable Supplies as Having Been Made for Nil Consideration for GST/HST Purposes.*

⁶ Revenue Canada, Customs and Excise COMMUNIQUÉ, April 27, 1992 "Jelinek Announces Six-Point Plan to Simplify the GST."



acquisitions and importations that are made in the course of their joint venture activities.”

The policy intent in 1992 and in Budget 2014 was to simplify administration and compliance for joint ventures, which in turn, also simplifies CRA’s administration and enforcement (*i.e.*, auditing or examining only the operator). While GOC’s intention appears to be similar, TEI is of the view that proposed section 273.01 does not meet that policy intent such that it is very restrictive and burdensome. It is questionable whether many other unincorporated joint ventures would utilize the New JV Election, as it does not simplify administration and compliance.

Finally, TEI submits that the New JV Election criteria should emphasize practicality with ease of administration and compliance. The new measure(s) should not be an “exercise” or “check the box” endeavour, and more importantly, not an assessment provision for a joint venture’s failure to comply with filing of the election. TEI is of the view that the prohibitive nature of the proposed section 273.01 will render the election not usable and likely lead to unintentional, inadvertent leakage in GST/HST or ITCs.

For the reasons set-out herein, TEI requests that Finance reconsider the proposed legislation and remove the vast restrictions that it currently contains as TEI views them to be counterproductive.

TEI would like to express its thanks again to Finance for its dedication to an ongoing and productive dialogue with business stakeholders. To the extent that Finance has concerns regarding the appropriate scope, TEI welcomes the opportunity to provide further input to address Finance’s concerns regarding how the election should apply. TEI looks forward to working with Finance to assist with transition rules and other issues that may arise as they implement changes to the New JV Election rules.

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This letter was prepared under the aegis of the TEI’s Canadian Commodity Tax Committee, whose chair is Ms. Jun Ping and whose legal staff liaison is Ms. Kelly Madigan. Vice Chair, Mr. Calvin NK Chiew, is the principal author. Committee Members Bonnie Long, Kevin Thom, and Nancy Sauve also contributed to this submission. If you have questions, please contact Ms. Ping at (416) 753-4684 or jun.ping@enbridge.com or Mr. Chiew at (403) 300-2292 or calvin_chiew@pacific-canbriam.ca.

Respectfully submitted,

Sandhya Edupuganty

Sandhya Edupuganty
International President
TAX EXECUTIVES INSTITUTE