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2023 TEI Canadian Commodity Tax Committee Liaison Meeting with Canada Revenue Agency Questions

1. Emission Allowance

CRA has published a description of the GST/HST treatment of an "emission allowance" in *Excise and GST/HST News No. 104* published July 2018 and in *News No. 113*, its interpretation of the phrase, **issued or created by, or on behalf of, a government or an international organization (a "regulator") or by a body established by, or an agency of, a regulator** that is used in the definition of an "emission allowance".

These efforts were required given the uncertainty in the definition and the punitive result of subsection 261(2.1) if the vendor and purchaser, in CRA's view, misinterpreted the legislation. If the vendor incorrectly charges the purchaser GST/HST the purchaser is barred from claiming an ITC. Conversely, if the vendor incorrectly doesn't charge the GST/HST, they are liable to assessment and unrecoverable penalty and interest.

Question for CRA:

Given the value of these transactions, incorrectly interpreting the legislation can result in a significant penalty even if both parties are involved in bona fide commercial activity. Can CRA publish a document that discloses CRA's views on which of the existing Canadian federal and provincial, credits, allowances and other instruments are considered to be emission allowances, and which are not? This is to eliminate confusion.

2. Emission Allowance Issued by Regulator

CRA published its views on the phrase "**issued or created by, or on behalf of, a government or an international organization (a "regulator") or by a body established by, or an agency of, a regulator"** from the definition of an "emission allowance" in Excise and GST/HST News No. 113.

In this document CRA stated that:

- "Generally, the CRA does not consider **instruments** (emphasis added) that are created by a person and simply validated by an employee of a regulator (or a body established by, or an agency of, a regulator) to be an emission allowance" and
- "For an instrument to meet the criterion in subparagraph (a)(i) of the definition of emission allowance, the instrument must be issued or created by, or on behalf of, a regulator or by a body established by, or an agency of, a regulator. For example, where the applicable legislation governing these instruments states that the instrument is issued or created by a designated or appointed employee (such as a director) of a regulator".

The criteria attempt to define who is creating the instrument. It appears that CRA is equating the actions that are carried out by an industry participant that qualify and allow for an instrument to be awarded with the creation of the instrument. The definition only looks to who creates the instrument and not the actions that allow for its creation. An example of this is the Part III credits under the BC low carbon fuel standard. The Part III fuel supplier does not technically have the authority to create an instrument. However, they may be awarded Part III credits if they sell fuel with a lower intensity than other fuels in the class. The fuel supplier performs the actions that earn them credits but they do not create the instrument. A fuel supplier must submit an application (i.e., request) to the Regulator for credit validation and the credit is only created once validated. Without the intervention of the Regulator, the actions carried out by a fuel supplier do not technically result in the issuance of an instrument that can be traded. Therefore, it cannot be said that the action of selling lower carbon intensity fuel results in the creation of an instrument.

We understand that the ETA requires an instrument to be created by an entity with the ability to create legislation or rules that can bind the general population or a person that is operating on behalf of the entity. This would preclude private organizations that create an environmental credit such as airline carbon offsets from "creating emission allowances". However, TEI believes that the BC credits are created by the BC government and not the Part III fuel supplier.

The issues with CRA's reliance on the governing legislation actually stating that the Regulator "issues" the instrument is shown by the discrepancy that results in the treatment of Alberta offset credits and BC Part III agreement credits. The instruments under both schemes are earned by a project organizer who completes activities approved by the applicable provincial Regulator. The legislation governing the Part III agreement credits states that the Regulator "issues" the credit. However, under the Alberta legislation the emissions reduction is verified by a third-party assurance provider based on standards established by Alberta and then serialized by an agency working with Alberta. The third-party assurance provider is qualified to verify emission reductions based on criteria established by Alberta. Without this verification and subsequent serialization, the credits may not be traded. However, the CRA's interpretation results in totally different outcomes in BC than Alberta for conceivably the same actions. It is our belief that the organizer's actions only earn the instrument. The instrument itself is created by the Regulator (or by a third party on behalf of a Regulator in the context of Alberta) when it is validated, issued, or serialized.

Question for CRA:

Will CRA reconsider its position?

3. Section 48 Limits

In 2011, CRA published ETSL-0076, Notice to Excise Tax licensees in the Canadian fuel industry sector, to detail its administrative criteria that would allow a licensed manufacturer to qualify for section 48 authorization. This section allows the licensee to purchase fuel tax-out if it is of a similar class or sold in conjunction with goods manufactured by the licensee ("similar goods"). The goods are deemed to be manufactured by the licensee and the manufacturer pays the FET when the goods are delivered to a purchaser. As a result, the sale by the actual manufacturer was not taxable by virtue of paragraph 23(7)(a). A further condition on this authorization is that the sales value of similar goods sold by the applicant must be no more than 25 per cent of the sales value of taxable goods of the licensee's manufacture or production in Canada. CRA believed that the administrative rules were "prudent, reasonable and in keeping with the intent of the legislation".

Given that the effect of the authorization is explicitly contemplated by legislation, it is hard to conceive how it would not be in keeping with the intent of the legislation.

Further, it will become more difficult for licensed manufacturers to maintain their level of purchases of similar goods below the 25% criterion due to government initiatives like the Clean Fuels Regulation, SOR/2022-140. This measure requires manufacturers to decrease the carbon intensity of their fuels by, amongst other measures, increasing the renewable fuel content in each litre of fuel. Since 2008 this fuel is taxable. Currently there are no licensed manufacturers engaged in producing renewable fuels. As a result, licensed manufacturers will have to source this fuel from others. This may likely mean that licensed manufacturers may not be able to maintain less than 25% purchases of similar goods since there already is a need to purchase similar goods due to events such as refinery maintenance shut-downs and other unexpected demands or supply outages.

Question for CRA:

Will CRA consider dropping the requirement that the value of similar goods sales be less 25% of the total value of an applicant's taxable sales or increase the limit but still ensure that the applicant is primarily selling goods of its own manufacture?

4. FET Wholesaler License

The current FET has been in place since before 1985 and has remained largely unmodified. It is based on the view that the industry consists of manufacturers who sell to wholesalers who in turn sell to retail dealers or in some cases large commercial end users. Manufacturers and wholesalers are generally licensed. These sales are one way and there are no sales from wholesalers to manufacturers other than minimal finished fuels. Industry has moved beyond this outdated version of the fuels business and the FET has not kept pace. In contrast, since the 1985 revision of the FET, the Department of Finance has introduced the GST/HST and FFC which have a more modern understanding of the industry.

One type of industry participant that is not properly contemplated in the drafting of the legislation is an unlicensed distributor that purchases from a

licensed manufacturer or imports product into Canada and then sells the fuel to a licensed manufacturer. In the majority of cases, these participants are not able to become licensed wholesalers even if they are Canadian residents.

It is common in the industry for a licensed manufacturer to produce feedstock that will be used by other licensed manufacturers to produce a finished fuel. Since the intermediary product meets the definition of either diesel or gasoline, its sale to an unlicensed distributor attracts the FET. It is also common that the unlicensed distributor will sell the intermediary product to another licensed manufacturer who will use the feedstock and blend it with ethanol to meet provincial and federal government regulations. Prior to this final blending the product is not saleable as a motive fuel in Canada even though it may meet the definition of either a gasoline or diesel product for FET purposes.

The ETA has mechanisms to ensure that sales from licensed persons to other licensed persons are relieved of tax. However, if a licensed manufacturer sells to an unlicensed distributor who sells to a licensed manufacturer, tax becomes embedded in the transaction. The original manufacturer is required by subsection 23(1) to pay the FET on delivery to the unlicensed distributor. It recovers the FET that it paid by embedding the FET into the price of the fuel to the unlicensed distributor. It is common to disclose this recovery on the invoice as FET, but the manufacturer is not charging the distributor FET. To recover this, the unlicensed distributor must increase its price by the "FET" that has been charged to it, when the person it is selling to is a manufacturer. This is regardless of the license status of the manufacturer. In some cases, this will be to a licensed manufacturer with a section 48 authorization. The second manufacturer is not able to use the relieving provision of subsection 23(7) because tax has already been paid by the original manufacturer. The purchased fuel is used as feedstock by the second manufacturer who must pay the FET again when it sells the finished product. As a result, the FET has been paid twice on the same volume of fuel.

In some situations, CRA has allowed licensed manufacturers with section 48 authorization to claim the "FET" that they paid to unlicensed distributors as an internal deduction under subsection 73(1). This is because it is common for licensed manufacturers not to be able to segregate between tax-paid and tax-out inventory. The finished good will be sold FET-in and the tax would have been paid twice.

However, if the second manufacturer either blends the product with other blends stocks that enhances its performance or doses the product with additives, CRA will not allow an offset. This is the case even if the finished product will be sold FET-in. CRA believes that the increase in volume due to the addition of blend stocks or additives negates the ability to grant the offset. Therefore, FET would have been collected twice on the volume of feedstock that's within the finished product. The mechanism that would currently allow the second manufacturer to be refunded the embedded tax is a remission order. While this mechanism is effective it is not efficient. It is our understanding that it currently takes a year to process a successful order. This is an excessive amount of time to correct an inequity caused by the legislation.

Question for CRA:

With the current legislation and administrative treatment by the CRA, global unlicensed traders are being incentivized to purchase product from a foreign source outside of Canada and to sell to Canadian entities. Will CRA consider reviewing and amending FET?

5. Exempt Sale for FET

To become a licensed wholesaler under the FET, CRA has required the entity to have at least 50% of its sales exempt from the FET over the previous three months. There is no explicit definition of an exempt sale in Part III of the ETA. CRA administratively defines exempt sales to be sales of Schedule 1 petroleum products to licensed wholesalers and sales by the entity where title transfers outside of Canada.

This interpretation made more sense when the ETA imposed a sales tax under paragraph 50(1.1)(c) of Part VI on Schedule II.1 petroleum products. However, with the introduction of the GST, the Consumption or Sales Tax levied under Part VI is not imposed on goods that were delivered after December 31, 1990, subject to the transitional provisions of section 118. This includes the sales tax levied under Schedule II.1. Conceivably, the only valid licensed wholesalers are those who were licensed prior to 1991 and there cannot be any created after that date. This is because subsection 55(1) refers to sales exempt from the sales tax and not the excise tax. In 2023, there are no longer any sales subject to Part VI. As a result, there should be no new licensees under subsection 55(1).

Section 64 in conjunction with the General Excise and Sales Tax Regulations allows persons who pay excise tax to become licensed. Under subsection 23(1), the tax is payable by manufacturers and importers. This means that importers may be eligible to become licensed as a wholesaler. Even if we assume that a case can be made that section 55(1) would allow an importer to become licensed, there are no exempt sales that an unlicensed person could make.

Various subsections of section 23 refer to sales of manufacturers and licensed wholesalers on which Part III tax is not payable. Subsection 23(6) allows a licensed wholesaler to purchase Schedule 1 goods without the payment of taxes. Subsection 23(7) allows a manufacturer to purchase goods without the payment of excise tax if they will become part of an excisable good. Subsection 23(8) allows an exemption like subsection 23(6). However, there is no provision in the legislation that allows an unlicensed person to exempt sales to the licensed entities in the section 23 exemptions. The unlicensed person would always be required to purchase products on which the excise tax has already been paid.

Conceivably, CRA's administrative provision is based on the ability of an unlicensed distributor obtaining a refund. FET paid on export sales could be refunded under section 68.1 while FET paid sales to licensed wholesalers could be refunded under section 68.2. However, there are other provisions that would allow a refund/drawback to be paid to the unlicensed distributor who purchased tax-in product.

Questions for CRA:

(a) Will CRA extend their administrative practice of what is considered exempt sales for the purposes of licensing entities as wholesalers? Also, since there is not a legislative basis for demanding that 50% of sales over the last three months are exempt excise sales will CRA abandon this requirement? Finally, will CRA remove the administrative requirement that an applicant have 90 days of exempt sales prior to the filing of the application for licensing?

(b) Will Finance amend the legislation to provide a legislative basis for the licensing of wholesalers that reflect the current industry practices?

6. Online Access

Since January 1, 2023, the Canada Revenue Agency ("CRA") has been responsible for administration for entities that are Selected Listed Financial Institutions ("SLFIs") for GST/HST and QST purposes. Since "harmonization", it has not been possible to view several aspects for SLFIs through My Business Account, including account activity, account balances and status of pension rebates.

The lack of the ability to obtain balance and transaction activity electronically for SLFI accounts, especially when combined with CRA's "standardized accounting" whereby balances are transferred between program accounts automatically (i.e.: transferred from RT accounts to RC, RP, etc. by CRA without notification), seriously impedes taxpayers' ability to manage their accounts and compliance. As a result, reconciliation of RT accounts for GST and QST SLFI accounts requires a request for a paper statement (which often takes well over a month to receive), and significant amounts of follow up between different personnel at large taxpayers as the people managing the RT, RC, RP etc. accounts are not the same, and can often be in different physical locations. This situation becomes even more problematic taxpayers have multiple taxation years impacted due to outstanding rebate claims, audits or objections.

TEI has raised this issue at several liaison meetings previously and CRA had confirmed that My Business Account functionality would continue to be limited until CRA was able to fully automate certain aspects. At the 2020 liaison meetings, CRA confirmed that discussions with Revenu Québec on automating certain aspects of the QST SLFI process were ongoing. In 2021, the CRA noted the priority was on delivering new and existing COVID measures along with other recently announced budget measures.

Question for CRA:

Could the CRA provide an update on the progress on My Business Account developments for SLFIs and does CRA have an expected timeline for when SLFIs will have full online access?

7. Recent Changes to Non-resident Simplified GST/HST Registered Businesses' Registration Numbers

The Canada Revenue Agency recently made changes to the GST/HST program account number for non-resident simplified GST/HST registered businesses, now using an RT9999 suffix. TEI applauds CRA for considering industry concerns and implementing such a change to make it easier for registrants to identify suppliers that are simplified registered businesses. This will help to avoid inadvertently claiming input tax credits relating to tax charged by simplified registered businesses.

Unfortunately, a search against the business number for these simplified registered businesses in the CRA's GST registry continues to produce a result that the entity is registered. Consequently, an additional step continues to be required for a GST/HST registrant to determine if taxes paid are eligible input tax credits : either (1) check the invoice to see if the supplier has listed an RT suffix with 9999 (though many suppliers do not include the RT suffix on their invoices, and many recipients do not systematically track the suffixes as they were previously irrelevant) or (2) check the supplier's name against the list of non-resident simplified GST/HST registered businesses. This additional step will continue to add administrative burden to registrants seeking to confirm whether their suppliers are registered under the regular GST/HST regime before claiming input tax credits.

Questions for CRA:

(a) In an effort to reduce this compliance burden on registrants, would the CRA consider treating the GST/HST registry as for regular GST registrants only and producing a negative result in the GST/HST registry for non-resident businesses registered under the simplified GST/HST regime?

(b) Additionally, it would be helpful if the search result could state the registration status under the simplified GST/HST regime, as this would facilitate communications to suppliers.

(c) TEI also has the following two suggestions to make the simplified GST/HST list more convenient for registrants to use in determining whether their suppliers are on the list:

(i) Make the simplified GST/HST registry list downloadable. This would allow registrants to utilize various functionality with Excel to aid in lookups of suppliers.

(ii) Separate the 9-digit BN from the RT9999 suffix into two fields as registrants generally only use the 9-digit BN in their vendor records. Separating the fields would allow for easier searches within registrant's systems.

For example, separate as follows:

BN	Extension
123456789	RT999

8. GST/HST Objection Timelines and New Audits on Same Issues

CRA's website states that it may take over 500 days on average to resolve high complexity GST/HST objections. TEI members are aware of objections taking over 1,000 or even 1,500 days before getting resolved, meaning that a new CRA GST/HST audit often starts without the objection related to the previous GST/HST audit having been resolved.

Questions for CRA:

What does the CRA consider as a reasonable delay to resolve a high complexity objection? When a new audit starts while an objection related to the previous audit is still unresolved, is there a way for the CRA to prioritize this file and expedite the process so that the taxpayer (and the CRA auditor) can have some clarity regarding the issues which were included in the objection? Can CRA share some statistics regarding the delays to resolve high complexity objections (number of files currently being handled by CRA, minimum and maximum delays, etc.)?

9. Proactive Communications Request for My Business Account Issues

In May 2023, several TEI members found issues with their section 156 closely related elections as they appeared on My Business Account ("MyBA"). In some

cases, the entire election disappeared while in others only a few of the entities that had elected were listed. The problems continued to persist as month end approached and several members were left scrambling trying to determine the best way to update their s.156 elections (e.g., whether to file a paper version of the election).

Thankfully, the errors were resolved prior to month end and any changes needed to s.156 elections could be made on MyBA. We thank the Canada Revenue Agency for their efforts to correct these issues and for confirming to TEI that there were in fact issues that the CRA was aware of.

Question for CRA:

When similar situations arise in the future, could the CRA consider immediately notifying MyBA users and TEI (to pass along to our members) of the issue and any remedial actions that MyBA users should take in the interim? Such a communication would be very valuable and much appreciated.

10. CRA My Business Account and Represent a Client Services Use for Authorizations

Similar issues have been raised in prior year's Liaison meetings. The new procedures to set up online access with the Canada Revenue Agency for new entities or newly acquired entities are causing increased frustration for TEI members. The processes are often not practical for large corporations and make it extremely difficult/burdensome to get CRA online access given directors of corporations are not involved in the tax functions of corporations. In addition, the short time limit set for a director to access the online approval to give authorization can expire before authorization is provided.

In some cases, taxpayers have provided a list of officers of the corporation along with a valid power of attorney for the VP tax along with corporation documents. However, TEI members have found it can often take several weeks to a month to get these documents processed by CRA before the VP Tax is provided access to further provide someone else with Level 3 access.

Question for CRA:

TEI understands the needs to protect taxpayer information and ensure only properly authorized persons are granted access; however, TEI members propose CRA consider setting up a special business online portal where large businesses could submit the required corporate information for streamlined review rather than faxing the information into the Tax Centre. TEI would not envision this particular online portal as requiring authorization to submit initial corporation documents. TEI would appreciate a status update from CRA.

11. RC4616 Closely Related Group Election on My Business Account

Registrants can view the entities for which an *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* is in effect on My Business Account (MyBA). However, the format that appears on MyBA is not easy to track as only the business number ("BN") of each entity and effective date is displayed on MyBA. The name of the entity does not appear with the BN, which can be very inconvenient if the corporate group has several dozen entities part of the election. TEI members have also noticed some other limitations with the functionality with the RC4616 on MyBA.

Questions for CRA:

TEI provides the following recommendations to the Canada Revenue Agency ("CRA") relating to the RC4616 and would appreciate CRA's comments on the viability of such recommendations:

(a) Could the CRA consider adding the entity name to the RC4616 on MyBA?

(b) For entities for which a revocation of the election has been filed, could the CRA consider adding the revocation date to the RC4616 on MyBA?

(c) For entities that have been amalgamated or dissolved (that still appear on the RC4616 on MyBA), could the CRA consider adding the amalgamation or dissolution date to the RC4616 on MyBA?

Additionally, despite the requirement for the RC4616 to be filed with CRA, auditors will routinely ask registrants to produce the election as part of the initial audit queries. Since CRA auditors can also access the RC4616, what is the rationale for auditors asking for the election?

12. CRA Offline/Telephone Access

TEI appreciates that the Canada Revenue Agency ("CRA") continues to enhance its processes for interacting with taxpayers and representatives offline while balancing the need to ensure taxpayer information is kept secure. However, TEI members are concerned that the process has been lengthened as a result of the number of additional questions that taxpayers are been asked in order to obtain information regarding their accounts. In the past, the following business information was typically confirmed by CRA agents:

- Business number (BN)
- The full legal name of the business
- Telephone number
- Complete mailing address
- Question about latest notice of assessment or payment made

In addition to confirming that the individual phoning in to CRA has access to the correct account (i.e. confirming name and Rep ID/legal entity in question), the representative/taxpayer must now also confirm multiple facts related to the tax account. This results in phone calls (including wait times) generally lasting more than 30 minutes. TEI members see this as a substantial use of both taxpayers' and CRA's resources, which is causing frustration. If the taxpayer representative does not answer a question properly, you are disconnected from the call and asked to call back later with "the right answer", which in effect, discourages future calls.

As an example, one TEI member with a question about a Notice of Assessment for a rebate claim, the following questions were posed by the CRA agent in addition to the above standard questions:

- Legal Name (both English and French) of the entity (The CRA agent would not accept just the English legal name);
- Last rebate amount and dates which the rebates applied for were;

- Last amount of rebate received and dates;
- Last payment made to the RT0001 account (both instalment and year end balance);
- Last payment made to the RT0002 account; and
- Other vague questions which a representative may not have the responses to (i.e., if the taxpayer representative only works in GST, the taxpayer representative may not have visibility to respond to the CRA agent's queries about payroll).

Questions for CRA:

(a) While TEI understands CRA's need to confirm the identity and authorization of taxpayer representatives, could the CRA consider an alternative to the lengthy questions such as the use of a two-step verification process through My Business Account or Represent a Client? For example, having the CRA telephone agent generate a verification number that is sent to the MyBA inbox for the taxpayer representative to confirm. This method would be very expedient for both CRA and the taxpayer, and this method is in line with the mode of authorization used by large financial institutions and also the CRA to log onto MyBA or Represent a Client.

(b) What's CRA internal policy regarding verification process for telephone inquiries?

13. Collections Resulting from Desk Audit of Joint Filing Registrants under Subsection 228(7)

Subsection 228(7) of the *Excise Tax Act* (Canada) allows closely related corporations, that meet the prescribed circumstances and conditions in the *Offset of Taxes (GST/HST) Regulations*, to elect for net tax payable of one corporate registrant to be reduced or offset against a net tax refund of a related corporate registrant within the same closely related group.

Despite a 228(7) election in place, some members have found that the Canada Revenue Agency will treat net tax payable that was net against a net tax refund to be short paid and send to collections when the GST/HST return for the net tax refund is under desk audit. The result is interest levied against the amount of net

tax payable that was offset against the net tax refund despite s. 228(7) and collection action taken for the balance.

Question for CRA:

As neither s. 228(7) nor the *Offset of Taxes (GST/HST) Regulations* support treating the amount offset against the net tax refund as unpaid when under audit, could the Canada Revenue Agency consider changing its practice and only consider an amount offset unpaid if the net tax refund or a portion thereof is denied?

14. Retention Period of Documents obtained on Audit

The Canada Revenue Agency obtains a significant amount of documents from taxpayers and registrants under the CRA's audit powers under Subdivision C of Division VIII of the *Excise Tax Act* (Canada). Subsection 286(3) provides the required retention periods for the taxpayer of its own records, however the *Excise Tax Act* (Canada) contains no equivalent provision for the retention periods for the CRA for documents obtained on audit. As a result, it would appear the *Privacy Act* (Canada) (under which the CRA is a listed organization) would govern the CRA's requirement on retention of audit records. While subsection 6(1) of the *Privacy Act* provides for time periods to be prescribed for a government institution to maintain records after it has been used for an administrative purpose, paragraph 4(1)(a) of the *Privacy Regulations* focuses only on personal information of an individual.

Question for CRA:

For reporting periods for which the assessment limitation period under s. 296 has expired and there are no ongoing objections or appeals, or any other enforcement actions, could the CRA confirm how long after the close of an audit that the CRA retains audit records and representations received from registrants/taxpayers? Once it has approached time limit, how audit records would be destroyed either paper or electronic version?

15. Documentary Requirements for Tax Exemptions based on Band-Management Activities

GST/HST Technical Information Bulletin TIB B-039: *GST/HST Administrative Policy - Application of the GST/HST to Indians* provides that band-empowered entities, both unincorporated and incorporated, are eligible to be exempt from GST/HST on acquisitions of goods and services for band management activities. The exemption applies to services acquired both on and off a reserve when acquired by a band or band-empowered entity for band management activities.

TIB B-039 defines band management activities as "activities or programs undertaken by a band or band-empowered entity that are not commercial activities for which they would otherwise be entitled to claim input tax credits. In determining whether the acquisition of a supply is for band management, the output of the activity or program will be the determining factor, as opposed to the objectives of the activity or program."

When providing an exemption to a band-empowered entity, the CRA requires a supplier to obtain a certificate confirming the property and/or services are being acquired for band management activities or for real property on a reserve.

Question for CRA:

As a supplier would not generally know if the band-empowered entity is engaged in commercial activity nor whether it was entitled to claim input tax credits, can the CRA confirm that a supplier may accept a completed band management certificate without further inquiry to determine its validity?

16. CRA Guidance to Auditors resulting from Judicial Decisions

There have been a few recent Tax Court of Canada decisions relating to judicial interpretations around registrant's ability to claim input tax credits ("ITCs") and the documentation required under subsection 169(4) of the *Excise Tax Act* (Canada) to substantiate such claims.

CFI Funding Trust v. The Queen, 2022 TCC 60 and *Fiera Foods Company v. The King*, 2023 TCC 140 are two recent examples of the documentary requirements for

ITCs. Further, *Mediclean Incorporated v. The Queen*, 2022 TCC 37 addressed requirements under subsection 261(1) in respect of claims for tax paid in error.

In TEI's view, these judicial decisions provide important updates to how Canada Revenue Agency ("CRA") auditors interact with registrant's ITC claims, though it many cases it does not appear that auditors are applying the latest jurisprudence in reviewing registrants' ITC claims.

Questions for CRA:

(a) Could the CRA provide some insight around the procedures for CRA HQ to provide guidance to auditors relating to recent jurisprudence?

(b) Additionally, does CRA HQ routinely provide feedback and direction to specific audit teams when their audits are overturned on objection or judicial appeal?

17. Collection of Provincial Component of HST after Audit by Revenu Québec

Please consider the following fact scenario.

A registrant based outside of Québec collected GST/QST on supplies of services to a recipient. The recipient is registered under both the regular GST/HST and QST regimes and eligible to fully claim both input tax credits and input tax refunds.

On a prior audit of the registrant by the Canada Revenue Agency ("CRA)", the CRA auditor had specifically reviewed this supply and did not reassess how the registrant determined the place of supply. However, on a subsequent QST audit of the registrant by Revenu Québec ("RQ"), the RQ auditor concluded that the place of supply should have been Ontario instead of Québec. The different place of supply arose from the fact that RQ's treatment of the nature of the supply lead to a different place of supply for services than previously accepted by CRA on audit.

No assessment resulted from the RQ audit, however the RQ auditor advised that the registrant should change its practice for determining the place of supply for these supplies, which would impact how the registrant charges tax on these

supplies throughout Canada. Further, the RQ auditor advised that the registrant could adjust the QST under section 449 of *An Act respecting the Québec sales tax* and charge the provincial portion of the HST ("PVAT") for supplies involved in the two preceding years.

TEI notes that CRA previously commented (February 24, 2011 Canadian Bar Association – Canada Revenue Agency roundtable Q5) that a supplier that charged GST/QST instead of ON HST would need to correct the tax otherwise interest would be charged, however in this Q&A addressed in 2011 charging GST/QST was clearly in error as contrasted with the above scenario.

Given the prior CRA audit and lack of specific guidance on the determination of the nature of the supply, the registrant is unsure whether to charge PVAT for prior periods and change its practice.

Questions for CRA:

(a) Could the CRA advise on how the registrant should approach this dilemma and also whether its 2011 CBA-CRA Roundtable position would be applicable in this scenario?

If CRA subsequently audited the registrant and agreed with RQ's interpretation, could CRA comment on the following?

(b) If the registrant credited back the QST and charged the PVAT for the prior two years, would CRA assess the registrant for non-collection of tax for the open audit periods beyond the two years? If yes, would such an assessment generally be the wash penalty?

(c) If the registrant did not charge the PVAT, would CRA assess the registrant for non-collection of the PVAT despite that GST/QST was collected on the supplies? If yes, would such an assessment generally be the wash penalty?

(d) More generally, when there appears to be a difference between how CRA and RQ are interpreting place of supply rules on audit, how would CRA suggest such difference be resolved by the registrant?

18. Partnership Dissolutions under Income Tax Act s. 98(3)

It is common to dissolve a partnership on a tax-deferred basis under subsection 98(3) of the *Income Tax Act* (Canada) ("ITA") by transferring an undivided interest in the partnership property to the partners in proportion to their partnership interest. The tax deferral under ITA s. 98(3) applies even when the partners are not closely related entities.

When a partnership dissolution under ITA s. 98(3) is contemplated as part of a reorganization of a closely related corporate group, a disconnect with partnership provisions of the *Excise Tax Act* (Canada) ("ETA") is highlighted. Subsection 272.1(4) of the ETA deems a transfer of partnership property from a partnership to a partner to occur at fair market value. Given each partner is receiving an undivided interest in the property, an election under ETA s. 167 is not available to mitigate the tax on the partnership dissolution.

Additionally, it would appear that any GST/HST that would be applicable under ETA s. 272.1(4) cannot be mitigated either by a 156 election nor input tax credits, creating unrecoverable tax on such a transfer. GST/HST Interpretation 11585-13D (August 11, 2000) confirms that if an amalgamation of the partners is undertaken after the partnership dissolution, the partners would not be eligible for ITCs on the ETA s. 272.1(4) transfer of the partnership property as the partners would not be receiving the partnership property for use in their commercial activity (as ETA s. 271(c) deems property transferred on amalgamation to not be a supply).

Further, the GST/HST on such a transfer of partnership property would be not allowed to be mitigated under a 156 election as paragraph 156(2.1)(b) of the ETA excludes transfers where the recipient (i.e. partner) is not receiving the property for use exclusively in its commercial activities (since the subsequent amalgamation is not a supply of the property as above).

As a result, if a partnership dissolution occurs under ITA s. 98(3), any taxable property transferred to the partners appears to be subject to GST/HST on the fair market value of the property and such GST/HST would be unrecoverable, even if the partners were engaged exclusively in commercial activity.

Questions for CRA:

(a) Could the CRA comment on whether GST/HST Interpretation 11585-13D (August 11, 2000) is still accurate, such that the partners would not be eligible for ITCs for GST/HST on the partnership property?

(b) Further, could the CRA comment on whether it agrees with the interpretation that s. 156 would not apply in this context as a result of paragraph 156(2.1)(b)?

(c) Lastly, could CRA confirm that if a partnership dissolution occurred under ITA s. 98(3), that any GST/HST applicable on partnership property would be unrecoverable to the partners, even if the partners were in commercial activity?

19. Request for information S288 and S 231.1

Canada Revenue Agency (CRA) auditors are increasingly issuing Requests for Information (RFI), which are seeking personal and transactional information for third parties, including customers, suppliers, and arms-length partners. Such requests are being issued under section 231.1 of the Income Tax Act and/or section 288(1) of the Excise Tax Act of Canada and require detailed information to be provided within reasonably short periods of time. As the requests relate to third parties they do not go into specifics on why the data is being requested, or provide any context to the reasonableness of the request, and on occasion can be broadly drafted in a way that gives uncertainly as to whether the auditor appreciates what they are requesting or expecting to be provided. For example, an auditor requesting sales history in the case where the third party they are auditing is not a seller, but rather a customer. In this case the more relevant request would be for the purchase history of the third party during a specified period. In a similar example, an auditor for a purported third party customer requested information related to compensation such as advertising revenue and tips, which is not applicable to customers who are making purchases of goods.

In addition, the RFI will require the recipient to provide the requested detail via onerous and unsecure transfer methods, including transmission by facsimile, or mailing printed documents, and/or mailing a USB drive. As these confidential

documents or USB drives are being delivered to auditors throughout Canada, recipients wanting to comply are faced with an administratively burdensome process of document delivery and significant risks and concerns with respect to third party privacy and data security. Given the number of RFIs that are being issued, this is not a sustainable and secure method for managing these types of requests.

Requests for CRA:

With this context we make the following requests to CRA:

Require Auditors issuing a RFI to provide the recipient with context to why the request is being made so that both the CRA audit team and the recipient are able to assess the reasonableness of the request. Requests with respect to customer purchases over a 4-6 year period creates administrative work for the recipient, and we are concerned that responding to a broadly scoped RFI may not necessarily assist the auditor with their audit. Auditors must be specific about the information they are requesting.

Provide mechanisms for recipients to respond to a RFI electronically. This could be achieved by:

(a) Allowing the recipients to submit information via email, secure email, or any secure e-transfer portal that recipients use to otherwise transmit confidential customer or supplier information.

(b) Allowing the recipient to submit documents under their Online Business.

(c) Account or Represent a Client portal, with reference to the specific taxpayer Case or Reference Number for the submissions. We understand this functionality may already exist and may just require the auditor to provide the taxpayer specific case number.

(d) Develop a specific and secure online portal for the submission of documents/data within the existing Online Business Account or Represent a Client framework.

20. Audit Practice

On occasion, the CRA GST/HST auditor requests input from CRA's Technical Guidance Section (TGS) at CRA's headquarters with respect to a specific technical issue. Some TEI members have expressed a concern as there have been instances where the taxpayer/registrant was not informed by the auditor that a question was being submitted to TGS. Therefore, there was no assurance that the submission contained a complete and accurate set of facts. In these cases, the taxpayer/registrant was notified verbally by the auditor that TGS had provided its guidance on a certain issue. It is our understanding that the auditor applies the guidance received from TGS to the audit being undertaken.

Questions for CRA:

(a) Is the auditor permitted to disregard the guidance received from TGS? If yes, under what circumstances would this take place? In addition, if taxpayer/registrant does not agree with TGS's guidance provided to the auditor, can the taxpayer/registrant request a second opinion from TGS?

(b) Would it be possible for the taxpayers/registrants to obtain in writing any question that an auditor wants to submit to TGS, as well as all the facts, before the question is submitted to TGS to ensure that the submission is complete and accurate?

(c) Would it be possible for the taxpayers/registrants to obtain a copy of the written response from TGS?

(d) Could the CRA tell us if taxpayers/registrants can have discussions with the TGS agent regarding certain questions? If so, could the CRA clarify whether the auditor is authorized to establish contact between the taxpayer/registrant and the TGS agent or whether the taxpayer/registrant must make a request to the auditor's immediate superior (team leader)?

21. Agency relationship and Supplier's Requirements for Recipient's Agency

According to GST/HST Policy Statement P-182R *Agency*,

> "Agency exists where one person (the principal) authorizes another person (the agent) to represent it and take certain actions on its behalf. The authority granted by the principal may be express or implied. In other words, an agency relationship may be created where one person explicitly consents to having another act on its behalf or behaves in such a way that consent is implied.
>
> Situations may arise where the agent does not disclose that it is acting as agent at all. The law does not require a person who is acting as an agent to disclose this fact to a third party. An agency relationship may be found to exist even where the third party is not aware of the identity of the principal or that there even is a principal." [emphasis added]

Consider the following fact scenario.

Operator and co-venturers of a joint venture, that is involved in a prescribed activity under the *Joint Venture (GST/HST) Regulations*, sign a GST21 election to have the joint venture operator account for GST/HST with the result that supplies by the operator to the co-venturers are deemed not to be a supply.

The co-venturers provide a formal agency agreement to the operator that states that A Co is the agent of co-venturers and that all the invoices for the co-venturers should be sent directly to their agent A Co. The service agreement between the operator and co-venturers clearly provides that the final payment obligation remains with recipient co-venturers and not the agent A Co.

In this context, TEI members have in some cases been assessed by the Canada Revenue Agency ("CRA") on the basis that the agency agreement was invalid, and the operator should have charged GST/HST to A Co. It is our understanding however that whether the agency relationship is valid or not is for CRA to determine on an audit of A Co or the co-venturers and the operator can rely on the agency agreement to not charge GST/HST in this context.

Questions for CRA:

(a) Could the CRA confirm that a supplier is not required to validate an agency agreement exists in determining the application of tax and that the proper

place for determination of the agency relationship is by CRA on an audit of the agent or recipient (co-venturers in this context)?

(b) If CRA confirms the supplier must validate an agency agreement using the guidance in P-182R, could the CRA describe the circumstances when the supplier is required to do so, particularly as the supplier might not have access to all the required information between the agent and recipient.