TAX EXECUTIVES INSTITUTE, INC.

COMMODITY TAX LIAISON MEETING

QUESTIONS AND DISCUSSION TOPICS

Submitted to

DEPARTMENT OF FINANCE

NOVEMBER 7, 2022

I. Timing of Exemption Certificates for Federal Fuel Charge

Paragraph 17(2)(b) of the *Greenhouse Gas Pollution Pricing Act* (Canada) ("GGPPA") provides that the federal fuel charge ("FFC") is not payable if an exemption certificate is applicable "in respect of the delivery" under section 36 of the Excise Tax Act (the "Act"). Section 36 provides that an exemption certificate "applies in respect of the delivery" only if the person "provides . . . the certificate in respect of the delivery to the other person" (emphasis added) that is "in a manner satisfactory to the Minister . . . ." Section 36 does not contain any timing requirements for the delivery of the exemption certificate, nor does section 36 provide that the timing of delivery would be prescribed.

The Canada Revenue Agency's ("CRA") position, on the other hand, is that the certificate must be received by the vendor either before or at the time of delivery to satisfy the requirements in section 36.

In practice, there can be timing differences between the registration date of a particular vendor and the date it issues an exemption certificate for its purchases. This may result in double taxation of FFC under Part 1 and subsequently Part 2 for the emitter. In addition, only the supplier is allowed to apply for a refund from the Minister if the purchaser provides its exemption certificate after the delivery, leaving the purchaser to seek a refund from the supplier. Finally, the GGPPA states in section 49(4) that a supplier is only allowed one application per month and if the supplier has more than one request in the month, they must amend their return. We do not believe this was the intended outcome of the federal carbon program.

(1) Would the Department of Finance consider amending section 36 to allow a customer's exemption certificate to be provided after the delivery if the customer's registration for FFC was prior to the delivery?

(2) Would the Department of Finance also consider amending the legislation to allow a purchaser to claim a refund of FFC, instead of the supplier, when an exemption certificate is not provided in a timely manner?

II. Internal Deductions of Federal Fuel Charge

Section 48 of the GGPPA allows for rebates in prescribed circumstances, while section 49 of the GGPPA provides for a rebate if an amount has been paid in excess of the amount that was payable by the person. The rebates in prescribed circumstances under section 48 do not currently allow for the correction of an amount paid in error.

Under section 49, a rebate is only payable when an amount was paid in excess of what was payable. This would encompass errors such as the use of an incorrect rate or where a registered distributor had a valid exemption certificate from a purchaser but incorrectly paid the FFC on sales to the purchaser. If the error is discovered and corrected within the same period, there is no need for a rebate. Instead, the FFC payable account will include an entry to record the FFC charged on the original invoice, an entry to reverse that FFC, and finally an entry to record the correct amount of FFC. All these entries occur in the same period as the fuel delivery in this case.

We have asked the CRA to confirm that auditors will not deny the reversal of the original invoice because it is merely an accounting entry and the net result of the three entries is to charge the correct amount of FFC in the orginal delivery period. If the CRA does not allow the reversal entry, it would force the person to pay an incorrect amount in the current period, despite that they could file for a rebaet in subsequent periods as they have paid an amount in error.

(1) Can the Department of Finance please comment whether it intended, where corrections are made in the same period, to permit the person to make the corrections on a net basis?

Similarly, in many circumstances, an error may be discovered in a period following the period of the original entry, where again the registered person has paid an amount in excess of what was payable. In publication FCN14, *Rebate under Section 49,* the CRA stated that in these situations a person must file for a rebate to correct the error. The only difference in the two situations, however, is the timing of the error correction as they both constitute corrections of accounting errors refundable under section 49. These errors (regrettably) occur frequently in large organizations. Thus, correcting entries will be made for both current and prior period errors. The proper classification of the errors between current and prior entries requires an inordinate amount of time and staff effort. It is extremely rare that a correction of a prior entry is more than a period or two after the original entry. It would be more efficient to sample and review correcting entries at the time of audit.

(2) Can the Department confirm its intent to allow entries that correct errors found in a period following the original entry to be made on the person's return without the need to file a refund claim, similar to correcting entries made in the same period as the original entry?

(3) If not, would the Department consider amending the legislation to allow purchasers to claim a rebate instead of the person being the only person allowed to make a claim

(similar to Excise Tax N15 Refund Claims)? This is particularly applicable in situations where the accounting error is a result of the purchasers' actions or inactions (i.e., where a purchaser fails to furnish an exemption certificate in due time). Thus, the burden to recover FFC in error would lie on the purchaser for its failure, and not on the person.

III. Effective Date of Amended FFC Regulations

The August 9, 2022, Draft Regulations Amending the Fuel Charge Regulations for the FFC appear to fix the issue for rebates of fuel delivered into Quebec by the addition of subsection 5.1(1). Previously, the regulations allowed a rebate to a registered distributor for a supply to a non-resident of Canada that was not registered when the non-resident provided proof of export. In that case, no FFC was charged by the registered distributor. This scenario, however, led to double taxation of fuel delivered in Ontario and then delivered on to Quebec if the Quebec entities were not registered for FFC. That is, FFC is charged on the delivery in Ontario and then the Quebec Cap and Trade applies when the fuel is subsequently delivered into Quebec. Double taxation occurs because there is no rebate for the FFC on the delivery into Quebec. However, the amended regulations are effective as of the Announcement Date of August 9, 2022, and not back to April 2019 when the FFC became effective.

Would the Department of Finance consider amending the effective date for this change back to April 2019?

IV. Emission Allowances and Offsets

In June 2018, the Department of Finance introduced new legislation requiring purchasers to self-assess the GST/HST payable on taxable qualifying emission allowance purchases. Most purchasers of carbon emission allowances would self-assess the tax and claim input tax credits on the same return where they acquired the allowances during their commercial activities. However, it appears the Department of Finance failed to consider offsets in the definition of "emission allowance" in section 123(1) of the Act as offsets are not issued by a government or regulatory body like an emission performance credit. This issue has been raised at previous TEI/Department of Finance liaison meetings where we requested "offsets" to be added to the definition of "emission allowance." Most recently, at the 2020 Liaison meetings, the Department indicated that it is not opposed to fixing the problem and that it was reasonable from a tax policy point of view.

Can the Department provide an update on the progress of amending the definition of a section 123(1) "emission allowance" to include emission offsets and/or other types of credits that are accepted under the government programs but are not issued by a government or regulatory body?

V. Update on Proposed Changes to Joint Venture Election in Subsection 273(1) of the Act

In the 2014 Federal Budget, the Minister of Finance proposed, to provide more commercial joint venture activities and participants with access to the GST/HST simplification benefits available under the subsection 273(1) excise tax election, to allow the participants in a joint venture to make the joint venture election where the activities of the joint venture are

exclusively commercial, and the participants are engaged exclusively in commercial activities. The Minister of Finance has, in every subsequent budget, confirmed its intention to proceed with this announced tax measure. However, as of today, this tax measure has yet to be enacted.

(1) Could the Department provide a further update on the status of such amendments (the last update was at the 2021 TEI/Department of Finance liaison meetings)?

(2) Given the addition of a new specific prescribed activity (in subsection 3(1) paragraph (q)) in the draft amendments to Joint Venture (GST/HST) Regulations released on August 9, 2022, it appears that taxpayers should revert to applying for prescription by Regulation, for a specific activity, on a case-by-case basis. Could the Department please comment?

VI. Select Luxury Items Tax Act (Luxury Vehicle Tax)

The exemption certificate provision of the *Select Luxury Items Tax Act* released this year is not very practical in that it requires the manufacturer to collect an exemption certificate for every VIN from the dealer, instead of allowing a blanket exemption certificate. The Canadian Vehicle Manufacturers' Association has raised this issue with the CRA and the CRA has said this would need to be addressed by the Department of Finance.

Would the Department of Finance consider amending the legislation to allow for blanket exemption certificates?

VII. Partnership update

In prior years, TEI has raised various challenges members face because of the differing treatment of corporations and partnerships under the Act. At the 2019 liaison meetings, one example raised by TEI is the differing challenges of maintaining input tax credits in a successor entity between a partnership and corporation.

The Department of Finance had previously mentioned that it would be willing to review some of these differences and consider whether changes would be appropriate. We also understood that the Department would be open to further discussions and the challenges faced by its members based on these differences.

Could the Department provide an update on this issue?

VIII. Crypto Asset Mining Amendments

In February 2022, Finance Canada released for public consultation draft amendments to the Act. One proposed amendment was to introduce new section 188.2 to the Special Cases subdivision (Subdivision C) of Division II of the Act. The proposed new section would deem the provision of crypto asset mining services not to be a supply for GST/HST purposes, and to deem such activity to not be undertaken in the course of a commercial activity. This effectively means that anyone undertaking this activity for the purpose of gaining or producing income is not required to charge or collect GST/HST, but equally, is not entitled to claim any input tax credits on their costs, regardless of whether the service is for export or not. This

proposed measure makes GST/HST a direct cost of doing business in Canada for the crypto asset mining sector.

(1) Could the Department of Finance provide insight into why the Special Cases approach was adopted rather than fitting this activity into the existing framework of the Act?

(2) Further, could the Department provide its view on what types of amendments may use the Special Cases Subdivision rather than the other areas of the Act?