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Tax Executives Institute – British Columbia Ministry of Finance Liaison Meeting – Additional Information

Tax Executives Institute, Inc. ("TEI") welcomes the opportunity to participate in the liaison meeting with the British Columbia ("BC") Ministry of Finance and share its recommendations on the following issues.

1. About TEI

TEI was founded in 1944 to serve the professional needs of in-house tax professionals. Today, the organization has 56 chapters across North and South America, Europe, and Asia, including four chapters in Canada. Our over 6,000 members represent 2,800 of the world's leading companies, many of which either are resident or do business in Canada. Over 15 percent of TEI's membership comprises tax professionals who work for Canadian businesses in a variety of industries across the country. TEI members are responsible for tax affairs of their employers and must contend daily with provisions of the tax law relating to the operation of business enterprises. The following recommendations reflect the views of TEI as a whole but, more particularly, those of our Canadian constituency.

2. TEI Comments and Recommendations

a) Partnership as a Person for PST Purposes

Under the PSTA, partnerships can register as collectors for PST purposes but are not treated as separate legal persons to own partnership property. Instead, each partner is treated as if it owns a fractional interest in all the partnership's property. This places responsibility on the partners to collect or pay PST on property utilized by the partnership when an interest in the partnership is purchased or sold. In contrast, there is no requirement to account for PST on property owned by a corporation when shares in the corporation are purchased or sold.

We request that the Ministry amend the PSTA and its regulations to treat partnerships as persons for PST purposes, including the ability to sell/purchase a partnership interest without triggering a PST liability related to the partner's proportionate share of underlying partnership property, and the ability to use exemptions for transactions within a closely related group.

Such treatment would be consistent with the treatment of partnerships under the ETA and other jurisdictions, such as Saskatchewan, Manitoba, and certain states in the USA.

b) Intercompany Transactions

Part 9 of the Provincial Sales Tax Exemption and Refund Regulation to the PSTA (“Regulation”) includes a PST exemption for transfers among related corporations. These exemptions prevent PST from being paid more than once on tangible personal property (“TPP”) or software when transferred among related corporations for operational reasons or as the result of restructuring. To qualify for this PST exemption, a related corporation must be a wholly-owned subsidiary of the other, or they must be wholly-owned subsidiaries of the same corporation. To qualify as a wholly-owned subsidiary of another corporation, the corporation must beneficially own at least 95% of the outstanding shares of each class of the share capital.

The requirement for the corporation to own 95% of each class of shares makes it impracticable for corporate groups to use preferred shares or non-voting common shares as a vehicle to raise capital, leaving debt financing as the only option. In competitive markets, related corporations require flexibility in how to raise capital. Issuing non-voting or preferred shares should not result in a PST expenditure.

By comparison, for GST purposes, the criteria for closely-related corporations are set out in Section 128 of the ETA:

> [Q]ualifying voting control in respect of the other corporation is held by, and not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the other corporation. . .

This threshold provides businesses with flexibility to use alternative structures for raising capital.

We request that the Ministry revise the criteria for the PST exemption on transfers among related corporations where, to qualify as a wholly-owned subsidiary of another corporation, the corporation must beneficially own at least 90% of the outstanding voting shares of the subsidiary corporation, similar to the criteria for ownership outlined in the ETA.

c) Exports – Customers Shipping Property Using Their Own Conveyance

The Regulation provides a point-of-sale exemption for exported TPP, but only if the TPP is shipped by the seller to a location outside BC.

For operational reasons, such as the physical attributes of the item being shipped, the location and capacity of available conveyances, and project requirements, a business operating outside of BC may choose to ship TPP it acquired in BC to a location outside BC using its own conveyance or by directly hiring a common carrier.

If the purchaser operating outside BC uses its own conveyance or hires a common carrier to export TPP from BC, it must pay PST to the seller and claim a refund directly from the Ministry under section 158 of the PSTA, a refund provision specific to TPP exported for business use. The refund process is time-consuming for the Ministry and the business and essentially taxes exports if the business is not aware of the refund process. BC-based retailers and wholesalers selling TPP for export would be more competitive if fewer tax compliance burdens were imposed on businesses exporting TPP using their own conveyances.

By comparison, the ETA eliminates the requirement to pay GST and HST on TPP that is exported using a business' own conveyance, or common carrier. Specifically, Section 1 of Part V of Schedule VI to the ETA provides a zero-rating on the supply of TPP exported by a business if the seller maintains "evidence" of the export of property. Such "evidence" typically includes customs clearance certificates, waybills, movements of dangerous goods tickets, carrier invoices, contracts of sale, purchase orders, and invoices. This zero-rating provision is not available for sales to purchasers that are consumers, thus limiting the zero-rating to exports for business use.

The decision regarding how to transport TPP should be based on operational and environmental concerns only; exporting property using the Business' own conveyance should not create an additional tax and/or compliance burden.

We request that the Ministry amend the Regulation to mirror the ETA's zero-rated export provision.

d) Legal Services – Exemption for Services Relating to Other Provinces

The application of PST to legal services is based on the location of the service provider and its client. If the legal service provider and client both reside in

BC, PST is payable on all legal services under subsection 126(1) of the PSTA, regardless of the jurisdiction to which the services relate. In contrast, when a BC-based client acquires legal services from a service provider located outside of BC, the fees are taxable under subsection 127(1), and an exemption is available for legal services relating to a jurisdiction other than BC. A similar outcome is achieved by subsection 126(2), whereby a non-resident of BC is only required to pay PST on legal services relating to BC.

These rules inadvertently encourage businesses with national operations to use legal service providers located outside BC to provide legal services for matters relating to a jurisdiction other than BC. The selection of a legal services provider should be based on their skills and experience, not on the PST status of the legal fees. Moreover, PST should not be payable on legal services acquired in BC relating to a jurisdiction other than BC. The payment of PST on the purchase of legal services in BC for matters outside the jurisdiction can create double taxation if the jurisdiction to which the services relate also imposes sales tax on the legal services.

For example, if a business with operations in BC and Saskatchewan acquires legal services relating to Saskatchewan from a BC-based service provider, the service will be subject to tax in both BC and Saskatchewan. In contrast, an exemption is available in Saskatchewan for legal services provided in Saskatchewan relating to BC, resulting in tax applying only once to the service.

Example of legal services subject to double taxation (BC PST and SK PST)

Facts

- A joint venture was formed between ABC and CDE on a 50-50 basis. The joint venture (JV) was formed to conduct a construction contract to construct a real property situated in Saskatchewan.
- ABC is not registered for BC PST and is not a resident of BC. ABC carries on business across Canada, except in BC.
- CDE is registered for BC PST and carries on business across Canada, including in BC.
- As the project progressed, several disputes arose which gave way to a claim brought by the Client which forced the JV to incur legal costs.
- The law firm representing the JV resides in BC and provided its services in BC. However, the legal services, other than having been performed in BC, have nothing to do with BC (none of the provisions of section 126(2) apply).
- BC PST was invoiced by the legal firm and paid by the joint venture.

- The law firm invoiced the JV by adding BC PST but eventually ABC was reimbursed by the law firm for their portion of BC PST paid as BC PST was, in fact, not applicable under any provision of the BC PSTA.
- After the refunds were issued to ABC, the law firm started to invoice ABC and CDE separately. Thus, the invoices addressed to ABC relate only to its portion of the total legal fees and no BC PST was collected on this part. ABC was not subject to BC PST on the same legal services while CDE was and CDE continued to pay the BC PST for its share.

Application of the PST laws of BC and SK

- BC PST was paid by CDE as per subsection 126(1) of the BC Provincial Sales Tax Act.
- Since the services related to Saskatchewan, the SK PST was also applicable as per subsection 5(10) of the Saskatchewan Provincial Sales Tax Act. As the law firm did not collect the SK PST, CDE self-assessed and remitted it.
- This situation resulted in a double taxation to CDE (7% BC PST and 6% SK PST).
- ABC was not subject to BC PST on the same legal services; it was only subject to 6% SK PST.

Comments

- This example shows:
    - Inequity between purchasers/recipients (CDE is subject to BC PST because it carries on business in BC while ABC is not because it does not carry-on business in BC).
    - Double taxation issue (CDE has to bear the cost of BC PST and SK PST).
- Since the legal services are related to real estate in SK, it seems more appropriate that they should only be subject to SK PST. Incidentally, BC has this same concept. The issue seems more at the level of the residence of the purchaser (or the fact that the purchaser carries-on a business in BC). Indeed, it seems that BC PST applies in this case only because the purchaser resides or operates a business in BC.

We request that the Ministry add a new provision to the PSTA or the Regulation to exempt PST on BC-based businesses obtaining legal services provided in BC relating to a jurisdiction other than BC.

e) Web-based services

As time passes, traditional services are increasingly offered via platforms designed for use on a handheld device (called an "app") or "web-based services" available over the internet using a handheld device, tablet, or personal computer. Many apps and web-based services are nothing more than a modern way to deliver services traditionally handled using paper-based processes. For example, financial institutions typically have an app or provide web-based banking to allow customers to check their account balance, pay bills, or transfer money. The customer only has online access to the financial institution's services and does not receive a separate right to use the software.

The fees charged by financial institutions for online services and in-branch services remain non-taxable for PST purposes. A similar outcome should result for other non-taxable services, such as web-based surveys, web-based training and testing, and web-based payroll processing. A fee for these services should not be treated as a payment for the right to use software when the customer merely obtains the ability to use the internet to transfer data or other information to and from the service provider.

There has also been the advent of new services, such as the following, which provide additional complexities:

- Platform as a Service (PaaS) is a complete cloud environment that includes everything developers need to build, run, and manage applications—from servers and operating systems to all the networking, storage, middleware, tools, and more.
- Infrastructure as a Service (IaaS) is a cloud service model that offers on-demand infrastructure resources, such as compute, storage, networking, and virtualization, to businesses and individuals via the cloud.

We request that the Ministry provide clarification on the application of PST to web-based services, examples of web-based services that are taxable and not taxable, comments on platform as a service "PaaS" and infrastructure as a service "IaaS" and comments on the impacts of the Hootsuite decision.

f) BC's New Carbon Pricing Model

In British Columbia's 2023 budget, the government announced plans to implement a 'made-in-British Columbia-output-based pricing system (BC OBPS)', carbon pricing model for large emitters, effective April 1, 2024. The Ministries of Environment, Climate Change Strategy and Finance are

developing the policy. TEI and its members would be happy to provide information/assistance with the development of the program.

The announcement raises a number of questions and potential challenges. Can you please provide information / comments on the following:

- While still in the policy development stage, can you provide any update on the progress made to date?
- Implementing a switch from a Carbon Tax to an OBPS system requires companies to have many different parts of the organization working together. With the three ministries working collaboratively, can you please advise what information rhythms the Ministry of Finance will be providing to keep interested parties, such as TEI members, informed of updates and program guidelines as they become available.
- Is there any information on the registration process for BC OBPS, including potential timing, and whether it may be an online or paper registration?
- Will there be information on how to identify the facilities eligible for OBPS and will there be aggregation of facilities, similar to the Alberta model?
- Will facilities be red lined similar to the Alberta TIER program?
- What will be the process of adding and removing facilities?
- Will participants in BC need to exchange new exemption certificates on fuel sales? BC exemption vs Federal Fuel Charge certificates?
- Will there be a list of companies who are registered under BC OBPS, similar to BC's list of registered consumers?
- How will BC OBPS be integrated with the BC Carbon Tax and will we potentially have both systems simultaneously?
- Will there be the option to not participate in the BC OBPS program / remain under the Carbon Tax Act regime?
- Who will be administering audits related to the BC OBPS program? Will it be the BC Ministry of Environment or the BC Ministry of Finance?
- Will Motor Fuel Tax continue to exist once the BC OBPS program is implemented?
- Will there be the ability to exchange AB/BC credits or will AB credits only be available for the AB program and the BC credits only be available for the BC program?

g) Cannabis Double Taxation

Division 10 of Part 2 of the *Provincial Sales Tax Exemption and Refund Regulations* (The Exemption Regulations) to the *Provincial Sales Tax Act* provides for the exemptions available for farming activities. However, many

of the exemptions are only available to "qualifying farmers" (e.g., tangible personal property described in *Schedule 2 – Tangible Personal Property for Farm Purpose* and "qualifying parts"). Further, the exemptions provided for energy in Division 7 of Part 2 of The Exemption Regulations is only available to "qualifying farmers".

"Qualifying farmer" is defined in subsection 1(1) of Part 1 of the Exemption Regulations to mean, in part, *"an owner, as defined in section 1(1) of the Assessment Act, of land classified as a farm under that Act."*

Subsection 1(1) of the Assessment Act defines farm to mean *"an area of land classified as a farm under this Act"*. Subsection 23(3.2) of the *Assessment Act* states that the Lieutenant Governor in Council may make regulations respecting the classification of land as a farm. Section 4 of the *Classification of Land as a Farm Regulations to the Assessment Act* requires an assessor to classify all or part of a parcel of land used for, in part, a qualifying agricultural use.

"Qualifying agricultural use" is defined in section 1(1) of the *Assessment Act* and specifically excludes use set out in section 2 of the Schedule to the *Classification of Land as a Farm Regulations*. Included in section 3 of the Schedule is the production of cannabis within the meaning of the *Cannabis Control and Licensing Act*.

Based on the above, the purchase of property and energy by cannabis producers are not exempt for PST purposes. The PST is therefore embedded in the cost to produce and sell cannabis. Further, cannabis is subject to 7% PST (PST 141 – Cannabis). The result being that the cannabis is, partially, subject to double taxation (i.e., the PST on property used in farming and energy and the PST on the sale to consumers). This is unfair to both producers and consumers. A fundamental principle of any tax system is that it does not result in double taxation.

We request that the Ministry review the exemption of PST available to cannabis producers or the application of PST to cannabis sales to consumers to eliminate the instance of double taxation.

h) Carbon and Motor Fuel Tax on Wholesale Transactions of Natural Gas Liquids in BC

The current carbon and motor fuel tax application to natural gas liquids (NGLs) works on a security basis; the tax is charged at the first sale and passed down the value chain until it is either recovered from the end user or a refund is filed for a non-taxable sale. There is no wholesale exemption available.

In many cases, NGLs are sold outside of BC or to a registered, or otherwise exempt, consumer and never sold to an end user for combustion in BC. Many NGLs are not combusted at all, rather they are used as a raw material in other industrial activities. These export and exempt consumer sales do not attract carbon and motor fuel tax, however, due to the security mechanism, carbon and motor fuel taxes must be charged on the wholesale transactions leading up to these sales. This results in wholesale suppliers filing large refund claims for these exempt sales.

Although the tax security mechanism works similarly to GST, unlike GST, the refund claims are not automatically processed each month through tax returns. Instead, the taxpayer is required to file for a refund of this tax with the Ministry. Unfortunately, refunds take a significant amount of time, documentation, and correspondence to obtain and provide each period. The taxpayer must go through a full review of the records related to the return filed, often with multiple administrative staff. The amount of tax being paid as security is substantial and results in a significant cash flow burden to the taxpayer due to the lag in time between when a refund claim is filed and when a refund is received. The administrative burden of filing, reviewing, and processing the refunds for both the taxpayer and Ministry is considerable.

Due to a large quantity of transactions in NGLs being for wholesale, export and to exempt consumers, the process of paying tax and claiming refunds in BC is not comparable to other provinces. For example, the Federal Fuel Charge makes use of wholesale registrations to avoid charging and refunding the fuel charge. The same NGL transactions in Alberta under the Federal Fuel Charge would have been non-taxable.

We request that the Ministry implement a wholesale licence framework, where the tax would only be charged to unregistered, or end users, thus alleviating the burdensome and expensive refund requirements.

i) Exemptions for Online Marketplace Services Provided to Related Parties and to First Nations

TEI acknowledges that the BC Ministry of Finance, pursuant to Order in Council No. 318, has amended the Provincial Sales Tax Exemption and Refund Regulation (PSTERR) to exempt online marketplace services when purchased by an online marketplace facilitator from a related corporation. This new exemption falls under s. 88.3 of the PSTERR and is effective 1 July 2023. Absent this new provision, online marketplace services purchased by related corporations were subject to BC PST pursuant to s. 134.3 of the

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Provincial Sales Tax Act (PSTA). S. 88.3 reflects the Province's long-standing policy of recognizing that tax should not apply to transactions between related corporations. It also reflects TEI's understanding that the Province did not intend to tax online marketplace services provided to an online marketplace seller where the parties are related corporations.

To better align the amendment with the Province's intention and established policy, we suggest making s. 88.3 of the PSTERR retroactively effective to 1 July 2022 when s. 134.3 of the PSTA became effective.

There currently are no exemptions for online marketplace services purchased by First Nations, as exists for related services under s. 77(2)(q) of the PSTERR. Accordingly, we suggest that an equivalent exemption be introduced in the PSTERR for online marketplace services.