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Retroactivity of Proposed British Columbia Revision of Retail Sales Tax

Canadian - 4/30/2009



April 30, 2009

On April 30, 2009, Tax Executives Institute submitted the following comments to the Honorable Colin Hansen, Minister of Finance for the Province of British Columbia, concerning the proposed retroactive amendment of the B.C. retail sales tax in respect of certain materials mailed into the province. The comments were prepared under the aegis of TEI's Canadian Commodity Tax Committee, whose chair is Phil W. Riley of ArcelorMittal Dofasco Inc. Also contributing materially to the preparation of TEI's comments were Diana M. Spagnuolo of Imperial Oil Limited and Terri D. McPhail of TELUS Communications Inc. Mary L. Fahey, TEI's General Counsel, is the legal staff liaison to the committee.

On behalf of Tax Executives Institute (TEI or Institute), I am writing to object to the retroactive amendment set forth in Section 33 of Bill 2, *Budget Measures Implementation Act, 2009*. The provision imposes a tax on administrative materials mailed into the Province of British Columbia (the "Province"). Although the change is described as a *clarification* of the law, the amendment retroactively reverses a longstanding position of the Province contained in the Tax Interpretation Manual (TIM) and imposes a new tax retroactive to 2000. Accordingly, we respectfully urge that the legislation be reconsidered.

In reality, this is nothing more than the government's effort to impose a new tax on mailings into the Province to increase its tax revenues and overturn, without the benefit of any consultation, a previously stated policy upon which taxpayers relied. Even if the substance of the provisions could be justified, the retroactive enactment of the legislation violates core principles underlying BC's tax regime— fairness and predictability.

Background

TEI is the preeminent association of business tax executives. The Institute's more than 7,000 professionals manage the tax affairs of the 3,200 leading companies in Canada, the United States, Europe, and Asia and must contend daily with the planning and compliance aspects of business tax laws in Canada and other jurisdictions. TEI's first Canadian chapter was founded in Toronto more than a half century ago, and Canadians constitute 10 percent of the Institute's worldwide membership, with our Canadian members belonging to chapters in Toronto, Montreal, Calgary, and Vancouver. In addition, many of our non-Canadian members are employed by companies with substantial activities in Canada.

As a broad-based association of tax professionals, TEI is concerned with issues of tax policy and administration and is dedicated to working with government agencies in Canada, including the provinces, as well as in the United States and elsewhere, to reduce the costs and burdens of tax compliance and administration to our common benefit. We are convinced that the administration of the tax laws in accordance with the highest standards of professional competence and integrity, as well as an atmosphere of mutual trust and confidence between business and government, will promote the efficient and equitable operation of the tax system. In furtherance of this principle, TEI supports efforts to improve the tax laws and their administration at all levels of government.

Discussion

For more than 20 years, the Province maintained an administrative policy that administrative materials¹ mailed to individual recipients in British Columbia from outside the Province were exempt from the provincial sales tax (PST). Prior to 2007, the TIM stated:

Administrative materials are exempt from tax in the following circumstances:

- Individual administrative materials (e.g., a letter on letterhead, one prospectus) are mailed directly from an out-of-province location to individual customers in BC. The postage fees and envelopes are exempt even where taxable items (e.g., promotional material) are mailed along with exempt items (e.g., credit card statement) in the same envelope.

In January 2007, the Province deleted the policy from its TIM, noting that it was under review. In its February 17, 2009, Budget, the Province announced an amendment to the Social Service Tax Act that overturned its previous policy for administrative materials. Two days later, the Ministry issued a *Notice to Businesses – PST on Administrative Materials* (Notice 2009-002), which “clarified” the application of PST to administrative materials:

Historically, PST was applied to the purchase price of administrative materials that were sent from outside British Columbia **to a representative or branch** of your business in the province. This notice clarifies that PST is also payable on administrative materials sent from outside British Columbia to **individual customers** in the province. This means you need to pay PST on all administrative materials that you send into British Columbia from outside the province. You pay PST whether the materials are shipped to a **representative or branch of your business, or sent to individual customers** in the province. PST applies to the cost of the supplies (e.g., paper and envelopes) used to produce the administrative materials and other charges, including shipping and customs costs incurred prior to the use of the materials in the province. (Emphasis in original.)

This notice was the first public announcement that the Province had “clarified” its earlier position. The revised policy is retroactive to January 1, 2000. To avoid interest and penalties, remittances must be made by June 23, 2009. The notice warns that the Ministry “may conduct an audit to your records up to a 4 year period.”

Thus, businesses may be assessed for tax even though they conducted business wholly in accordance with the Province’s TIM. Further, taxpayers will not find relief under the provincial Taxpayer Fairness and Service Code, which originally contemplated that a taxpayer relying on “incorrect or misleading written information” from the Ministry will not be subject to penalties and interest. The reason for this is that Ministry officials have clarified that this reliance must be on a taxpayer-specific ruling. In other words, reliance on the Province’s longstanding TIM will not be accepted as a defence in audit.

Although the government states this is a revenue neutral amendment — because it provides refunds for companies that had mass mailings to points outside of the Province — it is difficult to conclude that the offsetting refunds will exceed the tax liabilities created. Further, since tax must also be self-assessed on postage costs and the Post Office does not charge PST on outbound mailings, taxing inbound mailings generates substantially more PST.

The legislation requires companies to self-assess on mailings into the Province for the last four years. The prospect of assembling documents (*i.e.*, details and cost) of administrative mailings into British Columbia constitutes an unreasonable burden. Perhaps more important is the lack of fairness of the retroactive amendment. It will be extremely difficult for businesses to operate with the prospect of retroactive legislation hanging over them, particularly where the change is not a “clarification” of an administrative policy, but rather is the reversal of a published policy upon which taxpayers have relied.

Analyzing Retroactive Legislation

For a tax system to be fair and perceived as being fair, taxpayers must be able to rely on the legislation and regulations in effect when business transactions take place, expenditures are incurred, and other taxable events occur. Therefore, except in extreme circumstances, tax legislation should be prospective.

Clearly, a government is free to change its administrative policy, but fairness demands that the change should only be prospective if it will have a significant negative financial effect on taxpayers. Although the government may possess the authority to change the tax laws retroactively, it is a power that should be exercised sparingly. In this instance, the government moved not to vindicate any core principles of law or public finance — to stanch abuse — but rather to overturn a longstanding and reasonable policy.

The principles governing the retroactivity issue were fully explored in a September 1995 report by the federal Department of Finance. In its *Comprehensive Response of the Government of Canada to the Seventh Report of the Standing Committee on Public Accounts*, the Department held open the possibility of retroactive legislation in response to adverse decisions by the Tax Court of Canada. Nevertheless, the Department acknowledged that "[t]ax policy considerations . . . dictate that retroactive tax changes remain exceptional [because] [t]ax certainty . . . requires that taxpayers be able to determine precisely their tax liability."² This "is a fundamental principle of taxation."³ In addition, the Department stated that "taxpayers should be able to expect stability and continuity in the tax rules [and] they should be able to expect certain tax results when they plan their investments on the basis of the rules as they know and understand them."⁴

Moving beyond these broad policy considerations, the Department of Finance identified several situations where retroactivity might be justified:

- Where the amendments reflect a long-standing, well-known interpretation of the law by the Department of National Revenue;
- Where the amendments reflect a policy that is clear from the relevant provisions that is well-known and understood by taxpayers;
- Where the amendments are intended to prevent a windfall benefit to certain taxpayers;
- Where the amendments are necessary to preserve the stability of the Government's revenue base; and
- Where the amendments are corrections of ambiguous or deficient provisions that were not in accordance with the object of the Act.⁵

Thus, the "fundamental legal principle" favours clarifying amendments that are "made public before their application."⁶

Regrettably, there is no evidence that the Province's decision to amend the Social Service Tax Act retroactively was informed by any of these factors. Rather, the legislation represents a reversal of a longstanding administrative position to generate incremental taxes through both the broadening of the tax base and the application of the new law retrospectively to 2000.

For the above reasons, we respectfully urge that the legislation be reconsidered.

Conclusion

Tax Executives Institute strongly urges the Minister of Finance to reconsider the merits of this retroactive legislation. TEI would welcome the opportunity to meet with you or members of your Ministry to discuss this issue more fully. If you should have any questions about TEI's letter, please contact TEI's Vice President for Canadian Affairs, Sherrie Ann Pollock, at 416.955.7373 (sherrieann.pollock@rbcdexia-is.com) or Phil W. Riley, Chair of TEI's Canadian Commodity Tax Committee, at 905.548.4475 (phil.riley@arcelormittal.com).

* * *

1 According to Notice 2009-002, administrative materials "include documents you send to individual customers to provide them with information, as well as documents you send in bulk to representatives of your business for their use or for distribution to customers. Examples include account statements, invoices, purchase orders, business forms, financial reports, prospectuses and annual reports."

2 Session Paper 8512-351-79, September 1995, *Comprehensive Response of the Government of Canada to the Seventh Report of the Standing Committee on Public Accounts* at 15.

3 *Id.*

4 *Id.*

5 *Id.* at 16-17.

6 *Id.* at 15 (emphasis added).

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