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Re: Changes to GST/HST Election for Nil Consideration

Dear Mr. Keenan and Ms. Laflèche,

On February 11, 2014, the Federal Budget announced a number of changes to section 156 "Election for Nil Consideration" of the *Excise Tax Act* ("ETA"), which allows supplies between qualifying members of a closely related group to be made free of GST/HST. Tax Executives Institute ("TEI" or "the Institute") commends the continued efforts of the Department of Finance ("Finance") and Canada Revenue Agency ("CRA") to resolve long-standing issues with the application of section 156. Specifically, we welcome the expansion of the election to include new members of a closely related group that have not yet acquired property or made any taxable supplies. Making the election available to these entities will help streamline the GST/HST filing requirements occurring as a result of internal reorganizations and other transactions. While generally helpful to both taxpayers and the Government, a number of the amendments to section 156 remain troublesome and could have

unintended consequences resulting in narrowed availability of the election and an increased compliance burden. This letter identifies those areas of concern and provides suggested changes that would improve the administration of the election to the benefit of all stakeholders. TEI would be pleased to assist with transitional and other issues that may arise as the Government implements these changes.

TEI is the preeminent international association of in-house tax professionals worldwide. The Institute's nearly 7,000 professionals manage the tax affairs of more than 3,000 of the leading companies across all industry sectors in North America, Europe, and Asia. Canadians constitute approximately fifteen-percent of TEI's membership, with our Canadian members belonging to chapters in Calgary, Montreal, Vancouver, and Toronto (which is TEI's largest chapter). TEI members must contend daily with the planning and compliance aspects of Canada's business tax laws. TEI espouses organizational values and goals that include integrity, effectiveness and efficiency, and dedication to improving the tax system for the benefit of taxpayers and tax administrators alike. The comments set forth in this letter reflect the views of TEI as a whole, but more particularly those of our Canadian constituency.

I. Re-Introduction Of Filing Requirement for "Election For Nil Consideration"

Under current law and administrative practice, eligible corporations and partnerships making the section 156 election must complete Form GST25 (*Election or Revocation of the Election to Treat Certain Taxable Supplies as having been made for Nil Consideration*). Entities making the election need not file the completed form with CRA. They must instead keep it in the books and records of the entities included on the form for all years in which the election remains in place and for six years from the end of the year in which the election is revoked. Entities can formally revoke the election by completing a Form GST25, or by no longer qualifying under the requirements of section 156.

The proposed changes in the Federal Budget will require that all new section 156 elections or revocations be filed with CRA on Form RC4616, which will replace Form GST25. Parties to an existing election will also need to complete and file Form RC4616 with CRA to continue qualification for nil consideration treatment. If Form RC4616 is not filed by parties to an existing election by 2016, the election may be deemed never filed exposing the parties to significant GST/HST liabilities and creating a heavy administrative burden on both taxpayers and CRA.

The increased compliance burden that will result from these changes runs counter to many Government initiatives aimed at making compliance with regulations more efficient. In April 1992, then National Revenue Minister Otto Jelinek announced a six-point plan to help Canadian businesses save time and money by eliminating several forms and streamlining procedures. Minister Jelinek's plan included the elimination of the requirement to file nine election forms with CRA, including Form GST25. This change reduced the paperwork burden for both industry and CRA, freeing up much needed resources. For example, prior to this

change, a corporation with ten wholly-owned subsidiaries may have been required to file over 100 Forms GST25 with CRA. A corporation with 50 wholly-owned subsidiaries may have been filing over 2,500 forms. After the change, the corporation was only required to keep copies of the Forms GST25 on file and make them available to auditors upon request.

At the provincial level, the Ministère du revenu du Québec has followed Minister Jelinek's lead. Quebec originally had a filing requirement similar to that in section 156 but repealed it effective 1992 to harmonize with the GST/HST. In June 2006, Quebec dropped the requirement for the election to be in writing. Both of these steps follow the intent and spirit of an efficient and effective VAT. Quebec only re-introduced the requirement to complete and maintain these elections in the tax files of businesses in January 2013 as part of its measures aimed at increasing the harmonization of the QST with the GST/HST.

Even more recently, throughout the rollout of the February 2014 Federal Budget, the Government reiterated its commitment and support for the work of the Red Tape Reduction Commission to reduce the compliance burden on businesses. Indeed, Minister Flaherty's Federal Budget speech highlighted the Government's commitment to "eliminat[ing] waste that will cut the cost of government without cutting programs."

The proposed amendments to section 156 reintroducing the filing requirement for nil consideration elections runs counter to these efforts. Businesses will need to marshal scarce resources to complete a large number of new election forms, and CRA's already busy personnel will be faced with processing them – all with little discernable benefit to overall tax administration. TEI urges the Government to reconsider the proposed plan to revert back to required filing of section 156 election forms with CRA.

II. Practical Issues and Concerns

The draft legislation and accompanying supplementary information on the proposed changes to section 156 have not addressed their application to many common business situations. These practical issues should be addressed if the proposed amendments are adopted.

1. Expansion of Election to Certain Newly Created Entities

The current rules prohibit new entities with no property or that have not yet made any taxable supplies from making the section 156 election. This prohibition is problematic in situations such as internal reorganizations where entities are commonly formed to acquire property from a closely related party. The inability to make the election in those situations could expose transactions to GST/HST. The proposed changes to section 156 address these issues by including a welcome expansion of the nil consideration election to entities that hold no property and that have not made taxable supplies where it is reasonable to expect: (a) the entity will be making supplies throughout the next twelve months and substantially all of those supplies will be taxable supplies; and (b) substantially all the property manufactured, produced, acquired, or

imported by the entity in the succeeding twelve months will be for consumption, use, or supply exclusively in the course of its commercial activities.

It is unclear, however, whether a section 156 election will remain valid if a new entity acquires property with the intention of making a taxable supply within the succeeding 12 months and, due to unforeseen circumstances, does not make any taxable supplies during that period. Having some sense of what documentary evidence CRA will accept to support a “reasonable expectation” that the entity would make taxable supplies within 12 months of making the election would greatly assist taxpayers in documenting qualification for the election.

In certain industries, such as land development, it is common for an entity to purchase property and hold it for more than a year before making a taxable supply. The proposed amendments to section 156 are unclear as to whether an election will remain valid in those situations. If such an election remains valid, taxpayers would welcome guidance on the types of documentation CRA would accept in support of that election.

2. *Group Filings*

Taxpayers making the section 156 election have been able to complete a supplemental form with Form GST25 that includes multiple members of a closely related group in order to simplify the compliance process. The draft legislation at subsection 156(4) could be interpreted to require each member of a closely related group to file a separate election form for every member of the closely related group with which it engages in transactions qualifying for the election. TEI urges CRA to continue allowing members of a closely related group to use a supplementary form to establish that each member of the group is making the section 156 election with every other member of the group. If the supplemental form is adopted, guidance should identify which entity in the closely held group must file the election form with CRA.

3. *Revocations*

When revoking a section 156 election, it is not clear which entity must file the revocation (*e.g.*, the same entity that initially filed the election, any member of the closely related group, or some other entity). TEI recommends that CRA address this issue in published guidance to avoid inconsistencies in approach taken by taxpayers.

4. *Elections on File Prior to 1992*

Prior to 1992, closely related entities making a section 156 election were required to file their elections with CRA. Businesses that filed election forms during that period may no longer have copies in their files. It is unclear whether the proposed changes in the Federal Budget will effectively revoke those elections and force taxpayers to file new election forms. If resubmission of those elections is required, taxpayers should be permitted to select an effective date that includes all periods that remain open under the applicable statute of limitations. In some

situations, the persons authorized to make the election during past open years will no longer be working for the taxpayer. The signature of the current authorized representative should then be deemed effective for all prior open years to avoid situations where no person who had authority to sign the election for those years remains with the business. That same practice would be welcomed for all elections made prior to the date election forms will be required to be filed under the new rules referenced in the Federal Budget.

5. Method for Filing New Election Forms

The Federal Budget did not discuss the method taxpayers will be required to use to file their section 156 elections. TEI urges CRA to permit filing electronically using the My Business Account service rather than requiring paper election forms. This approach will reduce some of the increased compliance burden created by the new election filing requirements.

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TEI would be pleased to meet with CRA and Finance representatives to discuss our comments or any administrative issues relating to the section 156 election filing procedures. Our goal is to ensure the tax system is designed in the most practical, effective, and efficient manner for the benefit of the Government and the business community.

TEI's comments were prepared under the aegis of the Institute's Canadian Commodity Tax Committee, whose chair is Richard Taylor. Should you have any questions, please do not hesitate to contact Mr. Taylor at 416.935.2568 (richard.taylor@rci.rogers.com) or Paul Magrath, TEI's Vice President for Canadian Affairs, at 905.804.4930 (paul.magrath@astrazeneca.com).

Respectfully submitted,

Tax Executives Institute



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International President

cc: Carlos Achadinha, Legislative Chief, Department of Finance
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