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November 28, 2011

Minister of Finance
The Honourable James M. Flaherty
Department of Finance Canada
140 O'Connor Street
Ottawa, Ontario K1A 0G5

Dear Mr. Flaherty,

Re: 2011 GST Leader's Forum

We are writing on behalf of The GST Leaders' Forum ("GLF") with respect to concerns that were voiced during our May 2011 meeting. In September 2011, participants to the GLF reconvened and agreed that you should be informed about these concerns. We will identify some issues and our concerns hereafter and will make some recommendations.

About the GLF

I am the Chair of the most recent GLF held on May 4th- 5th, 2011 at Niagara-on-the-Lake, Ontario. The GLF is an annual gathering of invited, recognized GST/HST accounting and legal service professionals from across Canada. The GLF provides the opportunity for influential GST/HST leaders to explore some of the most pressing issues they are facing and to share knowledge, experiences and ideas in an open and professional environment. It was facilitated by the Canadian Institute of Chartered Accountants.

Four leaders facilitated discussions at the forum. The discussions followed four general themes, being GST/HST/QST and Pension Plans, GST/HST and Financial Services, Pot-Pourri of GST/HST Issues and The HST Harmonization – One Year Later. With all these themes, the Forum participants noted a constant: the ever expanding complexity of the GST. In view of this, the GLF agreed that an alert signal must be given and a recommendation must be made to the tax authorities, urging them to put the emphasis, in the near future, on three themes: tolerance, simplification and clarification.

TOLERANCE

Be it HST Harmonization or Pension Plans and Financial Services, the new rules put in place have brought and will continue to bring difficulties to taxpayers. In view of the confusion created by the new rules, the Forum urges the tax authorities to show tolerance upon auditing the application of the new rules. Errors have to be expected, so the aim should be to quickly contact taxpayers to inform them, not to catch them in default and penalize them. As the saying goes "the only good tax is an old tax"; presumably because the taxpayers have had time to better understand it and get used to it. The taxpayers will indeed need time to adjust to the new rules.

SIMPLIFICATION

The culprit here is mostly the very ambitious, extremely complex and still incomplete regime on Pension Plans, first announced on January 26, 2007. On January 28, 2011 the Department of Finance issued a Release which included proposed changes and also some "issues that have been raised during

consultations but which require further research, analysis and stakeholder consultations”. The Forum strongly suggests that one of the aims of such analysis should be to simplify the rules. If you want compliance, simplify the rules.

CLARIFICATION

In discussions over the two days at the GLF, the participants were surprised by how much time was spent on trying to “characterize” a supply. This was particularly true when dealing with the changes to the definition of “financial service” and the new Place of Supply rules for HST. The GLF recommends that special efforts be put into bringing to public notice the new rules and encourage doing so with publications using concrete examples.

SOME ISSUES

- **GST/HST/QST and Pension Plans**

Roughly, the new regime implicates a deemed supply by the employer (ETA 272.1), a rebate to the pension entity (ETA 261.01) and may involve tax adjustment notes (ETA 232.01), adjustments to net tax (ETA 225.2) and information returns (ETA 273.2).

Subsections 172.1 (5) and (6) deem the employer to have made a taxable supply of a specified resource or part, on the last day of the fiscal year of the employer in which it acquired the specified resource. This deemed supply is a separate supply from any actual supply of the specified resource or part made to the pension entity. Where an employer is deemed to have made taxable supplies, but has also charged tax on an actual supply, the issuance of a Tax Adjustment Note to the pension entity (ETA Sections 232.01 and 232.02) will allow him to reduce its net tax. On the other side, the Pension Entity is required to pay an amount to the Receiver General in respect of the duplicate “eligible amounts”.

The requirement to pay seems counterintuitive and will be a trap for the unwary taxpayer. In its analysis of the regime, Finance should consider deeming the actual supply not to be made, possibly with an exception where the employer (and Pension Entity?) so elect.

- **The deemed supply and the tax adjustment note: timing issue**

When an employer is assessed for not charging tax on an actual supply and only then issues the tax adjustment note to the Pension Entity to offset that liability of the employer, the Pension Entity then has a liability (i.e., essentially equal to the 33% rebate of the tax adjustment note amount that the Pension Entity could have claimed when the tax on the actual supply became payable). The provisions of the Excise Tax Act do not seem to work well in such a case. There could remain some unrecoverable tax because by the time the tax adjustment note is issued the Pension Entity might be out of time for actually claiming the 33% rebate that is essentially being recaptured (the “Recapture Amount”).

- **The concept of “Pension Entity”: the Master Trust issue**

The tax authorities’ position is that a Master Trust (“MT”) is not a “Pension Entity”, thus, there is no GST rebate on actual supplies paid out of the MT funds. The practical solution suggested is for the Master Trust to register, claim ITCs and bill the Pension Entities.

One possible difficulty with this solution is if the MT acquired tax exempt services. The resupply of such tax exempt services by the MT may well be considered as a taxable supply. The “excluded resource” provision would not apply here, as the supply is made to the MT and not to the employer.

One possible solution: consider the MT as a bare trustee. In fact, most MTs are only a flow-through tool, a pooling of funds.

- The concept of “pension entity” : no Trust is created issue

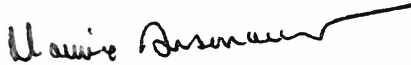
In some provinces the pension committee has no obligation to create a trust. Using Québec as an example, the pension committee may delegate all or part of its powers to a third person. In such case, often a trust is not created but a management contract is signed with the third person. Does it mean that there is no “pension entity” and that this pension plan is outside the new regime, like the pension plans funded through an insurance contract?

The definition of “pension plan” includes a registered pension plan “that governs a person that is a trust or that is deemed to be a trust...” (ETA 172.1). Some think that there is a deemed trust created under Québec pension law, others disagree. We could not reach a consensus on this matter. Clarification is needed.

Conclusion

The GLF commends both your departments on their approach and the importance given to stakeholder consultations on GST/HST matters. We appreciate the opportunity to provide our views and hope that you will find them helpful.

Yours truly,



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