2024 TEI Canadian Commodity Tax Committee Liaison Questions for Department of Finance

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1. Legislative Proposals to Expand opt-in Tax Jurisdiction for Indigenous governments

The Department of Finance released draft legislative proposals expanding the opt-in jurisdiction for Indigenous governments on July 12, 2024. Currently, the First Nations Tax ("FNT") applies on the sale of alcoholic beverages, fuel, and tobacco products identified in a band's bylaws on some First Nations reserves. The First Nations Goods and Services Tax ("FNGST") applies on supplies of most goods and services on First Nations lands where a band council, or other governing body, of a First Nation passes its own law imposing FNGST. The FNGST does not apply to a product on which the FNT applies. Where the FNT or FNGST applies, the GST does not apply. Both the FNT and FNGST are reported with the GST/HST using the GST34 (and GST499-1 for the FNT).

Under the draft legislative proposals of July 12, 2024, the Fuel, Alcohol, Cannabis, Tobacco, and Vaping ("FACT") value-added sales tax will be introduced. It is proposed to work in a similar manner to the existing FNGST, including by applying at the same 5% rate, but would be limited to FACT products. The Federal GST or federal component of the HST would not apply on products for which an Indigenous FACT sales tax applies.

Questions to Finance

(a) Can you clarify how the proposals impact the current FNGST and FNT?

(b) Can the FACT value-added tax apply to a FNT taxable product or a FNGST taxable product?

(c) Will there be any reporting changes required in monthly GST/HST return filing?

(d) Will the FACT value-added tax be reported on the GST34? Will another schedule be required?

2. Coupons and Simplified Registered Businesses

Section 181 of *Excise Tax Act* (Canada) ("ETA") sets the applicable rules for coupons for GST/HST. These rules apply where a registrant accepts a coupon in full or partial consideration for a taxable supply of property or a service (other than a zero-rated supply). Under subsection 123(1), a "registrant" is defined as a person who is registered, or who is required to be registered, under Subdivision D of Division V, i.e. under the general registration system provided for in section 240.

Subsection 211.1(2) specifically confirms that a reference to registration in Part IX (other than this Subdivision [E of Division II]) does not include registration under this Subdivision [E of Division II]. Thus, a person that is registered under the simplified regime for the purposes of Subdivision E of Division II of Part IX of the ETA on Electronic Commerce is not a registrant under the ETA.

Our understanding is that section 181 is not applicable where the supplier is registered under the simplified regime.

Questions to Finance

(a) Considering that a recipient that is a consumer of a taxable supply is required to pay GST/HST on its purchases regardless of the type of GST/HST registration of the supplier, could the Department of Finance confirm that it was the government's intention that the coupon rules would not be applicable on transactions made by a supplier under the simplified regime?

(b) If so, could the Department of Finance provide the underlying tax policy rationale? By comparison, under the electronic commerce rules in this Subdivision, in some specific circumstances, a supply is deemed to have been made by a distribution platform operator. Provided the distribution platform operator can be a registrant under Subdivision D of Division V, our understanding is that the tax rules referring to registrants are generally applicable, including section 181 of the ETA.

(c) If it is government's intention for coupon rules to apply even where the supplier is a registrant under the simplified regime, will the Department of Finance consider recommending legislative amendments s to clarify this point?

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3. Tax Court and Federal Court Jurisdictions given Supreme Court of Canada decisions in Dow Chemical and Iris Technologies

On June 28, 2024, the Supreme Court of Canada issued decisions in the two companion cases of *Dow Chemical Canada ULC v. Canada* (2024 SCC 23) and *Iris Technologies Inc. v. Canada* (2024 SCC 24) dealing with the different jurisdictions for tax issues of the Tax Court of Canada and Federal Court of Canada. While the decisions purport to clarify the jurisdictional divide between the Tax Court and Federal Court, some legal commentators have suggested the decisions have the potential to make litigating tax disputes more complex and costlier for taxpayers. For example, having different courts opine over differing elements of a tax dispute adds uncertainty, complexity and results in additional careful analysis to determine the appropriate legal mechanism to advance their case. It is not always clear whether the crux of a legal issue is strictly borne out of the correctness of an audit assessment, procedural fairness and conduct of an audit, or whether a decision of the Canada Revenue Agency is one of a discretionary nature. The additional time and costs it takes a taxpayer to determine the correct judicial path—the Tax Court of Canada, or the Federal Court—can be an additional barrier to many taxpayers who wish to advance their dispute through the judicial process.

While TEI is of the view that the legal profession is better suited to comment on the implications that these decisions have on the jurisdictions of the Tax Court and Federal Court, TEI is concerned that any lack of clarity between these jurisdictions could lead to a less efficient and less effective administration of tax laws through the judicial process and could potentially lead to increased time, resources and legal fees on TEI members seeking to resolve tax disputes in the courts. TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of government and taxpayers. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner.

Question for Finance

In light of these decisions, TEI requests the Department of Finance, in conjunction with the Department of Justice, review the jurisdictions of the Tax Court of Canada and Federal Court of Canada and recommend amendments to the *Tax Court of Canada Act* and *Federal Courts Act*. If this effort is not undertaken, the continued lack of clarity over the clear jurisdictional authority of the two Courts will continue to undermine the efficiency of tax dispute resolution process and lead to increased resources to both taxpayers and government taxpayer costs to do so.

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4. "Compliance or Intended Compliance" in Section 224.1

In recent years, there has been a proliferation of potential class action suits against suppliers related to the collection of tax. Despite sections 224.1 and 312 of the *Excise Tax Act* (Canada), plaintiff class counsels are framing potential class action suits for recovery of tax as actions for violation of provincial consumer protection legislation.

Notably, the Quebec action in *Gagnon c. Amazon.com Inc.*, 2019 QCCA 1166 wherein the Quebec Court of Appeal overruled the Quebec Superior Court in characterizing the action as a claim for punitive damages under consumer protection law despite it being premised under alleged wrongful collection of tax (TEI notes, however, the Quebec Court of Appeal has left consideration of sections 224.1 and 312 and the Quebec equivalents open for consideration at later stages).

While the Ontario Superior Court of Justice in *Lewis v. Uber Canada Inc. et al.*, 2023 ONSC 619 found at paragraph 59 that "the statutory bars in the *ETA* operate to bar the plaintiff's claim in its entirety is sufficient to dispose of the certification motion", a decision upheld by the Ontario Court of Appeals in *Lewis v Uber Canada Inc, 2024 ONCA 702,* statements made by the Ontario Superior Court of Justice in their judgment call into question the broadness of protections afforded to agents of the Crown under 224.1.

Paragraph 56 in *Lewis v. Uber Canada Inc. et al.*, 2023 ONSC 619 notes that the plaintiff failed to plead any material facts to support the allegation that Uber knowingly or recklessly overcharged GST and therefore could not avail itself of the protection of s. 224.1. Although the Ontario Superior Court of Justice in paragraph 55 also notes that a broad interpretation of 224.1 is merited, the wording in paragraph 56 calls into question whether a similar application of s. 224.1 would have occurred should the plaintiff have brought forward material facts supporting the allegation of "knowingly or recklessly" overcharging GST. As such, TEI is concerned that 224.1 is not an absolute bar to actions by recipients to sue suppliers for collection of tax; a concern which is exasperated by the number of cases of this nature against suppliers that continue reach varying levels of judicial review.

Consider that there may be instances where a supplier could be found to have "knowingly" collected tax in error as a result of limitations on the supplier, such as a billing system limitation, or other instances which could call into question what is "intended compliance" for example, where the application of taxes to a product is unclear and the supplier opts to collect tax to reduce its risk. In such situations, while the supplier would not have been enriched by such collection, the supplier may not be protected by sections 224.1 and 312 based on the reasoning outlined in paragraph 56 by the Ontario Superior Court of Justice in Uber.

At paragraph 9 of Ontario Court of Appeal in *Sorbara v. Canada (Attorney General), 2009 ONCA 506*, the court stated that "The Excise Tax Act provides a complete statutory framework with respect to a taxpayer's claim for a rebate of GST paid under Part IX of the Excise Tax Act." Suppliers remit GST/HST collected on behalf of the Crown and are not enriched when the collection of such taxes is in error. Further, the ETA does not require perfection given it provides mechanisms to refund taxes collected in error either by the supplier under section 232 or by refund application to the Minister under section 261.

Question for Finance

As a result, would the Department of Finance consider recommending amendments to section 224.1 to ensure it is an absolute bar to recipients bringing actions against suppliers for collection of GST/HST whether such claims are for wrongful collection or tax or under provincial consumer protection laws to indirectly claim back the tax?

5. Expansion of s. 153(3) Barters of Inventory

Subsection 153(3) of the *Excise Tax Act* (Canada) provides that when two registrants exchange property of the same class or kind and is acquired for use as inventory exclusively in commercial activities, the value of consideration is deemed to be nil.

Barters for services and non-inventory property are common practice in certain industries and the requirement for each registrant to invoice, collect and remit GST/HST and claiming offsetting input tax credits creates significant administrative burdens where the net result of the application of tax produces nil net tax effect on the barter transaction.

Questions for Finance

(a) Could the Department of Finance discuss the policy rationale of limiting subsection 153(3) to barters of inventory property and only to property of the same class or kind?

(b) Further, in order to lessen such administrative burden on registrants (particularly where the net tax effect is nil), would the Department of Finance consider recommending amendments to subsection 153(3) to broaden its application to barters of services and non-inventory property where both the supplier and recipient would be fully eligible for input tax credits on the barter?

6. Update of 2023 Question on Partnership Dissolutions under *Income Tax Act* s. 98(3)

At the 2023 liaison meetings, TEI raised some concerns around the interplay between the *Income Tax Act* (Canada) ("ITA") and the *Excise Tax Act* (Canada) for partnership dissolutions under subsection 98(3) of the ITA that could create unrecoverable GST/HST, particularly for closely related groups.

The Department of Finance had indicated that they were interested in the Canada Revenue Agency's position on this scenario before commenting on whether they would consider recommending an amendment to either section 272.1 or section 156 to allow transfers of partnership property to partners of a closely related group without the tax being unrecoverable.

Question for Finance

Could the Department of Finance provide an update on whether any subsequent discussions with the Canada Revenue Agency have informed a response to the 2023 question?

7. Joint Venture Proposals Update

Question for Finance

(a) Can the Department of Finance provide updates on the progress of proposed section 273.01 of the Excise Tax Act and share certain results of stakeholder engagements?

(b) Furthermore, can the Department advise of the next steps in the progression of this process and whether further stakeholder engagement will be sought?

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8. Ability for Digital Platform Operators to collect and remit GST/HST on supplies made by persons registered under Subdivision D of Division V of Part IX of the Excise Tax Act (Canada)
[Companion question also raised to CRA]

The requirement that sellers registered for GST/HST under Subdivision D of Division V of Part IX of the *Excise Tax Act* (Canada) ("ETA") ("Subdivision D") who make sales of qualifying tangible personal property supplies or specified supplies (collectively, "supplies") through a digital platform remain responsible for tax collection and remittance on those supplies continues to pose challenges for marketplace sellers, digital platform operators ("DPOs"), and Canada Revenue Agency ("CRA") auditors alike.

There are insufficient resources provided to DPOs to assist in correctly determining the registration status of sellers. This has meant DPOs have had to invest considerable amounts of their own resources in an attempt to make a determination of the registration status of sellers in an effort to comply with the current requirements of Subdivision E of Division II of Part IX of the ETA ("Subdivision E"), and then to build a tax system that can apply tax differently to a transaction depending on whether the DPO is deemed to be the supplier, or whether the seller remains the suppler. Some DPOs determined that implementing such a system would have required too many resources and would have resulted in too much risk to the DPO given the lack of tools available to them to be able to determine the accuracy of a GST/HST number provided by a seller. An alternative was to require all sellers registered under Subdivision D to elect that DPO collect and remit tax on behalf of the seller pursuant to subsection 177(1.1) of the ETA.

Based on the current documentary requirements imposed by the CRA, leveraging subsection 177 (1.1) of the ETA is neither a practical nor reasonable solution for many DPOs who may have thousands of sellers registered under Subdivision D selling on their digital platform.

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Questions for Finance

(a) TEI requests the Department of Finance recommend amendments to the relevant sections of Subdivision E of the ETA to give DPOs the option to collect and remit GST/HST on sales made through the digital platform, regardless of the registration status of the seller under Subdivision D. This reduces risks taken on by DPOs and also reduces the risk that a seller who may have provided a false statement to a DPO collects amounts on account of GST/HST and does not remit it to the CRA.

TEI understands the Department of Finance has a concern around adopting an approach that would allow DPOs to collect and remit taxes on all taxable supplies regardless of registration status of seller as such an approach could result in sellers registered under Subdivision D to be perpetually in a refund position. Respectfully, TEI members do not believe this is a compelling argument to prevent Canada's digital platform operator rules from conforming to global best-practices – which provide for DPOs to be able to collect and remit the applicable taxes on taxable transactions through their digital platform. Many sellers have other sales channels (such as their own website or bricks and mortar locations) and therefore simply because a DPO may remit taxes on their behalf, this does not mean that all taxes collected on the sellers' sales will be remitted by a DPO. Second, some DPOs already require sellers to enter into elections pursuant to 177(1.1) and therefore DPOs are already remitting taxes on behalf of the seller in these cases. Finally, the ability for DPOs to collect and remit taxes on sellers registered under Subdivision D should be optional and therefore not all DPOs may choose to do this.

(b) TEI also requests that DPOs are able to avail themselves of the protections under paragraphs 211.23(2)(c) and 211.13(5)(c), as applicable, for all sales made via their digital platform, including those where the seller is registered under Subdivision D. Information sharing between sellers and DPOs is necessary for both sellers and DPOs to understand their tax obligations for sales made via digital platforms. Allowing DPOs to be able to rely on 211.23(2)(c) and/or 211.13(5)(c) is important since DPOs are dependent on sellers, including sellers who are registered under Subsection D, to provide accurate information about their supplies in order to determine the rate at which GST/HST applies.

9. Sales of intangible personal property by non-resident persons registered under Subdivision D of the ETA, to non-resident, non-registrant recipients [Companion question also raised to CRA]

Supplies of intangible personal property ("IPP") to non-resident, non-registrant recipients are zero-rated provided the conditions outlined in section 10.1 of Part VI of Schedule VI of the *Excise Tax Act* (Canada) ("10.1") are met.

Pursuant to GST/HST Memorandum 4.5.3, suppliers are required to collect, verify, and maintain evidence to support the zero-rating in 10.1 such as:

1. Online self-declaration by non-resident recipients that they are not registered for GST/HST under Division V.
2. Online self-declaration by recipients that they are non-residents of Canada along with comparing the declaration to a complete home address and the billing address or address of financial institution attached to credit card; or geo-location software
3. Verification that the purchaser is not in Canada at the time of purchase by the use of geo-location software.

As there is no distinction between non-resident suppliers and resident suppliers, the zero-rating evidence requirements equally apply to non-resident suppliers who are registered under Subdivision D of Division V and supply IPP to customers globally, including those in Canada.

Consider the following example:

1. A non-resident supplier who resides outside Canada supplies digital content to customers around the world.
2. The digital content is IPP (that is not intellectual property) and includes world-wide rights (including Canada)
3. Customers in Canada are able purchase and access the digital content.
4. The digital content is for non-commercial use.
5. Given the nature of these supplies of digital content and the manner in which the global economy operates today, the supplier may have many millions of customers throughout the world purchasing this content each year, or even each month.
6. Under the simplified GST regime (Subdivision E of Division II), the supplier needs only to consider application of GST/HST to customers who are determined to be located in Canada, pursuant to the applicable rules under Subdivision E.
7. Under the standard regime (Subdivision D of Division V), however, the non-resident supplier would be required to ask every customer worldwide to declare that they are not registered for GST/HST under Division D; that they are non-residents of Canada; and conduct the address and location verification checks or risk a large assessment by the CRA, otherwise the supplier would be required to charge GST/HST.

The impracticality of the evidentiary requirements needed to support the zero-rating conditions of 10.1 does not align with the reality of global e-commerce today and the manner in which some digital content may also closely resemble a service. Having unnecessarily complex zero-rating provisions specific to IPP disincentivizes and acts as a barrier to non-resident suppliers who may want to expand operations to Canada. Likewise, it also acts as a barrier to Canadian companies who wish to expand their supplies globally. Lastly, arguments could be made that the application of GST/HST to supplies of IPP by non-residents to non-residents should simply be outside the scope of the ETA.

Questions for Finance

(a) TEI requests that the Department of Finance recommend amendments to deem supplies of IPP by non-residents (even when the supplier is registered under Subdivision D) to other non-residents to be supplies made outside Canada. Doing so removes the compliance burden of maintaining evidence to the recipient's registration status.

(b) Second, since it can be a grey area to distinguish between what may be a supply of a service versus a supply of IPP, TEI also requests that supplies of IPP be zero-rated in the same manner as services under section 7 of Part V of Schedule VI. This would alleviate the large administrative burden on suppliers and bring Canada's rules around this more in line with global VAT standards.

These requests should not result in any lost GST/HST revenue as any recipient who was purchasing the IPP for use in Canada would fall under the "imported taxable supplies" rules under Division IV pursuant to paragraph (c.1) of the definition and accordingly be subject to self-assessment under section 218 if the supply is not used exclusively in commercial activities.

10. Improvements to the CRA's GST/HST Registry search [Companion question also raised to CRA]

TEI, along with other representative bodies, has for many years been requesting improvements be made to the Canada Revenue Agency's GST/HST Registry search (the "Registry") to make the tool more usable and fit for purpose. These requests have included (1) changes to allow for the use of Application Programming Interface ("API") so that GST/HST numbers validated simply by searching by the GST/HST number provided; (2) that the Registry does not return a valid result if the business number entered is tied to a GST/HST registration under Subdivision E; and (3) the API allow for bulk searches.

At the time of TEI's last request on this matter during the 2022 liaison meetings, the Department of Finance communicated that this issue was the domain of the CRA. However, when presented with the same request, the CRA responded that it was unable to make such changes without legislative amendments to the privacy or confidentiality provisions of the ETA

Question for Finance

(a) TEI requests the CRA and Department of Finance work together to overcome this disconnect so that Canadians have a usable GST/HST Registry search tool similar to what is commonplace and standard throughout many other VAT-regime jurisdictions including Quebec with the objective of meeting the government's goal of tax compliance (i.e. avoiding fraud on collection of GST/HST, detecting carousel schemes, etc.).

(b) Notwithstanding the foregoing, TEI requests both the Department of Finance and CRA, in of itself or collectively, seek an opinion from the Department of Justice whether the disclosure of a particular GST/HST registrant's name and registration status on a specific date, would result in the contravention of the confidentiality provisions of the ETA.

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11. Definition of Manufacturer or Producer under the FET

The definition of manufacturer or producer in section 2 of the *Excise Tax Act* (Canada) ("ETA") includes several entities that would not be considered a manufacturer or a producer of goods. This includes vendors of cosmetics, Schedule III.1 goods and pre-recorded cassettes provided the entity does not sell these goods exclusively and directly to consumers for personal consumption. Under subsection 2(3), importers of these goods are deemed to be a manufacturer or producer in Canada, not to be the importer of the goods and to have manufactured or produced those goods in Canada.

These concessions require these entities to become licensed as manufacturers or producers under section 54. They also allow them to be deemed to be the manufacturer of "similar goods" under section 48. Finally, under various paragraphs of subsection 50(5) they are allowed to import these goods without the payment of consumption or sales tax under Part VI of the ETA ("FST"). Without these provisions, importers would be required to pay FST at the border and if the products were subsequently sold to manufacturers or producers there would be an embedded FST in the product since the products would have been tax-in products and the purchasing manufacturer would not be entitled to a refund. The only way to remove/recover this embedded tax would be to request a remission order.

These provisions demonstrate Parliament's willingness to remove inequities in the ETA. The possibility of a similar inequity exists in relation to the importation of renewable/bio-fuel ("renewable") products that are incorporated with petroleum products to meet the federal *Clean Fuel Regulations,* SOR/2022-140, the *Renewable Fuels Regulations*, SOR/2010-189 and similar provincial schemes.

The object of these Regulations is to reduce the carbon intensity of transportation fuels. To meet these requirements, producers acquire low carbon intensity renewable products to add to higher carbon intense petroleum products. This lowers the carbon emissions of the resultant mixture. The requirement for the low intensity fuels will increase over-time as regulations become more stringent. There are currently not enough Canadian manufacturers of renewable/bio-fuel products, so these products must be sourced from outside of Canada. Foreign entities are required to pay Part III Federal Excise Tax ("FET") when they import the product. It is unlikely that given the existing legislation, that these entities will be eligible to become licensed as either a manufacturer or wholesaler. They have no way to recover the FET other than increasing their fuel prices to the manufacturer. As a result, the amount of FET that the importers pay at the border becomes embedded in the cost to the licensed manufacturers. The renewable products are blended with other petroleum products to create a new taxable fuel. The manufacturer is required to pay FET again on this mixture when it is sold. The only way for licensed manufacturers to recover FET that is imbedded in the price they paid is to file for a remission order. This is a time-

consuming process for both the Canada Revenue Agency and industry and ties up cash while the remission request is being considered.

Question for Finance

Will the Department of Finance provide the Canada Revenue Agency with a comfort letter specifying that the Department of Finance will propose revisions to the definition of a manufacturer or producer in section 2 to include importers of renewable/bio-fuels that will be incorporated into an excisable product and to include these products in subsection 2(3)? These inclusions will require the importer to become licensed by virtue of section 54 and will deem the goods to be manufactured in Canada. This will allow the importation to be exempt of FET by virtue of subsection 23(2). The sale by the importer will be exempt when sold to a licensed manufacturer.

12. Legislative Proposals Relating to New GST/HST Joint Venture Election Rules

The Government of Canada's *2023 Fall Economic Statement* included proposed amendments to the *Excise Tax Act* (Canada) relating to GST/HST joint venture election rules. These proposals were long awaited changes to expand the application of the joint venture election to all commercial activities, which were first announced in Budget 2014.

The changes to the legislation came in the form of a new proposed section 273.01 as an election for joint ventures that are involved in commercial activities and that are not able to elect under section 273. Section 273 is specifically applicable to joint ventures involved in the exploration or exploitation of mineral deposits or a prescribed activity. It is understood that if the proposed 273.01 is enacted there will be two elections operating in parallel and one will not override the other; however, it is also understood that the Department of Finance may consider phasing out the existing subsection 273 at an undetermined future date. For existing joint ventures that qualify for the election under section 273, it is beneficial to allow these joint ventures to continue to elect under the current rules, given the cost and administrative burden imposed on companies with joint venture interests to transition from one set of rules to another.

Proposed section 273.01(5) requires a qualifying operator and a qualifying participant to jointly file a prescribed election form with the Canada Revenue Agency. This filing requirement is problematic, especially for the energy industry. While the current subsection 273(4) requires a prescribed joint election form to be completed by both the operator and co-venturer to make the election valid, this form does not need to be filed with the CRA and is generally kept by the joint venture participants as evidence for any CRA audit. For the energy industry, there are thousands of joint ventures where participant joint venture interests can change frequently. Imposing a requirement to file a prescribed form for every joint venture in existence under the proposed rules will result in a substantial administrative burden on taxpayers with joint venture interests.

Maintaining the existing subsection 273(4) is beneficial for taxpayers with existing joint venture elections under the current rules. Current subsection 273(4) prevents the administrative burden that arises where there is a requirement to file election forms with the CRA.

If the requirement to file a joint venture form with the CRA is inevitable, understanding that the election is technically a bi-lateral election between operator and a co-venturer or qualifying operator and a qualifying participant, the energy industry proposes an alternative form where the election is evidenced by the filing of an annual information return by the operator. The form could contain information on a joint venture's activities (based on pre-defined categories), the names of joint venture participants and their respective interests in the joint venture. Operators would rely on information from joint interest accounting and reporting tools common to the energy industry to extract data to populate an information return. Ideally, a flat data file with pre-defined fields could feasibly be submitted to CRA. This would reduce the administrative and compliance burden imposed by a filing requirement for every participant and for every change in a joint venture.

Questions for Finance

(a) Will the Department of Finance consider removing the requirement to file a prescribed joint venture election form subject to proposed subsection 273.01(5)?

(b) If the requirement to file a joint venture form with the CRA is inevitable for all joint ventures making the election, would Finance and the CRA instead consider an alternative filing methodology such as an annual information return as described above, to reduce the administrative burden? TEI believes that the filing of an annual information return with prescribed information would meet the objectives of the Government of Canada's information requirement with respect to joint venture activities in Canada and reduce the compliance burden on industry and the CRA.

13. Corporate Reorganizations and Stamps

Section 158.05 of the *Excise Act, 2001* (Canada) prohibits anyone from possessing a cannabis stamp, other than the producer of the stamp, the person who issued the stamp, or a prescribed person (a person transporting stamps and a person in possession of a stamp for purposes of applying adhesive).

As the cannabis industry matures, we are seeing rationalization and corporate reorganizations, such as acquisitions and wind-ups or amalgamations. Stamps belonging to a discontinued entity become unusable and must be destroyed. This creates unneeded waste, effort, and cost.

In other tax legislation, corporate reorganizations such as wind-ups and amalgamations result in the continuation of the predecessor entity.

Question for Finance

Would the Department of Finance consider proposing amendments to section 158.05 or adding prescribed persons to subsection 4(3) of the *Stamping and Marking of Tobacco, Cannabis and Vaping Products Regulation* to allow continuing corporations to use the stamps of predecessor corporations?

14. Duty Refunds for Re-working or Destroying Cannabis

Under section 158.16 of the *Excise Act, 2001* (Canada), a cannabis licensee may only re-work or destroy a cannabis product in the manner authorized by the Minister. Further, when applying for a refund under section 187.1, the Minister will only refund to the duty paid on a cannabis product that is re-worked or destroyed if it is done in accordance with section 158.16 and applied for within two years from the date of destruction.

Certain provincial boards (i.e. customers) suggest that the provincial board be responsible for the destruction of cannabis products as it is cheaper for the provincial board to destroy the products on site rather than have them shipped back to the supplier. However, this eliminates the ability to apply for a refund under section 187.1.

Question for Finance

Would Finance consider proposing amendments to section 158.16 to include destructions undertaken by provincial boards provided appropriate data is available?

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15. Deeming inventory exchanges of identical goods to not be supplies (or supplies of nil consideration) for purposes of GST/HST where 153(3) does not apply

As discussed in a previous question, subsection 153(3) of the *Excise Tax Act* (Canada) ("ETA") provides that when two registrants exchange property of the same class or kind of property that is acquired for use as inventory exclusively in commercial activities that the value of consideration is deemed to be nil. However, where there is an exchange of property of the same kind of class between two parties for use of inventory exclusively in commercial activities where one party is a registrant and the other is not, there is no current mechanism whereby the registrant supplier is not required to charge tax to the non-registrant recipient.

Consider the following example:

1. Seller A is registered under Subdivision D of Division V of Part IX of the ETA (Subdivision D).
2. Seller B is not a registered under Subdivision D.
3. Seller A and Seller B both sell identical tangible personal property (e.g. widget).
4. Seller A and B both sell their widgets through the same Distribution Platform Operator (DPO).
5. Seller A has their inventory at a storage facility operated by the DPO in Ontario.
6. Seller B has their inventory at a storage facility operated by the DPO in Alberta.
7. A customer, located in Alberta, purchases an item for sale from Seller A via the digital platform operated by the DPO.
8. In order to minimize the environmental footprint of shipping Seller A's product to the customer in Alberta from the facility in Ontario, it makes more business sense to ship the identical item owned by Seller B in Alberta to the customer in Alberta.
9. To enable this, Seller B effectively needs to transfer one of its widgets in Alberta to Seller A (for immediate resale and shipment to customer), and Seller A needs to transfer one of its widgets in Ontario to Seller B to compensate. This means Seller B will now have 9 widgets at the storage facility in Alberta, and 1 widget at the storage facility in Ontario. Seller A (post sale to customer) will now have 9 widgets at the storage facility in Ontario.
10. The inventory transfer between Seller A and Seller B *does not occur through* the digital platform.

Based on the above, Seller A would be required to charge and collect 13% HST (on the assumption the widget is not zero-rated) and issue an invoice to Seller B. Since Seller B is not registered under Subdivision D it cannot recover the 13% HST. Likewise, as Seller B is not registered under Subdivision D, and the transfer between sellers does not occur through the digital platform, no GST applies on Seller B's transfer of the widget to Seller A (even if seller was registered under Subdivision E, Seller A is not a specified Canadian recipient).

The above situation complicates the ability for sellers and digital platform operators to reduce their carbon footprint when fulfilling goods purchased by customers and creates unnecessary administrative challenges to carry out a 1:1 inventory exchange of identical goods. Many sellers who list their products for sale on digital platforms are non-residents and are not registered under Subdivision D. Incurring unrecoverable costs to facilitate reduction of environmental impacts is a barrier to participate in such climate-change reduction programs.

Question for Finance

TEI requests the Department of Finance recommend introducing amendments that would allow inventory to be exchanged between two parties (regardless of registration status) for nil consideration, by deeming such transfers to not be supplies for purposes of GST/HST.

16. Pre-Approval of Input Tax Credit (ITC) Methodologies

TEI Members have understood that one of the purposes[1] of Parliament introducing section 141.02 of the *Excise Tax Act* (Canada) was, in part, to create a process whereby the Minister of National Revenue ("Minister") would work with a "qualifying institution"[2] ("QI") in advance of a particular fiscal year in attempting to develop a "fair and reasonable" ITC methodology for that year. The Department of Finance's 2010 Technical Notes stated that the rules in section 141.02 apply to financial institutions (including QIs), *"… in addition to the more general rules in subsection 141.01(5)…"*, which provides, in relevant part, that an ITC methodology must be "fair and reasonable". In addition, in paragraph 141.02(27)(e), Finance clearly intended the Minister to review a QI's proposed methodology and allow the Minister to propose "fair and reasonable" modifications thereto.

[1] Another purpose of introducing 141.02 was to ensure that ITC methodologies could not be altered "after the fact" in response to the decision in *CIBC World Markets Inc. v The Queen*, 2011 FCA 270. See subsection 141.02(17).

[2] As defined in section 141.02.

However, this purpose underlying section 141.02 has been lost in the Minister's application of this provision in the QIs' pre-approval processes, perhaps due in part to the current wording of the provision. Under section 141.02 as currently enacted:

- the Minister may only approve or deny ITC methods proposed by a QI, on an "all or nothing" basis, with no requirement to provide "modifications" (in subsection (20));

- if the Minister denies the ITC methods proposed by a QI, the Minister must provide reasons, but the reasons are not held to meeting the standards of being "fair and reasonable" (as per subsection (22)); and

- if the Minister provides "modifications" (referred to only in subsection (27)), the "modifications" must be "fair and reasonable", but the Minister need not (and in practice, does not) provide such "modifications".

Based on the experiences of QIs, including our members, over the past several years dealing with the pre-approval process relating to ITC methodologies, the consequences of the shortcomings with the rules as currently written in section 141.02 have become clearer. To improve section 141.02, recommended solutions presented to the Department of Finance from members include the following:

(i) if a particular ITC method proposed by a QI *is* "fair and reasonable", the Minister must either: (i) authorize the use of the particular methods or; (ii) deny by providing "fair and reasonable" "modifications" to that particular method;

(ii) where the application for pre-approval contains more than one ITC method, the Minister may accept certain methods proposed for a year and propose modifications in writing to other methods proposed for a year (i.e., no longer "all or nothing");

(iii) if a particular method proposed by a QI *is not* "fair and reasonable", the Minister may deny or propose modifications in writing to that method;

(iv) any approval of a particular method proposed by a QI may be for a fiscal year or, at the discretion of the Minister and the QI, may be for multiple years, until there is a material change in the QI's business or relevant changes to the ETA have been made; and

(v) where a denial is given by the Minister for any pre-approval application that is properly submitted by a QI, the QI should be able to challenge that denial at the Tax Court of Canada (rather than Federal Court under a Judicial Review) arguing its methodologies meet the "fair and reasonable" standards and where the MNR has provided modifications, those modifications are not "fair and reasonable".

Questions to Finance

(a) Given this background and the above concerns have been previously raised, would the Department of Finance consider recommending amendments to section 141.02 of the ETA and incorporating any of the recommendations previously provided.

(b) Additionally, in the recent Tax Court of Canada decision, in *Royal Bank of Canada v. The King*, 2024 TCC 125, the Court concluded that the "the Minister is not **bound** (emphasis added) by the Method". If the Minister is not bound by the results of the pre-approval process, could the Department provide the policy rationale for section 141.02 and further would the Department consider recommending amendments to remove section 141.02?