Important GST/HST Developments from 2018

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Sales tax continues to be an important consideration in nearly all transactions and the Canada Revenue Agency (CRA) continues to scrutinize those transactions with a view to extract more revenues for the government coffers. There have been a number of key developments in the GST/HST case law in 2018 that are noteworthy for practitioners in the corporate-commercial space. Below, we have provided a highlight of the relevant cases in our year in review.

Secured creditors have priority over CRA where the bankrupt is a GST/HST debtor

Callidus Capital Corporation v. HMQ (SCC) clarifies that once a borrower files for bankruptcy a secured creditor is not subject to the CRA's deemed trust super-priority with respect to the property of a borrower.1 Callidus confirms that, in such cases, the CRA loses its deemed trust and is treated as an unsecured creditor with respect to its claim to unremitted GST/HST. For a detailed summary of *Callidus*, view our bulletin from November 2018.

Cross-border transactions – RVs sold outside Canada; RV parts inside Canada

The "place of supply" is an important issue in cross-border transactions, as supplies of property and services "made" outside of Canada do not attract GST/HST. *Jayco* is a timely reminder of the importance of well-drafted agreements that clearly establish the place of supply of goods and services for cross-border transactions.2 Care must be taken to ensure that the parties' intentions regarding the place of supply complies with the applicable sale of goods legislation (both inside and outside of Canada) as it relates to each specific supply.

Jayco, Inc. is a major manufacturer of RVs and related parts for sale with a network of authorized dealers throughout North America, including Canada. In *JayCo, Inc. v. R.*, the Canadian RV dealers purchased RVs and parts from the Jayco, Inc. who delivered the RVs to dealers "ready to ship" at its U.S. factory, then arranged for shipping into Canada.The Tax Court of Canada (TCC) was asked to determine whether the RVs and parts sold to the Canadian dealers took place in Canada or the U.S. If it were the latter, no GST/HST would need to have been charged on the sale. Justice D'Aurey closely examined the various agreements between the parties and the applicable Canadian and U.S. sale of goods law before concluding that the sale of RVs took place in the U.S. pursuant to Indiana's sale of goods law whereas the part sales took place in Canada and were subject to GST/HST.

The CRA's new GST/HST Investment Limited Partnership (ILP) rules

The "investment limited partnership" (ILP) rules were formally introduced by the October 25, 2018 Notice of Ways and Means motion. ILPs rules have a wide application and will subject certain LPs to the byzantine Selected Listed Financial Institution (SLFI) rules under the *Excise Tax Act* (ETA), which can inadvertently trigger unrecoverable GST/HST if a partner of the ILP provides the ILP with "management or administrative services." For example, if an LP is structured so that the general partner has an active role in the fund's management, you should consider the application of the ILP rules.

Note that an ILP is broadly defined as either (a) a limited partnership that is, or forms part of an arrangement that is represented as a hedge fund, investment limited partnership, mutual fund, private equity fund, venture capital fund or other similar collective investment vehicle; or (b) a limited partnership that has 50 per cent or more ownership by "listed financial institutions" (for example, a bank, insurer, or investment plan). For a summary of the ILP rules, view our bulletin from September 2017.

Stewardship Ontario, a non-profit organization, undertook commercial activities and was entitled to ITCs

Stewardship Ontario v. R. confirms that as long as a corporation is engaged in an "undertaking of any kind whatever", it is undertaking a business and may be permitted to offset the GST/HST it pays on its inputs by way of claiming input tax credits (ITCs).3

Stewardship Ontario was reassessed by the CRA to disallow its ITC claims on the basis that it was a non-profit organization acting under a statutory arrangement to recycle goods; it was not engaged in commercial activities and could not, therefore, claim ITCs. In *Stewardship Ontario v. R*., the TCC held that a business is broadly defined in the ETA to include an "undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit [or not]".

Director liability – one win, two losses

A director of a corporation can be held personally liable for the GST/HST debts of the corporation. There were a trio of cases on director's liability in 2018: Tozer, Le, and Fox.4 In *Tozer v. R*., the taxpayer was the sole director of two companies that went out of business and bankrupt with unremitted GST. The CRA assessed him personally for the corporation's GST/HST debts; Tozer argued the due diligence defence and that he ceased to be a director more than two years prior to the assessed periods. Of note, the TCC dismissed his appeal and held that a taxpayer continues to be a director upon a company's assignment into bankruptcy and, unless they give up directorship powers, they will continue to be liable under the ETA.

In Le v. R., the taxpayer successfully appealed a director's liability assessment on the basis that she was neither a je jure director nor a de facto director as she had no notice she was registered as a director and never held herself out as one despite having her name registered as one in the public records. In *Fox v. R.,* the taxpayer was found liable for GST/HST debts of his company for failure to remit GST/HST when the company was in financial difficulty. The court held that a long term intention to finance or sell the business in order to eventually address GST/HST non-remittances does not meet the

due diligence defence threshold where the company uses non-remitted GST/HST to keep a company running.

CRA failed to prove that a reassessment was sent when it claimed

A CRA notice of assessment/reassessment is deemed to have been made on the date it was sent by the CRA. It is not uncommon for a taxpayer to claim that they never received the assessment/reassessment or that it was received much later than claimed by the CRA. The date of the assessment/reassessment is crucial as it starts the clock on various elements under the ETA, including when an objection must be filed, which is within 90 days from the date of the assessment being disputed.

In *DaSilva*, the CRA claimed it mailed a Notice of Assessment to the taxpayer on January 11, 2013.5 The taxpayer said she received it on August 22, 2016 by a CRA collection officer. The Tax Court reiterated the jurisprudence on when an assessment is mailed and stated when a taxpayer makes a credible claim that an assessment was not mailed or mailed to the wrong address, the minister has the burden of proving the assessment was properly sent. In this case, the CRA failed to discharge its burden to prove that the assessment was mailed when it claimed and the later date was accepted.

1 *Callidus Capital Corporation v Canada*, 2018 SCC 47 (Supreme Court of Canada).

2 *Jayco, Inc. v R*, 2018 TCC 34 (Tax Court of Canada [General Procedure]).

3 *Stewardship Ontario v R*, 2018 TCC 59 (Tax Court of Canada [General Procedure]).

4 *Tozer v R*, 2018 TCC 56, (Tax Court of Canada [General Procedure]); *Le v R*, 2018 TCC 65 (Tax Court of Canada [Informal Procedure]; & *Fox v R*, 2018 TCC 43 (Tax Court of Canada [Informal Procedure].

5 *DaSilva v The Queen*, 2018 CarswellNat 1746, 2018 TCC 74 (Tax Court of Canada [Informal Procedure]).

By

Braek Urquhart

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749