GST/HST remittance deferral: Interest-free “loans” may trigger personal liability

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Canadian businesses are facing unprecedented times. In response, the Canadian government is announcing unprecedented support measures, including a GST/HST remittance deferral until the end of June 2020, for GST/HST payments or remittances (Remittance Obligations) that become owing on or after March 27, 2020.[1]

What you need to know

- GST/HST collected from customers remains the property of the government.
- Directors, trustees and partners can be held personally liable for unpaid Remittance Obligations of their company.
- Directors that use GST/HST collected by their corporation to pay business expenses may be held personally liable by the CRA as for any subsequent failure to remit that GST/HST.

Analysis

The Canadian government described the remittance deferral as “the equivalent of providing up to $30 billion in interest-free loans to Canadian businesses.” The government suggests businesses can use these “loans” “so they can continue to pay their employees and their bills, and help ease cash-flow challenges across the country.”[2]

These remittance deferrals may be interest free, but they are definitely not liability-free. What the government omits in its announcements is that directors may risk personal liability for a business’s failure to ultimately remit the GST/HST. All GST/HST collected by a business is held in trust for and is treated as the property of the government.[3] If a corporation fails to meet its Remittance Obligations, its directors may become jointly and severally liable for that remittance shortfall.[4] Similar rules exist for trustees, partners and even unincorporated associations.[5]

A director may avoid this liability by demonstrating they were duly diligent in *preventing* a corporation’s failure to remit GST/HST.[6] Courts routinely confirm that the due diligence defence does not protect directors who consciously divert funds collected as

GST/HST to satisfy other obligations such as payroll, creditors and suppliers (as the government appears to encourage with the remittance deferral).

The recent Federal Court of Appeal decision *Ahmar v. Canada* illuminates this issue.[7] In *Ahmar*, a concrete-forming business experienced the "perfect storm" of bad luck, including significant construction delays, which led to a cash flow crisis. The sole director of the business diverted amounts collected as GST/HST to satisfy other business obligations in the hopes of turning the company's financial position around.[8] In particular, the company continued to file GST/HST returns, but chose not to remit any GST/HST remittances owing with those returns. The company instead used any limited revenue that was generated, as well as personal funds from the director, to make small payments to keep suppliers happy and to meet payroll, union and insurance obligations.[9]

The Federal Court of Appeal affirmed the Tax Court of Canada's decision that the director was indeed personally liable for the corporation's unpaid Remittance Obligations. The Federal Court of Appeal reiterated that "the focus of the due diligence defence is 'to prevent the failure to remit, not to cure failures to do so.'" In other words, *Ahmar* confirms that a director can be personally liable for a corporation's GST/HST obligations where a business chooses to satisfy other obligations in priority to their Remittance Obligations.

Takeaways

If the remittance deferral is to be treated as an "interest-free loan" from the CRA to a business, directors of that business must understand they are effectively being treated as personal guarantors to that loan. Directors should be aware of these rules and be prepared to take on that potential liability.

Businesses should therefore be careful before accepting the government's offer of a remittance deferral. The remittance deferral may be a very welcome support to small businesses with healthy balance sheets that just need help matching their remittance obligations to actual cash flows, as GST/HST is usually remittable on an accrual basis (when a client is invoiced) as opposed to a cash basis (when a client actually pays GST/HST).

Businesses in dire circumstances however, must view the remittance deferral with caution. Accepting and treating the remittance deferral as an "interest free loan" may be trading short-term business liquidity for significant long-term personal liability. Businesses who foresee difficulties with meeting their Remittance Obligations should consult with their professional advisors to better understand how to benefit from the GST/HST remittance deferral. Contact our Commodity Tax Group with any questions you may have about the GST/HST remittance deferral or concerns about personal director's liability.

[1] Department of Finance Canada, "Additional Support for Canadian Businesses from the Economic Impact of COVID-19," March 27, 2020.

[2] Justin Trudeau news release, Prime Minister announces support for small businesses facing impacts of COVID-19, March 27, 2020.

[3] *Excise Tax Act*, RSC 1985, c E-15, s 222(1) (HST Act).

[4] HST Act, s 323(1).

[5] HST Act, s 267.1, 272.1, 324.

[6] HST Act, s 323(3).

[7] 2020 FCA 65 [*Ahmar*].

[8] *Ahmar*, para 23.

[9] *Ahmar*, para 6, 7.

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