Important Financial Services GST/HST Developments from 2019

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The sales tax uncertainty inherent in the financial services sector continued to generate significant jurisprudence in 2019.

Investment funds may eliminate unrecoverable GST/HST by engaging third parties to perform certain fund-related tasks

SLFI Group[1] provides guidance on how suppliers of exempt services (such as investment funds) can successfully address otherwise unrecoverable GST/HST issues by distilling out contractors' exempt activities from taxable ones, and outsourcing exempt activities to third parties.

In *SLFI Group*, the Federal Court of Appeal held that certain services, traditionally performed by investment fund managers, were GST/HST-exempt if they were "unbundled" and outsourced to a third party. Originally, the fund manager financed the upfront payment of brokerage selling commissions. This function attracted GST/HST, but only because it was provided alongside the fund manager's other taxable services (and therefore received the same tax treatment). The Federal Court of Appeal agreed with the taxpayer that this function became a distinct supply when provided by a third party, and should be characterized as an exempt supply. The Federal Court of Appeal confirmed the historic activities of the fund manager were irrelevant to this new arrangement.

For more details regarding this decision, please see our earlier bulletin.

Aeroplan Miles are taxable promotional services, not gift certificates

The *CIBC* Aeroplan Miles case[2] from the Tax Court was a novel decision on the definition of "gift certificates," suggesting the term applies to a much narrower class of certificates and points programs than jurisprudence may have previously suggested.

Gift certificates are undefined under the GST/HST legislation but receive special treatment. They are treated as money, not property. In *CIBC*, the Tax Court held that Aeroplan Miles purchased by *CIBC* were not gift certificates. The Tax Court held that a gift certificate should have a "stated monetary value" instead of a point value, and should have similar attributes to that of money. Notably, the Court disagreed with previous jurisprudence (and CRA policy) that a gift certificate includes a "device which entitles a person to redeem it for a specified product or service."

In any event, the Tax Court found the gift card issue moot – the essence of the parties' contract was one for promotional and marketing services, not for the purchase and sale of Aeroplan Miles.

Businesses dealing with similar "points" programs should revisit such programs in light of *CIBC*, and should note that this decision has been appealed to the Federal Court of Appeal.

Taxpayer was required to disclose information about its biggest customers to the CRA

Roofmart[3] demonstrates the breadth of CRA's powers to compel information disclosure.

In *Roofmart*, the Federal Court ordered the company, a roofing and siding supplier, to comply with the CRA's request for it to identify and disclose customers whose annual purchases exceeded a certain threshold. Roofmart was also required to disclose customers:

- contact information;
- CRA business numbers;
- itemized transaction details; and
- bank account information.

The CRA uses third-party requests, such as the request in *Roofmart*, to identify targets for future tax audits. Businesses should be aware of these CRA powers, but should also be aware of the limits to these powers and other important considerations with respect to the CRA's intended use of disclosed information.

Note that *Roofmart* has been appealed to the Federal Court of Appeal.

Zero-rating trumps section 150 deemed exempt supplies election

CIBC World Markets[4] is an important GST/HST decision for financial institutions with international operations.

The GST/HST legislation deems a non-resident branch of a Canadian business to be a separate person from the Canadian business. This permits a supply of services from the Canadian business to the non-resident branch to occur on a zero-rated basis, so that the Canadian business would not be required to charge GST/HST but could also claim ITCs related to its supplies to the non-resident branch (*i.e.* no GST/HST).

The main issue in *CIBC World Markets* was whether the zero-rating provisions of the *Excise Tax Act* trumped an election that the taxpayer had previously made under section 150 to deem all supplies made between related companies to be exempt supplies. This election included the non-resident branch. The Court was tasked with determining whether the section 150 election overrode the zero-rating rules such that the taxpayer could not claim input tax credits in relation to services performed for the non-resident branch.

At the Tax Court level, the Court determined that the section 150 election overrode the zero-rating rule. That decision was appealed to the Federal Court of Appeal, which overruled the Tax Court, and confirmed that the non-resident branch's status trumped the section 150 election, so the taxpayer's services were zero-rated.

This decision protects the scheme and purpose of the GST/HST legislation, which is to strip GST/HST from Canadian business's services to non-residents, maintaining Canadian competitiveness in the global marketplace.

[1] *SLFI Group v. Canada*, 2019 FCA 217 (Federal Court of Appeal).

[2] *Canadian Imperial Bank of Commerce v. R*, 2019 TCC 79, (Tax Court of Canada).

[3] *Canada (Minister of National Revenue - MN.) v. Roofmart Ontario Inc*., 2019 FC 506 (Federal Court).

[4] *CIBC World Markets Inc. v. R*, 2019 FCA 147 (Federal Court of Appeal).

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