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Case Number: 144133

RECEIVED
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Attention: W. Jack Millar

28 OCT. 2013

Dear Mr. Millar:

Subject: **GST/HST RULING**
<u>Stewardship Fees paid to Industry Funding Organizations</u>

Thank you for your letters dated May 18, 2010, October 12, 2010, February 25, 2011 and December 23, 2011, and for meeting with us on May 25 and November 30, 2011, concerning the application of the Goods and Services Tax (GST)/Harmonized Sales Tax (HST) to payments made by persons or organizations designated as stewards to Industry Funding Organizations (IFOs) pursuant to Ontario's *Waste Diversion Act, 2002*.

The HST applies in the participating provinces at the following rates: 13% in Ontario, New Brunswick and Newfoundland and Labrador, 14% in Prince Edward Island (effective April 1, 2013) and 15% in Nova Scotia. The GST applies in the rest of Canada at the rate of 5%.

Effective April 1, 2013, the 12% HST in British Columbia has been replaced by the 5% GST and a provincial sales tax.

All legislative references are to the *Excise Tax Act* (ETA) unless otherwise specified.

STATEMENT OF FACTS

We understand

1. Section 1 of *Ontario's Waste Diversion Act, 2002* (WDA) provides that its purpose is to promote the reduction, reuse and recycling of waste and to provide for the development, implementation and operation of waste diversion programs.

2. Section 3 of the WDA establishes Waste Diversion Ontario (WDO) as a corporation without share capital.

3. Section 5 of the WDA sets out the WDO's responsibilities which include

   (a) develop, implement and operate waste diversion programs for designated wastes in accordance with this Act and monitor the effectiveness and efficiency of those programs…

   (d) determine the amount of money required by Waste Diversion Ontario and the industry funding organizations to carry out their responsibilities under this Act…

4. Section 17 of the WDA states "*Waste Diversion Ontario is not an agent of the Crown in right of Ontario for any purpose, despite the Crown Agency Act, and shall not hold itself out as such.*"

5. Subsection 23(1) of the WDA states "*The Minister may require Waste Diversion Ontario to develop a waste diversion program for a designated waste.*" Subsection 23(2) of the WDA states "*Waste Diversion Ontario shall develop the program in co-operation with an industry funding organization.*" The IFO can be an existing organization or an organization to be incorporated under Part III of the *Corporations Act*.

6. Subsection 24(1) of the WDA states "*If Waste Diversion Ontario is required under section 23 to develop a waste diversion program for a designated waste, Waste Diversion Ontario shall cause a corporation without share capital to be incorporated under Part III of the Corporations Act for the purpose of the program.*"

7. Ontario Tire Stewardship (OTS), Stewardship Ontario (SO) and Ontario Electronic Stewardship (OES) were incorporated under Part III of the *Corporations Act*. Part III of the *Corporations Act* governs the incorporation of corporations without share capital. Corporations formed under Part III are subject to s.126 of the *Corporations Act* which provides:

   126. (1) A corporation, except a corporation to which Part V applies, shall be carried on without the purpose of gain for its members and any profits or other accretions to the corporation shall be used in promoting its objects and the letters patent shall so provide, and, where a company is converted into a corporation, the supplementary letters patent shall so provide.

8. Subsection 25(1) of the WDA states "*A waste diversion program developed under this Act for a designated waste may include the following:*

   1. Activities to reduce, reuse, and recycle the designated waste.

2. *Research and development activities relating to the management of the designated waste.*
3. *Activities to develop and promote products that result from the waste diversion program.*
4. *Educational and public awareness activities to support the waste diversion program.*"

9. Subsection 25(3) of the WDA states "*A waste diversion program developed under this Act must include an agreement between Waste Diversion Ontario and the industry funding organization that the program is developed in co-operation with, governing the role of the industry funding organization in the implementation and operation of the program and governing the exercise of the industry funding organization's powers under this Act.*"

10. Subsection 25(5) of the WDA states "*A waste diversion program developed under this Act for blue box waste must provide for payments to municipalities to be determined in a manner that results in the total amount paid to all municipalities under the program being equal to 50 per cent of the total net costs incurred by those municipalities as a result of the program.*"

11. Subsection 26(1) of the WDA states "*After a waste diversion program has been developed under section 23, Waste Diversion Ontario shall submit the program to the Minister for his or her approval.*" Subsection 26(2) of the WDA sets out the information that has to be submitted to the Minister including the name of the IFO that co-operated in the development of the program and the details about the program including its description and the estimated costs.

12. Subsection 29(1) of the WDA states that "*...Waste Diversion Ontario and the industry funding organization shall implement and operate the program in accordance with the agreement referred to in subsection 25(3).*"

13. Subsection 30(1) of the WDA states "*If an industry funding organization is designated by the regulations as the industry funding organization for a waste diversion program, the organization may make rules...*

    (a) designating persons or classes of persons as stewards in respect of the designated waste to which the waste diversion program applies;

    (b) setting the amount of the fees to be paid by stewards under subsection 31(1) or prescribing methods for determining the amount of the fees;

    (c) prescribing the times when fees are payable under subsection 31(1)

    (d) requiring the payment of interest or penalties on fees that are not paid in accordance with 31(1);

(e) exempting stewards or classes of stewards from subsection 31(1), subject to such conditions and restrictions as may be prescribed by the rules…"

14. Subsection 30(2) of the WDA states "*A rule made under clause 1(a) shall not designate a person as a steward in respect of a designated waste unless the person has a commercial connection to the designated waste or to a product from which the designated waste is derived.*"

15. Subsection 30(3) of the WDA states "*In making rules under clause (1)(b), the industry funding organization shall have regard to the following principles:*

    1. The total amount of fees paid by stewards under subsection 31(1) should not exceed the sum of the following amounts:

    - *i. The costs of developing, implementing and operating the program.*
    - *ii. A reasonable share of the costs not referred to in subparagraph i that are incurred by Waste Diversion Ontario in carrying out its responsibilities under this Act.*
    - *iii. A reasonable share of costs incurred by the Ministry in administering this Act.*

    2. The fee paid by a steward should fairly reflect the proportion of the sum referred to in paragraph 1 that is attributable to the steward."

16. Subsection 31(1) of the WDA states "*A person who is designated under the rules made by an industry funding organization as a steward in respect of a designated waste shall pay to the organization the fees determined in accordance with the rules at the times specified by the rules.*"

17. Subsection 32(1) of the WDA states "*Each industry funding organization…shall establish and maintain a fund in respect of the program.*" Subsection 32(2) of the WDA provides that the funds will be held in trust to be used to pay the costs of developing, implementing and operating the program, and to pay a reasonable share of the costs incurred by WDO and the Ministry of the Environment related to carrying out their responsibilities under the WDA and administering the WDA, respectively.

18. Subsection 33(1) of the WDA provides that each IFO must prepare an annual report on its activities during the previous year. It must include information about the program, the IFO's audited financial statements and consultations undertaken with persons affected by the program. The report must be provided to WDO and made available to the public.

19. Subsection 34(1) of the WDA provides that WDO may approve a written plan for waste diversion if the plan relates to a designated material for which the Minister has already approved a plan under section 26. This will only occur where the WDO is satisfied that the

plan will achieve objectives that are similar to or better than the existing waste diversion plan approved by the Minister.

20. Subsection 34(2) of the WDA provides that the Minister may approve a written plan that WDO refused to approve where it is satisfied that the objectives are similar to or better than those of the waste diversion program approved by the Minister.

21. Subsection 34(6) of the WDA states "*Subsection 31(1) does not apply to a person who is designated under the rules made by an industry funding organization as a steward in respect of a designated waste if a plan that relates to the designated waste is approved under this section and,*

    (a) the plan was approved on the application of the person; or

    (b) the person is required by a contract to participate in the plan and is a member of a class of persons described in the plan as participants of the plan."

22. Subsection 42(1) of the WDA states "*The Minister may make regulations…*

    (b) prescribing material as designated wastes for the purposes of this Act…

    (e) continuing an industry funding organization named under paragraph 1 of subsection 26(2) and designating the organization as the industry funding organization for a waste diversion program that has been approved by the Minister under section 26…"

23. Ontario Regulations 84/03, 542/06 and 393/04 prescribed OTS, SO and OES, respectively, as the IFOs for the waste diversion programs for used tires, municipal hazardous and special waste, and waste electrical and electronic equipment.

24. As required under the WDA, each of the Stewardship Programs (Waste Electrical and Electronic, Designated Blue Box Waste, Used Tire Stewardship, Municipal Hazardous and Special Waste) sets out rules for stewards with respect to designation of stewards and the payment of stewardship fees. These rules are similar under each program. As an example, Schedule A to the Program Plan for Waste Electrical and Electronic is entitled "*Rules for Stewards with Respect to Payment of EEE* (Electronics and Electrical Equipment) *Fees*" and includes the following:

    i. Under section 1 "Interpretation", *Brand Owner means, with respect to Branded EEE, during any time in the Data Period:*

        (a) a Person Resident in Ontario who is the registered owner of the Brand, or
        (b) a Person Resident in Ontario who is a licensee of the Brand, or
        (c) a Person Resident in Ontario, who owns the intellectual property rights to the Brand, or

(d) a Person Resident in Ontario, who is the licensee, in respect of the intellectual property rights of the Brand.

where "licensee" includes a Person who packages EEE which bear a Brand, other than a packager, producer, Manufacturer or filler of Private Label Goods, and includes any Person whose corporate name or business name registration contains the Brand."

ii. Section 2 "Designation of Stewards" states

"*For the purposes of determining which Person shall be designated as a Steward for a particular class or group of EEE, the following provisions shall apply, in the order in which they are set out. If two or more Persons are designated as a Steward pursuant to the following, the earlier provision shall prevail.*

(1) A Brand Owner is designated as a Steward with respect to all EEE:

a. for which it is the Brand Owner in the Data Period; and

b. to which it has a Commercial Connection;

(2) A First Importer is designated as a Steward with respect to all EEE for which it is the First Importer in the Data Period.

(3) A Franchisor is designated as a Steward with respect to all EEE which are Supplied within the relevant Franchise System in the Data Period.

(4) If there are two Brand Owners for the same EEE in the same Data Period, the Brand Owner more directly connected to the production of the EEE shall be designated as the Steward.

(5) If there is Unbranded EEE in the Data Period, and if the Manufacturer/Assembler is Resident in Ontario, the Manufacturer/Assembler of such EEE shall be designated as the Steward for such EEE; otherwise the First Importer shall be designated as the Steward for such EEE.

(6) A Person who receives a Supply of EEE for personal consumption and not for a business or commercial use is not a Steward."

iii. Section 3 "Steward's Report" states

"*(1) Every Steward shall file its first Steward's Report with OES the later of:*

(a) 31 days after the applicable Commencement Date; and

(b) 91 days after such Steward is notified of the existence of these Rules and how to obtain a copy of them.

(2) *The first Steward's Report(s) shall cover the period from the applicable Commencement Date to the end of the most recent Data Period*

(3) *If, as a result of the definition of "Supply", there is more than one Supply of an individual item of EEE, only the first Supply must be reported in a Steward's Report*

(4) *Stewards may amend a Steward's Report with the consent of OES* (Ontario Electronic Stewardship) *to correct information in the Steward's Report that is in error or to replace data previously reported.*

(5) *Once it has filed its first Steward's Report, an EEE Steward shall file a Steward's Report in accordance with the schedule as set out in Appendix E.*

(6) *Notwithstanding the above OES may require a Steward to file a Steward's Report by sending a written request to the Steward.*"

iv. Pursuant to subsection 4(1) "*Stewards shall pay Steward's Fees to OES in accordance with Appendix E* (Payment and Reporting Schedule). *The amount of Steward's Fees shall be calculated in accordance with Appendix F by multiplying the number of units of each type of EEE included in the Steward's Report by the Fee Rate set out opposite such type.*"

v. Charges to product stewards vary with the amount of designated waste generated by each product steward. Section 4 "*Fees Payable*" provides:

> *"(1) ... The amount of Steward's Fees shall be calculated in accordance with Appendix E by multiplying the number of units of each type of EEE included in the Steward's Report by the Fee Rate set out opposite such type..."*

vi. Section 5 "*Self-Managed Programs*" states

> *"(1) A Steward who operates a Self-Managed Program under agreement with OES shall file Steward Reports for EEE in such Self-Managed Programs in accordance with the terms and conditions of such agreement;*
>
> *(2) A Steward who operates a Self-Managed Program under an agreement with OES is exempt from payment of the Steward's Fees under Rule 4 and shall pay fees to OES in accordance with the terms and conditions of such agreement;"*

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vii. Section 11 *"Publishing Names"* states

"(1) OES will provide all Stewards with an identification number.

(2) The names and identification numbers of Stewards filing Steward's Reports will be posted on the OES website.

(3) OES may post a list on its website of all Brands reported in Steward's Reports from time to time."

25. In the OES materials (http://www.ontarioelectronicstewardship.ca/pdf/retailers/ehf-retailer-brochure.pdf), OES describes the purpose of the Stewards' Fees as follows:

"... OES sets the fees each year to cover the program's costs... none of the fees collected from Stewards go to government. All fees collected by OES from Stewards go towards covering the program's costs to collect, transport, consolidate and process waste electronics. In addition, funds are used for public education and awareness, research and development, continuous improvements in technology and program execution."

Stewards' Fees paid to OTS for Used Tires Program and to SO for Municipal Hazardous or Special Waste Program are used in a similar manner.

26. IFOs' responsibilities include:

(a) manage and oversee the day-to-day operations of the approved waste diversion programs;
(b) provide each steward with a program identification number and advertising services of posting the steward's name and number on the IFO's website;
(c) set up waste collection networks (commercial, municipal and not for profit);
(d) contract with transportation companies to safely transport the designated waste between collectors and recyclers;
(e) contract with recycling companies to recycle the collected designated waste;
(f) ensure that the recyclers are in compliance with established recycling standards;
(g) act as a liaison for stewards in interacting with WDO, government officials and the public;
(h) fund research and development activities related to the management of the designated waste; and
(i) implement and promote public awareness programs.

27. In "*Toward a Zero Waste Future: Review of Ontario's Waste Diversion Act, 2002 – Discussion Paper for Public Consultation*" published by the Ministry of the Environment, October 2008 (the "Consultation Paper"), the Ministry proposed that one of the key building blocks in striving for zero waste is "*A clear framework built upon the foundation of Extended Producer Responsibility*". The Consultation Paper provided that EPR is a

framework which holds producers responsible for the costs associated with the environmental impact of their products.

28. The Consultation Paper provided that although the WDA does not make explicit reference to EPR, it allows for fees to be charged to producers to support program development and implementation, thereby creating a degree of financial responsibility for the management of the designated wastes. The Consultation Paper further provided that "*By defining those producers as brand owners, manufacturers or first importers, these programs begin to utilize an extended producer responsibility framework in their design and implementation.*"

RULING REQUESTED

1. The Stewards' Fees paid to OTS, OES and SO (under the Municipal Hazardous and Special Waste Program) constitute consideration for taxable supplies.

2. OTS, OES and SO can claim input tax credits in respect of GST/HST paid or payable on the purchase of property or services in respect of the stewardship programs.

RULING GIVEN

Based on the facts set out above, we rule that

1. The Stewards' Fees paid to OTS, OES and SO (under the Municipal Hazardous and Special Waste Program) are not consideration for a supply.

2. OTS, OES and SO cannot claim input tax credits in respect of GST/HST paid or payable on the purchase of property or services in respect of the stewardship programs.

This ruling is subject to the qualifications in GST/HST Memorandum 1.4, *Excise and GST/HST Rulings and Interpretations Service.* We are bound by this ruling provided that none of the above issues are currently under audit, objection, or appeal, that no future changes to the ETA, regulations or our interpretative policy affect its validity, and all relevant facts and transactions have been fully disclosed.

EXPLANATION

The question is whether or not the fees paid by stewards to an IFO to cover the costs related to a stewardship program carried out pursuant to the WDA are consideration for a taxable supply for the purposes of the *Excise Tax Act* (ETA).

The WDA sets up a regulatory scheme for the purpose of promoting the reduction, reuse and recycling of waste and for the development, implementation and operation of waste diversion programs. Pursuant to the WDA, where the Minister requires a waste diversion program, WDO is given the responsibility to develop, implement and operate the program for designated wastes in cooperation with an IFO. WDO also determines the amount of money required by itself, the Ministry, and the IFO in order to carry out their responsibilities. Pursuant to the WDA, the IFO may make rules to designate persons as stewards and require those stewards to pay fees to cover the costs of the particular waste diversion program, including the costs of the IFO related to managing and operating the program (e.g., collection, transportation and processing of waste), the costs of the WDO that relate to the particular program and a portion of the Ministry's costs incurred in administering the WDA.

However, there is nothing within the WDA that makes stewards responsible for the implementation or operation of waste diversion programs or for the waste generated as a result of their products. As a result, the stewards are not paying for a supply related to the collection, transportation, consolidation and recycling of the waste generated, or for any other supply. Stewards are only responsible to pay the required stewardship fees and to file stewardship reports. Accordingly, it is our view that the stewardship fees are regulatory charges that are not related to the supply of property or a service (e.g., they are not fees for a service). Therefore the stewardship fees are not "consideration" for the purposes of the ETA and are not subject to the GST/HST.

Since the IFOs are not providing any taxable supplies to stewards in respect of the stewardship fees and therefore are not involved in a commercial activity, the IFOs would not be entitled to ITCs in respect of any GST/HST incurred in carrying out their obligations under the WDA and their stewardship program plans.

If you require clarification with respect to any of the issues discussed in this letter, please call me directly at 613-954-7656. Should you have additional questions on the interpretation and application of GST/HST, please contact a GST/HST Rulings officer at 1-800-959-8287.

Yours truly,

Gleola Mucchnes
for
Philippe Nault
Director
Public Service Bodies and Governments Division
Excise and GST/HST Rulings Directorate