GST and pension funds
The hole story
By Mike Firth and Brian Wurts
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Grid showing differing effect of six distinct approaches

TIB 032
TIB 032R
Overview

In the general scheme of a value added tax such as Canada’s Goods and Services Tax (“GST”), the tax incurred on the costs of making taxable supplies is fully recoverable, but tax incurred on any costs related to the making of an exempt supply is borne by the recipient. What should one do though, in the case of the peculiar bundle of costs related to management and administration of the varied population of pension funds that exist to serve the retirement needs of employees? Is it sound policy to have significant GST cost disparity not only between pension funds in the commercial and public sectors but also between funds within the two sectors? Is it appropriate that the costs of providing for my retirement (and inevitably the security and sufficiency of resources available to sustain me in my dotage) vary as a direct function of whether my employer supplied trains or travel insurance? Or, if I served the public and taught or nursed, should the tax treatment of my pension pool vary as a function of how independent of the provincial government was my pension fund?

Surveying the current situation regarding the treatment of the GST on costs relating to pension funds in Canada, there is no discernable evidence of any pension-fund-specific policy guiding legislation in this area. Rather, the treatment of costs related to pension funds seems to have been a function of how any particular fund’s facts fell into two significant control features of the GST, namely, the general rules allowing recovery of tax on costs to the extent they relate to taxable supplies, and, in the case of public sector pension plans, whether the plan qualified for the relief provided for entities that are a limb of a provincial government. The GST challenges currently facing pension funds are distinctly different within the private and public sectors, and so it is useful to consider each separately.

With regard to pension plans for the private sector, the current treatment of GST on related costs is now at its murkiest since the introduction of the GST. Employers, administrators and advisors currently face the cumulative result of legislative, administrative and judicial developments spanning the eighteen years of the tax. These developments have shaped an uncertain terrain in which numerous holes mark the landscape. Administrative measures allowing input tax credits to single-employer plans left multi-employer plans in a hole for the initial years of the tax. This was finally addressed by a legislated rebate, but some unfortunate plans fell into a remaining hole between the two reliefs. After years of living with an apparent gap between the administrative policy and the legislation, a Tax Court of Canada decision has revealed recoveries that are clearly viewed by the Canada Revenue Agency (“CRA”)¹ and the Federal Department of Finance (“Finance”) as a possible loophole. Will the federal government again relegate a trial in Canada’s Courts to the relevance of a game of Nintendo, by retroactively replacing the law relied on by the taxpayer and considered by the Court?² Most recently, there is a widening chronological hole opening up since

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¹ In this paper, unless otherwise indicated, the term “CRA” shall also be used to refer to its predecessor entities, the Canada Customs and Revenue Agency, and Revenue Canada.
² Tax Court of Canada, CIBC versus the Queen, 2006 (ETC 2891)
January 2007, when a completely new regime was proposed, and the unknown date when it becomes law. From what date will that new regime apply, and will declarations filed by taxpayers before the effective date be rendered incorrect as a result?

In the public sector, pension plans are treated unequally as a function of inclusion on specific lists identifying limbs of provincial governments. While the test leading to the inequality has remained stable over the eighteen years of the tax, evolutions in the pension sector have moved some funds out of the total GST relief that may have originally been intended to apply more widely than it does today. We will review the current state of the inequalities, and suggest that an update of the rules in this area is appropriate for two reasons. First, as already stated, the unequal GST burden may be an unintended result of a distinction made almost two decades ago and now outmoded. Second, and perhaps more pressing, the existing inequality could more than double upon sales tax harmonization. Clearly, the issue here goes beyond the mechanics of GST, venturing into the realm of federal-provincial relations and Constitutional law. However, there may be measures available to restore the scope of the original relief without any radical or far reaching upheaval.

So, measures leaving holes, holes in the measures, and the uniquely Canadian black hole of retroactive legislation all to be considered in reviewing in the GST treatment of pension plan costs. This brief document aims to provide guidance on the current environment, supported by some the history that shaped it.

Not addressed here is the specific question of whether fully discretionary investment management services are an exempt financial service for GST purposes. While that matter is of interest to pension funds and employers in the context of two Tax Court decisions now before the Court of Appeal (Nintendo-level two?), it has been commented on in other Papers at recent CICA Symposia. Also, we have not distinguished the differing policy aspects between defined benefit and defined contribution plans.

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1. The Private Sector

There is a considerable body of rulings and other material to be digested in trying to make sense of what has happened over the years to the treatment of GST on pension plan costs in the private sector. To assist the reader, included on page 18 is a grid which summarizes the treatment of the five key aspects of pension plan costs, for each of the six distinct approaches to their treatment which we have identified. The five key issues are Recovery of ITC’s on Employer Expenses, Recovery of ITC’s on Plan Trust Expenses, Re-supply Plan to Employer, Re-supply Employer to Plan, and In-House supplies generated within Employer and flowing to Plan. The six distinct approaches are TIB-032, TIB-032R Original view, TIB-032R Modified view, The GM Decision, Legislation, and New Regime (Measures announced in January 2007). Also appended for ease of reference are TIB-032 and TIB-032R.

a) Technical Information Bulletin (“TIB”)-032

Before TIB-032R (Revised) became effective from October 1 1993, the CRA’s original policy on costs related to pension funds was expressed in TIB-032. That initial approach is ancient history now, but is worth a brief visit for one reason alone. When held up against the February 2008 Tax Court of Canada Decision involving General Motors of Canada Limited (“The GM Decision”), in many respects it now appears uncannily prophetic, so maybe the CRA got things technically right the first time. While the GM Decision visited a number of technical issues such as the employer not being the trustee, on the fundamental issue of recipient and recovery by the employer, TIB-032 and The GM Decision are completely in harmony.

TIB-032 took a very simple view of matters, and predicated GST recovery upon whether the employer or the pension plan (clearly separate persons) was legally obliged to pay for the expenses related to the plan. Should the employer be liable, then recovery of GST was permissible, subject to the employers’ activities being GST-commercial in nature. This was simple, completely in accord with the definition of “recipient” in the Excise Tax Act (“The Act”), and as it turned out, entirely with the grain of the 2008 GM Decision. To the extent that the pension plan was liable to pay the expenses, however, no recovery was possible, the activities of the plan being overwhelmingly exempt.

An administrative policy on GST recovery that was aligned with the definition of “recipient” in The Act, however, was quickly found to produce unequal results between one employer/plan and another, based on legal obligations put in place for a myriad of reasons, none of which contemplated the GST. This inequality could be exacerbated as a function of the flexibility of the parties to restructure their respective obligations. Obviously, where plan arrangements could be modified, there was an incentive for employers to take on the mantle of “recipient”, thereby reducing the net costs of managing and administering the plan.
There have been a number of situations over the life of the GST throughout the financial sector where the simplicity of the key definition of “recipient” of a supply has had serious implications, either for the taxpayer (e.g. deferred sales commissions in the mutual fund sector) or for the tax authorities. Looking back to the replacement of TIB-032 with TIB-032R, we may well be seeing the first significant instance of the problem.

b) TIB-032R

At the time TIB-032R was released, there were a number of Technical Papers published describing the overall administrative approach. Consequently, to recite that detail here would add no incremental knowledge. What may be helpful, more than a decade later, is to briefly summarize the TIB’s principal elements, and then note some of the subsequent developments as it became evident the GM matter would be proceeding to the Tax Court of Canada to challenge the key principles in its approach.

Briefly, TIB-032R attempted to provide greater consistency in the treatment of pension plan expenses, while at the same time limiting the ability of employers to claim “excessive” amounts of input tax credits for expenses relating to the investment function of pension funds. The key concept underpinning the new approach in TIB-032R appears to have been that once monies were vested in the plan they became severed from the activities of the employer, and therefore the costs of their management should not give rise to any ITC in the employer regardless of the actual facts around contract obligations and recipient status. The TIB set out two categories of costs, “Employer Expenses” and “Plan Trust expenses”, and it is useful to list the two types here.

i) Employer Expenses (per TIB-032R)

(a) the establishment or subsequent amendment of the pension plan or the plan trust;
(b) the administration in relation to the collection of pension contributions and payment of pension benefits;
(c) the retention of the trustee for the plan trust;
(d) the appointment of an investment manager for the plan trust;
(e) the preparation and filing of actuarial reports, financial reports and other information for the pension plan pursuant to statutory requirements;
(f) the appraisal of the plan trust investment performance; and
(g) the general pension plan administration, such as the maintenance of records, benefit calculations, pension adjustment calculations, etc.

ii) Plan Trust Expenses (per TIB-032R)

(a) the investment advice regarding the plan trust assets;

(b) the brokerage, agents' charges and all other property or services relating to acquisition, utilization or disposal of the plan trust assets;

(c) the plan trust portfolio management;

(d) the custodial or nominee services for the plan trust assets; and

(e) certain legal, accounting or auditing services in respect of the plan trust assets.

With the benefit of much hindsight, it now appears that by identifying the two categories of costs, and then constructing a set of administrative rules that effectively attached costs to Employer or Plan, the CRA departed from the scheme of legislation in a number of troubling respects. The laudable motivation seems to have been to erect a structure that produced the “intuitively right” result, i.e. that GST should be broadly recovered on “Employer Expenses” but not on “Plan Trust Expenses”. Uniformly applied by all employers responsible for single employer plans, every eligible plan covered by the TIB would effectively bear a homogenized level of GST cost. In effect, GST recovery was facilitated on costs which under pension regulations were generally aligned with obligations of employers, and denied on costs which under those regulations were viewed as obligations of the plans. Impressive but possibly extra-statutory gifts were that the new TIB would be applied to the period before 1 October 1993 only to the extent it facilitated previously unclaimed recoveries, and the fact that in the case of a plan that was not registered for GST, the employer could claim the GST on “Employer Expenses” paid for by the plan regardless of whether the employer did in fact reimburse the plan. Peculiarly, the employer was not required to flow this input tax credit, which was arguably a windfall, to the plan.

Another aspect that would cause trouble down the road was the position that to the extent either the plan or the employer paid for costs in a category assigned by the TIB to the other, the position of the TIB was that there was certainly a re-supply from one to the other, with mechanical rules on when GST would be accounted for on those resupplies. The question of whether there was a resupply was (as things turned out, perilously) to be determined entirely based the TIB category into which the expense fell. While the whole effort had a Pollyannaish neatness, it was charmingly unencumbered by any explanation of where each resupply or entitlement was supported by The Act.

Publication of the new TIB met with a buzz of interest and a certain amount of activity on implementation. For over a decade, the administrative approach set out in the TIB became standard for the majority of taxpayers whose objective was simply to comply with CRA’s direction, and claim the input tax credits which were offered to them under the TIB.

Upon reflection, however, TIB-032R sowed the seeds for challenges and uncertainty regarding the GST treatment of pension plan expenses. It created two tax applications. The first is the administrative direction articulated in the TIB, laudable for its straightforward objectives and intended consistency, yet possibly not comprehensively supported by legislation. The second is the legislatively correct approach, which was pushed into the background by the TIB, only to re-emerge later. It appears that at the time the TIB was introduced, either Finance did not believe the administrative policy
enunciated in the TIB required any legislative amendments to give it the force and certainty of law, or the required legislative buttressing fell victim to a lack of resources, priority, or the political will to effect the changes.

c) Rebate for Multi-Employer Pension Plans

In the years which followed the introduction of TIB-032R, in response to pleas from pension plan administrators, the policy focus shifted to the treatment of multi-employer pension plans. TIB-032R makes no specific reference limiting the TIB to single employer pension plans. However, the CRA has maintained the position that employers sponsoring multi-employer plans are not entitled to input tax credits for “Employer Expenses” as set out in TIB-032R, on the basis that the individual employers are not each responsible for the administration of the plan. Specifically, the CRA has indicated that for such plans, an individual employer “cannot be said to have acquired the related property or services for use in its commercial activities, and no ITC’s can be claimed by the employer”5. In addition, the CRA has noted that the employers sponsoring such plans typically do not directly contract with third parties for any administrative services, nor are they required to reimburse the plan trust for expenses incurred by it.

Recognizing the higher GST costs burden on employers involved in multi-employer pension plans relative to those sponsoring single employer plans, in 1999 the government announced the establishment of a 33% rebate available to trusts governed by such multi-employer pension plans. The 33% represented an approximation of the percentage recovery which employers sponsoring single-employer pension plans could recover through claiming input tax credits for Employer Expenses, as described in TIB-032R.

It must be said that for the majority of multi-employer pension plans, the rebate has functioned well since its introduction. However, the policy was marred by one oversight, for which the process has been quite unsatisfactory – the treatment of related-employer pension plans.

d) Related Employer Pension Plans

Qualification for the Multi-Employer Pension Plan Rebate was tied to existing terms used for income tax purposes. Specifically, to qualify, a plan would have to satisfy the definition of "multi-employer plan" in subsection 8500(1) of the Income Tax Regulations.

In the years that followed the introduction of the rebate, questions arose regarding the treatment of “related-employer pension plans”. The definition of multi-employer pension plans in the Income Tax Regulations excluded plans in which 95% of the plan members were employed by a related group of employers. Consequently, by referencing the income tax definition, such related-employer plans were effectively disqualified from the GST rebate.

5 CRA Ruling Letter, November 4, 1997 (File/No. 11585-32, RITS/No. HQR0000704)
In October 2003, the Minister of Finance announced that this oversight was being rectified. The Backgrounder stated:

“Under the existing legislation, in order to qualify for the rebate, the plan must satisfy the definition of “multi-employer plan” set out in subsection 8500(1) of the Income Tax Regulations. That definition excludes a pension plan in which more than 95 per cent of the plan members are employed by a related group of employers….. The incorporation of the income tax definition of “multi-employer plan” in the Excise Tax Act therefore has the inadvertent effect of excluding trusts governed by related-employer pension plans from claiming the GST/HST rebate.

To correct this problem, an amendment is proposed to the definition of “multi-employer plan” in the Excise Tax Act so that it will include all registered pension plans that have more than one participating employer. As a result, a trust governed by a related-employer pension plan would be eligible to claim the rebate.”

The proposed amendment was to be retroactive to 1999. A set of transitional rules was proposed which would allow such plans to claim rebates for expenses incurred back to 1999, thereby putting them on an equal footing with other multi-employer pension plans.

However, in the period subsequent to this announcement, it appears that further concerns were expressed over the treatment of such related-employer pension plans. Two years passed and no legislation implementing the amendment was tabled. Related-employer pension plans and their sponsors were put in legislative limbo.

Then, in November 2005, in the press release announcing sweeping changes to the GST treatment of imported services, Finance included a short statement in which it retracted the 2003 proposed amendment to the Multi-Employer Pension Plan Rebate, as follows:

“The Minister also announced that draft amendments regarding the multi-employer pension plan (MEPP) rebate, originally tabled on October 3, 2003, will not be enacted into law because they are no longer required. These amendments would have extended the MEPP rebate to related employer pension plans. After consulting with the pension industry and the Canada Revenue Agency (CRA), it was determined that these plans could more appropriately be accommodated through modifications to CRA administrative policies that apply the existing GST/HST legislation to pension plans.”

The exclusion, inclusion, and then re-exclusion of related-employer pension plans added to the confusion in the treatment of pension plan expenses. If related employer pension plans were not eligible for the multi-employer pension plan rebate, would they administratively be brought within the scope of the TIB-032R policy – i.e., treated as an employer sponsoring a single employer pension plan? Apparently, the provisions of the

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6 Department of Finance, Backgrounder, October 3, 2003.
7 Department of Finance, Backgrounder, November 17, 2005
TIB were not offered to employers involved in related-employer plans. Rather, a more limited scope of input tax credits was made available to them. However, at this time, it appears that changes were also afoot in the interpretation of TIB-032R for single employer pension plans.

**e) Re-Interpretation of the Interpretation**

TIB-032R, combined with ruling letters issued shortly after its release, provided taxpayers an understanding of the CRA’s expectations for purposes of claiming input tax credits on pension related expenses. Taxpayer compliance required a certain leap of faith, but as long as taxpayers reasonably classified their pension-related expenditures as either Employer or Plan Trust Expenses, the CRA permitted the input credits claimed on the former category, and the system appeared to roll on relatively smoothly for over a decade.

However, by 2006 there were visible signs that there was a significant shift occurring in the CRA’s interpretation of its TIB, the effect of which could be the reduction in the input credits potentially claimable by employers. There was no up-front announcement that the TIB was no longer valid as written, but ruling letters issued in 2006 abandoned their focus on the dichotomy between the Employer and Plan Trust Expense categories as the dominant factor. Instead, the rulings emphasized the issue of who was the recipient of the supply and whether it was for use in the employer’s commercial activity.

The emergence of a “new” CRA position regarding TIB-032R involved the emphasis of certain parts of the TIB, and a corresponding de-emphasis of other elements of the TIB policy package. In particular, a key area in which there was arguably a shift in the interpretation of the TIB was whether the employer had to actually bear the cost of the Employer Expense in order to claim the input tax credit. The TIB did state that “the employer…is entitled to claim an input tax credit on Employer Expenses to the extent that they are acquired or imported by the employer for consumption or use in the course of its commercial activities, and the GST on the Employer Expenses is paid or payable by the employer.” However, there were a number of statements within the TIB and in CRA correspondence at the time indicating that the CRA would effectively consider the employer to have paid any costs which fell into the “Employer Expenses” category – even if the plan trust actually bore the costs.

For example, in the section dealing with non-registrant plan trusts, the TIB stated that, for Employer Expenses, the employer “will be considered to have acquired or imported the related property or services directly from the supplier and paid the applicable GST.” There was no qualification that the plan actually had to invoice the employer for it to be treated as having borne the expenses.

Additionally, in a response by the CRA to an inquiry seeking confirmation whether a corporation could claim input tax credits if it shifted Employer Expenses to the plan trust, the CRA noted that, in contrast with the position in the previous TIB-032 in which the

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8 For example CRA Ruling/Interpretation letter, June 8, 2006 (Case No. 58 290)
9 CRA Ruling/ Interpretation Letter, January 17, 1994 (File No. 11585-32)
corporation could only claim an input tax credit for an expense if it was “legally
required” to pay for those expenses, under the new TIB, the legally required condition
was no longer relevant. The CRA letter further confirmed that the corporation “would be
considered to have acquired the related property or services directly from the original
supplier”. Notably, the entire premise of the question to the CRA was that the corporation
was currently paying for the expenses and wished to shift the cost to the pension trust.
Consequently, it cannot simply be a case of the CRA omitting to note that the recharge to
the corporation was a necessary pre-condition for claiming the input credit.

Another potential “hole” resulted from a reference in the TIB to the fact that, in order to
be recoverable by the employer, the expense had to be in respect of “activities that are the
responsibilities of the employer pursuant to the pension plan agreement or the applicable
legislation”. This raises a question as to what constitutes “activities that are the
responsibilities of the employer”. For example, where legislation governing a pension
plan requires that the administration costs are to be paid out of the pension fund, the CRA
has indicated that the employer is therefore not “responsible” for the plan’s
administration, and consequently, is not eligible for any input credits. Such an
interpretation would seem to create an unnecessary, and surely unintended, inequity in
the GST treatment between plans, particularly given that an employer may well be held
“responsible” for the effective administration of its pension plan, notwithstanding a
requirement that the plan pay for the administrative costs.

f) Implications for Taxpayers

The purpose of the above review is simply to show that at the time the TIB was
introduced, it was generally portrayed by the CRA and understood by taxpayers to be a
simplified mechanism allowing employers to claim input tax credits for specified
Employer Expenses under a variety of payment arrangements. The employer apparently
did not need to be “legally required” to pay certain expenses or actually bear their cost in
order to be eligible for the input credit. In the years which followed the implementation
of the TIB until 2006, there appear to be no interpretations or ruling letters to taxpayers
which contradicted this widely held perception. However, beginning in 2006, this
simplified mechanism was replaced by a more legislatively-founded interpretation that
employers must be legally required to pay for the supply and it must be for their use in
their GST-commercial activity.

The fact that the CRA changed its approach is not, in and of itself, a problem. This is a
common occurrence. However, although the CRA noted that the TIB was under review,
there were no clear pronouncements that the CRA’s interpretation had changed, and on
what basis would prior years’ practices be assessed.

For this reason, the decade-long experiment with TIB-032R may have put many
taxpayers in a precarious position. To the extent that some of the less stringent
interpretations originally put forth in the TIB were not fully supported by the legislation,
taxpayers, whose intention was merely to comply with the tax by following the CRA’s
guidance, may now find themselves without legislative support for their actions and with
an administrative policy which is explicitly (as of February 2006) under review. Had the
policies articulated in the TIB been formalized into legislation by Finance at the time of
the release of the TIB in 1993, or in the years immediately thereafter, there would by now
have been numerous years of rulings and perhaps jurisprudence on its key elements – i.e.,
on the composition of Employer versus Plan Trust Expenses, on the legal requirement to
pay or bear the cost of the expense. If there was subsequently a desire to move in a
different direction, new legislation could then have been put forth with a clear
understanding of how the rules worked prior to, and after, a set coming-into-force date.

Alas, without the benefit of legislation, no clear pronouncements on how the CRA views
and its administrative policy had changed, and no guidance on how the CRA will handle
input tax credits claimed by employers prior to the apparent change, taxpayers which did
their best to follow the TIB as they understood it would seem to have no recourse to
challenge any assessments denying input credits other than based on the strict
interpretation of the legislation.

g) The GM Decision – is there still room in the Hummer?

The GM Decision is under appeal, and so we must all await the outcome to see if any
aspects of the Tax Court outcome are overturned. While the GM Decision considered a
range of structural and legal process aspects not covered in this document, what can be
said at this stage is that it certainly puts the cat among the pigeons, and throws wide open
the whole subject of what an employer can recover as an ITC under the legislation as it
currently exists. On the two key and widely relevant subjects of determination of
recipient of the supply, and the application of Section 169 of the Act, the Court seemed to
find little difficulty in applying these simple provisions.

So, for an employer that has a commercial activity, sponsors a single employer plan, and
has recovered only that GST that the CRA would appear to permit under either the
original or latterly-constricted interpretation of TIB-032R, should any protective action
be taken to avail itself of any additional GST recovery as a result of the GM Decision?
While a purely protective action, properly explained to the CRA, and structured so as to
avoid penalty in the event of a negative outcome cannot be criticized, let’s take a look at
the hurdles.

First, as with other Tax Court Decisions with which it disagreed, the CRA is likely to
point out to taxpayers that the GM Decision is “heavily fact driven”. The particular facts
around engagement of the investment advisors and the comprehensive involvement in the
affairs of the plan, and “backstop” responsibility of GM under this defined-benefit plan
may not be a match with those in place between many employers and their plans. Any
claims are likely to be denied by assessment, prompting a need for an Objection,
following which the matter may be propelled into the need for a Tax Court filing either
deliberately or, as does happen, by oversight.

Second (see Section 4b), Finance has already proposed a new regime, one feature of
which will be to effectively deny all access for retained recovery by employers on any
costs related to pension plans. The effective date of that regime may be the January 2007
announcement date. Given the upcoming election and the prevailing lengthy delays in
getting GST amendments into law, the interim period, and the scope of any consequent reassessments may be years. It may not be pure coincidence that the GM trial concluded on the 24th January 2007, and the new regime was unveiled, absent any draft legislation, on the 26th January 2007. Still think a protective claim might have some merit? Read on.

Third, and very significant, this is Canada, where in the event Finance does not like the view of the Courts on the effect of the GST legislation in connection with any matters related to the finance sector, a harsh retroactive change is always a real possibility. This, an unfortunate tax policy legacy of the Hon. Paul Martin’s time as Finance Minister, must always be weighed when making any tax filing decisions in Canada. Reliance on legislation, even after the specific topical effect has been clearly illuminated by the Courts, is not without significant peril.
2. The Public Sector

Public pension plans typically do not give rise to the same issues as private pension plans. Rather, there are other unique factors which impact on their GST treatment. This section reviews certain key issues of note with regard to the GST treatment of public pension plans.

Provincial governments are not required to pay GST on their purchases by virtue of Section 125 of the Constitution Act, 1867. The non-taxable status extends not only to provincial government ministries, but also to entities which are considered to be agents of the provincial government.

The CRA maintains a list of provincial government entities, including Crown corporations, boards, commissions and agencies, which qualify for such non-taxable status. The Federal Department of Finance and its provincial counterparts jointly determine which entities are to be included on the list, as part of the broader negotiations under the Reciprocal Taxation Agreements.

The CRA list includes a broad range of provincial government “agents”. In some cases, an entity on the list is explicitly specified to be an agent of the province in its establishing legislation. However, for many of the listed entities, their classification as crown agents eligible for non-taxable status would appear to be determined through a subjective assessment, based on an interpretation of the degree of apparent control the province has over the entity and, to a large extent, on historical practice.

Many pension plans for public servants and other provincial government employees receive full relief on their purchases, either because they are administered directly by a provincial government ministry or by a provincial crown agency which is included on the CRA list.

An important implication of the Constitutional exemption from tax as it applies to pension plans is that the GST treatment of public pension plans can vary widely from province to province, and also within a particular province.

To illustrate, in Ontario, reforms to the governance structure of many public pension plans were implemented in the 1990’s, with the objective of providing employees a greater say in the operation of their pension plans. However, as a result of these reforms, the current Ontario pension plans for a wide range of public servants and other public sector employees are considered to be too independent of the provincial government to be on the non-taxable list. Consequently, pension plans for major categories of public employees in Ontario are subject to GST on their purchases. This includes the pension plan for Ontario public servants (OPSEU Pension Trust), the Ontario Teachers Pension Plan, and the Colleges of Applied Arts and Technologies (CATT) Pension Plan.
By comparison, pension plans for these specific public employee groups in other provinces are not subject to GST on their purchases. The treatment of these three specific types of pension plans is illustrated in Table 1.

**Table 1: Tax Status of Equivalent Public Employee Pension Plans by Province**

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<th>Province</th>
<th>Public Servants</th>
<th>Public Teachers</th>
<th>College Employees</th>
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Within provinces, there is substantial variation as well. For example in Ontario, the OMERS pension plan (covering a wide range of municipal employees) is considered to be a crown agent and accordingly receives immunity from paying GST on its purchases. Thus, while Ontario pension plans for public servants, teachers, and college employees are taxable on their purchases, the plan for municipal employees is not. It is particularly notable that the CAAT Pension Plan initially was administered with the OMERS plan, and received immunity. With the reform of its pension plan governance in the mid-1990’s, the plan became subject to tax on its expenditures.

It should be noted that the differences in the treatment of such plans are not the result of any deliberate GST policy. There is no direct reference in The Act or the Regulations thereto which provides immunity for these public pension plans. Rather, they arise indirectly from the immunity granted to the provinces under the Constitution and the determination that the pension funds/trusts are directly a part of the provincial government, or are considered to be an agent of the provincial government.
3. The New Regime

a) Why 33%?

The January 26, 2007 Department of Finance press release which provided details on the new rules for imported services, allocation rules for financial institutions and the introduction of the Annual Information Schedule for financial institutions also included a proposal for the establishment of a new rebate system for all employer-sponsored pension trusts.

The proposed new rebate is intended to provide a level playing field for all pension plans. As has been elaborated in previous CICA papers, a 33% rebate would be available for GST/HST paid on all expenses relating to pension plans. The Finance announcement noted that the “rebate percentage reflects the proportion of pension trust expenses generally eligible for input tax credits”.

The decision by Finance to legislatively abandon the current practice of employers claiming input tax credits for pension-related expenses points to the relative success of the Multi-Employer Pension Plan Rebate. Details of the design of the measure have yet to be released, however, there are a few points which may be noted.

Importantly, upon reflection, what is the justification for choosing a rate of 33%? The press release noted that this is broadly equal to the amount of input credits which would otherwise be claimable. If that is the rationale, shouldn’t the rebate percentage now be recalculated on the basis of The GM Decision which acknowledged that employers are typically eligible for a much broader range of input tax credits than has previously been permitted? If there is intended to be a direct link to the proportion of “otherwise eligible” input tax credits, then logically the rebate percentage should be raised in the event that the Court of Appeal agrees with the Tax Court decision, because there was a conceptual target that has now been recalibrated.

It seems more plausible to view the 33% figure as simply an arbitrary number, intended to allow pension plans to recover a reasonable percentage of tax, without requiring employer sponsors of the plan and the CRA to determine what percentage of inputs would otherwise be eligible for input tax credits. If this is the case, i.e., if the 33% rebate percentage is better viewed as an arbitrary percentage divorced from the input tax credit system altogether, isn’t it really more akin to a public program, entitling some relief from GST for the pensioners? This is further supported by the fact that since its inception, pension plans for a wide range of public institutions and otherwise exempt entities have been eligible for the 33% Multi-Employer Pension Plan Rebate, notwithstanding that many of the employers which sponsor the plans are not engaged in commercial activities.
b) Grave Concerns on Timing

The new rebate was announced in January 2007, with a request for submissions by stakeholders and interested parties by April 30, 2007. Perhaps with all the other issues on Finance’s agenda, it is not surprising that there has been no further announcement on the implementation of the measure. **However, the announcement in January 2007 did not specify any effective date for this measure.** Given the lengthy period of time without news on this implementation, it is clear that retroactive implementation of the measure effective from the announcement date would create enormous upheaval. Over the past year and a half, employers have been claiming input credits for tax paid on expenses relating to their commercial activity – calculated either on the basis of their understanding of TIB-032R, or other criteria (e.g., the GM Decision). However, in contrast to the policy proposed in the press release, employers have not claimed input credits for all pension-related expenses nor have they been charging GST to the plan trust for any deemed supplies which would result under the new policy.

When the new legislation is released, there needs to be sufficient lead time to allow employers and plan trusts to prepare for the new system in an orderly fashion.

c) Pension Funds associated with Listed Financial Institutions

If we are to assume that the new regime comes to pass largely as described in the curt January 2007 Announcement, then there will be a broad parity between single, multi and related employer plans in the private and (excluding those enjoying total GST relief) public sectors with one notable exception. Upon examination, that exception is a policy flaw that needs to be reviewed and corrected before final implementation.

The announcement explains:

> “The only pension trusts that would not be eligible for the rebate would be those for which 10% or more of the contributions to the plan are made by listed financial institutions (since listed financial institutions cannot generally claim ITC’s to recover GST/HST paid on their expenses).”

This exclusion is a continuance of the exclusion from the currently legislated rebate for multi-employer pension plans, so let’s first consider that before moving on to consider the migration of the disqualification into the new regime. Presumably, exclusion from the currently legislated rebate was inserted to maintain a crude parity between a listed financial institution, and a multi-employer plan that received contributions from a group of employers containing listed financial institutions. However, depending on the mix of their taxable and exempt supplies, many listed financial institutions that are sponsors of single employer plans may recover very significant (possibly exceeding 50%) levels of GST incurred. Also, to effect a total disqualification for such a low level (10%) of contribution from listed financial institutions penalizes possibly more than 90% of the employees covered by the plan, placing them at a GST disadvantage to their commercial employer peers. The overly harsh effect is potentially magnified when considering that

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10 Department of Finance Backgrounder, January 26, 2007.
any entity that is party to a Section 150(1) election is deemed to be a listed financial institution. Consequently, many large commercial entities having financing or leasing affiliates with which they elect will be listed financial institutions, and so will have their contributions fall into the ‘ineligible’ side of the equation, likely triggering the disqualification. For example, consider a plan that receives one percent of its contributions from a listed financial institution. That entity then elects with another entity which contributes ten percent of the plan’s total contributions. The consequence is that eleven percent of the contributions to the plan are now from listed financial institutions, and every employee covered by the plan is denied GST relief. Clearly, more refined measures could have been developed to achieve the desired parity.

Moving on to the new regime, the January 2007 backgrounder states:

“The government recognizes the need to more generally address the issues concerning pension trusts to ensure that the full benefits of pension plan GST/HST relief accrue to pension trusts so that they can better provide benefits to pensioners.”

Note the thrust of the measure here. There is recognition that the pension plan serves the pensioners, not the employer. The general scheme of The Act is that GST recovery is predicated on the attribution of the cost bearing the GST to a taxable supply, at either a zero or positive rate. Many of the pension funds that will be eligible for the 33% rebate under the proposed new regime will take in contributions from employers that make either no or minimal taxable supplies (most healthcare and education is exempt from GST for example). Why then, in framing a new system designed to replace all the inequity and uncertainty commented on in this document, has Finance chosen to discriminate between populations of pensioners, building in a GST cost for employees hapless enough to have worked either for a financial institution, or for a commercial employer that elected with a financial institution or, most unluckily, for a commercial employer that contributes to the same pension fund as these blighted entities?

There is no good policy reason. This exclusion is at odds with the stated objectives of the measure and should be removed.
4. Conclusion

Canada is about to introduce a single mechanism to deal with the GST borne on costs related to all pension funds. The mechanism has the attractive features of simplicity and certainty, but could be further improved before receiving a wholehearted ‘buy’ recommendation from the writers. A glaring defect is the proposed discrimination against employees of listed financial institutions, which is ill-conceived and should be deleted. Consideration should also be given to updating the test affording total relief to provincial government/agency administered plans, so as not to deny the relief to plans solely because of reforms giving rise to increased participation in their governance by plan members.

Standing back a little, there have been many teething problems with the GST where a dialogue between government and taxpayers has resolved the matter in an admirable fashion. The story of the treatment of GST on costs related to pension plans has had positive chapters in it, such as the dialogue leading to development of the rebate for multi-employer plans. Overall though, the story is one of a dismal decline to the current day situation, which must be given a failing grade in any ‘good government’ test.

Today, employers and plan administrators cannot be sure that their filings based on TIB-032R will not be reassessed on a more restrictive, but yet to be fully published view. They do not know when (or in fact, if) the new CRA policy will be published. They cannot rely definitively on the Tax Court of Canada’s very clear view in the GM Decision, because the law considered by the Court may be retroactively changed. They have seen a two page description of a radically new structure that would certainly entail major retroactive changes to the tax liabilities of all employers participating in single employer pension plans if introduced effective January 2007, but they have no written indication from Finance what will be the effective date. As with a number of other technical disputes, recourse by one taxpayer to the Courts throws the system into paralysis, and the CRA seems to perceive that its key role is to keep the waters muddy to deter any aligned claims.

How might the story have been less dismal?

Administrative policies, no matter how tidy or well meaning, have to be thoroughly crash tested to ensure they are well-founded on the legislation.

TIB’s should be forthrightly withdrawn, or have an end to their effective date clearly stated, once the CRA no longer stands behind their content. A similar process should be adopted for ruling letters. Rulings and TIBS left published but prominently marked “NOT EXTANT AS OF [DATE]” would be more in keeping with the taxpayers’ charter.

Hasty announcements of a significant change, with no effective date, and without any draft legislation, followed by extended periods of silence leaving taxpayers in the dark…well, need we say more?
<table>
<thead>
<tr>
<th>Recovery of ITC’s on “Employer Expenses”</th>
<th>TIB 032</th>
<th>Original view TIB 032R</th>
<th>Modified view TIB 032 R</th>
<th>GM Decision</th>
<th>Legislation</th>
<th>New Regime</th>
</tr>
</thead>
<tbody>
<tr>
<td>YES, subject to legal obligation to pay.</td>
<td>YES, regardless of whether Employer actually pays.</td>
<td>YES, but subject to rigid Recipient” and Payment Test</td>
<td>YES, literal interpretation of “Recipient”</td>
<td>As GM</td>
<td>NO. (ITC locked to charging of GST on “resupply”)</td>
<td></td>
</tr>
<tr>
<td>Recovery of ITC’s by Employer on “Plan Trust Expenses”</td>
<td>YES Subject only to Recipient Test</td>
<td>NO</td>
<td>NO</td>
<td>YES Literal interpretation of “Recipient”</td>
<td>As GM</td>
<td>NO</td>
</tr>
<tr>
<td>Re-supply Employer to Plan</td>
<td>YES This is envisaged</td>
<td>YES “Plan Trust Expenses” incurred by Employer are resupplied</td>
<td>YES “Plan Trust Expenses” incurred by Employer are resupplied</td>
<td>Not fully explored</td>
<td>Only if terms of S 155 are met</td>
<td>Yes GST cost incurred by Employer can be partly recovered by Plan</td>
</tr>
<tr>
<td>Supply Plan to Employer</td>
<td>Silent</td>
<td>YES Where plan registered, otherwise employer able to recover GST on “Employer Expenses” paid by Plan in any event.</td>
<td>Unclear</td>
<td>Silent</td>
<td>Unless S155 applies or consideration paid, No</td>
<td>NO</td>
</tr>
<tr>
<td>In-House Supplies generated by Employer to Plan</td>
<td>Silent</td>
<td>YES</td>
<td>YES</td>
<td>Silent</td>
<td>Only if terms of S 155 are met</td>
<td>Subject to S155 being triggered</td>
</tr>
</tbody>
</table>
REGISTERED PENSION PLANS AND REGISTERED RETIREMENT SAVINGS PLANS

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the Excise Tax Act and Regulations. If interpretation problems occur, please refer to the legislation or contact the nearest Revenue Canada Excise office.

INTRODUCTION

This document outlines the application of the Goods and Services Tax (GST) to services acquired by registered pension plans (RPPs) and registered retirement savings plans (RRSPs). This document also addresses the tax status of contributions made to these plans, as well as the subsequent payment of funds from the plans to beneficiaries.

REGISTERED PENSION PLANS

A trust governed by an RPP is an "investment plan" and qualifies as a listed financial institution for purposes of the GST.

RPPs are deferred income plans, and are generally established to hold funds for investment purposes. Therefore most of the services provided by these plans relate to the investment of funds. These services qualify as financial services and are exempt from the GST when provided to Canadian residents. Similar services provided to non-residents will be zero-rated.
Beneficiaries essentially direct investment activities through deferred income plans. Accordingly, the contribution of funds to an RPP by plan members or the plan sponsor, for example the employer in the case of employee pension plans, will be exempted from the GST. The distribution of funds to beneficiaries is also an exempt activity.

The most common services paid for by an RPP are investment advice, trusteeship, portfolio appraisal and actuarial services. These are all taxable services, and the RPP will have to pay the GST for them. If these services were provided from outside Canada by a non-registrant, self-assessing rules would apply, and the plan would subsequently remit any tax due.

An RPP is not required to register for the GST if its only income, for a year, is derived from the investment of funds in Canada. If the plan's income from taxable services (excluding financial services provided to non-residents or sales of capital property) throughout the year does not exceed $30,000, it is also not required to register. However, the plan may voluntarily elect to register.

As an RPP normally supplies only exempt services to Canadian residents, it will not qualify for input tax credits on tax paid or payable for taxable purchases used to provide such services. However, an input tax credit may be claimed for the GST on purchases used in commercial activities, such as commercial real estate and foreign investments.

Occasionally, as part of the agreement under which the plan is set up, the sponsor may have to pay for all or part of the operating expenses of the plan. If the sponsor is itself engaged in a commercial activity, and is required to incur these expenses to further this commercial activity, it may be able to claim input tax credits for GST incurred on the expenses. However, if the sponsor is not legally obliged to pay for the plan's expenses, it may not claim input tax credits for the GST on the expenses.

Alternatively, the sponsor may bill the plan for the expenses and charge the GST for them. In this case, the plan sponsor may qualify for an input tax credit for tax paid previously.
RRSPs follow essentially the same rules as RPPS. Where the RRSP is governed by a trust, as with self-directed RRSPs, and management or administrative fees are charged, these fees will be subject to the GST.

Fees such as brokerage fees and charges for the purchase of a share of a mutual fund paid by the trust are supplies of exempt financial services. The trust would therefore not be subject to tax on these services.

Deposit accounts, annuity contracts and investment certificates may be registered as RRSPs separately. In general, these instruments are themselves financial instruments and charges associated with their purchase are included in the purchase price and are exempt.

Normally there are no separate fees charged for the management of these instruments. However, if there were separate fees, these would be treated as exempt. In many cases, a self-directed RRSP trust will contain investments which could be registered as RRSPs on their own, such as deposit accounts or investment contracts. Charges which would otherwise be exempt will remain exempt when related to these investments and charged to the trust (for example, brokerage fees).

Whether fees charged to a trust of a self-directed RRSP are taxable or exempt must be evaluated on the basis of the nature of the fees and their relationship to the investments of the trust. For example, a self-directed RRSP trust which holds a mortgage will be considered a mortgagee, and the issuer will be treated as the mortgagor. Administrative fees charged by the trustees for managing such an arrangement are not defined as supplies of a financial service, and would therefore be taxable.
GST/HST Technical Information Bulletin B-032

February 2006

The Canada Revenue Agency (CRA) is currently reviewing its policy on the application of the GST/HST to the operation of pension plan trusts. During this review period, please direct any questions you may have on this issue to:

Ken Syer
Manager, Specialty Tax
Financial Institutions and Real Property Division
Excise and GST/HST Rulings Directorate
Ottawa, ON K1A 0L5
Telephone (613) 952-9219
Fax (613) 990-3602

Registered Pension Plans

June 8, 1993

This bulletin does not replace the law found in the Excise Tax Act and its Regulations. It is provided for your reference. As it may not completely address your particular operation, you may wish to refer to the Act or appropriate Regulation or contact any Revenue Canada Excise/GST district office for additional information. If you are located in the province of Quebec, please contact the ministère du Revenu du Québec (MRQ) for additional information.

This bulletin may reflect amendments proposed to the Excise Tax Act contained in Bill C-112 which was tabled in the House of Commons on February 11, 1993, or the Notices of Ways and Means Motion dated March 30, 1993 and April 30, 1993. [Where the information provided in this bulletin reflects proposed amendments, the information is enclosed in square brackets.] At the time of publication, Parliament had not enacted these proposed amendments. Any commentary in this bulletin should not be taken as a statement by the Department that such amendments will in fact be enacted into law in their current form.

Introduction

This bulletin outlines the application of the Goods and Services Tax (GST) to supplies acquired for the operation of registered pension plans.

NOTE: This bulletin supersedes Technical Information Bulletin B-032, Registered Pension Plans and Registered Retirement Savings Plans, dated December 20, 1990

http://www.cra-arc.gc.ca/E/pub/gm/b-032r/b-032r-e.html

9/18/2008
Registered Pension Plans

("TIB B-032"). Due to the significant revisions to that bulletin, the changes in this bulletin are not side-barred.

Effective Date

This bulletin will be effective October 1, 1993. Where the application of the position outlined in this bulletin would be more beneficial to a person than that in TIB B-032, the Department of National Revenue, Customs, Excise and Taxation (hereinafter referred to as the "Department") will permit the person to apply the position described in this bulletin back to January 1, 1991.

Registered pension plans

A pension plan may generally be described as an arrangement between an employer and its employees, or between a union and its members, for providing pension benefits to the employees or the union members on retirement. Pension plans are regulated by federal and/or provincial legislation.

There are two basic types of pension plans:

(a) money-purchase plans and

(b) defined benefit plans. Other pension plans may contain elements of a money-purchase plan and a defined benefit plan. In a money-purchase plan, the employer contributes a specified amount to the plan each period, usually a percentage of the employees' salaries. The employees may also contribute to the plan. The contributions are invested, and the pension benefit that the employees will receive is dependent upon the total amount of contributions and the yield on the investments. In a defined benefit plan, the employer and/or the employees contribute to the plan. The pension benefit that the employees will receive is a stated amount, usually a percentage of the average salary of the employees. The key feature of this plan is that the employer must make sufficient contributions to the plan, as determined on an actuarial basis, to ensure that there are sufficient funds in the plan to meet the required pension benefit payments.

A registered pension plan is a pension plan that has been accepted by the Minister of National Revenue for registration for purposes of the Income Tax Act, whose registration has not been revoked.

Although there are many types of pension plans, there are generally at least three main elements in a pension plan arrangement: the plan sponsor or the employer, the plan itself, and the funding medium or the "Fund".

The comments in this bulletin apply to a pension plan where the funding medium is a trust resident in Canada.

A trust is a person for GST purposes. A trust governed by a registered pension plan qualifies as an investment plan by virtue of subparagraph 149(5)(a)(i) of the Excise

http://www.cra-arc.gc.ca/E/pub/gm/b-032r/b-032r-e.html

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Tax Act, and is included as a listed financial institution under subsection 149(1). The terms "plan trust" and "employer" will be used in the remainder of this bulletin to refer to the two separate persons involved in a pension plan arrangement. Where arrangements differ from this basic model, the applicable principles may be similar as long as the funding medium is an entity that is a "person" for GST purposes separate from the employer.

An essential function of a plan trust is to hold funds for investment purposes. Most services provided by a plan trust are normally financial services and are exempt from the GST. The contribution of funds to the plan trust by the members of the plan and by the employer is a financial service and exempt from the GST. Similarly, the distribution of funds to the beneficiaries by the plan trust is also an exempt financial service.

Registration for purposes of the GST

A plan trust will not be required to be registered for purposes of the GST if it makes only exempt supplies, such as the investment of funds in financial instruments. If a plan trust also carries on commercial activities in the year (generally making taxable supplies), usually it is still not required to be registered for purposes of the GST if the total consideration from taxable supplies (other than supplies by way of sale of capital property and generally supplies of zero-rated financial services) made by the plan trust for the preceding 12 months did not exceed $30,000. However, as a listed financial institution, the plan trust may voluntarily apply to be registered for purposes of the GST.

Input tax credits

Normally, a plan trust will not qualify for input tax credits since it may only make exempt supplies (e.g., receipt of interest or dividends). However, if the plan trust is a registrant and if, in addition to the provision of the exempt supplies, it also makes taxable supplies (e.g., rentals of commercial real property), the plan trust will be able to claim an input tax credit for any GST paid or payable on property or services to the extent they are acquired or imported by it for consumption, use or supply in the course of its commercial activities.

Employer expenses and plan trust expenses

It is the Department's position that certain property or services that are acquired or imported in respect of the pension plan are required for the operation of the employer's business (referred to in this bulletin as "Employer Expenses") while other property or services that are acquired or imported in respect of the pension plan are required for the operation of the plan trust (referred to in this bulletin as "Plan Trust Expenses"). The Department's position on which property or services are Employer Expenses and which property or services are Plan Trust Expenses is set out below. Only the employer, and not the plan trust, is entitled to claim an input tax credit on Employer Expenses to the extent that they are acquired or imported by the employer for consumption or use in the course of its commercial activities, and the GST on the

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Employer Expenses is paid or payable by the employer. Similarly, only the plan trust, and not the employer, is entitled to claim an input tax credit on the Plan Trust Expenses to the extent that they are acquired or imported by the plan trust for consumption or use in the course of its commercial activities, and the GST on the Plan Trust Expenses is paid or payable by the plan trust.

**Employer Expenses**

Examples of activities that relate to the establishment or administration of the pension plan are described below. In general, these activities are specified as the employer’s responsibilities in the pension plan agreement or under the applicable pension legislation. Hence, any property or services that are for use in such activities will be regarded as for use in the course of the employer’s business, and considered as Employer Expenses. Examples of these activities are:

(a) the establishment or subsequent amendment of the pension plan or the plan trust;
(b) the administration in relation to the collection of pension contributions and payment of pension benefits;
(c) the retention of the trustee for the plan trust;
(d) the appointment of an investment manager for the plan trust;
(e) the preparation and filing of actuarial reports, financial reports and other information for the pension plan pursuant to statutory requirements;
(f) the appraisal of the plan trust investment performance; and
(g) the general pension plan administration, such as the maintenance of records, benefit calculations, pension adjustment calculations, etc.

**Plan Trust Expenses**

The plan trust is, for GST purposes, a separate person from the employer. Assets vested in the plan trust will become the property of the plan trust, and accordingly are not the property of the employer. The very purpose for creating the plan trust is to ensure that ownership of the assets is separated from the employer.

It is the Department’s position that all property and services that are acquired or imported for use in the activities relating to the plan trust assets, such as the holding or the investment of the assets, will be regarded as for the use in the plan trust’s operation, and considered as Plan Trust Expenses. In general, the Department will consider the following related property or services as Plan Trust Expenses:

(a) the investment advice regarding the plan trust assets;

(b) the brokerage, agents' charges and all other property or services relating to acquisition, utilization or disposal of the plan trust assets;

(c) the plan trust portfolio management;

(d) the custodial or nominee services for the plan trust assets; and

(e) certain legal, accounting or auditing services in respect of the plan trust assets.

Re-supplies

In many pension arrangements as they currently stand, property or services that are required for use in the operation of the plan trust may be invoiced to and paid for by the employer or vice versa. The comments below explain the Department's position where the related property or services that are required for use in the operation of one party are invoiced to and paid for by the other.

Plan Trust Expenses Invoiced to and Paid for by the Employer

When the employer acquires or imports and pays for the Plan Trust Expenses, since the related property or services are required by the plan trust for use in its operation, the Department will consider that this property or these services are re-supplied by the employer to the plan trust. Therefore, where the employer is a registrant, it will be able to claim an input tax credit for the GST paid or payable on the Plan Trust Expenses that it re-supplied to the plan trust. The employer must also charge and remit the GST based on the value of the consideration for the re-supply where it is a taxable supply. When the plan trust is a registrant, it may claim an input tax credit for the GST paid or payable on the re-supply to the extent the related property or services are acquired for consumption or use in the course of its commercial activities. Due to the close relationship of the employer and the plan trust, if the employer charges the plan trust an amount less than what it was charged by the supplier for the Plan Trust Expenses, the Department will take the position that the re-supply by the employer cannot be said to have been made between persons dealing at arm's length. In this case, if the amount charged is less than the fair market value of the related property or services, section 155 of the Excise Tax Act will apply unless the plan trust is a registrant who is acquiring the related property or services for consumption, use or supply exclusively in the course of its commercial activities. Section 155 of the Excise Tax Act will deem the value of the consideration for the re-supply to be equal to the fair market value of the related property or services.

If the employer invoices the plan trust for the re-supply an amount equal to the amount it was charged by the original supplier, the Department will generally accept that, for purposes of section 155 of the Excise Tax Act, the amount invoiced by the employer is an appropriate approximation of the fair market value of the related property or services.

Date Modified: 2006-02-22

http://www.cra-arc.gc.ca/E/pub/gm/b-032r/b-032r-e.html

9/18/2008
Where the employer has established more than one plan trust and the employer acquires or imports and pays the Plan Trust Expenses that are for use in the operation of these trusts, the employer may only invoice a plan trust for the re-supply of the related property or services that are for use by that particular plan trust. If the total amount invoiced by the employer to all the plan trusts for the re-supplies is equal to the amount charged by the supplier to the employer, the Department will generally accept that the amounts invoiced to the plan trusts are an appropriate approximation of the fair market value of the re-supplies made to the plan trusts. However, there must be a reasonable allocation of the amounts invoiced for the re-supplies among the plan trusts.

A plan trust may claim an input tax credit for the GST paid or payable on the acquisition of the related property or services only to the extent that they are acquired by the plan trust for consumption or use in the course of its commercial activities.

**Employer Expenses Invoiced to and Paid for by the Plan Trust**

If the plan trust acquires or imports and pays for the Employer Expenses, when the related property or services are acquired or imported for use in activities that are the responsibilities of the employer pursuant to the pension plan agreement or the applicable legislation, the Department will consider that this property or these services are re-supplied by the plan trust to the employer. Therefore, where the plan trust is a registrant, it will be able to claim an input tax credit for the GST paid or payable on the Employer Expenses that it re-supplied to the employer. The plan trust must also charge and remit the relevant GST on the value of the consideration for the re-supply where it is a taxable supply. When the employer is a registrant, it may claim an input tax credit for the GST paid or payable on the resupply to the extent that the related property or services are acquired for consumption or use in the course of its commercial activities.

For some pension plan arrangements, the employer’s responsibilities regarding the pension plan are limited, and the related property or services will not be acquired or imported for use in activities that are the responsibilities of the employer pursuant to the pension plan agreement or the applicable pension legislation. In this case, there will not be a re-supply of the related property or services to the employer.

If there is a re-supply of the Employer Expenses by the plan trust to the employer and the amount charged for the re-supply is less than what the plan trust was charged, the Department will take the position that the re-supply cannot be said to have been made between persons at arm’s length. In this case, if the amount charged by the plan trust is less than the fair market value of the related property or services, section 155 of the *Excise Tax Act* will apply to deem the value of the consideration for the re-supply to be equal to the fair market value of the related property or services, unless the employer is a registrant who is acquiring the related property or services for use exclusively in the course of its commercial activities.

If the plan trust invoices the employer for the re-supply an amount equal to the amount it was charged by the original supplier, the Department will generally accept that, for purposes of section 155 of the *Excise Tax Act*, the amount invoiced by the
plan trust is an appropriate approximation of the fair market value of the related property or services.

To reduce the administrative burden to those plan trusts that are not registrants, the Department takes the position that, if a non-registrant plan trust is invoiced and pays for the Employer Expenses and the related GST, the employer will be considered to have acquired or imported the related property or services directly from the supplier and paid the applicable GST. Therefore, the plan trust will not be required to include the value of the related property or services in determining its small supplier threshold. The plan trust will not be required to be registered for purposes of the GST merely because it was invoiced and has paid for the Employer Expenses. The employer may claim an input tax credit for the GST charged by the supplier on the related property or services to the extent that they are acquired or imported for consumption or use by the employer in the course of its commercial activities, where the employer is a registrant.

Where the employer or the plan trust has paid for the other's expenses, but does not invoice the other for the re-supply of the related property or services, the Department will not seek to apply section 155 of the Excise Tax Act, provided that neither the employer nor the plan trust, as either supplier or recipient, claims an input tax credit with respect to the related property or services.

**In-house supplies**

In addition to the re-supply of property or services by an employer to the plan trust, there may be situations where the employer may make an "in-house" supply of property or services to the plan trust. For example, the staff of the employer's treasury department may provide an investment advice service to the plan trust in connection with the plan trust's investment activities. If the employer makes the supply for no consideration or for consideration less than the fair market value of the "in-house" property or services, the supply will be considered not to have been made between persons dealing with each other at arm's length. If the trust is not a registrant who is acquiring the property or services for consumption, use or supply exclusively in the course of its commercial activities, section 155 of the Excise Tax Act will apply to deem the supply to have been made for consideration equal to the fair market value of the property or services at that time. In general, the Department will accept the costs to the employer in providing the in-house supply as the fair market value of the property or services as long as they include both direct and indirect costs. Where the supply is a taxable supply and the employer is a registrant, the employer should collect GST from the plan trust on this value. There may also be cases where the plan trust may supply property or services to the employer, in which case the results will be the same as outlined above.

**Imported taxable supplies**

Where a taxable supply is made outside Canada to the employer or the plan trust, the supply will generally be subject to the GST on a self-assessment basis under Division IV of the Excise Tax Act unless the supply was acquired for consumption, use or supply exclusively in the course of the commercial activities of the recipient, or unless the

supply was of goods that are subject to GST under Division III of the *Excise Tax Act*. If a taxable supply of a Plan Trust Expense that is made outside Canada is invoiced to and paid by the employer for re-supply to the plan trust, or if a taxable supply of an Employer Expense that is made outside Canada is invoiced to and paid by the plan trust for re-supply to the employer, the imported supply will not be subject to the GST under Division IV of the *Excise Tax Act* since it will be considered to have been acquired for supply exclusively in the course of commercial activities of the party who thereafter makes the re-supply. However, the re-supply of the related property or services in Canada will still be subject to the GST based on the fair market value of the related property or services.

In the situation where a **non-registrant** plan trust is invoiced and pays for a taxable supply of Employer Expenses made outside Canada, the Department will consider that the employer acquired the imported supply directly from the original supplier, and that there was no re-supply of the related property or services by the non-registrant plan trust (*Refer to the section of this bulletin entitled "RE-SUPPLIES".*). However, the employer must self-assess the GST under Division IV of the *Excise Tax Act* unless the supply was acquired for consumption, use or supply exclusively in the course of its commercial activities, or unless the supply was of goods that were subject to GST under Division III of the *Excise Tax Act*.

**Documentation**

Subsection 169(4) of the *Excise Tax Act* sets out the general documentary and information requirements that a registrant must meet before filing a GST return for the reporting period in which an input tax credit may be claimed. To satisfy these requirements, the employer or plan trust, as the case may be, that makes the supply must make an invoice or similar documentation as described in GST Memorandum 400-1-2, *Documentary Requirements*, to the other party to substantiate the making of the re-supply. Otherwise, the recipient of the re-supply will not be entitled to claim the appropriate input tax credit.

Where a non-registrant plan trust is invoiced and pays for the Employer Expenses and the employer is considered to have acquired the related property or services **directly** from the original supplier, an invoice issued by the supplier to the plan trust will generally be considered as sufficient evidence in determining the employer's input tax credit entitlement under subsection 169(4) of the *Excise Tax Act*, provided that the invoice meets the general requirements under the Regulations to the *Excise Tax Act*.

http://www.cra-arc.gc.ca/E/pub/gm/b-032r/b-032r-e.html  
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