

Sales Tax Cost Of Administration

By: Craig Robertson

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Benefits

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Two recent decisions of the Federal Court of Appeal (FCA) – General Motors of Canada and The Canadian Medical Protection Associations, could mean GST savings opportunities for employers and other sponsors of benefits plans. This comes as a relief at a time when most pension plans are in deficit and employers are hard-pressed to find the necessary funds.

The General Motors Case

GM sponsors separate Defined Benefit pension plans for its unionized employees and for its salaried employees. Like many employers, GM is the administrator of the plans and engages investment managers to manage the investment of parts of the trust funds. The agreements with both the fund trustee and the investment managers were clear that GM, not the trustee, was responsible for investment decisions and that the plan managers reported to GM, not to the trustee, for their investment management decisions. GM is responsible for the investment managers' fees, although it is entitled to, and does, charge them through to the plan trust assets for payment.

CRA's position has been that employers cannot recover GST payable on expenses that relate to pension plan trust funds, including investment management services, on the basis that the pension fund trusts are separate persons from the employer plan sponsor, and that the plan trust, because it is an investment vehicle, is not entitled to recover the GST. CRA's position was originally set out in Technical Information Bulletin B-032R, but has been evolving and becoming increasingly more restrictive.

GM claimed input tax credits (ITCs) on the investment management fees, taking the position that:

- it hired the investment managers and acquired their services
- the fees were payable by GM, albeit reimbursed/paid from the pension funds
- GM's sponsoring the pension plans and hiring the managers is integral to its automotive business (which is a key requirement for claiming ITCs) since the pension plan is part of its compensation policy and tied into the union contracts

CRA denied the ITCs claimed. GM appealed to the Tax Court of Canada (TCC) which agreed with GM's position. The FCA confirmed the TCC's decision. At time of writing, CRA was still considering whether to apply for leave to appeal to the Supreme Court of Canada (SCC).

The Canadian Medical Protection Association (CMPA) Case

CMPA arrives at a similar result, relief from GST, but for different reasons. CMPA provides professional liability protection to medical physicians. It must maintain reserves and investments to fund claims and for this purpose it hires discretionary investment managers.

Buying, selling, and holding debt and equity investments are 'financial services' which generally are GST-exempt. Furthermore, services provided by brokers, underwriters, and other third parties in 'arranging for' other 'financial services' are also GST-exempt financial services so GST is not payable on such services.

CRA's position has been that investment managers do not provide 'arranging for' services, and instead provide advisory services which are expressly excluded from the definition of 'financial service.'

CMPA disagreed and filed a rebate claim for GST 'paid in error' on the basis that its investment managers – to whom CMPA gave full discretion to make decisions to buy sell, sell and hold securities – are 'arranging for' those financial services. CRA denied the rebate applications.

The TCC agreed with CMPA and allowed the claim for GST recovery. The FCA confirmed the TCC's decision. Again at time of writing, CRA was considering whether to apply for leave to appeal to the SCC.

The applicability, however, of the CMPA decision may be limited by another exclusion from the definition of 'financial service' affecting "an investment plan (...) or any corporation, partnership, or trust whose principal activity is the investing of funds."

'Investment plans' are defined to include many trust-based investment vehicles including registered pension plans. CRA may argue that services that would otherwise be GST-exempt 'arranging for' services may be GST-taxable when supplied to one of the above entities.

Companion Pieces

The GM and CMPA are interesting companion pieces. The principles in the GM decisions – that you must look at the actual relationships and roles played by the different participants in an arrangement – can apply to other benefits plans. They can also assist a wider range of employers who are not engaged in GST-taxable activities so that they cannot claim ITCs. Such participants may not be an ‘investment plan’ so that the CMPA holding that investment management fees are GST-exempt may apply to them whereas it may not apply if the services were provided for example, to a pension plan itself.

Both decisions demonstrate the importance of looking closely at plan structures (in GM, the pension plans) and contractual agreements (in CMPA, the investment management agreements).

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