



THE CANADIAN
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October 15, 2013

Via email: Gervais.Coulombe@fin.gc.ca

Gervais Coulombe
Senior Advisor, Sales Tax Division
Tax Policy Branch
Finance Canada
140 O'Connor St
Ottawa, ON K1A 0G5

Dear Mr. Coulombe:

Re: Potential changes to *Excise Tax Act* section 156 – group relief election

I am writing on behalf of the Commodity Tax, Customs and Trade Law Section of the Canadian Bar Association (CBA Section), in response to your correspondence dated September 11, 2013 to Robert Kreklewetz, seeking the CBA Section's view on potential changes to section 156 of the *Excise Tax Act* (ETA). Thank you for the opportunity to offer our input.

The CBA is a national association representing over 37,000 jurists, including lawyers, Québec notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The CBA Section comprises lawyers from across Canada who deal with law and practice issues relating to commodity tax, customs and trade remedy matters.

The CBA Section has identified potential problems with the application of s. 156 in certain situations. To remedy the problem, we had recommended that section 156 be amended to expressly allow for the closely related group election to apply to the initial acquisition of property or services by a new corporation or new partnership (i.e., a corporation or partnership with no substantial commercial activities, the "New Entity").

The CBA Section understands that Finance Canada has historically been receptive to this, on the condition that the New Entity: (1) continue in existence and make supplies on an ongoing basis; and (2) enter into a joint indemnity. Accordingly, since 2010, the CBA Section has framed its request for relief on the same basis. More recently, Finance Canada

has indicated the possible filing requirement for all section 156 elections, as a further condition to amending section 156.

At present the CBA Section does not oppose either a joint indemnity requirement or a filing requirement, so long as any filing requirement for the election parallels the language in section 167, including ministerial discretion for late filing (i.e. “or on such later day as the Minister may determine on application of the recipient”). Any filing requirement must also be effective on the effective date of the amendment, with prospective application only.

Having reconsidered the matter, however, the CBA Section is now of the opinion that the “continue in existence” requirement (i.e. that the New Entity continue in existence and make supplies on an ongoing basis) is unnecessary. A “continue in existence” requirement is counter-productive and unnecessary if the joint liability provision is added to the amendment. While the CBA Section understands Finance Canada’s concern that “temporary member” situations be limited to butterfly transactions dealt with in the 2006 amendments, we believe it is an approach unfit for today’s corporate environment, would often defeat the purpose of the proposed amendment, and would continue to force New Entities to take multi-step approaches to comply with current section 156.

In summary, while the CBA Section would support the joint indemnity and filing requirements, on the basis above, we oppose the “continue in existence” requirement.

If the “continue in existence” requirement is to persist, the Explanatory Notes should make it clear that if a New Entity is amalgamated with another existing entity, it does “continue in existence” in the meaning of the condition as a matter of law. The Department should also address whether a “continue in existence” condition will create additional section 156 problems for partnerships.

Thank you for the opportunity to comment on this important matter.

Sincerely,

(original signed by Noah Arshinoff for Cyndee Todgham Cherniak)

Cyndee Todgham Cherniak
Chair, National Commodity Tax, Customs and Trade Section

(original signed by Noah Arshinoff for Robert G. Kreklewetz)

Robert G. Kreklewetz
Chair, Finance Liaison Committee, National Commodity Tax, Customs and Trade Section

cc: Lalith Kottachchi
Chief, Sales Tax Division, Tax Policy Branch, Finance Canada
Lalith.kottachchi@fin.gc.ca

encl.



December 5, 2011

Lalith Kottachchi
Legislative Chief, Real Property and Financial Institutions
Sales Tax Division
Finance Canada
140 O'Connor Street
Ottawa, Ontario K1A 0G5

Dear Mr. Kottachchi:

Re: Commodity Tax, Customs & Trade Section Meeting

Thank you for meeting with representatives of the Commodity Tax, Customs & Trade Section of the Canadian Bar Association (the CBA Section), on February 23, 2011. The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. Lawyers in the CBA Section deal specifically with commodity tax, customs and trade in their practices and are grateful for opportunities to consult with Finance Canada on ways to improve the law in these areas.

The CBA Section would like to follow-up with Finance Canada on the following issues, which we feel are particularly significant.

In order of importance:

1. The inherent limitations on the application of section 156 of the *Excise Tax Act* (the Act) remain a continuing problem, particularly in corporate reorganizations. We recommend amending section 156 to expressly permit the closely related group election to apply to a corporation's or partnership's initial acquisition of property, provided the entity will continue in existence and make supplies on an ongoing basis, and enters into a joint indemnity.
2. There is also continuing difficulty in applying section 167 in commercially common situations involving a purchasing entity, which is a newly incorporated company (Newco) incorporated solely to purchase the business in question, with the parties' intent to sell the Newco shares following the transaction to a third-party purchaser,

and subsequently wind up or amalgamate Newco with the third-party purchaser. The Canada Revenue Agency takes the position that “commercial activity is required in order that Newco be entitled to register and make the section 167 election”, making the election questionable for Newco in this situation. We recommend amending the Act to expressly permit use of the election in this situation.

3. Section 273 continues to be unduly limited because of inherent limitations in the section itself. We recommend amending section 273 to extend the prescribed election to cover the initial acquisition of joint venture property by joint venture participants.
4. We recommend amending *The Input Tax Credit Information (GST/HST) Regulations* to expressly contemplate billing agents. These agents are sufficiently ubiquitous as to be important to consider in the regulations.
5. Pension plans and the December 2009 amendments to the definition of financial services were the subject of significant discussion at our meeting. We continue to be of the view that significant issues remain in these areas. We recommend that these areas be reviewed with a view to further clarifying and simplifying the rules.

Thank you for your time and attention.

Yours very truly,

(original signed by Rebecca Bromwich for Craig M. McDougall)

Craig M. McDougall, QC
Chair
Commodity Tax, Customs and Trade Section