THE CANADIAN BAR ASSOCIATION
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Via email: peter.fonseca@parl.gc.ca

Peter Fonseca, M.P.
Chair, Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Fonseca:

Re: Retroactive GST/HST Measures in Bill C-47, *Budget Implementation Act*, 2023, No. 1

I write on behalf of the Commodity Tax, Customs, and Trade Section of the Canadian Bar Association (CBA Section) to comment on the proposed "coming into force" provisions (CIF Provisions) of the GST/HST amendments to the *Excise Tax Act* (ETA) in Bill C-47, *Budget Implementation Act, 2023, No. 1*. The CIF Provisions changes the law retroactively to December 17, 1990 and extends the normal four-year GST assessment period in connection with the proposed amendments for all taxation years back to December 17, 1990.

We have serious concerns about the retroactive effect of the CIF Provisions and the extension of the normal assessment period for statute-barred periods.

Tax legislation plays an essential role in Canada's economy and sets the legal framework for the collection of taxes used to finance public goods and services. Retroactive tax legislation seeks to impose taxes on transactions that have already taken place. This type of legislation is not only unfair to taxpayers, but also a breach of the rule of law.

We urge Parliament to amend the legislation to apply prospectively, not retroactively.

Overview

In the 2023 Federal Budget, the government announced draft amendments to the ETA (Proposed Amendments) to impose GST/HST on certain services provided by payment card network operators, including the authorization of transactions, clearing, settlement and other related services (Services).

The CIF Provisions would allow the Minister to apply the rules retroactively to when the GST was first introduced and to assess tax in respect of the Services for the same period. In particular, the CIF Provisions allow the CRA to reassess for past periods, including those for which the general limitation period has already closed (i.e., opening otherwise statute-barred periods to assess tax in situations where tax was not payable at the time the supplies were made).

The CIF Provisions in subsections 114(5) and (6) of Bill C-47 read as follows:

> (5) Subsection (2) applies to a service rendered under an agreement for a supply if
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> (a) any consideration for the supply becomes due after March 28, 2023 or is paid after that day without having become due; or
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> (b) all of the consideration for the supply became due or was paid on or before March 28, 2023, except that, for the purposes of Part IX of the Act, other than Division IV of that Part, subsection (2) does not apply in respect of the service if
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> (i) the supplier did not, on or before March 28, 2023, charge, collect or remit any amount as or on account of tax under Part IX of the Act in respect of the supply, and
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> (ii) the supplier did not, on or before March 28, 2023, charge, collect or remit any amount as or on account of tax under Part IX of the Act in respect of any other supply that is made under the agreement and that includes the provision of a service referred to in paragraph (r.6) of the definition *financial service* in subsection 123(1) of the Act, as amended by subsection (2).
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> (6) Despite section 298 of the Act, the Minister of National Revenue may assess, reassess or make an additional assessment of any amount in respect of paragraph (r.6) of the definition *financial service* in subsection 123(1) of the Act, as amended by subsection (1), at any time on or before the later of the day that is one year after the day on which the legislation enacting subsection (1) receives royal assent and the last day of the period otherwise allowed under that section for making the assessment, reassessment or additional assessment.

Paragraph 114(5)(b) would impose the Proposed Amendments on any payments before March 28, 2023, except in limited circumstances where a Canadian supplier did not charge GST/HST on the Services or any other services given under the same agreement as the Services. For Services obtained from non-resident payment card network operators (e.g., MasterCard), there is no exception, due to the exclusion of Division IV from the exception, which applies to cross-border services.

The broad retroactive effect has generated concern in the legal and business community. We believe the retroactive application undermines the rule of law and violates the Department of Finance's own guidelines for enacting retroactive legislation.

Importance of the rule of law

Canadian democracy is founded on the rule of law, and the "law should be such that people will be able to be guided by it."[1] It is important for people to be able to "foresee the consequences of their conduct in order that persons be given fair notice of what to avoid."[2]

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1 *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at para. 62.

2 *Reference re ss. 193 and 195.19(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123.

It is a "basic tenet of our legal system" that the legal consequences that flow from a person's conduct "should be judged on the basis of the law in force at the time."[3]

Applying legislation retroactively is a "serious violation of the rule of law…[as] it is inherently arbitrary for those who could not know its content when acting or making their plans"[4] and it is "duplicitous and dishonourable" to apply legislation retroactively and that "overly frequent recourse to such a method may undermine the effectiveness of law in governing human behaviour."[5]

These principles are particularly applicable in the tax context where courts have continuously underscored the importance of predictability, certainty and fairness so taxpayers may properly manage their affairs.[6] Taxpayers are obligated to read, understand and apply the law as it exists at the time they engage in their taxable endeavours.

In the GST/HST context, the vendor and the purchaser must apply the nature and tax characterization of a transaction at the time it happens. As GST is a transaction-based tax, the participants are expected to know the applicable GST implications at the time the supply occurs because that is when a decision must be made to charge and collect the tax.

Retroactive amendments imposing taxes upset this system. They undermine the rule of law: the taxpayer's behaviour is "governed successively by two rules: that in force at the moment the behaviour takes place, and that enacted by the retroactive legislation."[7]

Further, retroactive changes to tax legislation create uncertainty and make it difficult for taxpayers to plan their affairs, as taxpayers have no way of knowing if their past transactions will be subject to additional taxes in the future. This issue is exacerbated when taxation periods that have already closed (i.e., it is too late for them to be reassessed) can subsequently be reopened. This uncertainty can have a chilling effect on investment and economic activity. It can also affect the trust in the government and its institutions.

CIBC Visa case

Financial services are generally exempt from GST/HST. This means that no GST/HST is payable on these transactions.

The definition of "financial service" in the ETA includes the "exchange, payment, issue, receipt or transfer of money" as well as "any service provided pursuant to the terms and conditions of any agreement relating to payments of amounts for which a credit card voucher or charge card voucher has been issued," but excludes certain services that may otherwise fall into the definition of "financial services." One of the exclusions is an "administrative service."

Payment card clearing services are provided by a payment card network operator to a card issuer.

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3 *R. v. K.R.J.*, 2016 SCC 31, at para. 1.

4 R. Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: Lexis), s. 25.05.

5 P.-A. Côté, *The Interpretation of Legislation in Canada*, 4th ed., at p. 157.

6 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 31.

7 Côté, *The Interpretation of Legislation*, at p. 157.

In January 2021, the Federal Court of Appeal held in the CIBC Visa decision that GST/HST does not apply to the supply of services by payment card network operators.[8] The court concluded, in part, that these payment card network services were "financial services" under the ETA, not "administrative services."

More than two years later, the 2023 Budget introduced changes that would effectively overrule the CIBC Visa decision. The 2023 Budget described the Proposed Amendments as "clarifying" that payment card services provided by a payment card network operator are excluded from the definition of "financial service." Further, Budget 2023 stated that it has "always been widely understood that the services of payment card network operators are excluded from the GST/HST definition of 'financial service.'"

In our view, there is no support for the Department of Finance's broad statement that it has "always been widely understood" that the Services are taxable. In fact the CIBC Visa decision validates the opposite conclusion, that the Services were always exempt from GST/HST.

Inappropriateness of applying Proposed Amendments retroactively

We understand that the Department of Finance has developed guidelines on when it believes it is appropriate to enact tax legislation with retroactive effect.[9] These guidelines state that retroactive clarifying changes "should only be considered in highly exceptional situations". The guidelines also explain that enacting retroactive legislation in response to court decisions is "legally possible" but that such an approach would "result in more complex legislation, would conflict with the principle that the courts should be the final interpreters of the law, and would undermine the certainty that taxpayers should be able to expect from the tax system."

In short, the Department of Finance's policy identifies that retroactive amendments may be permissible when they conform to the CRA and taxpayers' expectations of the statute, reflect clear, well-known policy, are intended to prevent a small number of people from benefitting at the expense of many others and correct ambiguous or deficient provisions.

In our view, based on the Department of Finance's own criteria, the retroactive application is not required or appropriate in this case.

First, it is unsubstantiated to claim that it has always been "widely understood" that services provided by payment card network operators are not a "financial service".

In the CIBC Visa decision, CIBC made rebate claims for amounts of GST/HST paid in error for years dating back to 2003. While the government argued that these services were taxable, it is not fair to assume that financial institutions agreed with the CRA's position. At best it can be said that the government *thought* these services were taxable. There is no evidence that most, much less all, taxpayers believed they were taxable. In fact, there is significant evidence, as seen in court filings from numerous taxpayers, that many, if not most, did not believe these services were taxable.

There has been no uncertainty for the last two years. For the 26 months following the CIBC Visa decision, there is no question that it has been widely understood by all parties (taxpayers, CRA, Department of Justice) that the Services were exempt. We understand that the CRA and the

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8 *Canadian Imperial Bank of Commerce*, 2021 FCA 10 (CIBC Visa Decision).

9 Department of Finance, Comprehensive Response of the Government of Canada to the Seventh Report (1995).

Department of Justice agreed with this analysis and settled numerous cases and audits on the basis that the Services were exempt "financial services."

The CIF Provisions are particularly troubling. Even if the Department of Finance wants to take the position that a retroactive amendment would have been appropriate immediately after the CIBC Visa decision, deciding to do so more than two years after the decision (and when all parties have been acting like the supplies were exempt) is entirely inappropriate. In the intervening 26 months, consent orders, settlements and reassessments have been issued in accordance with the CIBC Visa decision and the CRA and the Department of Justice clearly saw themselves bound by the decision.

In addition, the Proposed Amendments do not reflect well-known tax policy. Indeed, there is no evidence that the court's interpretation in CIBC Visa was overly literal or contrary to the purpose of the ETA. Had the court's conclusion been plainly wrong and inconsistent with tax policy, the government should have sought leave to appeal to the Supreme Court. No leave was sought. Instead, the Department of Justice and the CRA endorsed and followed the court's conclusion, resulting in subsequent consent to judgments and settlements.

There is no evidence that the legislation was ambiguous or deficient, nor is there any evidence of an overriding policy concern that required the Proposed Amendments to be applied retroactively.

Inappropriateness of opening up statute-barred periods

It is not only inappropriate to apply the Proposed Amendments retroactively, it is against the rule of law to open statute-barred periods. Limitation periods, like section 298 of the ETA, give companies finality and certainty, key pillars of tax law. Without this finality and certainty, companies would not be able to plan their affairs efficiently. In addition, the ETA gives timelines for companies to keep their books and records (generally six years).

The CIF Provisions purport to allow the CRA to reassess companies for transactions that occurred over 30 years ago, regardless of whether there was a final determination and regardless of whether the CRA carefully examined rebates and paid them out. This treatment is normally only reserved for egregious tax misrepresentations and fraud and is disproportionate to the government's current aims.

The CIF Provisions also purport to apply for periods where there is no longer any obligation to keep books and records. The ETA requires companies to make rebate claims for GST/HST paid in error within two years of the date the GST/HST was paid. The CIF Provisions now add a significant degree of uncertainty and unfairness by opening up periods that have long been resolved and closed.

As the Proposed Amendments are a clear change in the policy that all parties have followed for 26 months after the CIBC Visa decision, it would be appropriate to make the Proposed Amendments apply only prospectively and not retroactively.

The following example illustrates the negative consequences of retroactive application of the Proposed Amendments. If a financial institution (and public company) obtained a refund from the CRA for GST/HST paid in error on the Services, it may have paid dividends to its shareholders at that time. If more than two years later, those same refunds can be reassessed and denied, it will negatively impact current shareholders who will bear the economic burden of reassessments that were not foreseeable (as they were contrary to the established law of the CIBC Visa decision), even where the benefits were given to different shareholders. They may also require financial

institutions to increase the fees they charge to their customers to offset the direct impact to their income statement.

If, as the Department of Finance suggests, all parties understood the Services to be taxable, the CRA should have reassessed taxpayers within the timelines in section 298 of the ETA and should have refused to issue rebates for amounts paid in error based on the knowledge that retroactive changes were going to come into effect shortly, such that the rebates would remain open to be reassessed.

There is no reason to allow the CRA to revisit years that were never disputed. In cases that were disputed but ultimately settled, the CRA should not be permitted to renege on its contractual agreements or try to reverse final judicial decisions. Allowing retroactive application would result in taxpayers losing faith in the judicial process and democracy, as the rules of the games (i.e., taxing statute) could be amended retroactively to change whether a taxpayer should have charged, collected, and remitted tax. For a transaction tax where collectors act as agents of the Crown, this would add significant uncertainty to investing in Canada.

Closing comments

There is no justification for the retroactive application of the Proposed Amendments. If the CIF Provisions are enacted in their current form, it would undermine the certainty, predictability and fairness of the tax system. It would seriously undermine the rule of law and the basic principle that people should be governed by laws knowable at the time of their conduct.

Although these Proposed Amendments affect only one industry, other businesses will be concerned that retroactive amendments may be imposed and that they no longer have any certainty on potential tax liabilities.

To allow the government to enact retroactive legislation in response to an unfavourable court decision, absent any other justification, would set a dangerous precedent. Parliament's power to enact retroactive amendments of tax legislation must only be exercised in exceptional circumstances.

To respect the rule of law, the CIF Provisions should be amended to remove its retroactivity and remove the unlimited assessment period for statute-barred transactions. We recommend amending s. 114 of Bill C-47 by deleting paragraph 114(5)(b) and subsection 114(6).

We would welcome the opportunity to discuss this matter in greater detail.

Yours truly,

(original letter signed by Marc-André O'Rourke for Maryse Janelle)

Maryse Janelle
Chair, Commodity Tax, Customs, and Trade Section