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Canadian Indirect Tax News

The City of Calgary Supreme Court of Canada Decision (GST)

April 27, 2012 (12-3)

Many agreements but only one supply

On April 26, 2012, the Supreme Court of Canada released its unanimous decision in rejecting the City of Calgary's goods and services tax (GST) appeal with respect to input tax credits (ITCs) claimed on the construction of transit infrastructure system. The question under appeal was whether the acquisition and construction of the transit facilities constituted the making of an exempt supply only, or whether it also constituted the making of a taxable supply to the Province of Alberta. Specifically, the Supreme Court focused on the question of whether there were one (an exempt supply of a public transit services) or two supplies being made (an exempt supply of public transit services and a taxable supply of construction services of a transit facilities system to the Province).

The City took the position that the construction of the transit facilities (as opposed to their operations) was a separate distinct supply to the Province pursuant to its obligations under the City Transportation Act, R.S.A (CTA). Under the CTA, the province would share the cost of the transit system with the City and towards that end entered into funding agreements.

The City paid GST in respect of acquisitions to construct the transit facilities. Prior to 2003, the City claimed the public service body rebate for 57.14% of the GST paid. In January 2003, the City filed for \$6,351,976 of ITCs for the difference between the GST paid and the previously claimed rebates based on the rationale that it was making a taxable supply to the Province pursuant to its contractual obligations to the Province under the funding agreements. The Minister of National Revenue rejected the City's position; however, the Tax Court of Canada agreed with the City based on the Des Chenes (Commission Scolaire), [2002] G.S.T.C. 11 (F.C.A.) and Lethbridge (County), [2006] G.S.T.C. 16 (T.C.C.) decisions which suggested that there was a contractual relationship between the City and Province and that the funding represented consideration for a taxable supply of building a transit system.

The subsequent Federal Court of Appeal allowed the Minister's appeal, thus rejecting the argument that the City was the Province's "de facto" general contractor of a transit facilities system.

The Supreme Court upheld the Federal Court of Appeal's decision based on the view that the transit facilities were constructed, acquired and made available in order to

supply a municipal transit service to the Calgary public. Thus there was only one supply: the supply of an exempt municipal transit system. Although the City entered into funding agreements with the Province of Alberta, it was determined that there was no supply by the City of any goods, services or other benefit to the Province. Since the supply of a municipal transit service is exempt, the City was not entitled to any ITCs for the GST paid on the construction costs.

Although many indirect tax practitioners anticipated that the City of Calgary decision would deal with the difficult issue of whether grants/subsidies are viewed as consideration for a supply, instead the Supreme Court focused on the issue of single versus multiple supplies. This is an important reminder that when examining the indirect tax consequences under various funding agreements that the “consideration for a supply” analysis should first start with the question, what is the supply?

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