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OCT 16 2018

Case Number: 189816

Attention: M. Lee Stratton

Dear Mr. Stratton:

Subject: GST/HST RULING
Ontario Tire Stewardship Payments to Tire Processors

Thank you for your letter of February 21, 2018, concerning the application of the goods and services tax/harmonized sales tax (GST/HST) to payments made by Ontario Tire Stewardship (OTS) to registered tire processors.

Although a ruling was provided in April 2012 in regards to payments made by OTS to tire processors (case number 124343), through OTS's previous representative, we understand that OTS revised its Used Tires Program effective October 1, 2014 and that the legislative framework governing OTS's Used Tires Program was amended in November 2016. As well, the Tax Court of Canada (TCC)'s decision in *Stewardship Ontario v. Her Majesty the Queen* 2018 TCC 59 must be taken into consideration in evaluating the GST/HST consequences of the payments made by OTS to tire processors.

The HST applies in the participating provinces at the following rates: 13% in Ontario; and 15% in New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island. The GST applies in the rest of Canada at the rate of 5%.

All legislative references are to the *Excise Tax Act* (ETA) unless otherwise specified.

STATEMENT OF FACTS

We understand

1. OTS was designated under *Ontario Regulation 84/03* as the industry funding organization for purposes of the waste diversion program for used tires. As such, in accordance with subsection 29(1) of the *Waste Diversion Act* (WDA), it is responsible along with Waste Diversion Ontario to implement and operate the Used Tire Program in Ontario.
2. The Ontario Tire Stewardship Used Tires Program Plan (Program Plan) dated February 27, 2009 sets out the plan for dealing with used tires from collection to processing.
3. Section 4.8 of the Program Plan deals with the incentives to be paid to in-province registered tire processors and provides that a Processor Agreement will spell out performance guarantees and serve as the basis for the commercial relationship between OTS and the Processor.
4. The Processor Agreement (Agreement) that came into effect on and after October 1, 2014 and which is entered between OTS and a Processor includes the following terms:

i. The Recitals provide that

- A. OTS has been designated as the industry funding organization under the [WDA] to be responsible for the collection and environmentally responsible recycling of Used Tires¹;
- B. The Processor wishes to operate as a processor and/or recycler of Used Tires, to receive delivery of Used Tires from Registered Haulers², and to receive Incentives³ in accordance with the Plan;
- C. The Processor has been approved by OTS as an approved processor in accordance with the Plan; and
- D. The purpose of this Agreement is to set out the terms and conditions under which the Processor will operate as an approved processor under the Plan.”

ii. As set out in paragraph 2.1(d), the Processor is obligated to, “recycle Used Tires received by it, specifically by:

¹ “Used Tires” are defined in paragraph 1.1(qq) to mean tires or parts of tires that have not been refurbished for road use or that are not suitable for their intended purpose and refers only to the body of the tire.

² “Registered Hauler” is defined in paragraph 1.1(ff) and is an entity that has entered a Hauler Agreement with OTS and picks-up eligible Used Tires from Registered Collectors and delivers them to the Processor.

³ “Incentives” are defined in paragraph 1.1(q) to mean any or all of the Collection Incentives, Transportation Incentives, and Processing Incentives (these incentives are payments made by OTS in respect of the collection, transportation and processing of Used Tires). It is noted that Transportation Incentives are paid by OTS to the Processors who then pay Haulers directly (see fact 4.vi.).

- (i) accepting delivery of, at no cost to Registered Haulers, Used Tires delivered by Registered Haulers;
 - (ii) processing all Used Tires received from Registered Haulers and not Culled by the Processor into TDP [Tire Derived Products]; and
 - (iii) selling processed TDP on to end users;
- all in accordance with the Plan.”

- iii. Section 2.4 provides that the Processor is required to post a performance bond in favour of OTS which must remain in effect during the term of the Agreement. Under section 7.5, OTS may make a claim against the bond within 30 days’ written notice to the Processor following an act of default which results in OTS paying an Incentive which should not have been paid or OTS incurring any costs which it would otherwise not have incurred.
- iv. Section 5.1 provides that OTS will allow or facilitate the delivery of Used Tires by Registered Haulers to the Processor.
- v. Section 5.3 provides that OTS shall pay Incentives to the Processor within 35 days of receipt by OTS of the completed claims documentation as specified by OTS.
- vi. Paragraph 6.2(b) provides that the Processor may in its own right enter into any number of contracts with Registered Collectors and/or Registered Haulers for the pick-up and delivery of Used Tires and may provide for payments by or to the Processor. It has been provided that, commencing October 1, 2014, program changes allow a Processor to arrange with Registered Haulers to acquire their own supplies of Used Tires. In this regard, a Hauler and Processor agree on their own prices for services provided by the Hauler (i.e., OTS is not involved in the pricing) and the amount paid to the Hauler may be more or less than the Transportation Incentive paid by OTS to the Processor.
- vii. Section 6.4 states, “OTS reserves the right at any time to reduce, refuse to pay or recover all or part of Processing Incentives in respect of TDPs sold or delivered to a person situated outside of the Province of Ontario... which may, in the opinion of OTS, result in a violation of the laws of Canada or the export jurisdiction or which may result in the possibility of administrative or legal action against OTS, Waste Diversion Ontario or the Governments of Ontario or Canada or the possibility of trade sanctions against TDPs originating from Ontario...”
- viii. Section 10.1 states, “Processor acknowledges and agrees that at no time shall OTS take possession of any Used Tires or TDP and that OTS shall not, in any event, be liable under any theory of liability to Processor, the previous owner(s)...for any damages,

losses, expenses, liabilities and/or other amounts... arising out of or related to any loss, improper use, improper culling, improper transfer or sale, improper disposal or environmental degradation resulting, proceeding or connected in any way to Used Tires or TDP.”

5. The WDA was repealed pursuant to section 75 of Ontario’s *Waste Diversion Transition Act, 2016* (WDTA), an act which came into effect on November 30, 2016.
6. Subsection 9(1) of the WDTA provides that the Used Tire Program will continue until it is wound up, which you have confirmed will occur at the end of 2018.
7. Subsection 15(2) of the WDTA provides that OTS is continued and is designated as the industry funding organization for the (continued) waste diversion program for used tires.

RULING REQUESTED

You would like to confirm that the payment of Transportation Incentives and Processing Incentives paid by OTS to tire Processors are not consideration for a supply.

RULING GIVEN

Based on the facts set out above, we rule that the Transportation Incentives and Processing Incentives paid by OTS to tire Processors are consideration for a taxable supply of tire recycling services and are, therefore, subject to the GST/HST.

Although the WDA was repealed November 30, 2016, as OTS is continued and its program plans will continue until they are wound-up at the end of 2018, the ruling set out above will apply until the end of 2018, assuming there are no other amendments to the Used Tire Program or the legislative framework thereby impacting on OTS or the Used Tire Program.

EXPLANATION

Consistent with the guidelines set out in *TIB-067, Good and Services Tax Treatment of Grants and Subsidies*, determining whether a transfer payment is consideration for a supply for purposes of the ETA requires determining whether a direct link exists between the transfer payment provided by a grantor and a supply made by a grantee. A direct link will be established where the grantee makes a supply to the grantor or to a specified third party in return for the payment. In this case, it must be determined whether a direct link exists between the payment of the Transportation and Processing Incentives by OTS to tire Processors and a supply made by the Processors.

The TCC decision in *Stewardship Ontario v. Her Majesty the Queen* provided that Stewardship Ontario (SO), in carrying out its Municipal Hazardous and Special Waste (MHSW) Program, provided taxable supplies of waste diversion/recycling services. As stewards that are commercially connected to the MHSW were required to pay the costs of SO's MHSW Program pursuant to Ontario's WDA, the TCC concluded that these stewards were the recipients of those supplies.

In applying the TCC's decision in *Stewardship Ontario v. Her Majesty the Queen* to OTS's activities as set out above, OTS can also be viewed to be making taxable supplies of tire recycling services to commercially connected tire stewards. By taking the view that OTS is making these taxable supplies to tire stewards, where OTS contracts to pay a tire Processor to undertake the actual recycling of Used Tires, OTS is acquiring these services as an input into the making of taxable recycling services to the stewards. As such, the payment of incentives by OTS to a Processor is directly linked to the supply of the recycling service made by the Processor to OTS. Therefore, the payment of the Transportation Incentive and the Processing Incentive are consideration for a taxable supply of recycling services and are subject to the GST/HST.

In accordance with the qualifications and guidelines set out in GST/HST Memorandum 1.4, *Excise and GST/HST Rulings and Interpretations Service*, the Canada Revenue Agency (CRA) is bound by the ruling(s) given in this letter provided that: none of the issues discussed in the ruling(s) are currently under audit, objection, or appeal; no future changes to the ETA, regulations or the CRA's interpretative policy affect its validity; and all relevant facts and transactions have been fully and accurately disclosed.

If you require clarification with respect to any of the issues discussed in this letter, please call me directly at 613-670-7938. Should you have additional questions on the interpretation and application of GST/HST, please contact a GST/HST Rulings officer at 1-800-959-8287.

Yours truly,



Brent Fleming
Government Sectors Unit
Public Service Bodies and Governments Division
Excise and GST/HST Rulings Directorate