GST ON THE SALE OF MEDICAL MARIJUANA

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Legislation

- Under the *Excise Tax Act* (“ETA”), a supplier in Canada is required to collect and remit GST on the sale of certain goods, unless it is a zero-rated or exempt supply.

- Generally, the sale of prescription drugs for human consumption is zero-rated.

Legislation

- The supply of various federally controlled drugs under the *Narcotic Control Regulation* is zero-rated throughout the production and distribution chain.

- *Exception to the zero-rating rule*: GST will apply to a federally controlled drug sold to a consumer with neither a prescription nor an exemption by the Minister of Health.

Background of Court Case

Hedges v. R., 2014, (Tax Court of Canada, "TCC")

- Gerry Hedges grew marijuana (branded "Po-Chi"), and sold it to the BC Compassion Club Society ("BCCS"), which were then sold to its members for their personal use.
- Hedges did not collect or remit GST on his marijuana sales from 2007 to 2009.
- The CRA reassessed those years on the basis that his sales were taxable supplies (and therefore subject to GST); they assessed him $15k for uncollected GST (including interest and penalties) on those sales.
- Hedges disagreed with CRA's position and appealed to the TCC.

Tax Position of Taxpayer

- The ETA zero-rates the sale of marijuana as it is a drug listed under the *Narcotic Control Regulations.*

- The relevant exception to this rule should not apply as the term "consumer" in the legislation refers to a *generic* consumer and not a selected group of individuals that require the drug for medical purposes. That is, marijuana is not the same as an over the counter drug.

- The sale of marijuana under the *Medical Marijuana Access Regulations* ("MMAR") requires a person to have an Authorization to Possess ("ATP").

- Therefore, as marijuana *cannot* simply be sold to *any* consumer without a prescription or exemption, the sale of marijuana should be zero-rated, and GST should not apply.

Tax Position of CRA

- Marijuana is not a “drug” within the meaning of the ETA as it is not “approved” in Canada. Therefore, it is not zero-rated.

- MMAR permits *some* consumers to purchase it once an ATP is granted to them. Since ATP is not a prescription, marijuana can technically be “sold to a consumer without a prescription”.

- Therefore, even if it could be argued that marijuana is a drug, the relevant exception would apply to prevent the drug from being zero-rated. GST should apply.

In other words…

- How to interpret the *exception* portion of the rule?

- **Taxpayer's interpretation**:
  - "Is it possible for the *general public* to purchase the drug without a prescription or exemption?"
  - If yes, then GST applies. If not, GST does not apply.

- **CRA interpretation**:
  - "Is it possible for *any type* of consumer to purchase the drug without a prescription or exemption?"
  - If yes, then GST applies. If not, GST does not apply

Conclusion of the Court

- Medical marijuana is sold or represented for use in the treatment of disease. Therefore, the court determined marijuana is a "drug" within the meaning of the ETA.

- Because marijuana is available from Health Canada under the MMAR and technically "it may be sold to a consumer without a prescription", the sale of medical marijuana is not zero-rated. In other words, as long as *some* consumers can purchase medical marijuana legally without a prescription, that meets the exclusion from zero-rating rules.

- Conclusion: Without a prescription for the purchase of medical marijuana, the sale should be taxable. This conclusion was re-affirmed under the Federal Court of Appeal [Hedges v. R., 2016 FCA].

What's Next?

- Counsel for Hedges sought appeal to the Supreme Court of Canada but the request was denied.

- The FCA in Hedges indicated that the relevant legislation is confusing – "the language is oblique and awkward".

- Given the rise of the industry, it is likely that the legislation will be revised to add clarity on the intention of Parliament on the application of GST on marijuana.