

## Consultation sur les planifications fiscales agressives

Titre du mémoire : Comment on the Paper « Aggressive Tax Planning »

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Minister :

In January 2009, you published a working paper entitled « Aggressive Tax Planning », and invited comment on a proposed program to combat what is termed “aggressive tax planning”. Brendan Moore & Associates Ltd. (« Brendan Moore ») is deeply concerned about some aspects of the program, specifically the lack of definition of particular terms used in the Ministry’s discussion paper and the potential for abuse by officials of the MRQ as a result.

Your paper addresses a target group which you feel is exceptionally susceptible to particular tax planning schemes, yet no such group was identified in the paper. Additionally, the targeted tax planning was identified by reference to “transactions” undertaken by this target group. Again, no definition was provided of what would constitute a “transaction” that would concern your Ministry. However, from a sales tax perspective, the preamble to the paper identified the circumstances of three specific interpretations as examples.

In each of these cases, it should be noted that no transaction was undertaken by the taxpayer concerned. Rather, an interpretation was applied to routine transactions of the type that the taxpayer represented would be expected to enter into (the purchase of utilities by a manufacturer, the provision of school busing by a school authority and entering into construction contracts by a municipality), none of which were entered into with the intention of contriving a favourable tax position. Each of the interpretations taken was established retroactively after the normal business activities had been undertaken, and each of the interpretations were within the normal and customary operation of the *Act respecting the Quebec Sales Tax*. The legislation already provides for full recovery of GST and QST where a supply has been acquired for use or consumption in the course of the taxpayer’s commercial activities, or for the recovery of QST where a taxpayer is engaged in production. All that occurred as a result was that the taxpayer claimed input tax refunds and/or input tax credits that, based on the interpretation in question, it would have been entitled to claim.

It is provided that, for most taxpayers, there is a four-year period in which a taxpayer is permitted to recover an input tax credit or input tax refund for QST paid in the course of its commercial activities. If a taxpayer is not aware of a particular interpretation, or has missed claiming credits to which it is entitled merely through oversight, we would submit that it should be allowed to claim these credits without fear that non-disclosure penalties will be imposed merely because it takes advantage of the four-year period.

Your paper identifies some indicia of the circumstances that might lead to a transaction that would be subject to the disclosure and penalty rules. One is that the presenter of a scheme that your Ministry considers offensive might be remunerated on a commission basis, which may

only be payable upon the success of the scheme in question. Another is that the presenter may insist on the circumstances of the scheme being kept confidential. We respectfully suggest that the circumstances of payment of the taxpayer's advisors are no concern of the Ministry. Many organizations – including major accounting firms and boutique firms – often structure their agreements with their clients on a variable commission basis. The goal is simply to present an alternative to fixed-fee work that minimizes the cost to the taxpayer.

Again, many of these organizations provide nothing more than a retrospective review of the taxpayers records, without counselling entering into any transactions (as, in fact, happened in each of the sales tax issues you present as offensive transactions). Yet, there is no exclusion from your paper for reviews of this nature. Further, several provisions of the federal and Quebec sales tax legislation provide for a certain result upon a certain happening, for example, GST and QST can be recovered from bad debts provided the debt is written off, or a taxpayer may recover GST or QST from a receivable by issuing a credit note containing information that identifies the GST and QST in the amount of the credit. Or, in the simplest case, registrants are only permitted to recover GST or QST when they have the appropriate documentation to support the claim for credit, which may be obtained after the transaction has taken place, but must occur before the claim is made. Each of these circumstances requires a transaction of some kind to correct the deficiency. For example, issuing the credit note is a transaction as such, but the issuance of a credit note would be the normal result of an adjustment of a sale. Yet would issuing a credit note, or writing off of a bad debt, or obtaining, after the fact, the required documentation, be regarded as an offensive transaction? Clearly not, as each is contemplated by the legislation, but your paper provides for no such exceptions.

Our overriding concern is that not only does your paper not address transactions about which you are concerned, but without adequate safeguards, the MRQ will levy penalties for non-disclosure in any case where they uncover a recovery identified by a taxpayer's representative that is remunerated on a commission basis dependant on the success or failure of its work. There is no need for such penalties where the legislation already provides for the potential for reassessment if any adjustment to a taxpayer's records is found to be incorrect or unsupported, and for a punitive rate of interest in addition. It is further our contention that, given the many actions provided by the legislation for retroactive correction of a taxpayer's accounts, it is close to impossible to design a set of circumstances that would capture a transaction as being offensive yet exclude other transactions as being the normal and customary operation of the legislation.

It cannot be the intention of the Ministry to prevent a taxpayer from adopting an interpretation from a pre-existing set of facts that differs from the position that would have applied on filing the return. A taxpayer should always be permitted to question the interpretation of a fiscal statute without fear of penalties for considering whether an alternative construction may exist. It should be noted that the courts have supported revised interpretations by taxpayers – see the *Commission Scolaire des Chenes* case in which the courts approved an interpretation that your Ministry apparently now identifies as offensive.

It is our view that your Ministry is attempting to legislate away a taxpayer's right to compute its sales tax credits by imposing an implied threat of penalty in cases of normal compliance with

the legislation that would intimidate a taxpayer into deliberately not reviewing its past accounting practices or into not availing itself of its statutory entitlements or even into not dealing with certain advisors. Further, the Ministry cannot insist that it has the only reasonable interpretation of the application of the Act, to the exclusion of any question by taxpayers and their advisors. The requirement for advance disclosure is clearly inflammatory and unnecessary. It is submitted that the legislation already provides adequate safeguards without the need for these penalties, and that they should not be applied to transactions to which the *Act respecting the Quebec Sales Tax Act* already has application.

Thank you for your consideration of this submission.

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