

September 25, 2017

PAY YOUR SALES TAXES!

Most agreements will address whether there is an obligation to pay HST or GST in addition to amounts specified in the agreement. But what if an agreement is silent on this point? Recently, the Ontario Superior Court of Justice addressed whether HST was payable when the agreement did not provide for it.

OMISSION OF HST IN THE AGREEMENT

In *Re TravelBrands Inc.*, shortly after leasing office space the tenant experienced financial difficulties and sought protection under the *Companies' Creditors Arrangement Act* (the "CCAA"). As part of the CCAA proceeding, the tenant disclaimed the lease and negotiated a settlement with the landlord for certain amounts of rent owing under the lease.

Pursuant to the settlement agreement, the parent company of the tenant agreed to pay the landlord \$5 million in monthly payments over 10 years, but the agreement failed to specify whether the monthly amounts included HST. (During the negotiations, the parties had not discussed the HST.)

LANDLORD SOUGHT TO IMPOSE HST

The first two payments made by the parent company included additional amounts for HST. However, in subsequent payments, the parent company refused to pay HST on the basis that it was not contemplated by the terms of the settlement agreement.

The landlord made an application to the Ontario Superior Court of Justice for an order declaring that

HST be added to all settlement payments. The Tenant opposed the application, arguing that since other sections of the settlement agreement provided for payment of HST on top of certain amounts, the fact that the wording had been omitted from the settlement amount evidenced that the parties intended to exclude it.

THE DECISION

In deciding the issue, the Court examined a number of principles of contract interpretation. It explained that a contract is to be interpreted:

- as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- by determining the intention of the parties in accordance with the wording used in the document and based on the "cardinal presumption" that the parties intended what they said;
- with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and
- to the extent there is any ambiguity, in a fashion that accords with sound commercial principles and good business sense

and that avoids a commercial absurdity.

In applying these principles, the Court held that the landlord was entitled to an order declaring HST be added to the settlement payments. In arriving at this conclusion, the Court explained that, just because one section of the settlement agreement included reference to HST, did not mean that HST was to be excluded and not payable under another section.

The Court held that it is common commercial practice to quote the price point or cost of a good or service as excluding HST. In fact, in past dealings between the parties, price points were quoted exclusive of HST and the tenant had not previously raised concerns. The Court explained that in light of these facts, and because it is common practice in the real estate industry to quote rental rates exclusive of HST, the normative regime should apply.

It further held that the parent company's own actions reflected an expectation that the settlement payments should include an

additional HST payment, since the first two payments had added HST.

Finally, because Section 182 of the *Excise Tax Act* deems sales taxes to have been paid with any surrender payment, had the parent company not been obligated to pay the HST amounts in addition to the settlement payment, the landlord would have been shortchanged.

TO AVOID CONFLICT – SPELL IT OUT!

Sales taxes usually apply and are (mostly) revenue neutral as input tax credits.

When drafting any agreement that provides for specified payments, it is helpful to address whether sales taxes are payable in addition to the noted amounts. If an agreement is silent on this issue, a Court may, nevertheless, find that they are owing.

It seems that the old adage that death and taxes are the only two things that are unavoidable, may be true (with respect to surrender payments, at least!).

MARY ANN BADON
416-598-7056
mbadon@dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

JEANNE BANKA
416-597-0830
jbanka@dv-law.com

CANDACE COOPER
416-597-8578
ccooper@dv-law.com

DENNIS DAOUST
416-597-9339
ddaoust@dv-law.com

BITALI FU
416-598-7053
bitalif@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

S. RONALD HABER
416-597-6824
rhaber@dv-law.com

PAETRA KAUFMANN
416-479-4357
pkaufmann@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MIMI LIN
416-597-8493
mimil@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcbain@dv-law.com

JENNA MORLEY
416-597-9225
jmorley@dv-law.com

MARIA MORVAI
416-597-5742
mmorvai@dv-law.com

PORTIA PANG
416-597-9384
ppang@dv-law.com

JAMIE PAQUIN
416-598-7059
jpaquin@dv-law.com

BRIAN PARKER
416-591-3036
bparker@dv-law.com

DINA PEAT
416-598-7055
dpeat@dv-law.com

ALICE PERALTA
416-597-1536
aperalta@dv-law.com

KEN PIMENTEL
416-598-7049
kpimentel@dv-law.com

LUCIA TEDESCO
416-597-8668
ltesesco@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

DANIEL WALDMAN
416-597-9306
dwaldman@dv-law.com

DEBORAH A. WATKINS
416-598-7042
dwatkins@dv-law.com

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward.

The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.