

GST/HST Update (2017) and Recent Tax Case of Note

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Overview

- Bill C-29
 - Closely related party election
 - Alternative arguments by Minister
- GST/HST Rulings (Online)
- Tax Case of Note (*2252493 Ontario Limited v. HMQ*)

Bill C-29

- Received royal assent on Dec.15, 2016.
- Closely Related Election
 - “strengthening the test for determining whether two corporations, or a partnership and a corporation, can be considered closely related”;
- Alternative Arguments
 - “clarifying that the CRA and the courts may increase or adjust an amount included in an assessment that is under objection or appeal at any time, provided the total amount of the assessment does not increase.”

Closely Related Person Election

- Election allows members of a closely related group of corporations, or partnership of corporations, to eliminate the need to charge or collect GST/HST on intercompany supplies.
 - Streamlining of GST/HST compliance
 - Improve cash flow within a group on a on-going basis
 - Relief for certain re-organizations and related transactions.
 - E.g., ss. 55 butterfly transactions; “temporary member”.

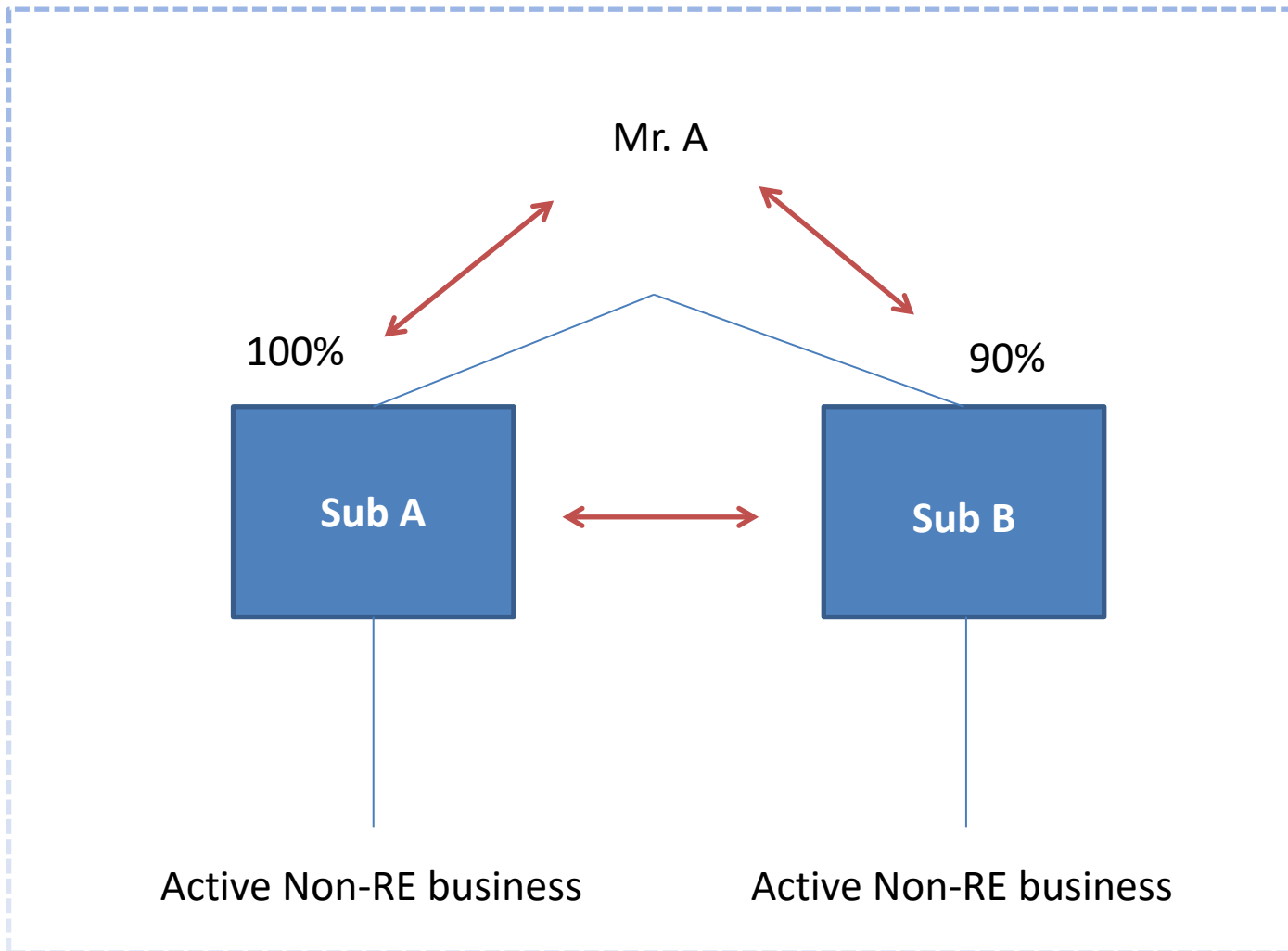
Budget 2016 –Closely Related Election

- Budget 2016 proposed an amendment to the closely related test
 - Test only met where nearly complete voting control exists.
 - A corporation or partnership of corps must also hold and control 90 per cent or more of the votes in respect of every corporate matter of the subsidiary corporation (with limited exceptions) to be closely related.
- New requirements will be effective on the day that is one year after Budget Day – **March 22, 2017.**
- “Closely related test” became effective as of March 23, 2016 to determine whether the closely related test is met in respect of elections under sections 150 and 156 of the ETA.
 - For elections filed after March 22, 2016 to be effective as of March 23, 2016.

Basic Requirements

- (a) GST/HST registrants,
- (b) engaged exclusively in “commercial activities”,
- (c) Canadian resident corporation or Canadian partnerships, or a combination of each, and
- (d) "closely related" for GST/HST purposes.

Closely Related Test - FAIL



Changes to Closely Related Test

- Amendments to ss. 123(1), 128(1), s.156 and *Closely Related Corporations (GST/HST) Regulations*
- Reason:

“due to the complexity of share capital structures, it has been suggested that a parent corporation or partnership could be considered to be closely related to a subsidiary corporation even if it lacks nearly complete voting control over the subsidiary corporation.”
- Introduction of new defined term: “qualifying voting control”

Closely Related Test

- ***Qualifying subsidiary*** of a particular corporation means another corporation in respect of which the particular corporation holds qualifying voting control and owns not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the other corporation ...

Closely Related Test

- S. 128(1) – **Closely Related Corporation** – ... a particular corporation and another corporation are closely related to each other at any time if at that time
 - (a) qualifying voting control in respect of the other corporation is held by, and not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the other corporation are owned by, ...

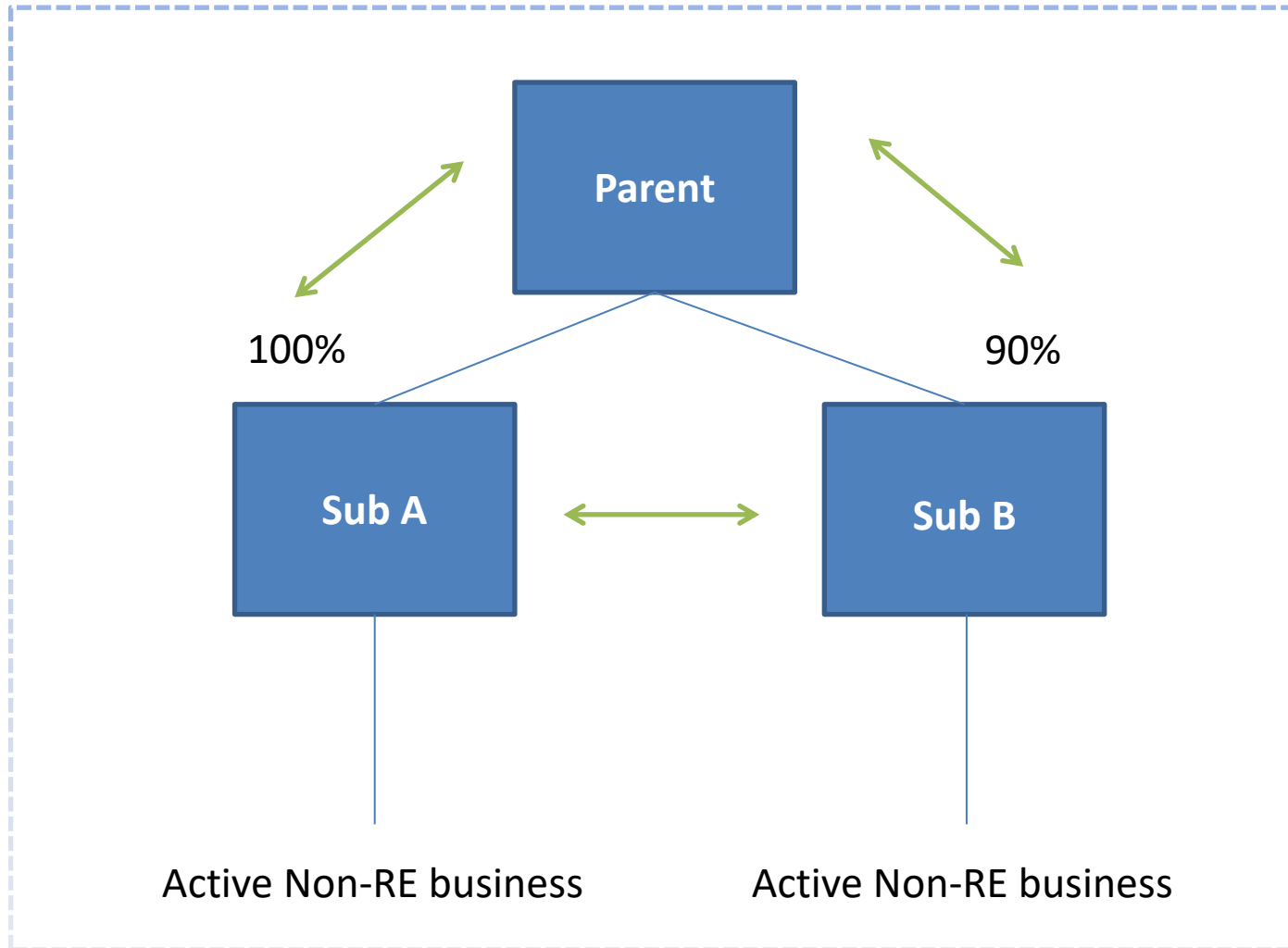
Closely Related Test

- **NEW ss. 128 (1.1)** ... a person or a group of persons holds qualifying voting control in respect of a corporation at any time if at that time
- **(a)** the person, or the members of the group collectively, as the case may be, own shares of the corporation to which are attached not less than 90% of the shareholder votes that may be cast in respect of each matter, other than a matter ..
 - Exceptions for certain corporate shareholder rights provided by statute ...
 - E.g., Class of fixed-value shares with no vote (pref shares) are OK. Tricky with valuation.

Closely Related Test

- Joint Election under ss. 156(2)
 - RC4616
- Does not apply to:
 - A sale of real property within closely related group
 - A supply of property or service that is not acquired by recipient for use or supply exclusively in commercial activity.
 - Individuals or trust

Closely Related Test



Bill C-29

Alternative Arguments

- **Alternative Arguments in Support of Assessment**
 - Minister may raise “alternative” arguments on objection or appeal from an assessment
- **New ss. 298 (6.1):**
 - The Minister may advance an alternative basis or argument in support of an assessment of a person, or in support of all or any portion of the total amount determined on assessment to be payable or remittable by a person under this Part, at any time after the period otherwise limited by subsection (1) or (2) for making the assessment unless, on an appeal under this Part ...

Alternative Arguments

- New amendment is response to FCA in ***HMQ v. Last*** (2014 FCA 129):
- *Last* held that: “while the basis of an assessment can be changed after the expiration of normal reassessment period (4 yrs), each source of income must be considered in isolation and the amount of the assessment in respect of any particular source of income cannot increase.”

Alternative Arguments

Example

- CRA completes a GST/HST audit of Mr. X and assesses him for unreported GST/HST of \$500,000 on the sale of real property and \$0 GST/HST for sale of Widgets.
- Mr. X files a Notice of Objection.
- At the CRA appeals stage, the appeal officer determines the sale of real property was not subject to GST/HST
- Instead, finds that Mr. X should have charged GST/HST of \$350,000 on his sale of Widgets during the same reporting period.

Alternative Arguments

Example continued

- *Last* arguably stood for the authority that CRA could not advance a new basis for the assessment beyond the 4 year limitation period.
- Amendments now “clarify” that CRA may assess in this way, so long as the total GST/HST amount doesn’t increase.
 - Mirror amendments to the ITA.
- Come into force on the day on which this Act receives royal assent (i.e., December 15, 2016),
 - does not apply in respect of appeals instituted on or before that day

GST/HST Ruling or Interpretation

- CRA “Submit documents” service recently updated to allow representatives to electronically submit a written request for a GST/HST ruling or interpretation and/or supporting documentation.
- GST/HST ruling is a formal written letter that provides the CRA position on how the relevant provisions of the *Excise Tax Act* apply to a clearly defined fact situation or transaction.
 - GST/HST Memorandum 1.4, Excise and GST/HST Rulings and Interpretations Service.
- Require: all the relevant facts of a transaction or series of transactions and all supporting documents have been provided. **A ruling is binding on the CRA.**

Tax Case of Note

2252493 Ontario Limited

- Released January 31, 2017.
- Issue: HST on Sale of Real Property
 - HST Amount of \$416,881.83
- Dealt with Agency in the GST/HST context
- Cautionary note to Tax Advisors

Result

- TCC concluded that Vendor was required to charge, collect and remit GST/HST of ~\$400K on its sale of Real Property.
- The Property @ 840 Yonge St. in Toronto sold for \$3.2M
- Significant tax risk

Facts

- 2252493 Ontario Limited (the Appellant) was supplier of real property
- APS signed on October 29, 2011
- “Buyer” was Mayling Holding Inc. (“Mayling”)
- PP: \$3.2M; payable in full on closing (Aug. 29, 2012)
- APS included standard OREA language re HST...

Standard HST Clause

“If the sale of the property (Real Property as described above) is subject to Goods and Services Tax (GST) or Harmonized Sales Tax (HST), then such tax shall be in addition to the Purchase Price. The Seller will not collect GST or HST if the Buyer provides to the Seller a warranty that the Buyer is registered under the Excise Tax Act (“ETA”), together with a copy of the Buyer’s ETA registration, a warranty that the Buyer shall self-assess and remit the GST or HST payable and file the prescribed form and shall indemnify the Seller in respect of any GST or HST payable. The foregoing warranties shall not merge but shall survive the completion of the transaction. If the sale of the property is not subject to GST or HST, Seller agrees to certify on or before closing, that the transaction is not subject to GST or HST. Any HST on chattels, if applicable, is not included in the purchase price.”

Facts

- On Closing, Aug. 29, 2012, lawyer for purchaser directed “deed and title” to be registered in the name of *840 Yonge Street Holdings Inc. (“840 Holdings”)*
 - *All other closing docs also in 840 Holdings*
- Registered on August 30, 2012 in name of 840 Holdings.

Facts

- Vendor's lawyer did not account for HST on sale. Believed that 840 Holdings was the recipient.
 - Referred to Statutory Declaration document that included HST # and registration for 840 Holdings.
- 840 Holdings was required to self-assess and remit HST

Facts

- On Feb 15, 2013, Appellant was reassessed by the CRA.
- After the reassessment, 840 Holdings provided documents to CRA that the actual “recipient” of the Real Property was not 840 Holdings but another company called Bazis YYC Inc.
 - 840 Holdings purchased as trustee or agent on behalf of Bazis YYC
 - Bazis YYC was a GST/HST registrant
- Importantly, Bazis YYC nor 840 Holdings existed at the time that the APS was signed.

Relevant Provisions

1) Collection of Tax

- ss. 221(1): Every person who makes a taxable supply shall collect the tax payable by the recipient in respect of the supply
- ss. 221(2) – exception: A supplier who makes a taxable supply of real property by way of sale where the recipient is a registrant.

2) Self-Assessment on Acquisition of RP

- ss. 228(4): Where tax is payable by a person in respect of a supply of real property and the supplier is not required to collect the tax .. (a) where the person is a registrant and acquired the property for use or supply primarily in the course of commercial activities

Relevant Provisions

3) “Recipient”

- ss. 123(1): recipient of a supply of property means .. (a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration.

4) Timing of Supply

- ss. 133: where an agreement is entered into to provide property ... (a) the entering into of the agreement shall be deemed to be a supply of the property or service made at the time the agreement is entered into..

Appellant Arguments

- Bazis YYC was beneficial owner, paid the PP, GST/HST registrant *on closing* + self-assessed and paid the HST
 - i.e., Mayling, 840 Yonge were agents or trustee of Bazis YYC
- CRA Admin (GST Memorandum 8.1)
 - “Even though the agent may appear to be the recipient of the supply as the agent is identified on the invoice as the customer, it is the principal who is ultimately liable to pay the consideration thereby making the principal the recipient of the supply”
 - Extensive CRA Admin and case law on Agency

Respondent's Arguments

- Mayling was, during the entire period from execution until, and at, the closing date, the party liable under the APS. As such, it was the recipient.
- “840 Holdings, Bazis YYC or Plazacorp were recipients is not legally possible; firstly, none of them were parties to the APS and none became liable under the APS”.
- The APS contains a paramountcy clause over ancillary documents and confidentiality provisions as between the two parties.
- At the time of the APS execution, neither Bazis YYC or 840 Holdings existed. Therefore no agency.

TCC Decision

- First sentence from Bocock, J.:
 - “At the time the APS was executed, neither Bazis YYC nor 840 Holdings existed. Factually, neither of the purported agent or bare trustee nor principal or Beneficial Owner existed when the APS was executed.”
- S. 133 deals with the timing (at time APS is signed)
 - “[i]n conclusion, trusts (even bare ones) and agencies (however cursory) are not aspirational constructs formed by imprecise intention or inchoate plans ... This is especially true when the time for determination of the recipient and obligant is fixed: the time the contract for supply arises and the closing date. Section 133 of the Act makes this clear.

Other factors

- Something more concurrent with closing than a one page unilateral direction regarding title is necessary to dislodge the countervailing, mutual agreement, patent facts, logical conclusions and legal obligations in the APS.
- A one or two page assignment and assumption agreement, a simple declaration of trust or co-execution of the APS as between Mayling and 840 Holdings
- Current and accurate disclosure of the Beneficial Owners as obligants would also have gone a long way

Conclusion

- Mayling remained the purchaser until closing and, as such, obligated to pay the consideration.
- Satisfied the definition and conditions for the recipient to collect and remit the HST under the ETA provided Mayling was a registrant. It was not.
- Therefore both the ETA and APS required the Appellant to collect and remit the HST. It did not.
- The reassessment is therefore correct.

Lessons

- Who is the recipient?
- Who is ultimately liable to pay?
- Written Agency Agreement? Bare Trust Agreement?
- Does the beneficial owner exist at the time of signing APS?
 - “a company to be incorporated” ...
- Are they a GST/HST registrant?

GST/HST Diligence is critical

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Background

Bobby Solhi is a Canadian Tax Partner and co-founder of TaxChambers LLP in Toronto, Canada.

Areas of Practice

Bobby is frequently recommended to assist with GST/HST and commodity tax matters for domestic and international clients. He also has extensive experience in implementing tax efficient ownership structures and reorganizations involving the use of trusts, partnerships, and corporations.

Bobby has a very active tax controversy practice and has appeared before the Tax Court of Canada and Federal Court of Appeal while the vast majority of cases have been settled favorably prior to a hearing.

Publications

Bobby is a regular contributor to *Wolters Kluwer Tax Newsletter Series* and *Tax Topics*, and *CTF's Tax for the Owner Manager*, and is an expert contributor to *LexisNexis Practice Advisor* where he develops modules on tax law for other lawyers.

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