CANADIAN TAX Highlights

Agent, Principal, or Broker?

The TCC informal procedure decision in *Dick Irwin* illustrates the GST's complex handling of agents and the potential traps. Generally, a person acting on his or her own account--as principal--is obliged to charge, collect, and remit the GST; an agent may be obliged to collect the tax, but the actual GST accounting is left to the principal. But there are some important exceptions.

Richard Irwin was the vice president of the Dick Irwin Group (DIG), a yacht broker involved in the resale of pre-owned yachts. Through DIG, Mr. Irwin agreed to sell vendors' boats; DIG was authorized to contract and sell for a specified price, and to use due diligence to find purchasers for the vessels, boarding and showing the vessels to prospective purchasers. At the bottom of the purchase and sale agreement form, in the area signed by the vendor, DIG's commission was referred to as "paid to the Broker as my/our agent."

The CCRA assumed that DIG was selling the vessels as an agent on behalf of the owners, who were not required to collect GST on the sales, probably because they were not used in commercial activities, or were otherwise small suppliers. Excise Tax Act section 177 deems, in these circumstances, a taxable supply to exist between the agent and the ultimate purchaser: the agent must charge tax to the purchaser on the full sales price even though the principal acting directly would not. The CCRA assessed DIG for underreported GST of $106,622.29, plus penalty and interest. Was DIG the vendors' agent? The TCC concluded, on the first principles of agency law, that DIG was not the sort of agent contemplated by section 177, but was a broker, a more restricted form of agency. Citing Fridman's *Law of Agency*, the TCC noted that brokers are agents that are not given possession of goods or documents of title, and though they may negotiate sales, they are not generally expected to sell in their own name. Section 177 "describes a person who 'is making the supply on behalf of the principal,' . . . not . . . a broker." A section 177 agent's collecting of tax is "perfectly logical respecting an agent who has possession of the goods and receives the payment of consideration for the sale of goods. It is not logical respecting a broker such as [DIG] who is not 'intrusted' to fix terms, to have possession, to receive payment for, and to execute a transfer of the goods. . . . In other

words, a broker is not an agent within the meaning of [section] 177 . . . because he does not make a supply."

The decision may be logically sound, but it adds yet another layer of complexity to the treatment of an agent for GST purposes. The tax policy underlying section 177 is not clear. Under the old rules, if a registered but undisclosed agent sold goods on behalf of an unregistered principal, the purchaser may have viewed the undisclosed agent as a registered vendor that failed to charge and collect tax. Section 177 may have been intended to remove this confusion and require all agents to collect tax. *Dick Irwin* does not disturb that putative tax policy, because the broker is always disclosed, but it makes broker situations a bit more complex for taxpayers and practitioners. It is also worth noting that section 177 is aimed only at agents selling tangible personal property, and does not apply to sales of real property or services; other special rules also exist for auctioneers.

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