

AHSC CHAIRS AND ADMINISTRATORS' MEETING **November 17, 2014**

HST UPDATE

Representatives of OMA Legal, Thorsteinssons Tax Lawyers, and Ernst and Young attended the meeting to address questions.

BACKGROUND

The Ottawa Hospital Academic Medical Organization (TOHAMO), recently requested clarification from the Canada Revenue Agency (CRA) as to whether HST applied to payments made in accordance with the Alternate Funding Plan (AFP) agreements.

On September 18, 2014 CRA provided a ruling and technical interpretation to TOHAMO.

The **ruling** concluded that:

- 1) Payments from the Ministry of Health and Long-Term Care (MOHLTC) to TOHAMO are **not** subject to HST; and
- 2) Payments from TOHAMO to various practice plans are **not** subject to HST.

While the rulings are specific to TOHAMO, it can be assumed that CRA would reach the same conclusion for all payments made under agreements that follow the 2012 AHSC AFP Template Agreement.

Note: OMA and MOHLTC have been working on the updated language for all AFP agreements.

TECHNICAL INTERPRETATIONS

The CRA also provided an **interpretation** on HST implications relating to the AFP funds received by the practice plan from TOHAMO and subsequently paid to physicians or their medicine professional corporations (MPC). The **interpretation is not conclusive** but does provide some guidance on how HST rules are likely to apply in certain fact situations.

1) Application of HST to AFP Funding Provided by TOHAMO Under an Innovation Fund Project

CRA had not been provided with the details of the Innovation Fund terms of reference and declined to rule on the HST status of these payments.

A submission to CRA on behalf of TOHAMO to obtain a ruling that an amount paid as Innovation funding is also grant or subsidy funding with no HST consequences is being prepared.

2) Application of HST to AFP Funding Paid to Physicians and Medical Corporations by a Practice Plan

CRA interpretation suggests “HST would likely apply where a supply of academic research or administrative services are provided to a hospital, university or third party through a payment of AFP funds by the practice plan to the physician or MPC”.

In effect, CRA assumes the practice plan is the end recipient of the transfer payment, and no longer views the payment from the practice plan to the physician or MPC as a transfer.

Distribution of funds from the practice plans is governed by the terms of their agreements.

SUMMARY

Good news for academic physicians is the ruling provides clarity as to the treatment of AFP funding received by the practice plans and there should be no exposure to practice plans for failure to have collected HST on this funding.

Request for a ruling on the distribution of AFP Innovation Funding will be shared with all AHSC governance organizations.

There could be HST consequences to the distribution of AFP funds by the practice plans to individual physicians or their MPCs, and it is recommended each practice plan work with professional advisors to review how funds are distributed and whether it could be viewed as a supply of services. Some general guidelines were presented for each type of entity.

IMPLICATIONS TO NOAMA AND THE LEGS

- 1) Applicability of the rulings to NOAMA under the new 2012 AFP boilerplate agreement.
 - Expedite the MOHLTC/OMA follow-up on the outstanding issues in the September 24th letter.
- 2) AFP Innovation Funding Payment Interpretation
 - No immediate action required.
 - Await the results of the TOHAMO ruling request as this is a provincial initiative.
- 3) Applicability of the interpretation regarding the HST implications of the distribution of funding by LEGs to their members.
 - Develop a NOAMA plan to address this on behalf of the LEGs:
 - Consider using Thorsteinssons to review structure and the actual distribution of funds from a sample of the unincorporated LEGs.
 - Provide the facts and request his opinion as to whether to pursue a ruling or interpretation.
 - Currently the NOAMA LEG Agreements include the 3 components recommended in the guidelines of the advisors.
 - Determine timing and content of any communication to be forwarded to the LEGs.

- Consider including some LEG leads on a working group to provide clarity regarding the specifics of their distributions to members
- An alternative is to fund LEGs to have their own professional advisors review this, as recommended to the AHSC Chairs and Administrators. The challenge with this alternative is the varying degrees of knowledge and expertise with this complex issue. In addition, the majority of agreements for unincorporated associations, the structure recommended by the OMA, are similar.

Respectfully submitted,

Dorothy A. Wright
Executive Director

AND WHEREAS the Physicians participate collectively as a local education group under an alternative funding arrangement dated April 1, 2009 (the "AFP") administered by the Northern Ontario Academic Medicine Association ("NOAMA");

AND WHEREAS the Physicians receive AFP funding from NOAMA as a transfer payment in the same manner as the funding transfer from the Ministry to NOAMA;

AND WHEREAS the payment of expenses and the receipt and distribution of AFP funds are made by the Group as the agent for the Physicians;



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Chair, AHSC AFP Governance Organizations
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Academic Medical Organization

12 November 2014

Summary – CRA Ruling/Interpretation on AFP Funding

Dear Dr. Rubin:

This is provided further to our conversation earlier this week and your request that we provide you with our comments concerning the above-noted communication received from the Canada Revenue Agency (“CRA”).

As you are aware, on January 17, 2014, Ernst & Young/Couzin Taylor LLP, with the support of the Ontario Medical Association, Thorsteinssons and the Ontario Ministry of Health and Long Term Care (“the Ministry”), filed an extensive submission on behalf of The Ottawa Hospital Academic Medical Organization (“TOHAMO”) with the GST/HST Rulings and Interpretations Directorate of the CRA. The purpose of the submission was to seek a ruling with respect to the Phase I, Phase III and current AFP Agreements (“the Agreements”) in order to clarify whether funds received under the Agreements are subject to GST/HST.

CRA has now provided a response to our submission and in doing so, has clarified its position on this issue.

As a matter of policy, CRA will provide a ruling only where it considers that it has been provided with all relevant facts or agreements relating to a transaction, and then it will bind itself within the context of those facts or agreements. Where the CRA considers that specific facts or agreements have not been provided, non-binding interpretations will be issued to supply general guidance as to the application of GST/HST in particular circumstances. In this case, the CRA has provided both rulings and interpretations concerning the application of GST/HST to AFP funding. Its conclusions, together with our comments with respect to each, are as follows:

- 1. CRA has provided a binding ruling to confirm that payments made by the Ministry to TOHAMO are not consideration for a supply and are therefore not subject to GST/HST.**

For GST/HST purposes, funding will qualify as a grant or subsidy where there is no direct link between the money transferred and a supply by the recipient of the funding to either the grantor or a specified third party.

The CRA agreed with our submission that the funding provided to TOHAMO in its role as a “governance organization” under the Agreements was not consideration for a supply and that any responsibilities of TOHAMO under the Agreements were only in the nature of accountability measures. It has confirmed that there is no supply made to the Ministry or to another specified person in return for the funding received by TOHAMO, and therefore it considers this funding to be a grant or subsidy and GST/HST will not apply.

2. CRA has provided a binding ruling to confirm that payments made by TOHAMO to a practice plan are not consideration for a supply and are not subject to GST/HST.

We argued in our submission that the funding provided under the Agreements constituted a grant or subsidy and not consideration for any supply, because of the public interest served (the advancement of research and the training of new physicians), and because of the mandate of the Ministry to provide ongoing, long-term support for health care in the province. The CRA concurred with our view that there was no supply made by the practice plans to either the Ministry or TOHAMO in return for the “non-OHIP” funding received under the Agreements. This funding therefore constitutes a grant or subsidy and has no GST/HST consequences.

Similarly, the CRA concluded that the portion of the AFP funding representing a “flow-through” of a portion of the OHIP billings payable to participating physicians does not represent consideration for any supply by the practice plan to either the Ministry or TOHAMO. Accordingly, this portion of the AFP funding also constitutes a grant or subsidy and has no GST/HST consequences.

3. CRA has provided a non-binding interpretation with respect to the application of GST/HST to AFP funding provided by TOHAMO under an Innovation Fund Project.

Our submission made no distinction between Innovation Fund Project funding and other funds provided under the AFP Agreements, and we took the position that all funding under the agreements represented a grant or subsidy.

However CRA concluded that payments made by TOHAMO to practice plans or individual physicians under the Innovation Fund framework were made “pursuant to the terms of an approved Innovation Fund Project Agreement”. Because CRA had not been provided with details about the Innovation Fund terms of reference, (and in fact did not ask for additional details), it declined to rule on the GST/HST status of these payments. Instead it provided general comments to indicate that if, under the terms of a particular Innovation Fund agreement, the funding provided resulted in a particular supply being made to the Ministry, TOHAMO or a third party, the amount paid could constitute consideration for a supply, with GST/HST consequences.

Based upon our preliminary review of the Framework and Guidelines for the AHSC AFP Innovation Fund, we believe that, when it is provided with additional information, the CRA will rule that Innovation Project Funding provided under the Agreements also constitutes a grant or subsidy. Ernst & Young/Couzin Taylor will prepare a further submission to CRA on behalf of TOHAMO in an effort to obtain a ruling that an amount paid as Innovation funding is also grant or subsidy funding with no GST/HST consequences.

4. CRA has provided a non-binding interpretation with respect to the application of GST/HST to AFP funding paid to physicians and medical corporations by a practice plan.

As noted above, the CRA has ruled that AFP funding is a grant or subsidy with no GST/HST consequences to the point where it is received by a practice plan from an academic medical organization (“AMO”). However it has noted that AFP funding is then distributed by a practice plan to individual physicians or medicine professional corporations (“MPCs”) under the terms of individual practice plan agreements. Because it was not asked to provide a specific ruling concerning the application of GST/HST to payments made under those agreements, it declined to rule on this issue.

Instead the CRA issued an interpretation in which it reiterated the principle that, to the extent that AFP funding flowing from the practice plan to its members constitutes consideration for an identifiable supply, the resulting GST/HST consequences would be determined by the nature of the supply:

- Payments that represent consideration for a supply of clinical services by a physician to a patient would be exempt, with no application of GST/HST.
- Payments that can be traced to a particular supply of academic, research or other services being made to a hospital or university, or to another specified third party, could result in the application of GST/HST. The GST/HST result will vary depending on whether the services in question are supplied by a physician who is an employee of the hospital or university, an independent contractor or a “small supplier” who is not required to be registered for GST/HST purposes.
- Payments by a practice plan to one of its members that consist of a portion of a physician’s OHIP approved billings will likely be exempt. Where OHIP-based amounts are “co-mingled” with other AFP funds and used to compensate physicians under a practice plan agreement, the application of GST/HST will be determined on the basis of whether the amount paid represents consideration for a supply, and if so, on the basis of the nature of that supply.

Analysis and Next Steps

We consider the ruling/interpretation issued by the CRA to be good news for academic physicians because it provides comfort as to the treatment of AFP funding received by practice plans – going forward and on a retroactive basis, there should be no exposure to practice plans for failure to have collected GST/HST on this funding.

There could, however, be GST/HST consequences to the distribution of AFP funds by a practice plan to individual physicians or MPCs. It will therefore be important for each practice plan to work with their professional advisors to review the way in which AFP funding is distributed and the extent to which it could conceivably be viewed as consideration for a supply of services to the practice plan, the Ministry or some other identified party.

The application of GST/HST to various sources of practice plan revenues can be complex, and the approach which will produce the most advantageous GST/HST results will vary according to the circumstances. However for purposes of this analysis, practice plans should consider the following with their advisors:

- The CRA’s interpretation does not address the fact that many practice plans are constituted as partnerships. For GST/HST purposes, a partnership is a “person” and everything that is done by a partner “in the course of the partnership’s activities” (as determined by the terms of the partnership agreement) is deemed to be done by the partnership. There will therefore be no GST/HST supply where a partnership distributes AFP or any other funds to a physician who is a partner, in accordance with the terms of the partnership agreement. It will be important for practice plans that are constituted as partnerships to review the terms of their partnership agreements to ensure that they reflect the realities of the way in which funds are distributed and accounted for by the partnership
- There could be GST/HST consequences where a practice plan that is a partnership distributes AFP funding to a non-partner or where a non-partnership distributes funding to physicians or MPCs. If it can be demonstrated that the distribution by the practice plan simply represents a further “flow-through” distribution of grant funding to physicians, rather than a payment for any specific supplies by the physician, the payments may continue to be characterized as grants or subsidies for GST/HST



purposes but the accounting practices and documentation maintained by the parties should clearly support this conclusion.

- Since most Ontario AFP agreements generally follow the TOHAMO template agreements that were considered by the CRA, it would be reasonable for other AFP governance organizations to assume that the CRA would reach similar conclusions with respect to their AFP agreements. However, although it also seems likely that the CRA would reach similar conclusions in respect of other transfer payments made to physicians by the Ministry, there can be no certainty that this would be the case. To the extent that a particular funding agreement varies in any significant way from the AFP agreements it would be necessary to examine the terms of that agreement in light of the CRA's policy on grants and subsidies in order to ascertain what the CRA's conclusions might be. In the event that the result is not clear, it may be necessary to seek additional rulings from CRA as to the application of GST/HST to particular types of funding. It should be noted although they frequently make transfer payments, government departments also typically purchase a variety of goods and services. It is therefore not sufficient to simply conclude that, because revenue has come from the Ministry or another government department, there will be no GST/HST consequences.

On a balance, we believe that the recent ruling/interpretation should be welcomed by Ontario's academic physicians for the clarification it provides in respect of some aspects of AFP funding. However it will be very important for practice plans to work with their professional advisors to determine the impact of the CRA's response upon their particular circumstances.

We look forward to discussing this matter further with you and your colleagues during the upcoming conference call.

Yours sincerely,

Mary Anne McMahon
National Advisor, Indirect tax
Couzin Taylor LLP

Marty Clement
Senior Manager
EY LLP

TO: Jim Simpson, *General Counsel, Ontario Medical Association*
FROM: Colin Smith*
DATE: October 3, 2014
SUBJECT: The CRA's GST/HST Ruling Issued to TOHAMO

The Ottawa Hospital Academic Medical Organization ("TOHAMO") recently sought clarification from the Canada Revenue Agency ("CRA") regarding the HST implications resulting from payments made under a number of alternative funding plan ("AFP") agreements, one of which included the 2012 AHSC AFP Template Agreement. The specific clarification sought was whether HST applied to the payments made in accordance with the agreements.

On September 18, 2014, the CRA provided a ruling and technical interpretation to TOHAMO. The ruling concluded that:

- 1) payments made from the Ontario Ministry of Health and Long-Term Care (the "Ministry") to TOHAMO under the 2012 AHSC AFP Template Agreement are not subject to HST; and
- 2) payments made from TOHAMO to the various practice plans under the 2012 AHSC AFP Template Agreement are not subject to HST.

Both of the conclusions in the ruling refer to the CRA's *Technical Interpretation Bulletin B-067* addressing transfer payments. Based on this, the CRA concludes that the funds flowing from the Ministry to TOHAMO and then to the practice plans are transfer payments and therefore not subject to HST. While the rulings provided are specific to TOHAMO, it can be assumed that the CRA would reach the same conclusion for all payments made under agreements which closely follow the 2012 AHSC AFP Template Agreement. In this regard, the rulings help confirm that the various governance organizations under Ontario's AFP agreements have no potential HST liability stemming from the payments made under the 2012 AHSC AFP Template Agreement.

The CRA also provided an interpretation on the HST implications relating to AFP funds received by practice plans and subsequently paid to physicians or medicine professional corporations ("MPC"). An interpretation differs from a ruling in that it is not a conclusion, but guidance on how the HST rules are likely to apply in certain fact situations. It is not surprising or concerning that the CRA did not provide a ruling on this issue as the practice plan agreements can differ materially and the CRA did not review the agreements for the various practice plans are party to the TOHAMO AFP agreements.

The CRA's interpretation confirms that amounts paid by a practice plan to a physician or MPC that relate to non-cosmetic clinical services would generally fall within the HST exception for medical services. The CRA's interpretation also suggests that HST would likely apply where a supply of academic, research or administrative services are provided to a hospital, university or third party and funded through a payment of AFP funds by the practice plan to the physician or MPC.

The CRA's interpretation assumes that the practice plan is the end recipient of the AFP transfer payment. The CRA appears to view the payment from the practice plan to the physician or MPC as no longer being a transfer payment and potentially subject to HST. While this assumption may be correct in some circumstances, in many cases the end recipient of the transfer payment is not the practice plan but the physician or MPC. It is our view that the CRA's interpretation is overly restrictive on this point. Nonetheless, given that the CRA has now articulated its position, it is prudent for practice plans to ensure their agreements and structure are within the CRA's framework (to the extent practical). For this reason, I have highlighted below some key points as they apply to practice plans structured as (i) partnerships, (ii) corporations or (iii) unincorporated associations (often referred to as cost sharing arrangements). ***For clarity, the comments below are not to be relied upon, but instead are intended to highlight the issues that the practice plans should be reviewing with their own tax advisor.***

(i) Partnerships

For practice plans that are structured as partnerships, it would be relatively straight-forward to avoid any potential HST issues resulting from the receipt of AFP funds. Partnership draws are not subject to HST. Thus to the extent that a partnership receives AFP funds and distributes those funds to partners as draws, there would be no HST implications for either the partnership or the partners. However, many partnerships are structured to pay service fees to partners' MPCs to allow the MPCs to benefit from the small business deduction. To the extent that such payments are made for non-cosmetic clinical services, the service fee would be clearly exempt from HST. However, if the payments relate to anything other than non-cosmetic clinical services, HST could apply. In that event, agreements should clearly set out that any service fees paid to a MPC is payment for medical services. It should be noted that agreements should always be based on, and in accordance with the specific facts or circumstances. For example, if a physician performs only research and no clinical services, a service fee could not be made to that physician's MPC without potentially attracting HST and the physician should receive only partnership draws if the desire is to avoid HST.

(ii) Corporations

For practice plans structured as corporations, dividends and employment income are not subject to HST. However, similar to partnerships, corporate practice plans need to ensure that service payments made to physicians or MPCs are made for non-cosmetic clinical services in order to avoid the potential application of HST. Again, it is important that the agreements clearly set this out.

(iii) Unincorporated Associations

For practice plans operating as unincorporated associations, the HST implications of the ruling are not as clear. It appears that the CRA may treat the unincorporated association as an entity for HST purposes with the result that HST may apply to any payment of AFP funds made to a member of an association for teaching, research or administrative services. Thus, for practice plans structured as unincorporated associations it is particularly important that the relevant agreements provide that: (a) the physicians within the practice plans are parties to the AFP agreement; (b) the only role of the practice plan is to receive and distribute the AFP funds in accordance with the AFP agreement; and (c) the practice plan holds all AFP funds as agent or bare trustee for the physicians or MPCs entitled to such funds.

If you have any questions or would like me to elaborate on anything further, please feel free to call me at 416-864-9480.