

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.