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Headquarters Excise and GST/HST Rulings severed letters – March 2013

Date: March 12, 2013

Document No: 138581

Subject: GST/HST RULING - Determining if an entity is a non-profit organization

Reference: ETA 123(1)

Please note that the following document, although correct at the time of issue, may not represent the current position of the Canada Revenue Agency. / Veuillez prendre note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'Agence du revenu du Canada.

Excise and GST/HST Rulings Directorate

Place de Ville, Tower A, 15th floor

320 Queen Street

Ottawa ON K1A 0L5

[Addressee]

Case Number: 138581

Business Number: [...]

March 12, 2013

Dear [Client]:

Subject: GST/HST RULING

Determining if an entity is a non-profit organization

This is in response to [...], concerning the application of the Goods and Services Tax (GST)/Harmonized Sales Tax (HST) to [...] (the Corporation).

The HST applies in the participating provinces at the following rates: 13% in Ontario, New Brunswick and Newfoundland and Labrador, 15% in Nova Scotia, and 12% in British Columbia. The GST applies in the rest of Canada at the rate of 5%.

Effective April 1, 2013, the 12% HST in British Columbia will be replaced by the 5% GST and a provincial sales tax. It is also proposed that, effective April 1, 2013, the provincial sales tax and the 5% GST currently in effect in Prince Edward Island will be replaced by a 14% HST.

All legislative references are to the Excise Tax Act (ETA) unless otherwise specified.

STATEMENT OF FACTS

We understand:

1. The Corporation was established by [...] dated [mm/dd/yyyy]. [...] was issued pursuant to [...] (the Provincial Act) and [...] (the Provincial Regulations).
2. The Provincial Act was passed by the legislature of the Province of [...] and proclaimed into force effective [mm/dd/yyyy].
3. The relevant provisions of the Provincial Act for the purposes of this ruling are as follows: [...] [provisions of the Provincial Act].
4. [...] dated [mm/dd/yyyy] also transferred to the Corporation the assets from [...]. Included in these assets were the shares of [...] (the Subsidiary).
5. The Subsidiary has its own business number and is registered to collect and remit the GST/HST. In its corporate income tax returns the Subsidiary has claimed that no tax is payable under Part I of the Income Tax Act on its taxable income due to an exemption other than the exemption set out in paragraph 149(1)(l) of the Income Tax Act.

6. The financial information of the Subsidiary is combined with the financial information of the Corporation in the Corporation's annual report.

7. The relevant provisions of the Provincial Regulation for the purposes of this ruling are as follows: [...]

8. There is no provision in the Provincial Act, the Provincial Regulation or [...] which mandates the Corporation to operate for a purpose other than profit.

9. There is no provision in the Provincial Act, the Provincial Regulation or [...] which mandates the Corporation to ensure that no part of its income is payable to or otherwise available to the personal benefit of the members or shareholder(s).

10. The Corporation is also subject to the following Acts of the Provincial Government: [...]. None of these Acts mandates the Corporation to either operate for a purpose other than profit or to ensure that no part of its income is payable to or otherwise available to the personal benefit of the members or shareholder(s).

11. There is no provision in the Provincial Act, the Provincial Regulation or [...] which either sets out the circumstances under which a dividend can be declared on the Corporation's share or sets out who has the authority to make that declaration.

12. The Corporation's annual report covering the fiscal period ended [mm/dd/yyyy] reveals the following: [...]

13. The Corporation's annual report for fiscal period ending [mm/dd/yyyy] reveals the following: [...]

14. In its income tax returns the Corporation has claimed that no tax is payable under Part I of the Income Tax Act on its taxable income due to an exemption other than the exemption set out in paragraph 149(1)(l) of the Income Tax Act.

RULING REQUESTED

You would like to know whether the Corporation is a non-profit organization within the meaning of the ETA.

RULING GIVEN

Based on the facts set out above, we rule that the Corporation was not organized solely for a purpose other than profit and therefore the Corporation is not a non-profit organization under the ETA.

This ruling is subject to the qualifications in GST/HST Memorandum 1.4, Excise and GST/HST Rulings and Interpretations Service. We are bound by this ruling provided that none of the above issues are currently under audit, objection, or appeal, that no future changes to the ETA, regulations or our interpretative policy affect its validity, and all relevant facts and transactions have been fully disclosed.

EXPLANATION

Subsection 123(1) of the ETA defines a “non-profit organization” to mean a person (other than an individual, an estate, a trust, a charity, a public institution, a municipality or a government) that was organized and is operated solely for a purpose other than profit, no part of the income of which is payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder is a club, a society or an association the primary purpose and function of which is the promotion of amateur athletics in Canada.

Policy Statement P-215, Determination of whether an entity is a “non-profit organization” for purpose of the Excise Tax Act provides the following guidance:

To be a non-profit organization, an entity must be organized solely for a purpose other than profit. To establish the purpose for which an entity was organized, the Department will normally look to the instruments by which it was created. These instruments may include letters patent, articles of incorporation, orders-in-council, legislation, memoranda of agreement, by-laws and so on.

To qualify as a non-profit organization, ideally the governing documents should contain a statement that the entity is organized solely for non-profit purposes. However, in some situations they may not. In those situations the Department will examine the purposes for which the entity was organized to determine whether the entity was organized solely for non-profit purposes.... An entity may be considered to be organized solely for non-profit purposes if its aims and activities are directed toward the general improvement of conditions within one or more areas of business. An example of this would be where an

entity was organized to advance the educational standards within a particular industry or profession, to publicize, improve and promote the entity's objectives in a general way and to encourage the exchange of relevant technical information. If the activities of such an entity were consistent with these aims, then it would qualify as a non-profit organization provided that all other conditions with respect to non-profit organizations as defined in subsection 123(1) were complied with. However, the entity will probably not qualify as a non-profit organization if it is primarily involved, for example, in an activity that is directly connected with the sales of members' goods or services and for such services receives a fee or commission computed in relation to sales promoted. Such an entity is normally considered to be an extension of the members' sales organizations and will be considered to be carrying on a normal commercial operation.

...[A]n entity may be organized under legislation for corporations with share capital. Such legislation includes, for example, the Canada Business Corporations Act ("CBCA") and the Ontario Business Corporations Act ("OBCA"). If a corporation is organized under such legislation, without any statement in the governing documents that it is organized for non-profit purposes, this may be conclusive evidence that it was organized for profit purposes.

Whether an entity was organized solely for a purpose other than profit is a question of fact which is determined by an examination of the instruments which lead to the creation of the entity. The above-quoted excerpts of our Policy P-215 confirms that where this question cannot be conclusively determined by a review of these instruments, it is possible to consider the intended purpose of the entity, including the activities in which it engages to further its intended purpose.

The Corporation was established as a corporation with share capital and without any statement that it was organized for non-profit purposes. Further, there is no statutory provision which prohibits the Corporation from either operating on a for-profit basis or allowing any part of its income to be payable or otherwise available to its members or shareholder(s). This creates a presumption that the Corporation was not organized solely for a purpose other than profit.

[...]. Almost half of the Corporation's income comes from fees earned [...] for its service and income earned on the sale of its products. These sources of income have allowed the Corporation to generate operational surpluses far in excess of its budgeted projections in [...] fiscal periods. Despite these operational surpluses the funding the Corporation received from Provincial Government during [...] fiscal periods has increased. All of the above would further indicate that the Corporation was not organized with a view to operate solely on a non-profit basis.

[...].

The determination of whether the Corporation has been operated solely for a purpose other than profit need not be made at this time as the Corporation, as currently structured, is not organized solely for a purpose other than profit. The determination of whether the Corporation operates on a non-profit basis is

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a question of fact which cannot be made in the context of a ruling but would be made after a complete review of the organization's financial records as would normally be performed during an audit.

If you require clarification with respect to any of the issues discussed in this letter, please call me directly at 613-952-4157. Should you have additional questions on the interpretation and application of GST/HST, please contact a GST/HST Rulings officer at 1-800-959-8287.

Yours truly,

Michael Mavis

Government Sectors Unit

Public Service Bodies and Governments Division

Excise and GST/HST Rulings Directorate