

Tax

Invesco case: Rebate for GST paid in error or notice of objection?

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(November 14, 2019, 11:17 AM EST) -- In the recent judgment rendered in the *Invesco* case (*SLFI Group v. Canada* 2019 FCA 217), the Federal Court of Appeal ruled that a notice of objection is the only recourse available when an assessment is issued against a taxpayer, as opposed to a rebate for tax paid in error, even when the initial assessment was issued to a third party.

Case

A group of Canadian mutual funds (funds) offered their investors the option of deferring the broker/dealer commissions charged upon purchasing certain securities, referred to as the "deferred sales charge" (DSC) option. At first, the DSCs were funded by the manager of the funds but starting on April 1, 2002, an alternative financing method was put in place through an arrangement (arrangement) with a U.S. subsidiary of Citibank, N.A., which would fund the DSCs in exchange for fees paid by the funds (fees).

The fees were arrived at by adding two components:

- A fee referred to as the Redemption Fee, on which the manager did not self-assess GST/HST, since the funds construed this fee as an exempt supply (as discussed more fully in our previous article).
- A fee referred to as the Daily Fee, on which the manager self-assessed GST/HST on behalf of the funds, since none of them had a GST/HST registration number prior to July 1, 2010. The manager therefore filed rebate applications for GST paid in error, in its own capacity and/or as "Trustee" or "on behalf" of the funds.



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The minister took the position that the Daily Fee was a taxable supply and that in any event the applications for GST paid in error were not valid; as such the minister denied these applications. It should be noted that while the manager had filed applications for GST paid in error as of April 2002, only the reporting periods for Feb. 1, 2007, to June 30, 2010, were in dispute.

The *Excise Tax Act* (ETA) provides that a person who paid GST in error can claim a refund. At issue was whether, if the Daily Fee was found to be an exempt supply as argued by the funds, a rebate should thus have been allowed for GST paid in error. Since the Tax Court of Canada determined that the Daily Fee was not an exempt supply, this secondary issue had not been addressed in first instance.



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Federal Court of Appeal's decision

The Federal Court partly allowed the appeal and concluded that the fees were an exempt supply.

Nevertheless, the court denied the appeal in respect of the GST self-assessed in error by the manager on the Daily Fee, in view of the absence of any notices of objection filed by the manager.

By virtue of the ETA, the refund for GST paid in error can be claimed only where an assessment has not been issued, in which case the only recourse available is a notice of objection rather than a rebate application. Yet, upon the issuance of the impugned GST assessments, the manager and the funds filed rebate applications rather than objections. The funds argued that they were allowed to do so since they were never assessed *per se*, as the assessments were addressed to the manager, not the funds.

Without pronouncing whether or not the assessments were in fact issued to the funds — they were issued to the manager after it self-assessed on behalf of the funds — the court ruled that this question was irrelevant because the ETA did not require that the assessment be issued to the person who claimed the rebate.

In other words, the fact that the assessments were issued to the manager prevented the funds from filing rebate applications and the proper and only recourse was an objection by the manager. Consequently, the funds did not qualify for the rebates and the appeal was denied in that regard.

Takeaway

While the Federal Court of Appeal's conclusion adequately reflects the restrictions pertaining to the rebate application once an assessment is issued, the fact that the initial assessments towards the manager prevented the funds from obtaining rebates from tax paid in error creates discomfort among some practitioners. Unlike in income tax, GST/HST returns are not systematically assessed by the tax authorities, which leaves registrants in constant uncertainty as to their recourses for tax paid in error, since a person may not be informed that a third party — such as a manager — has been assessed on its behalf or not.

In such cases where assessments were issued, whether directly to the person or not, registrants must be mindful that objections must be filed no later than 90 days following the date the notice of assessment was issued by the tax authorities, which in practice is very little time, especially since tax paid in error is not usually discovered promptly. This case illustrates the importance of determining *a priori* the sales tax implications of transactions and supplies, and effective communication with parties who file on one's behalf.

This is the second of a two-part series on this judgment. Read part one: Invesco case: Funding services not subject to GST/HST.

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