

BUDGET 2019: NEW EXCISE DUTY REGIME FOR THREE NEW CLASSES OF LEGALIZED CANNABIS PRODUCTS, AND GST/HST AMENDMENTS FOR HEALTH CARE AND ZERO-EMISSION PASSENGER VEHICLES

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EXCISE DUTY MEASURES

Cannabis Taxation

Currently, under the *Cannabis Act*,^[1] there are five classes of legal cannabis, namely, fresh/dried cannabis, cannabis oil, cannabis plant seeds, and cannabis plants. The *Excise Act, 2001*^[2] generally imposes combined federal and provincial/territorial duties on the sale of cannabis equal to the greater (or, in cannabis parlance, “higher”) of \$1.00 per gram (the flat rate) and 10% of the “dutiabale amount” (the *ad valorem* rate) when sold by a cannabis producer/licensee for delivery to a purchaser in Canada (or as applicable, 10% of the customs value when imported into Canada).^[3] In general, applicable duties are divided between the federal government and the provinces/territories on a 25%/75% basis.

In December 2018, the federal government released for consultation proposals to add three new categories of cannabis for legal production, importation and sale in 2019, namely edible cannabis, cannabis extracts and cannabis topicals.^[4] It is proposed that cannabis oils (currently a separate class) will be subsumed in cannabis extracts. Accordingly, there will be seven classes of legal cannabis products once the latest proposals are fully implemented.

Budget 2019 proposes to introduce a new excise duty regime for these three new classes of cannabis products. Instead of imposing duties at the higher of the flat rate per gram and *ad valorem rate*, excise duties will apply at the combined federal and provincial/territorial excise duty rate of \$0.01 per milligram of total tetrahydrocannabinol (“**THC**”), the primary psychoactive compound in cannabis. This duty would be payable by an excise duty licensee when delivered by the licensee to a non-cannabis licensee (e.g., a provincial wholesaler, retailer or individual consumer), or at the border on importation.

This new regime will not affect how the existing classes of cannabis are taxed, except for cannabis oils. Budget

2019 has also confirmed that current exemptions from the cannabis duty will continue to apply. Products containing no more than 0.3 per cent of THC, including cannabis oils, will not be subject to the excise duty. Pharmaceutical products derived from cannabis that have a Drug Identification Number, and can only be acquired with a prescription, will also continue to be exempt.

This new excise duty regime will alleviate the compliance challenges and administrative burden imposed under the existing regime on cannabis oil producers and importers of tracing the quantities of dutiable cannabis contained in cannabis oils. The new regime should facilitate calculating excise duties more easily than under the existing regime, and also allow the Canada Revenue Agency (the “**CRA**”)/Canada Border Services Agency to verify compliance more easily. The rationale for imposing duties in this new way (\$0.01 per milligram of THC) equally applies to all three new classes of legal cannabis. The administration of the new excise duty regime will be aided by the labelling regulations under the *Cannabis Act* that mandate the display of total THC content on cannabis product packaging.

Subject to certain transitional rules, the new excise duty regime will become effective as of May 1, 2019. However, where cannabis oils are packaged and ready for final sale to consumers before May 1, 2019, the existing excise duty regime will apply, regardless of when the products are delivered to the purchaser (i.e., even if delivery occurs after April 30, 2019). As the production and sale of cannabis edibles, topicals and other extracts (other than cannabis oil) become legally permitted, the new THC-based excise duty regime will apply.

GST/HST MEASURES

Health and Medical

Budget 2019 contained a number of proposals to expand the scope of GST/HST relief in the medical industry to reflect the evolving nature of the health care sector.

Human Ova and In Vitro Embryos

With new technological advances in assisted human reproductive procedures, Budget 2019 expands the GST/HST relief to keep up with these advances. Effective after Budget Day (March 19, 2019), no tax will apply to:

1. supplies and imports of human ova,^[5] and
2. imports of human *in vitro* embryos.^[6]

Foot Care Devices Supplied on the Order of a Podiatrist or Chiroprapist

Currently, although the services rendered by licensed/certified podiatrists and chiroprapists are generally exempt supplies of health care services under section 7, Part II of Schedule V to the *Excise Tax Act* (the “**ETA**”),^[7] certain foot care devices (e.g., orthopedic devices and embolic stockings) are only zero-rated when

made on the written order of physicians, nurses, physiotherapists and occupational therapists. To be consistent with the policy objectives underlying these GST/HST relieving provisions, Budget 2019 will add licensed/certified podiatrists and chiropodists to the list of practitioners on whose order supplies of foot care devices are zero-rated for GST/HST purposes effective after Budget Day.

Multidisciplinary Health Care Services

In order to exempt a bundled supply of two or more health care services that, if supplied separately, would be exempt from GST/HST, Budget 2019 proposes to add section 7.4 to Part II of Schedule V to the ETA effective after Budget Day. This exemption is designed to capture the multidisciplinary provision of health care services by a team of licensed health care professionals rendered to an individual (e.g., per the Explanatory Notes released with Budget 2019, “an assessment and rehabilitation program can be rendered jointly by a team consisting of a physician, an occupational therapist, and a physiotherapist.”) If the health care services rendered separately by these health care professionals could each, on their own, be separate exempt supplies, there is no policy reason that the combined supply of these services should not be exempt.

The supply would be exempt if “all or substantially all of the consideration for the supply is reasonably attributable” to these services. Administratively, the CRA generally interprets “all or substantially all” as meaning 90% or more. The Courts do not adhere to such a strict formula, adopting a more flexible approach that examines the particular circumstances. That means, even under the CRA’s restrictive test, up to 10% of the consideration could relate to a supply other than an exempt health care service, without tainting the exemption for the entire consideration under new section 7.4, Part II of Schedule V.

A fundamental underlying consideration is whether the combined health care services constitute a bundled supply of the multi-disciplinary health care services. There is considerable jurisprudence on how to distinguish between a bundled single supply and separate supplies, depending on the particular circumstances. The CRA has also published its own administrative policies for guidance.

Zero-Emission Passenger Vehicles

Budget 2019 introduced the ability to claim capital cost allowance (the “**CCA**”) in respect of certain zero-emission vehicles at enhanced rates in the year of their acquisition. These vehicles, as defined in the *Income Tax Act* (Canada) (the “**ITA**”), will include electric battery, plug-in hybrid (with a battery capacity of at least 15 kWh) or hydrogen fuel cell vehicles, including light-, medium- and heavy-duty vehicles purchased by a business.

The existing GST/HST definition of “passenger vehicle” in ss. 123(1) of the ETA incorporates the definition of “passenger vehicle” from ss. 248(1) of the ITA.^[8] Budget 2019 proposes to add to this GST/HST definition of

"passenger vehicle" a "zero-emission passenger vehicle", as that term is proposed under Budget 2019 to be defined in ss. 248(1) of the ITA, and to make consequential amendments to certain GST/HST provisions dependant on the definition of "passenger vehicle".

Among other things, these proposed amendments align the GST/HST input tax credit limitations with the enhanced CCA deductions allowed for a "zero-emission passenger vehicle", as proposed under the ITA and its Regulations. Under newly added CCA Class 54, zero-emission passenger vehicles will benefit from an increased CCA deduction limit of \$55,000, plus applicable sale taxes, increased from \$30,000, plus applicable sales taxes, under either CCA Class 10 or 10.1. The increased deductibility limits for leased zero-emission passenger vehicles will also have the effect of increasing ITC eligibility (recovery of GST/HST payable) on related lease payments.

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[1] S.C. 2018, c. 16, as amended.[ps2id id='1' target=""]

[2] S.C. 2002, c. 22, as amended.[ps2id id='2' target=""]

[3] Certain provinces and territories adjust their duty rates higher within the existing framework.[ps2id id='3' target=""]

[4] Regulations Amending the Cannabis Regulations (New Classes of Cannabis), (2018) C Gaz I, 4984.[ps2id id='4' target=""]

[5] As this term is defined in section 3 of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, as amended (the "AHRA"). This treatment mirrors the existing treatment for human sperm used for fertilization. As the supplies of human ova and sperm will be zero-rated (taxable supplies at a 0% rate) pursuant to sections 5 and 6, Part I of Schedule VI to the *Excise Tax Act* (Canada), fertilization and reproduction clinics will benefit from input tax credit claims to recover GST/HST payable on their business inputs.[ps2id id='5' target=""]

[6] As this term is defined in section 3 of the AHRA.[ps2id id='6' target=""]

[7] R.S.C. 1985, Chapter E-15, Parts VIII and IX enacted by S.C. 1990, c. 45 [Bill C-62], as amended.[ps2id id='7' target=""]

[8] R.S.C. 1985, c.1 (5th Supplement), as amended.[ps2id id='8' target=""]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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