WHY REWARDS PROGRAMS MAY NOT BE SO REWARDING FOR CREDIT CARD ISSUERS

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The Tax Court of Canada (the "**Court**") recently confirmed that participation in certain reward and loyalty programs, such as Aeroplan, may have significant tax implications for Canadian banks, and other issuers of credit card products.

In the case at hand, a large Canadian bank sought a rebate for GST (in an amount of over 44 million dollars) relating to payments made under an Aeroplan loyalty program (the "**Program**"). Under the Program, the bank would issue an Aeroplan branded credit card to a customer, who could then make purchases with the card. Certain purchases made with the card would earn the customer points or "Aeroplan Miles" (the "**Miles**"), which could then be used to redeem rewards offered by Aeroplan. Pursuant to the Credit Card Agreement (the "**Agreement**") governing the bank's participation in the Program, Aeroplan would invoice the bank for the cost of the Miles issued by Aeroplan to the credit card holder, at an amount stipulated in the Agreement. The bank made substantial payments of this type during its participation in the Program. Aeroplan, in turn, charged, and the bank paid, GST on these payments.

As part of the arrangement between the bank and Aeroplan, Aeroplan would also provide certain referral and marketing related services in support of the bank's credit card products, in addition to the supply of the Miles themselves.

The bank argued that the supply of the Miles under the Program constituted "gift certificates", and thus, pursuant to the *Excise Tax Act* (the "**Act**"), should not be subject to GST. On April 16, 2019, the Court released its decision, which confirmed that the supply of the Miles and other benefits to the bank pursuant to the Program was in fact subject to GST, and the bank was not entitled to a rebate.

The Court's decision centered around two factual considerations:

i. whether the supply should be considered a supply of "property" or a supply of "services"; and
ii. whether the supply of property or services to the bank pursuant to the Program should be characterized as a single taxable supply or multiple taxable supplies for purposes of the Act.

Ultimately, the Court determined that the elements of the Program should be characterized as the supply of a "service", and that the various elements, together, formed a single compound supply. Specifically, the Court found that the "true nature" or predominant element of the Program was its marketing and promotion function.

The Program therefore fell within the definition of a "taxable supply" under the Act, and was subject to GST.

Despite its conclusion, the Court also considered whether the supplies provided under the Program could be considered a gift certificate (which they weren't) and, in so doing, clarified the definition of "gift certificate" for purposes of the Act. Specifically, a gift certificate should have attributes similar to money, a stated monetary value, and should be, in essence, a storage mechanism for money. It is not a device which entitles an individual to redeem it for a specified product or service.

Implications

Canadian banks and other issuers of credit cards, or participants in rewards and loyalty programs such as Aeroplan, should be aware that, depending on the factual circumstances, payments made pursuant such programs may be subject to GST/HST.

It is also important to note that, in reaching its conclusion, the Court looked to the contractual intentions of the parties to the Agreement, especially with respect to the predominant element of the Program. Careful drafting of such agreements is therefore important to ensure that the proper intention of the parties is conveyed.

Further, it is unclear from the Court's decision whether its analysis would apply to a more broad set of reward and loyalty programs, or whether the court's conclusion relates only to similar types of "airmiles-style" rewards programs. Institutions participating in other types of programs may wish to seek tax advice to confirm whether their programs could give rise to tax liabilities, pursuant to the Act.

Although the Court appears to have reached a decisive conclusion, on May 16, 2019, the bank launched an application for leave to appeal with the Federal Court of Appeal. Thus, it will be important to track any further developments in this case going forward.

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A Cautionary Note


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