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Tax Court Finds That Broker Fees on a Private Company Sale Were GST/HST-Taxable

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The Tax Court of Canada recently released its decision in *Barr v. The Queen*, 2018 TCC 86, which considered whether share-sale commissions were exempt from HST.

The taxpayer was the sole shareholder of a Canadian company. He had retained two brokers for the sale of his company or its assets. The question of whether the commissions that they charged on the ultimate sale of the shares to a purchaser whom they had found were exempt from HST turned, in part, on whether their services were those of "arranging for" the sale of the shares. In a brief decision finding that this "arranging for" exemption was not available, the Court took into account the following factors:

- The brokers merely brought potential purchasers to the shareholder and had no involvement in negotiating or concluding the sale, including even the price at which it occurred.
- They did not undertake to find a purchaser for the shares as contrasted to the assets – and, in fact, when they found the ultimate purchaser, that purchaser initially made an offer for the assets (at which point the brokers dropped out of the picture). Only later was a share sale negotiated.
- The brokers were not investment dealers or other registered business or securities brokers.

It is unclear how much weight the Court attached to each of these factors.

The Canada Revenue Agency had also argued that if the "arranging for" exemption was available, the brokers' services nonetheless would be taxable under a relatively recent rule (the "preparatory services rule") that deems services to be taxable if they consist of such matters as market research and promotional services that are preparatory to an "arranging for" financial service. The Court found that the brokers mostly were engaged in market research and promotional activities, and concluded that the commissions also would have been taxable on this alternative ground. It is unclear how compelling this alternative finding is. It was "obiter," i.e., superfluous to reaching the Court's decision, and also very brief – so that it did not discuss earlier jurisprudence that limited the preparatory services rule to very narrow circumstances.

It is common for engagement agreements with investment dealers for the sale of a business or part of a business to be flexible as to whether the sale can occur as an asset or share sale, and the investment dealers may not have a significant role in negotiating the sale terms once the likely purchaser has been identified. Accordingly, while the scope and significance of this decision are unclear, it may result in investment dealers seeking to charge GST/HST on their fees under such engagement agreements in a wider range of circumstances than has traditionally been the case.

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