

RECOGNIZING TAX IMPLICATIONS FOR DAMAGE AWARDS

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As Celine Dion once sang, taxes are as inevitable as rain.

THD Inc. c. Sa Majesté la Reine (2018 CCI 147), a recent Tax Court of Canada decision, provides a fresh reminder for lawyers to be mindful of potential tax implications of damage awards. Lawyers need to be aware that a damage award may be deemed to include GST or HST. If it does, and you have not negotiated a settlement or otherwise recovered an additional amount for the tax, your client will end up with a smaller net recovery than expected after they comply with their statutory obligation to remit the GST or HST from the settlement or judgment to Canada Revenue Agency.

The underlying arbitration

THD Inc. entered into an agreement with McKesson Corporation of Canada to provide transportation for McKesson's wares. McKesson later unilaterally modified the contract to cancel some of the routes. THD sued for damages and obtained a damage award of \$727,934.40 plus \$50,677.60 in costs and interest for a total of \$778,612.00. McKesson paid the amounts owing to THD in full. THD did not claim the GST from McKesson in the arbitration and no amount in respect of the GST was awarded.

The tax reassessment

On the basis of s. 182(1)(b) of the Excise Tax Act, which deems the GST to be paid to a GST-registrant on receipt of an amount credited or received on a breach, modification or termination of a contract for supply of services or property, the CRA took the position that

the arbitration award included an amount in respect of the GST.

Appeal and outcome

THD appealed from the reassessment and argued both that s. 182 of the Excise Tax Act did not apply unless the contract was terminated and that a tax would be an unjust enrichment of the Crown because McKesson did not claim any input tax credits on the tax paid. The Tax Court rejected THD's argument and upheld CRA's reassessment.

Conclusion

Lawyers need to be aware of potential tax implications of the claims they advise upon. Both THD Inc. c. Sa Majesté la Reine ([2018 CCI 147](#)) and CRA guidance note that a taxable amount (either GST or HST, depending on the province) is payable where the following conditions are met:

1. There is a supply agreement for a taxable supply of a property or service in Canada;
2. The supplier is a registrant under the Excise Tax Act;
3. There has been a breach, modification, or termination of the supply agreement; and
4. There is an amount received or credited to the registered supplier as a result.

There are other instances where tax may be owed on a damage award. For further consideration, please review [CRA Policy Statement P-218R](#).

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Related Tax, Commercial Litigation

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