

January 2005

**FOR DISCUSSION PURPOSES ONLY**

**GST/HST Policy Statement, *What constitutes an “other body established by a government” for purposes of the Excise Tax Act***

This policy statement is being disseminated by the Canada Revenue Agency in draft form for comments. Comments or suggestions should be sent by March 1, 2005 to:

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**GST/HST Policy Statement**

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<b>P-XXX</b>	What constitutes an “other body established by a government” for purposes of the <i>Excise Tax Act</i> (ETA)?
<b>DATE OF ISSUE</b>	January 4, 2005
<b>LEGISLATIVE REFERENCES</b>	Section 20 of Part VI of Schedule V; subsection 141.01(1.2), and sections 146, 178.7, 189.1 and 191.1 of the <i>Excise Tax Act</i> (ETA) and section 2 of the <i>Public Service Body Rebate (GST/HST) Regulations</i>
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***Issue***

This policy statement sets out the Canada Revenue Agency’s (CRA) position in respect of what constitutes an “other body established by a government” in the context of the phrase “a board, commission or other body established by a government” in the ETA. This policy statement only applies to bodies established by a government. Government is defined as “Her Majesty in right of Canada or a province” in subsection 123(1) of the ETA.

## **GST/HST Legislation**

An “other body established by a government” may make certain supplies of a regulatory or administrative nature on an exempt basis pursuant to section 20 of Part VI of Schedule V and section 189.1 of the ETA. It is also deemed, for greater certainty, to make specific supplies in the course of a commercial activity under section 146 of the ETA.

The term “other body established by a government” is also found in other provisions including in the definition of “grantor” in section 191.1 of the ETA for the purposes of determining “government funding” in respect of a residential complex and in the definition of “grantor” in section 2 of the *Public Service Body Rebate (GST/HST) Regulations* for the purposes of determining government funding in respect of a non-profit organization’s (NPO) eligibility for a public service body (PSB) rebate. The term is found also in subsection 141.01(1.2) of the ETA in determining who makes payments of a “grant, subsidy, forgivable loan or other form of assistance” for the purposes of that subsection.

In addition, the term is found in section 178.7 in determining what services may not qualify as a “specified service” for a “designated” charity for the purposes of that section and paragraph 1(d.1) of Part V.1 of Schedule V.

## ***Decision***

It is the CRA’s position that, to qualify as an “other body established by a government”, a body must fall within one of the following three categories:

**Category 1** – A body created by a government in legislation.

**Category 2** – A body incorporated by a government.

**Category 3** – A body that meets all the following criteria:

***(a) A government has taken action relating to the body***

- i. There is evidence that a government has been involved in setting up the body.
- ii. The purpose of the body and the function/activity delegated to the body are provided through legislative authority.

***(b) The purpose for which the body is set up is to undertake a public service function that the government usually undertakes***

- i. The purpose of the body is to carry out the public service function/activity delegated to it by the government.
- ii. The body is established and operated other than for profit.

***(c) The government retains the overall authority for the regulatory program and the body remains accountable to the government***

- i. The government retains the overall legislative authority and the overall policy making authority for the regulatory program in issue.
- ii. The body is required to demonstrate accountability to government in respect of the delegated activity.

This paper will discuss each of these three categories and the criteria listed in category 3.

## ***Discussion***

### **Category 1 – A body created by a government in legislation**

An “other body established by a government” includes a body that a government creates in legislation (i.e., through statute and subordinate legislation such as regulations and orders in council). For instance, the Ontario Energy Board was created under the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B; the Canadian Wheat Board was created under the *Canadian Wheat Board Act*, R.S. 1985, c. C-24 and the Safety Codes Council was created under the *Safety Codes Act*, R.S.A. 2000, c. S-1. To fit within this category, the body must have been **directly** created in legislation.

It should be noted that this category does not include a body that is incorporated pursuant to the authority of a statute that provides the legal basis for and a scheme for incorporation, for example, corporations that are incorporated under the authority of the *Canada Corporations Act*, R.S. 1970, c. C-32 or the *Business Corporations Act*, S.B.C. 2002, c. 57.

### **Category 2 – A body incorporated by a government**

An “other body established by a government” includes a body for which a government actually files the incorporating documents requesting incorporation under statutory authority (e.g. pursuant to the *Canada Corporations Act*, Part II, R.S. 1970, c. C-32). This would include instances where specific statutes provide authority to incorporate entities for specific purposes. For example, the federal Minister of Transport may file letters patent under the authority of the *Canada Marine Act*, 1998, c.10 to create port authorities such as the Toronto Port Authority.

### **Category 3 – A body that meets all the following criteria:**

The ordinary meaning of the term “established” when considered in the context of the words “other body established by a government” in the ETA includes more than a body that is created by a government. The common definition of “establish” as reflected in *Black’s Law Dictionary* (7<sup>th</sup> Ed.) includes ‘to bring about or into existence’ and it also includes “to settle, make or fix firmly; to enact permanently”.

Consequently, a body will be “established by a government” if it meets the criteria set out in a) to c) below:

#### ***(a) A government has taken action relating to the body.***

- i. There is evidence that a government has been involved in setting up the body.*

There is limited case law dealing with the meaning of the term “establish”. However, in Re O’Brien 77 D.L.R. (3d) 397, 1977 Carswell NS 395, Hallet J. of the Nova Scotia Supreme Court expressed the view (at paragraph 11) that, in the case of an institution, to be established “it must be set up with a degree of permanence and stability”. Thus, in addition to bodies that are directly created by a government, “other body established by a government” will also include a body where the government has been involved in setting it up for the purpose of undertaking the function/activity intended.

To meet this criterion, the government must have acted in such a way as to be instrumental in setting up the body or bringing it into being to perform the function intended. This is evident where the government has designated the body for a specific purpose and/or delegated specific authority to the entity so that it can fulfill a specific purpose.

The actions of the government may be such that the government “establishes” an entity that was already created (e.g., a non-profit entity originally incorporated by individuals other than a government). Where the government has been involved in the setting up of the body for a specific purpose such that its actions indicate a clear intention to set up a “new body” that did not exist in that capacity before, that body might be considered “established” by a government. Effectively, the government’s actions have resulted in the establishment of the body for a specific purpose.

*ii. The purpose of the body and function/activity delegated to it are provided through legislative authority.*

The government has delegated the purpose and key function/activity to the body in legislation (i.e., in statute or subordinate legislation such as by regulation or order in council). This provides the legal basis and authority for the body to fulfill the purpose and undertake the function/activity. In addition, the government always retains the power to revoke a delegation of authority.

In some cases, the body may have been designated in legislation as a body for a specific purpose that undertakes the specific functions that are being delegated to it in legislation.

**(b) *The purpose for which the body is set up is to undertake a public service function/activity that a government usually undertakes.***

*i. The purpose of the body is to carry out the public service function/activity delegated to it by the government.*

The body’s function/activity is of the type that the government would normally undertake itself (e.g., administrative function or day-to-day regulatory activity of a government). The body is undertaking a public service type of function/activity as opposed to a function/activity of a commercial nature.

The purpose for which the body is set up is to undertake the function/activity that the government delegates to it in legislation. While the body may be undertaking other incidental/peripheral activities in support of the delegated function/activity, the purpose for which it is set up is to undertake the delegated function.

*ii. The body is established and operated other than for profit.*

The body is established and operated for a purpose other than for profit. It may not provide any pecuniary benefit to its members. This criterion reflects that generally any profits that the body makes will be used to further the objects of the body.

This criterion is consistent with the requirement that the body’s purpose is to undertake a public service type of function of a regulatory or administrative nature that consequently will have a public purpose. Therefore, the entity should not be undertaking activities for which profits will accrue to its members.

***(c) The government retains the overall authority for the regulatory program and the body remains accountable to the government.***

- i. The government retains the overall legislative authority and the overall policy-making authority for the regulatory program in issue.*

Where the body is “established by a government”, the government continues to retain its responsibility for rulemaking (i.e., retaining the overall legislating power in respect of the regulatory program in issue) and setting the overall policy of the regulatory program. The government does not delegate to the body the authority to legislate in statute or to make policy in respect of the overall public service regulatory program but rather, it delegates an authority to undertake administrative and/or regulatory activities under the program on a day-to-day basis.

For example, a government may delegate to a body the power to administer day-to-day operations of a program (e.g., the issuance of licenses or permits to members of an industry) that is subject to a regulatory regime set up in legislation by the government and for which the government retains the overall policy making authority.

The body should be distinguished from one to which the government has devolved/transferred specific powers, activities and assets for the purpose of privatizing those activities. In such cases, the government completely devolves or transfers (rather than delegates) the responsibilities and assets to the body for the purpose of vacating the field. Those cases deal with responsibilities and activities that are generally commercial in nature. For instance, where the government has privatized a program that it previously undertook (e.g., authorizing in legislation an entity to undertake all the powers in respect of a regulatory program that the government previously undertook as well as transferring the related assets to the entity) the body will not meet this criterion.

- iii. The body is required to demonstrate accountability to government in respect of the delegated activities.*

The body is also obligated to account to the government in respect of the authority delegated to it. For instance, the body may be required to file an annual report to government for tabling in Parliament or a Legislature; it may be subject to on-going monitoring by government and/or it may be subject to government audit.

**Documentation to consider in determining whether the criteria have been met**

To assist in determining whether a body meets the above criteria, the CRA will review relevant documentation including authorizing legislation (e.g., the statute that provides for any designation and/or delegation of authority, statutory authority in respect of the regulatory program in issue and/or subordinate legislation such as regulations or orders in council), incorporating documents (e.g., articles of incorporation, letters patent), contractual or administrative agreements between the government and the body and by-laws or similar administrative rules of the body.

## *Example*

### **Statement of facts**

1. Government A is responsible for regulating safety in a specific industry sector. Government A passed legislation—the *Safe Consumers Act* (SCA)\*—on January 10, 2002. Under the SCA, Government A set up a new framework for regulating safety in the specific industry. The SCA provided Government A with the authority to delegate the administration of the SCA to an incorporated non-profit company.
2. Prior to passage of the SCA, Government A issued licenses to businesses in the specific industry pursuant to the *Consumer Protection and Safety Act*\*. These licenses were exempt from GST/HST pursuant to paragraph 20(c) of Part VI of Schedule V to the ETA.
3. Following discussions with Government A, four members of the specific industry incorporated NPO Corp. on February 12, 2002, with the objects (as set out in its incorporating documents) of administering a safety regulatory program for the specific industry, including the issuance of licenses to the specific industry and undertaking other administrative functions such as information and consultations activities and managing consumer inquiries related to promoting safety in that sector.
4. On March 24, 2002, Government A designated NPO Corp. to be the corporation that administers the SCA and delegated to NPO Corp. the authority to administer the SCA, including the power to issue licenses to industry businesses, the power to inspect industry facilities relating to the safety requirements imposed under the SCA and other related administrative functions. The SCA also provided that NPO Corp. was required to file an annual report with Government A for tabling with Parliament/Legislature in respect of its delegated responsibilities under the SCA.
5. Effective the same day, Government A repealed its power to issue licenses to industry businesses in the *Consumer Protection and Safety Act*\*.
6. Pursuant to the SCA, Government A retained the responsibility for legislating the overall regulatory framework for the specific industry. It also maintained responsibility for setting overall policy for the SCA regulatory program.
7. Effective March 24, 2002, NPO Corp. started to administer the SCA, including issuing licenses and undertaking related administrative activities (including consultations with the industry to promote safety in the industry and the development of information packages and managing consumer inquiries relating to safety in the industry) that were delegated to it.

### **Issue**

Is NPO Corp. an “other body established by a government” within the meaning of section 20 of Part VI of Schedule V to the ETA?

### **Comments**

Section 20 of Part VI of Schedule V to the ETA exempts certain activities of an administrative/regulatory nature when made by a government or a “board, commission or other body established by a government”. A “body established by a government” would include a body that was created in statute or one for which

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\* The names of these acts were invented for purposes of this example only. They are fictitious acts.

a government has filed the incorporating documents. NPO Corp. has not been created directly in legislation nor has a government incorporated it.

However, it may still be a “body established by a government” if it meets the following criteria.

***(a) A government has taken action relating to the body.***

- ii. There is evidence that a government has been involved in the set up of the body.
- iii. The purpose of the body and the function/activity delegated to the body are provided through legislative authority.

***(b) The purpose for which the body is set up is to undertake a public service function that the government usually undertakes.***

- i. The purpose of the body is to carry out the public service function/activity delegated to it by the government.
- ii. The body is established and operated other than for profit.

***(c) The government retains the overall authority for the regulatory program and the body remains accountable to the government.***

- i. The government retains the overall legislative authority and the overall policy making authority for the regulatory program in issue.
- ii. The body is required to demonstrate accountability to government in respect of the delegated activity

NPO Corp. was set up for the purpose of undertaking a function that a government would usually undertake. Its mandate, which was given to it by Government A, is to administer the SCA by undertaking specific functions such as the licensing of businesses in the specific industry, providing information to consumers, and consulting with industry representatives with respect to consumer safety issues in the industry. Its role is to undertake administrative/regulatory activities and in that capacity, it serves a purpose other than for profit.

NPO Corp. was originally incorporated by members of the industry; however, the purpose for which it currently functions is to undertake a government-type function that the government would usually undertake that was delegated to it by Government A under the SCA. Government A designated NPO Corp as the corporation that would administer the SCA under the SCA. NPO Corp. was set up by Government A for the purpose for which it currently exists, which was to undertake the activities that Government A delegated to it.

Government A did not devolve or transfer all of the assets and powers of the consumer safety regulatory program to NPO Corp. Government A retains the legislating power and overall policy-making power for the program while delegating to NPO Corp. the day-to-day administrative operations of the regulatory program. NPO Corp. is required to file an annual report with the Minister of Consumer Affairs of Government A and as such, is required to demonstrate accountability to the government.

Based on the facts given, NPO Corp. meets the criteria set forth in category 3 and is a body established by Government A.