TORONTO

REPORT FOR ACTION

Four Appeals Regarding the Disallowance of Requests for Refund Concerning Third Party Sign Taxes Paid for Sign I.D. No. 19-059 (2 Strachan Avenue)

Date: February 7, 2017
To: Government Management Committee
From: Chief Building Official and Executive Director, Toronto Building (Acting)
Wards: Ward 19 – Trinity-Spadina

SUMMARY

The Chief Building Official (the "CBO") is responsible for the administration of City of Toronto Municipal Code Chapter 771, Taxation, Third Party Sign Tax (the "Sign Tax By-law"). Owners of third party signs are liable for paying third party sign tax ("Sign Tax") in connection with their signs on an annual basis. However, the Sign Tax By-law provides for a list of exemptions to the payment of Sign Tax. One such exemption, which is the subject of this appeal, is set out in s. 771-8.K which provides that no tax is payable by an owner of a sign as defined by the Sign Tax By-law ("Sign Owner") who has entered into a revenue sharing agreement with the City of Toronto during the term of the agreement.

An owner who has paid an amount under the Sign Tax By-law and believes that it is not payable may apply to the CBO for a refund. Where the application for a refund is refused the applicant may object to the disallowance of the refund, and require a reconsideration of the disallowance. Article X of the Sign Tax By-law allows the applicant to then appeal the disallowance to City Council through the Government Management Committee.

The subject of this report are four appeals by Clarity Outdoor Media Inc. ("Clarity"), under the Sign Tax By-law, to have four separate statements of disallowance issued on February 1, 2017 vacated, and to be granted refunds of Sign Tax paid for the years 2011 to 2014 in relation to Sign No. 19-059 (the "Sign").

The Sign is a third party electronic ground sign with six sign faces located at 2 Strachan Avenue on Exhibition Place grounds. The Sign was the subject of a recent Sign By-law amendment application (Item PG13.6) that was before the Planning and Growth Management Committee on June 15, 2016 and City Council on July 12, 2016. Staff recommended refusal of the request and Council, following recommendations from the Planning and Growth Management Committee, adopted the recommendations of staff.

Clarity operated the Sign subject to a revenue sharing agreement entered into with the Board of Governors of Exhibition Place (the "Board"). The agreement provides that Clarity was responsible for the payment of all taxes. It is Clarity's position that the exemption contained in s. 771-8.K for owners with revenue sharing agreements with the City of Toronto, should be read as including Clarity's revenue sharing agreement with the Board by virtue of the statutory agency relationship between the City and the Board such that Clarity is exempt from the payment of Sign Tax. The CBO rejects this position and is of the view that the exemption relates only to revenue sharing agreements entered into with the City directly and does not apply to revenue sharing agreements with the Board or another city board.

Similarly, another sign on the Exhibition Place grounds near the Dufferin Gate, operated by an outdoor advertising company, has a revenue sharing agreement with the Board. That company does pay the Sign Tax annually.

Furthermore, there are other city boards that have signs with revenue sharing agreements. The Sign Tax has been collected annually for those signs.

RECOMMENDATIONS

The Chief Building Official and Executive Director, Toronto Building, recommends that:

1. City Council dismiss, in whole, each of the four appeals concerning Statement of Disallowance No. 11-19-059-A, Statement of Disallowance No. 12-19-059-B, Statement of Disallowance No. 13-19-059-C, and Statement of Disallowance No. 14-19-059-D respecting third party sign taxes paid for Sign I.D. No. 19-059 (2 Strachan Avenue) on the basis that the appellant's revenue sharing agreement is with the Exhibition Place Board of Governors, and as the exemption in s. 771-8.K of Municipal Code Chapter 771 applies only to a sign owner who has entered into a revenue sharing agreement with the City of Toronto directly and does not apply to a sign owner who has entered into a revenue sharing agreement with a city board; and

2. City Council direct the Chief Building Official to issue a fresh statement of disallowance with respect to each appeal.

FINANCIAL IMPACT

If the recommendations in this report are adopted, the tax exemptions contained in the Sign Tax By-law are preserved and, in addition to the approximate $100,000.00 assessed to Clarity over the 2011 to 2014 tax years (exclusive of penalties and interest totalling an additional approximate $75,000.00), Sign Owners will continue to be assessed the Sign Tax for the signs they operate on the properties managed by local boards, including city boards.

If the recommendations in this report are not adopted, the City will forego approximately $175,000.00 in tax revenue (including interest and penalties) for the Sign. In addition, the adoption of this interpretation of the exemption would cause the City to face the broader, negative financial implication of an annual reduction of approximately

$500,000.00 in the amount of Sign Tax collected by the City each year for similarly-operated signs.

DECISION HISTORY

PG33.10 – New Sign Regulation and Revenue Strategy for the City of Toronto
In addition to establishing a new regulatory regime for signage city-wide and a delegated decision-making authority respecting sign variances, Council adopted the Sign Tax which came into effect on April 6, 2010.
http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2009.PG33.10

ISSUES BACKGROUND

Background

The CBO has assigned Sign No. 19-059 to the Sign for purposes of the administration of the Sign Tax By-law. Sign No. 19-059 is a third party electronic ground sign with six sign faces located at 2 Strachan Avenue on Exhibition Place grounds.

Clarity operated the Sign in the taxation years 2011 to 2014 with a revenue sharing agreement entered into between Clarity and the Board. The term of the Agreement is 15 years (although in May of 2014, Clarity ceased operating the Sign and assigned its rights and obligations under the Agreement to a new sign company with the approval of the Board).

Clarity was assessed for the payment of the Sign Tax in connection with the Sign for each of the years in question. It is not disputed that Clarity was the owner of the Sign as defined in the Sign Tax By-law. Until recently, Clarity did not pay any of the Sign Tax for which it was assessed. As Clarity did not pay the Sign Tax assessed, interest has accrued and penalties have been assessed.

There is currently ongoing litigation in the Ontario Superior Court of Justice between Clarity, the Board, and the City regarding compliance with the terms of the Agreement unrelated to the issue of the Sign Tax. However, because Clarity had not paid the Sign Tax assessed, the City's counterclaim against Clarity included a claim for all Sign Tax amounts outstanding. Clarity then commenced a separate court application against the City in the Ontario Superior Court of Justice pursuant to Rule 14.05 of the Rules of Civil Procedure for a declaration that Sign Tax was not payable. It was ultimately agreed by the parties that the matter of the Sign Tax would be dealt with in the Rule 14.05 court application as opposed to the other litigation. However, such agreement was made with the qualification that Clarity was required to exhaust the administrative remedies provided for in the Sign Tax By-law before it could seek a remedy in court. This court application is scheduled to be heard in court on **April 5, 2017**.

In early January of 2017, Clarity finally agreed to pursue the administrative remedy still available to it. Clarity paid only the principal amount of the Sign Tax owing for each of the outstanding tax years and applied for refunds of the amounts paid on the grounds that the exemption in s. 771-8.K applied to exempt Clarity from the Sign Tax.

The Applicable Process under the Sign Tax By-law

A person who has paid an amount under the Sign Tax By-law that s/he believes is not payable may apply to the CBO for a refund within 24 months after the payment date. Where that person's claim is refused, the CBO shall provide a statement of disallowance, including the reasons. Clarity's counsel applied for a refund of the Sign Tax amounts paid for each of the taxation years in issue on January 23, 2017. The refunds were refused and statements of disallowance were issued to Clarity on January 25, 2017.

A person who receives a statement of disallowance may object within 60 days. Notices of objections to the statements of disallowance were served on January 30, 2017. Fresh statements of disallowance were issued on February 1, 2017. Attachment 1 consists of the four fresh statements of disallowance for each of the four refund applications. Attachment 2 is the CBO's letter of February 1, 2017, notifying Clarity of the actions taken with respect to the four objections.

The Sign Tax By-law allows for an appeal of a statement of disallowance to Council. The power to hold a hearing in respect of an appeal is delegated to the Government Management Committee. Attachment 3 is Clarity's Notice of Appeal dated February 3, 2017, concerning its four appeals for each of the Statement of Disallowance Nos. 11-19-059-A, 12-19-059-B, 13-19-059-C, and 14-19-059-D. Clarity's Notice of Appeal includes the materials submitted with respect to four earlier objections dated January 30, 2017 setting out its position that Sign Tax is not payable.

The Government Management Committee's role is set out in s. 771-45. It states that following its consideration of an appeal, the Committee shall recommend to Council in writing that Council should dispose of an appeal by allowing or dismissing it, in whole or in part, together with the reasons for its recommendation. Council may dispose of an appeal by allowing or dismissing it, in whole or in part.

It is noted that a person is entitled to raise in the appeal only those issues raised in the notice of objection to the statement of disallowance being appealed. The issues raised are those set out in Clarity's Notice of Appeal which encloses its objection letter of January 30, 2017.

The court proceeding between Clarity and the City which is scheduled to be heard on April 5, 2017 is not relevant to the consideration of Clarity's appeal and should not be taken into account in any way. If Council should decide to allow Clarity's appeal and grant the refunds, the court application will be abandoned. If Council should decide to dismiss Clarity's appeal, the court application will proceed as scheduled.

COMMENTS

Clarity's Position

The basis of Clarity's appeal is that no Sign Tax is payable because the exemption in s. 771-8.K of the Sign Tax By-law applied to it. S. 771-8.K provides that "no tax is payable" by a Sign Owner who is:

> K. During the term of a revenue sharing agreement with the City of Toronto, an Owner who has entered into a revenue sharing agreement with the City of Toronto.

It is not disputed that Clarity was the Sign Owner for the tax years in question. Clarity's position is fully set out in its objection letter dated January 30, 2017 as Attachment 3 in this report (and reference should be made to it). In brief, it is Clarity's position that the Agreement entered into with the Board was a revenue sharing agreement with the City such that the exemption in s. 771-8.K applied. Clarity argues that a proper interpretation of the Sign Tax By-law must give effect to the agency relationship between the City and Clarity such that the exemption in s. 771-8.K must be read to include revenue sharing agreements entered into with city boards.

The CBO's Position

The CBO does not agree with Clarity's position and the details of the CBO's decision are included in the February 2017 Notification of Actions of the Chief Building Official Concerning Objections to the Statements of Disallowance, included in this report as Attachment 2. Firstly, the City and the Board are separate legal entities. Pursuant to the *City of Toronto Act, 2006* ("COTA"), the Board is a body corporate, distinct from the City, with all the powers of a natural person. The Board has many powers wherein it can act independently of the City including, but not limited to, procuring goods and services and entering into agreements. Its staff are not employees of the City, and it can initiate or defend legal proceedings in its own name. It is, in all respects, a separate entity from the City.

Section 10 of COTA provides that a by-law passed under COTA may be general or specific in its application and may differentiate in any way and on any basis the City considers appropriate. The power to so differentiate includes the right to differentiate between the City and its local boards. It includes the right to differentiate between the City and city boards notwithstanding the existence of a statutory agency relationship. When passing the Sign Tax By-law, the City opted to exempt a Sign Owner who has entered into a revenue sharing agreement with the City during the term of said agreement. It did not exempt a Sign Owner who has entered into a revenue sharing agreement with a city board. Had it intended to do so, it would have done so expressly.

The City did not intend to exempt a Sign Owner who has entered into a revenue sharing agreement with a city board or any other local board. Its intention was simply to only exempt a Sign Owner who has entered into a revenue sharing agreement with the City directly.

The plain meaning of the words in the exemptions section of the Sign Tax By-law provides further evidence that references to the City of Toronto was not intended to include local boards (including city boards) and that the City intended to differentiate between itself and its local boards. One exemption (s. 771-8.J) provides an exemption of the Sign Tax to a local board as defined in COTA where the local board is the Sign Owner; another (s. 771-8.I) provides an exemption to the City of Toronto where the City is the Sign Owner. Reference to the larger class of "local boards" would include all members of that class, including those of the subclass known as "city boards". There is a clear distinction in the Sign Tax By-law between the City and its boards. As such, had the City intended to exempt a Sign Owner who entered into a revenue sharing agreement with a local board, it would have expressly done so. It did not. The exemption in s. 771-8.K applies only to a Sign Owner who has entered into a revenue sharing agreement with the City.

In summary, it was open to the City to differentiate between itself and its boards in its by-laws. The City opted to differentiate between itself and its local boards, including city boards, in the Sign Tax By-law when approving exemptions to the payment of Sign Tax. As such, the exemption in s. 771-8.K applies only to a Sign Owner who has entered into a revenue sharing agreement with the City directly and does not apply to a Sign Owner who has entered into a revenue sharing agreement with a city board regardless of the agency relationship between that board and the City. This is the City's statutory prerogative.

CONTACT

Robert Bader, Supervisor, Sign By-law Unit, Toronto Building
Tel: (416) 392-4113; Email: Robert.Bader@toronto.ca

SIGNATURE

Mario Angelucci
Chief Building Official and Executive Director (Acting)
Toronto Building

ATTACHMENTS

Attachment 1 – Chief Building Official's Fresh Statements of Disallowance (February 1, 2017)

Attachment 2 – Notification of Actions of the Chief Building Official Concerning Objections to the Statements of Disallowance (February 1, 2017)

Attachment 3 – Clarity's Notice of Appeal Enclosing Letter of Objection (February 3, 2017)