

# General Partner Distributions: Subject to GST/HST?

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On September 8, 2017, the Department of Finance (“Finance”) released a series of draft legislative changes to the *Excise Tax Act* (Canada) (the “ETA”). Of particular note is legislation that will have broad ranging impact on limited partnerships that are engaged in investment activities including investment in other partnerships.

## *Do these rules apply to your limited partnership?*

These new rules apply to “investment limited partnerships.” This newly defined term includes limited partnerships (“LP”), the primary purpose of which is to invest funds in property consisting primarily of financial instruments (which includes equity securities, debt securities, insurance policies, interests in partnerships, trusts, or any options / guarantees in respect of the foregoing), and that meet one of the following two conditions (i.e., (a) or (b)):

- (a) Either (i) the LP itself is represented/promoted as a hedge fund, investment limited partnership, mutual fund, private equity fund, venture capital fund or other similar collective investment vehicle, or (ii) the LP is part of an arrangement or structure that is represented/promoted as a hedge fund, investment limited partnership, mutual fund, private equity fund, venture capital fund or other similar collective investment vehicle; OR
- (b) The total value of all interests in the LP held by “listed financial institutions” is 50% or more of the total value of all interests in the LP.

LPs that would fall into Category (a) above include LPs in tiered investment fund structures such as master-feeder funds or fund-of-funds. It is not clear what it means for the LP to be represented or promoted, particularly where no particular registration or licensing is required for the partnership to undertake the activities. It is easy to envision many circumstances where the status as an “investment limited partnership” will turn on whether the partnership is represented/promoted as a particular investment vehicle.

LPs that would fall into Category (b) above include any LP used as an investment vehicle for, or a funding medium for investing on behalf of, “listed financial institutions” (which includes banks, among others, insurers, lenders, traders/dealers of financial instruments, credit unions, investment plans and persons whose primary business is the lending of money).

This new definition for “investment limited partnership” (or “Investment LP”) will be deemed to come into force effective September 8, 2017.

An LP which invests exclusively and directly in real property would not constitute an Investment LP. In contrast, an LP that invests exclusively in partnership interests of other partnerships could constitute an Investment LP if it meets the conditions of either of paragraph (a) or (b) above. This might include, for instance, an LP that invests in subsidiary LPs engaged in investments in real property, where 50% or more of the LP interests are held by a pension plan.

Neither the draft legislation nor the Explanatory Notes specify how to interpret the phrase “primary purpose.” To the extent an LP is engaged in both investment in financial instruments and investment in real property directly, this consideration becomes particularly important.

## *What happens if an LP is considered to be an “investment LP”?*

There are 3 notable GST/HST consequences if an LP is considered to be an “investment LP” for purposes of the ETA.

First, by virtue of new draft subsection 272.1(8) of the ETA, a general partner (a “GP”) of an Investment LP that provides management or administrative services to the Investment LP will be required to charge, collect and remit the applicable GST/HST in respect of its management or administrative services. By virtue of existing subsections 155 and 272.1(3) of the ETA, the value of the consideration for the GP’s services is either (a) the actual amount of the partnership draw that the GP receives, in cases where the Investment LP can claim a full input tax credit (“ITC”) in respect of the GST/HST payable on the GP distributions, or (b) the fair market value of the management or administrative services rendered by the GP, in cases where the Investment LP cannot claim full ITCs. This new rule applies for all amounts distributed to GPs of investment LPs on or after September 8, 2017. This rule will also apply retroactively to the extent the GP previously charged, collected or remitted GST/HST in respect of past payments from the Investment LP.

Second, by virtue of the proposed amendment to the definition of “investment plan” in subsection 149(5) of the ETA, an Investment LP will be added to the definition of “investment plan”. This means that Investment LPs will fall within the definition of “listed financial institution” within the meaning of subparagraph 149(1)(a)(ix) of the ETA. In short, this results in new compliance burdens:

- Potential requirement to file Form GST111, to the extent the Investment LP is a “reporting institution” within the meaning of section 273.2 of the ETA. Failure to file Forms GST111 as and when required can lead to potentially severe penalties; and
- Potential for Investment LPs to be classified as “selected listed financial institutions” (or “SLFIs”) within the meaning of the ETA, which carries with it additional onerous filing and reporting requirements.

Third, an Investment LP that is also a SLFI will be automatically switched, by operation of new draft subsection 244.1(4) of the ETA, to a calendar year fiscal period for GST/HST purposes commencing January 1, 2019.

### **There’s More!**

The draft legislation includes many other provisions affecting partnerships, pension plans and drop-shipments. Some of the proposed legislation has been previously announced, but the draft legislation may differ significantly from previously-announced changes.

### **Questions?**

These proposed amendments are complex and, to the extent they apply, will result in (potentially unrecoverable) GST/HST payable on GP distributions and create onerous GST/HST compliance obligations that previously may not have existed for the limited partnership.

If you have any questions regarding how these draft legislative amendments apply to you, please contact:

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