

Got PILT?

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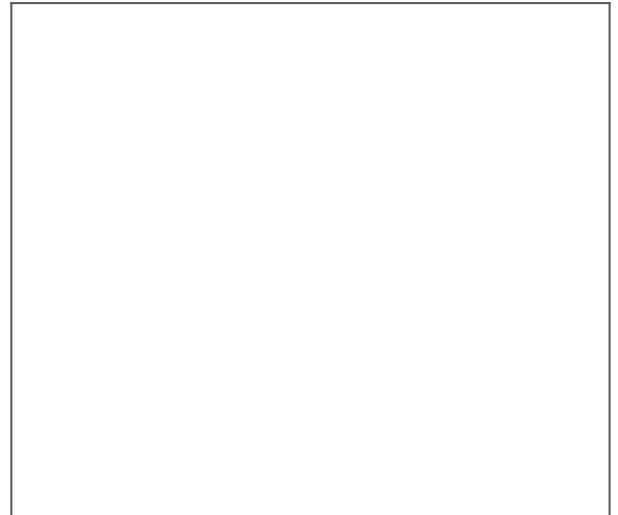
published 12/14/2010

If your municipality is the proud location of federal government or federal agency land or buildings, chances are you already know about “payments in lieu of taxes” or “PILT”. Under section 125 of the Constitution Act, 1867, the Government of Canada is exempt from paying any taxes imposed by local governments. In recognition of the municipal services received by these properties, the federal government pays a discretionary PILT. All of this is laid out in the Payment in Lieu of Taxes Act and regulations.

With some exceptions, the Act sets the amount of the PILT as an amount equal to the tax rate established by the municipality applied to a value of the land established by the Minister. In setting the property value, the Minister is to consider the value as if the property were privately owned and subject to assessment.

If there is disagreement, the matter can be referred to the PILT Dispute Advisory Panel. The Panel provides advice to the Minister when a taxing authority disagrees with the applicable property value, dimensions or effective tax. The Minister’s ultimate discretion is preserved. The advice of the Panel is not, strictly speaking, binding upon the Minister, but the Minister must have some rationale for departing from the Panel’s advice.

Some very interesting litigation has arisen in recent years where the municipality and the



Minister have disagreed, with one case having been decided this spring by the Supreme Court of Canada.

The City of Montreal v. Montreal Port Authority

In the course of its municipal amalgamations, Montreal abolished business (occupancy) taxes. It then implemented a variable rate property tax that would make up the revenue shortfall. The Port Authority and the CBC (which had not previously paid business taxes) calculated their PILT payments by reducing the property tax rate to exclude the portion that they saw as a replacement for the business tax. The Port Authority also excluded silos and piers when setting the property value. Both argued that they retained the discretion to set the payments. The difference in PILT payments was in the range of \$3.5 million, annually.

Montreal brought a challenge in the Federal Court, saying that the decisions were unreasonable and therefore unlawful in light of the provisions of the Act that require that Crown corporations set the PILT as if the property was assessable and taxable. The trial judge agreed, saying that the decisions in setting the PILT were arbitrary and capricious and without jurisdiction. He sent the corporations back, with instructions to calculate the PILT based on Montreal's tax rates.

The Federal Court of Appeal reversed the decision, finding that the Ministers had exercised their discretion appropriately. Off to the Supreme Court!

In reasons released April 15, 2010, Justice LeBel, writing for the Supreme Court of Canada, noted that the purpose of the Act was to reconcile the Crown's immunity from taxation with tax fairness for municipalities. He pointed out that, under the regulations, neither of the two Crown Corporations were required to pay PILT in respect of business taxes. He also agreed that the corporations had decision-making power over the relevant tax rate.

The Court held, however, that the Crown's discretion is not absolute; in a country founded on the rule of law, discretion must be exercised within the confines of the legislation that grants the discretion. The Crown must still have discretion to deal with legitimate differences in opinion on valuation, to sort out applicable classifications and tax rates and to protect against municipalities that might use their taxing authority in bad faith. The Court said that the exercise of the discretion must also be reasonable.

It held that the corporations acted unreasonably in setting a tax rate that excluded a notional allowance for a business tax component. What the Act required them to do was identify the appropriate rate, not arbitrarily invent a rate more to their liking. Similarly, the Port Authority could not exclude the value of its silos; its interpretation was inconsistent with the

assessment regime and there was no statutory exemption that would have justified their exclusion.

Canada v. Halifax Regional Municipality

The Halifax Citadel is a national historic site on over 48 acres of land in the centre of Halifax, featuring a six acre, stone, walled fortress. Halifax claimed it was owed approximately \$13 million in PILT for the years 1997 to 2007. The Nova Scotia assessor put the property value at approximately \$38 million; the Minister set the value at just \$5.3 million. The main differences related to the open space outside the Citadel and certain stone structures (casemates and demi-casemates, originally used for ammunition storage). The differences were referred to an Advisory Panel. The Minister issued a new valuation at just over \$9 million, based on the Panel's report. Much of the land was given a nominal value of ten dollars because it was zoned as a historic site and the integrity of the site would not permit its development for any use but open space.

The Federal Court found that the Minister's valuation fell short, due to inadequacies in the Advisory Panel's reasons for its recommendations. The Advisory Panel only makes recommendations, and, therefore, its decisions are not reviewable, but the Minister's acceptance of those recommendations can be challenged.

The Federal Court of Appeal (July 21, 2010), considered the matter in light of the Montreal case. The majority upheld the Minister's nominal valuation of the land. Even though the Advisory Panel's reasons were "not a model of clarity", the decision was sufficiently clear when read as a whole (the dissenting judge disagreed on this point). On the valuation of the casemates and demi-casemates, the whole Court found that the Panel's reasons and the record of the hearing were inadequate; they did not enable the Court to determine whether the Minister's valuation was reasonable. That issue was sent back to the Minister for a new decision.

Closing

Although the federal Crown is given broad discretion in setting PILT payments, the Courts have made it clear that it must be exercised within the framework of the Act and its decisions must meet the standard of reasonableness. The stage has been set for greater deference to municipal property tax regimes, more challenges and further guidance from the Courts.

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