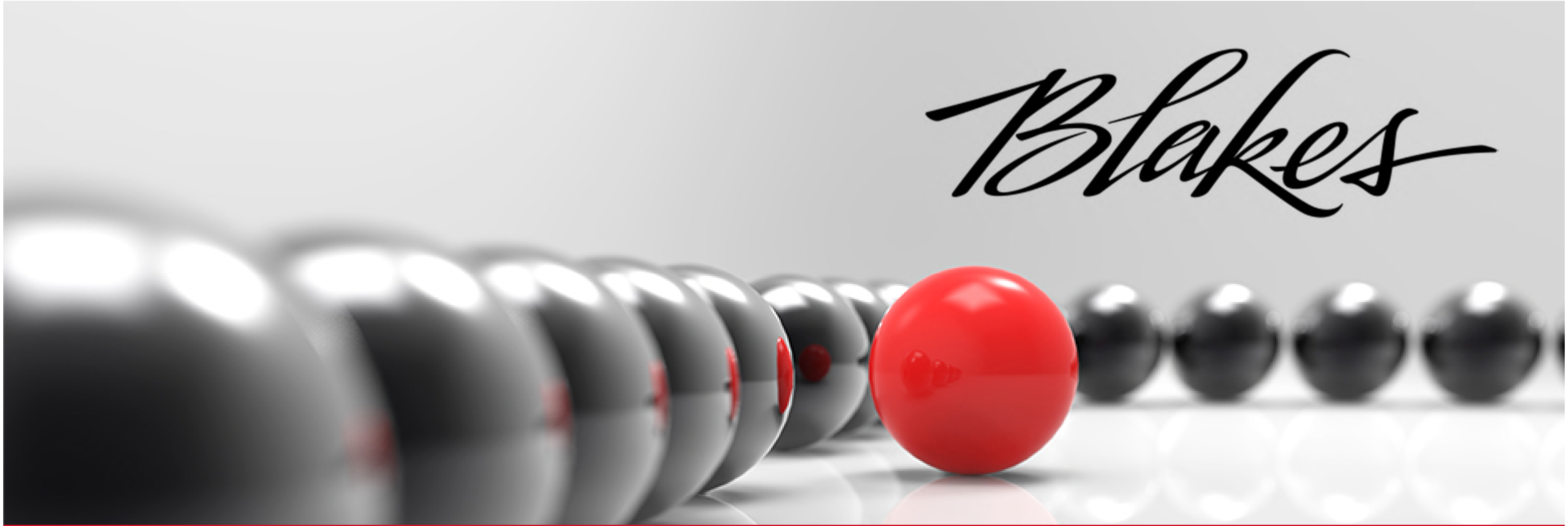

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ICPA 2018 Canada Conference
Structuring E-Commerce Sales to Canada: Duty and Tax Considerations

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On the

Agenda

1. Introduction
2. Structuring Considerations
3. Selected Common Structures
4. Customs Valuation Issues
5. GST Issues

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Introduction

What is Electronic Commerce

- World Trade Organization definition:

  “the production, distribution, marketing, sale or delivery of goods and services by electronic means”.

Source: Work Programme on Electronic Commerce, www.wto.org

- Canada Revenue Agency definition:

  “the delivery of information, products, services, or

  payments by telephone, computer or other automated media.”

Source: www.canada.ca/en/revenue-agency/services/tax

E-Commerce by the Numbers

- 80% of Canadians shopped online in 2015*
- 53% of Canadian online shoppers made at least one cross-border purchase

Regarding cross-border online purchases:

- 83% reported making purchases from the U.S.
- 42% made purchases from the Pacific Rim
- 16% reported purchases from the EU

Source: Growing E-Commerce in Canada, Canada Post www.canadapost.ca

*Period covered was March 2015 – March 2016

Infrastructure Needed for E-Commerce

- In the case of related groups, a factor considered by the CBSA in "value for duty" audits is the party who entered into the relevant contract:

1. Hardware (personal computers, modems, servers, routers)
2. Telecommunications networks
3. Network service providers or Internet service providers (ISPs) to connect individuals or businesses to the network
4. Software programs to run the hardware and electronic commerce packages; and
5. Ancillary services (such as advertising, delivery/courier, credit card, and authentication/certification services)

Source: Occasional Paper No. 54 "Electronic Commerce and the Rules of the World Trade Organization", University of Ottawa, Centre for Trade Policy and Law.

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Key Considerations in Structuring E-Commerce Sales

Key Structuring Considerations

1. Selecting a Structure to Match Vendor's Overall Objectives
   - expanding customer base to Canada?
   - introducing a new channel of distribution?
   - matching retail price available in Canadian stores?
   - minimal compliance issues for customer?
   - using NR vendor's existing e-commerce platform?
2. Duty and Tax Considerations in Structuring E-Commerce Sales
   - avoiding import/GST registration by NR vendor
   - minimizing border taxes
   - minimizing sales tax collection obligations

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Selected Common Structures

Selected Common Structures

1. NR vendor sells direct to Canadian consumer, consumer is IOR
2. NR vendor sells direct to Canadian consumer, NR vendor is IOR
3. NR vendor – TP – Canadian consumer, TP is IOR
4. Canadian Retailer/Sub (CanCo) sells to Canadian consumer, fulfills order from Inventory in Canada, and is IOR
5. CanCo sells to Canadian consumer, fulfills order from NR supplier, and is IOR

Duty and Tax Issues Per Structure

1. NR vendor sells direct to Canadian consumer, consumer is IOR

- ✓ expands customer base to Canada
- ✓ introduces new channel of distribution
- X matches retail price available in Canadian stores
- X minimal compliance issues for customer
- ✓ uses NR vendor’s existing e-commerce platform
- ✓ avoids import/GST registration by NR vendor
- X minimizes border taxes
- ✓ minimizes sales tax collection obligations

Duty and Tax Issues Per Structure

2. NR vendor sells direct to Canadian consumer, NR vendor is IOR

- ✓ expands customer base to Canada
- ✓ introduces new channel of distribution
- ✓ /X matches retail price available in Canadian stores
- ✓ minimal compliance issues for customer
- ✓ uses NR vendor's existing e-commerce platform
- X avoids import/GST registration by NR vendor
- ✓ /X minimizes border taxes
- X minimizes sales tax collection obligations

Duty and Tax Issues Per Structure

3. NR vendor → TP → Canadian consumer, TP is IOR

- ✓ expands customer base to Canada
- ✓ introduces new channel of distribution
- ✓ /X matches retail price available in Canadian stores
- ✓ minimal compliance issues for customer
- ✓ /X uses NR vendor's existing e-commerce platform
- ✓ avoids import/GST registration by NR vendor
- X minimizes border taxes
- ✓ minimizes sales tax collection obligations

Duty and Tax Issues Per Structure

4. CanCo sells to Canadian consumer, fulfills order from Inventory in Canada, and is IOR

- ✓ expands customer base to Canada
- ✓ introduces new channel of distribution
- ✓ matches retail price available in Canadian stores
- ✓ minimal compliance issues for customer
- ✓ uses NR vendor's existing e-commerce platform
- \- avoids import/GST registration by NR vendor
- ✓ minimizes border taxes
- \- minimizes sales tax collection obligations

Duty and Tax Issues Per Structure

5. CanCo sells to Canadian consumer, fulfills order from NR supplier, and is IOR

- ✓ expands customer base to Canada
- ✓ introduces new channel of distribution
- ✓ matches retail price available in Canadian stores
- ✓ minimal compliance issues for customer
- ✓ uses NR vendor’s existing e-commerce platform
- ✓ avoids import/GST registration by NR vendor
- ✓ minimizes border taxes
- \- minimizes sales tax collection obligations

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Customs Valuation Issues

Customs Valuation Issues

- valuation provisions of the *Customs Act* equally applicable to sales made by e-commerce as other forms of commerce.
- the “transaction value” method is the primary basis of appraisal:

> “… the value for duty of goods is the transaction value of the goods
> if the goods are **sold for export to Canada** to a **purchaser in Canada**
> and the **price paid or payable** for the goods can be determined …”
> [ss. 48(1), Customs Act]

- the “sold for export to Canada” requirement is satisfied where there is a “sale” and where the sale is “for export to Canada”
- CBSA interprets the term “sale” in the “widest sense” and includes cases where the vendor has transferred, or agreed to transfer, title for a price to the purchaser of the subject goods, including agreements to sell [paras. 2 & 4, D13-4-2]

Customs Valuation Issues

- issue arises where vendor wishes to minimize duties and taxes
- Common structure involves a Canadian retailer (CanCo) with a U.S. or other non-Canadian related parent/supplier of goods.
- Compare the two situations:
- **NR Vendor, No Canadian Sub/Retailer:** A foreign vendor and a Canadian purchaser negotiate terms for the delivery of goods to the purchaser in Canada and the vendor subsequently enters into an agreement with a third person who supplies the goods that are exported to Canada. The relevant sale for establishing the value for duty in these circumstances is the one that sets off this chain of events, i.e., the transaction in which the person in Canada is directly involved. [para. 7, D13-4-2]
- **NR Supplier to related Canadian Retailer:** A customer in Canada orders goods for delivery within Canada from a second person in Canada who subsequently orders the goods from a foreign supplier. The first of these two transactions is for the domestic supply of goods, even if the customer knows that the goods must be imported. The second transaction requires an international transfer of the goods to Canada. In this situation … a calculation of **value for duty is based on the price charged by the foreign supplier, and not on the price in the domestic supply of the goods.** [para. 8, D13-4-2]

Customs Valuation Issues

- Issues raised by CBSA:
  - Whether ordering goods from a website = ordering “goods for delivery within Canada from a second person in Canada”
  - Whether quoting prices in U.S. dollars is “not consistent with a domestic sale”
  - Whether order fulfillment role of NR supplier means NR supplier becomes the true “vendor” vs. Canadian Retailer/Sub
- Challenge is to apply best practices in structuring the e-commerce website to avoid challenge by CBSA

Best Practices for Minimizing Value for Duty

1. CanCo's website should be a ".ca" rather than a ".com" domain.
2. The website should be registered in the name of CanCo rather than USCo.
3. The website should be hosted on a Canadian server.
4. The website should quote landed prices in Canadian dollars (rather than USD)
5. Orders should be fulfilled, to the greatest extent possible, from Canadian inventory.
6. Service contracts relating to the website (i.e., payment processing) should be with CanCo rather than USCo.
7. If using a ".com" domain, ensure there are sufficient indicia or notices to customers that they are ordering from CanCo rather than a seller located outside Canada.

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GST Issues

GST Issues

- Goods and Services Tax (5%) **payable** by importer on the “duty paid value” of goods imported into Canada.
- GST is fully refundable where the importer (i) is registered for GST and (ii) is importing for the purpose of making a sale in Canada.
- Harmonized Sales Tax (GST + provincial VAT) of either 5%, 13% or 15% **collectable** from customer on sales made in Canada by registered vendors

GST Issues, cont'd

- NR vendors may elect to avoid being registered for GST or acting as importer in certain circumstances
  - "delivery" must occur outside Canada
  - NR does not "carry on business" in Canada
  - NR does not act as importer of record

    See: subsection 142(2) and 143(1) *Excise Tax Act*

- Issue: structure must contemplate and plan around two GST payment/collection provisions (border and domestic supply)

Do you have any questions?

Please let us know if you have any questions or would like to discuss a specific topics.

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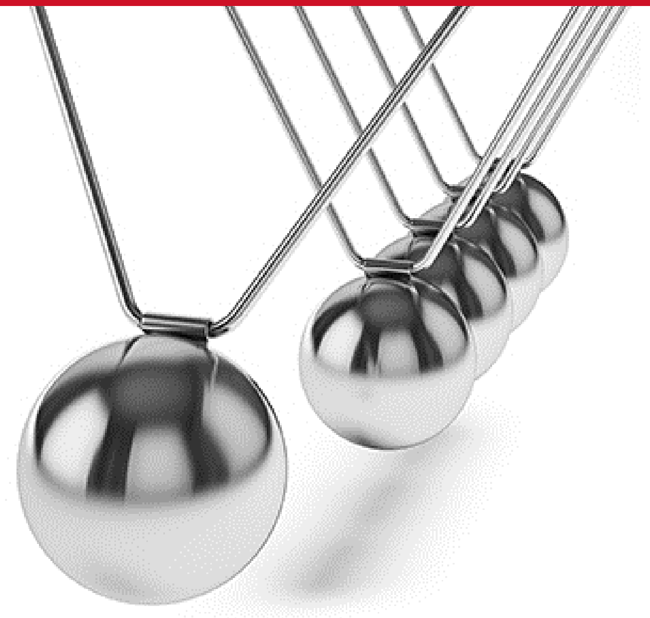

Thank You