

2018 ICPA Annual Conference

GST/HST Issues for Non-Resident Importers

Greg Kanargelidis, Partner
Blake, Cassels & Graydon LLP
greg.kanargelidis@blakes.com

March 13, 2018 – San Diego

The logo for the law firm Blakes, featuring the name "Blakes" in a stylized, cursive script font.

Order of Presentation

1. Overview of GST/HST
2. Treatment of Non-Residents
3. How GST Applies at the Border
4. Paying/Recovering GST/HST
5. Planning Considerations Using Incoterms Rules
6. GST Cases on Imports

Introduction

- Presentation focusses on the GST/HST rules applicable to non-resident sellers of goods to customers in Canada.
- The presentation does not cover GST/HST treatment of other types of supplies (real property, intangible property, services) or special cases such as temporary imports.

GST/HST Overview

GST

- Goods and Services Tax is a 5% value-added tax imposed under the *Excise Tax Act*
- Applies to supplies of “property” and “services” that are “made in Canada” or imported into Canada
- There are “taxable supplies”, “exempt supplies” and “zero-rated supplies”
- GST registered suppliers are required to charge and collect the GST on “taxable supplies”; GST on “zero-rated” supplies is 0% (tax free)
- GST registered suppliers may as a general rule claim a full refund of GST incurred on inputs acquired to make “taxable” or “zero-rated” supplies
- Only the “net tax” is remitted to the Canada Revenue Agency. If more tax was paid in a particular reporting period than collected, the registrant is entitled to receive a “net tax refund” from the CRA.

GST/HST Overview

HST

- The Harmonized Sales Tax (HST) refers to the tax on supplies made in those provinces of Canada which have harmonized their provincial sales tax with the federal GST.
- The HST applies in the same manner as the GST on most goods and services supplied in the HST provinces
- GST registrants are automatically registered for HST purposes
- Remaining provinces charge their own provincial sales tax (except Alberta)

Tax Rates

- GST is charged at the rate of 5% of the price of the goods being sold.
- GST at the rate of 5% is also imposed on most commercial importations of goods (with the exception of non-taxable, exempt, or zero-rated supplies)
- HST ranges depending on the province in which a sale is made.
- The HST applicable in the harmonized provinces is 13% in Ontario and 15% in New Brunswick, Newfoundland & Labrador, Nova Scotia, and Prince Edward Island.

Tax Rates

- The provincial sales tax rates applicable in the rest of the provinces are as follows:
- B.C. – 7%
- Manitoba – 8%
- Saskatchewan – 5%
- Quebec – 9.975%
- Alberta – No Provincial Tax

Treatment of Non-Residents

Summary

- A non-resident who “carries on business” in Canada must become registered for GST/HST purposes if the non-resident has annual worldwide supplies of over \$30,000 CAN.
- A non-resident who is not carrying on business in Canada and therefore not required to register for GST/HST purposes may voluntarily register for GST purposes in certain circumstances.
- A non-resident who is able to remain unregistered for GST purposes benefits from the “non-resident override” rule

When is a Non-Resident “carrying on business” in Canada?

- A “business” includes a profession, calling, trade, manufacture, or undertaking of any kind, whether or not the activity or undertaking is performed for profit.
- To be “carrying on business” in Canada is a factual determination that takes into account all relevant factors. The factors considered by the CRA are as follows:
 - place of delivery
 - place of payment
 - place where agents or employees are located
 - place where purchases are made or assets are acquired
 - place from which transactions are solicited
 - location of assets or an inventory of goods
 - place where contracts are made
 - location of a bank account
 - place where non-resident’s name/business are listed in a directory
 - location of a branch or office
 - place where the service is performed
 - place of manufacture or production

Voluntary Registration

- A non-resident may voluntarily register for GST if it:
 - is engaged in a commercial activity in Canada;
 - in the ordinary course of carrying on business outside Canada, regularly solicits orders for goods (except prescribed goods) to be exported or delivered to Canada; or
 - in the ordinary course of carrying on business outside Canada, enters into an agreement to supply services to be performed in Canada, or intangible personal property such as intellectual property to be used in Canada or that relates to real property situated in Canada, to goods that are ordinarily situated in Canada, or to services to be performed in Canada.

GST Registration

Advantages of Registering for GST

- As a GST registrant, the company is entitled to recover as an Input Tax Credit (ITC) any GST incurred on any goods and services acquired in Canada in relation to its commercial activities (e.g., purchases of inventory, warehouse costs, rentals, customs broker's fees)
- GST registrants are entitled to recover GST paid on imports by way of an ITC

GST Registration

Implications of GST Registration

- GST registrants must file periodic returns either on an annual, quarterly or monthly basis depending on levels of worldwide supplies.
- A non-resident GST registrant with no “permanent establishment” in Canada must put up a security deposit
- security deposit equal to 50% of the estimated “net tax” annually, with a minimum of CAN\$5,000 and a maximum of CAN\$1,000,000.
- A non-resident who registers for GST purposes is disqualified from the benefits of the “non-resident override” rule

Non-Resident Override Rule

- A deeming rule applicable where three conditions are met:
 - (1) non-resident supplier
 - (2) non-registrant
 - (3) not “carrying on business” in Canada
- All supplies made by the non-resident are deemed to be made outside Canada, and therefore the supplier is not required to charge and collect the GST/HST on sales to customers in Canada
- Downside is that such a non-resident cannot claim input tax credits for GST/HST it must pay to suppliers since not registered.

How Does GST Apply to Imported Goods at the Border?

- GST/HST is levied under Division III of the ETA when goods are imported into Canada
- S. 212 – Every person who is liable to pay duty under the *Customs Act* or who would be liable if the goods were subject to duty, is required to pay GST on imported goods (the importer of record)
- GST/HST is collected at the time of importation into Canada
- S. 215 – GST is payable on the “value for duty” of the goods, plus the amount of all duties and taxes, if any, imposed under the *Customs Tariff*, the *Excise Act*, the *Special Import Measures Act*, and any other law relating to customs.

How Does GST Apply to Imported Goods at the Border?

- The 5% GST applies on all commercial importations of goods at the border.
- The HST applies on all “casual importations” of goods at the border, such as importations by an individual consumer who purchased goods via a retailer’s e-commerce website.
- Where casual goods are imported into a non-harmonized sales tax province, that province’s provincial retail sales tax is collected in addition to the 5% GST.

Types of “Supplies”

- GST/HST applies to “taxable supplies” which are supplies of all property or services except those that qualify as “zero-rated supplies” and “exempt supplies”.
- With respect to imported goods, there is a further category of “non-taxable importations” which are not subject to GST at the border.
- Zero-Rated Supplies are taxable supplies in which the tax rate is 0%. These differ from exempt supplies (which are not subject to the tax at all) in how they impact the supplier’s ability to claim input tax credits.
- If a supplier makes “exempt supplies”, the supplier is not entitled to claim a refund of GST/HST paid to operate the supplier’s business.
- If a supplier makes “zero-rated supplies”, the supplier is entitled to claim a full refund of GST/HST paid to operate the supplier’s business.

Non-Taxable Importations

Schedule VII – Non-taxable importations

- Goods listed in Schedule VII are not taxable when imported into Canada – s. 213
- Examples:
 - tariff exemptions (Chapter 98, Customs Tariff)
 - warranty replacements/parts
 - mailed goods up to \$20 VFD
 - prescribed goods (*Non-Taxable Imported Goods (GST/HST) Regulations*)

Canadian Goods Returned

Canadian Goods Returned

- Tax free importation of goods under tariff items 98.13 and 98.14 where the owner or importer previously acquired the goods in Canada or imported them for consumption, use or supply in Canada
- HOWEVER, tax-free importation will not be allowed for goods that are being imported for the first time after having been:
 - supplied outside Canada;
 - supplied in Canada for export under conditions resulting in zero-rating of the supply; or
 - supplied to a non-resident recipient who was entitled to claim a rebate of the GST under s.252(1).

Zero-Rated Goods

Schedule VI – Zero-Rated Goods

- Zero-rated goods are subject to GST at a rate of 0%
- Applies to goods listed in 10 Parts of Schedule VI, such as:
 - prescription drugs
 - medical and assistive devices
 - basic groceries
 - agricultural and fishing
 - certain transportation services

Exempt Supplies

Schedule V - Exempt Supplies

- Goods listed in Schedule V are not considered taxable supplies
- Examples:
 - health care services
 - educational services
 - supplies by charities (e.g., meals on wheels)
 - financial services

Structuring Import Transactions to Avoid/Minimize GST at the Border

Summary

- A non-resident can avoid GST at the border by structuring the sale to be “made outside Canada” and not act as importer of record
- A registered non-resident who acts as importer of record can claim directly an input tax credit for GST it is required to pay at the border.
- Alternatively, an unregistered non-resident who acts as importer of record and incurs the GST at the border can “flow through” the input tax credit to its registered customer in Canada

When is a sale made “outside Canada”?

- The GST legislation includes certain “place of supply” rules which help to determine whether a sale is made in Canada or outside Canada.
- Only sales “made in Canada” are subject to GST collectable by a registered seller.
- Focussing on the sale of goods:
 1. the supply is deemed to be made “in Canada” where the goods are “delivered or made available” in Canada.
 2. The supply is deemed to be made “outside Canada” where the goods are “delivered or made available” outside Canada

When is a sale made “outside Canada”?

- The key is whether the goods are “delivered or made available” inside or outside Canada
- The point of delivery is determined in part by the terms of trade negotiated between the parties, such as INCO terms.
- For example:
 1. a sale of goods “Ex Works USA Distribution Centre” represents a delivery of the goods outside Canada
 2. a sale of goods “Delivered Duty Paid, Toronto Ontario” represents a delivery of the goods inside Canada

Paying/Recovering GST

1. SS. 169(1) – General Rule
2. SS. 169(2) – Services on Imported Goods
3. S. 180 – Non-resident supplier/importer
4. S.178.8 – Registered non-resident supplier who imports

Paying/Recovering GST

169(1) – General Rule

- The GST/HST and QST are recoverable taxes for persons who are:
 - registered for such taxes; and
 - purchasing goods and services for consumption, use or supply in a “commercial activity”
- Registrants net out GST/HST paid on input costs against GST/HST collected for any reporting period
- If GST/HST paid is greater than GST/HST collected, registrants claim a “net tax refund” from Canada Revenue Agency

Paying/Recovering GST

169(2) – Services on Imported Goods

- Section 169(2) of ETA provides ITCs for goods imported to provide commercial services
- Applies where a registrant service provider imports goods of a non-resident person who is not registered for GST purposes
- Goods must be imported for the purpose of making a taxable supply to the non-resident person of a commercial service in respect of the goods
- The section allows the registrant service provider to claim ITCs for GST paid on the importation of the goods

Treatment of Goods Sold by an Unregistered Non-Resident Importer

- where the vendor is not registered for GST purposes and sells goods to a customer in Canada and acts as the IOR in respect of the imported goods, the following general rules apply
 1. the non-resident IOR must pay the GST at the time of importation
 2. the non-resident vendor/IOR does not charge the GST on its invoice to its customer
 3. the non-resident vendor/IOR is not entitled to claim an input tax credit (i.e., refund) of the GST because the vendor is not a GST registrant
 4. the non-resident vendor/IOR may be able to use the “flow through mechanism” to deal with the GST

Paying/Recovering GST

180 – Unregistered Non-resident Supplier/Importer

- Section 180 of ETA/“Flow through” of ITCs to a recipient
- The section applies where a non-resident person, who is not registered for GST purposes
 - makes a supply of tangible personal property to a recipient
 - delivers the property or makes it available in Canada to the recipient
 - has paid GST on the importation of the property; and
 - provides to the recipient evidence that such GST was paid
 - the recipient is deemed to have paid the GST and (if entitled) can then claim an ITC for such GST pursuant to subsection 169(1) of the ETA

Using the Flow Through Mechanism for ITCs

- the registered customer is able to claim the input tax credit (i.e., refund) of the GST paid at the border by the unregistered non-resident seller, as if the customer paid the GST directly.
- In order for this to work, the registered customer has to receive evidence of the GST actually paid at the border (i.e., by receiving a copy of the customs documents)
- Also, the non-resident seller should be careful to show the border tax as a “reimbursement of Division III GST” on the invoice, rather than referring to the charge as “GST”.
- This rule does not work well where the goods in the shipment are intended for multiple customers.

Treatment of Goods Sold by Registered Non-Resident Importer

- Where the vendor is a non-resident who is registered for GST purposes and who sells goods to a customer in Canada that are delivered or made available to the customer in Canada, the following general rules apply:
- The non-resident IOR must pay the GST at the time of importation
- The non-resident claims an input tax credit (i.e., refund) in respect of the GST on its GST return for the period in question or a subsequent period, within the prescribed time limits
- The registered non-resident vendor charges the GST/HST to its customer on its invoice price

Paying/Recovering GST

S. 178.8 “Constructive Importer” Rule

- addresses circumstances where a supplier delivers goods outside of Canada to a recipient and then supplier imports goods into Canada
- supplier cannot technically claim ITCs for GST paid on importation, as the supplier is not importing the goods for “consumption, use or supply”, the supply has already been made outside Canada

Applying the Constructive Importer Rule

Section 178.8 of the ETA offers two options for parties:

(i) Parties can rely on default rule:

- only the recipient of the imported goods can claim the ITC
- provided the recipient obtains the necessary information from the supplier to substantiate the claim
- supplier should obtain reimbursement of GST it paid at the border

Applying the Constructive Importer Rule

(ii) Parties can elect to have supplier claim the ITC:

- election must be made on prescribed form
- avoids the need for the exchange of import documentation
- under the election, the two parties agree to have the supplier claim the ITC and the supply is deemed to have been made in Canada
- supplier must then charge and collect GST from the recipient on supply deemed to have been made in Canada

Planning Considerations in Using Incoterms® Rules

- Incoterms® Rules should not be considered in a vacuum
- parties should also consider impact of Convention on the International Sale of Goods (CISG) and Sale of Goods legislation in each province
- appropriate Incoterms® Rules depend on the type of goods, nature of shipping, among other factors
- no requirement to use Incoterms® Rules at all
- parties may vary from the terms of any Incoterms® Rules
- quoting Incoterms® Rules is not a substitute for a fully developed contract of sale
- when using Incoterms® Rules parties should always reference a particular place plus the version of Incoterms® Rules being used, e.g. DAP 199 Bay Street, Toronto Incoterms® 2010

Implications for Tax and Trade Compliance

- choice of Incoterms® rules can have legal consequences beyond question of obligations and risks as between buyer and seller
- when adopted by parties, Incoterms® rules become terms of a binding contract
- tax authorities and/or customs authorities rely on the Incoterms® rules selected by parties to determine tax and customs liability

Implications for GST/HST Compliance

Definition of "Delivered or Made Available"

- CRA's interpretation is that the place where goods are delivered or made available is determined by reference to
 - (i) the terms of the contract; and/or
 - (ii) the law of the sale of goods applicable

Key Point

- the delivery obligations in Incoterms® 2010 can be used to determine where goods are "delivered or made available" for purposes of the GST/HST

Implications for GST/HST Compliance

(Cont'd)

Inter-Provincial Sales of Goods

- currently the ETA imposes a combined GST/HST of between 13% and 15% on taxable supplies of goods delivered or made available within Canada
- there are special “place of supply” rules to determine which tax rate to apply on a particular sale of goods from one province to another
- the ETA provides that a sale of goods is made in a “participating HST province” if the supplier “delivers or makes available” the goods in the province to the recipient of the supply
- **KEY POINT:** Incoterms ® are also used to determine the particular HST rate applicable on the supply of goods from one province to another province

Blakes

GST Cases on Imports

Goods are “Delivered or Made Available” in Canada by U.S. Mail Order Company

- A mail order company based in New York that was registered for GST purposes would receive orders from customers in Canada.
- The company never collected GST on the sales invoice to customers because it believed all of its sales were made outside Canada
- The CRA assessed the company for failing to charge and collect the GST from customers, on the basis that all sales were delivered or made available in Canada
- The company would fulfill orders out of its inventory in New York and an independent trucker would take the packaged orders to Detroit where they were delivered to a courier company
- The courier company took the orders across the border to Windsor, Ontario.
- The packages were then delivered to Canada Post for delivery to each consumer
- The Tax Court held that the point of delivery of the goods was in Canada when the goods were dropped off at Canada Post, and the earlier freight movements did not establish a delivery point to the consumer.
- Case: *ADV Limited v. The Queen and AFX Company v. The Queen*

GST Cases on Imports

Registered Vendor Must Collect GST from Customer in Canada Even When Customer is the IOR

- Vendor was a GST registrant based in the U.S. but with a branch in Canada and sold cars to customers in Canada delivered “FOB” or “CIF” a location in Canada.
- When Toyota acted as IOR, it charged and collected GST on its invoice to customers.
- When the customer acted as the IOR, Toyota did not charge GST on its invoice to customers.
- The CRA assessed Toyota for failing to charge and collect GST in these instances, on the basis that the delivery point was a place in Canada, even if the IOR was the customer.
- End result: this structure meant that the customer paid the GST twice: once on the value at the border, and a second time to Toyota on its invoice.
- However, all of the GST was fully refundable to the customer.
- Case: *Toyota Tsusho America Inc. v. The Queen*

GST Concluding Remarks

- The application of GST at the border can be complicated.
- There are a number of ways to strategically structure transactions to save on the costs of importation.
- It is prudent to seek the advice of an experienced commodity tax practitioner.

GST/HST Publications

- Doing Business in Canada – GST/HST Information for Non-Residents (Rev. 2016)
<http://www.cra-arc.gc.ca/E/pub/gp/rc4027/rc4027-16e.pdf>
- GST/HST Policy Statement P-051R2: Carrying on Business in Canada (April 29, 2005)
<http://www.cra-arc.gc.ca/E/pub/gl/p-051r2/p-051r2-e.pdf>
- GST/HST Policy Statement P-125R: Input Tax Credit Entitlement for Tax on Imported Goods (June 1, 2007)
<http://www.cra-arc.gc.ca/E/pub/gl/p-125/p-125-e.pdf>
- GST/HST Technical Information Bulletin B-081: Application of HST to Imports (February 28, 1997)
<http://www.cra-arc.gc.ca/E/pub/gm/b-081/b-081-e.html>
- GST Memorandum 300-8: Imported Goods (February 6, 1991)
<http://www.cra-arc.gc.ca/E/pub/gm/g300-8/g300-8-e.html>

Questions?

Blakes