

TAX NOTES

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Government Proposes GST/HST Collection Regime for Online Supplies

On November 30, 2020, the Minister of Finance proposed a new registration and collection regime for GST/HST payable in respect of supplies of property and services made through online platforms. The proposed regime is conceptually similar to the QST registration and collection regime enacted by Québec in 2019 and to some of the piecemeal PST registration and collection rules enacted by various non-participating provinces, although the mechanics of the proposed regime are entirely different.

The proposed regime applies to three different categories of supplies that may be made over the internet:

- Supplies of short-term accommodation;
- Supplies of intangible personal property and services; and
- Supplies of tangible personal property.

The obligation of a supplier or digital platform operator may vary depending on the category into which the relevant supplies are assigned. However, there are many common definitions and concepts that are relevant to all three categories of internet-driven supplies.

If the proposed regime is enacted in their current form, registration and collection obligations will apply in respect of all relevant supplies made on or after July 1, 2021. Registration and collection obligations will also apply in respect of relevant supplies made on or before June 30, 2021 if all or part of the consideration for the supply becomes due, or is paid without having become due, after June 30, 2021.

General Principles

The basic building block of the proposed regime is the concept of a “digital platform,” which is defined broadly as a website, online portal or store. A digital platform does not include an electronic interface that solely processes payments (e.g. PayPal) and the Minister of Finance will have the power to prescribe other specific platforms or types of platforms that are not digital platforms.

A digital platform and its operator are not subject to the proposed regime if the operator is an “excluded operator”. A platform operator is an excluded operator if: (i) it solely processes payments; (ii) it solely provides for the advertising or listing of the property or service to be supplied (e.g. Craigslist); or (iii) it does not control the terms of the supply or the charging of the recipient for the supply and is not involved in the ordering, delivery or rendering of the property or service supplied.

Collection obligations generally exist in respect of supplies to “specified Canadian recipients”, who are recipients that have not provided a GST number and that have a usual place of residence in Canada. The supplies must also generally involve a “specified non-resident supplier,” defined as a non-resident of Canada that does not make supplies in the course of a business carried on in Canada and that is not registered for GST.

The proposed legislation contains objective criteria for determining whether a recipient’s usual place of residence is in Canada, and thus whether the recipient of a supply is a specified Canadian resident. A recipient’s usual place of residence is generally deemed to be in Canada if two or more *indicia* of residence in Canada have been obtained by the supplier or platform operator. If the recipient’s usual residence is in Canada, then the same *indicia* will generally be used to determine the province in which the supply is made. Indicators of Canadian residence include billing addresses, home addresses, IP addresses and payment-related information.

Supplies of Short-Term Accommodations

The operator of an accommodation platform – a digital platform that facilitates the making of supplies of short-term accommodation in Canada by non-registrants – may be required to register if their threshold amount for any 12-month period beginning after June 2021 exceeds \$30,000. The threshold amount consists of consideration for supplies of short-term accommodation in Canada made through the accommodation platform to non-registrants, as well as booking fees, administration fees or similar charges for a supply of services made by the platform operator.

If the person making supplies of short-term accommodation through the accommodation platform is not registered, then the supply is deemed to be made by the platform operator and the platform operator must collect GST/HST. The supplies of services represented by booking fees or administration fees payable by guests will be deemed to be made in Canada if the recipient of that supply is not registered and GST/HST must also be collected on this amount. The accommodation platform operator is deemed not to make a supply of services to the person supplying the short-term accommodation and so there should be no additional GST/HST payable by the supplier of the real property.

The place of supply for the supply of short-term accommodation should be the province in which the real property is located. If a supply of a service represented by a booking fee or administration fee is deemed to be made in Canada, then that supply is also deemed to be made in the province in which the accommodation is situated. So, for example, if an accommodation platform is used to make a supply of short-term accommodation in a Toronto condo, HST is payable at the 13% Ontario

rate on both the consideration for the supply of the accommodation and the booking fee charged by the platform operator to the guest.

An accommodation platform operator that is not carrying on business in Canada and that is registered under this regime is a quarterly filer and is not entitled to input tax credits (ITCs). The accommodation platform operator is also required to file an annual information form containing information to be prescribed by future regulations. Unlike most registrants, accommodation platform operators may be permitted to calculate net tax and remit net tax in a qualifying currency, such as the US dollar or the euro. It is intended that the CRA will create an online filing and payment mechanism for accommodation platform operators who are required to register.

Supplies of Services and Intangibles

A specified non-resident supplier may be required to register if their threshold amount for any 12-month period beginning after June 2021 exceeds \$30,000. The threshold amount consists of consideration for supplies to specified Canadian recipients made by the specified non-resident supplier.

The operator of a specified distribution platform – generally, a digital platform through which specified non-resident suppliers can make supplies of services or intangibles, other than supplies that are intended for use or consumption outside of Canada, and excluding an accommodation platform – may also be required to register if its threshold amount for any 12-month period beginning after June 2021 exceeds \$30,000. The threshold amount consists of consideration for supplies of services or intangibles made by specified non-resident suppliers through the distribution platform to specified Canadian residents.

If the person making supplies of services or intangibles through a specified distribution platform is not registered, then the supply is deemed to be made by the platform operator. The platform operator is deemed not to make a supply of services to the specified non-resident supplier.

Any supply of an intangible or a service that is made or deemed to be made by a person required to register under this regime is deemed to be made in Canada, so GST/HST must be collected. The place of supply will be in the province in which the usual place of residence of the specified Canadian recipient is situated; for example, if the specified Canadian resident's mailing and billing address are both in Alberta, the place of supply should be in Alberta and GST will apply at the 5% rate.

The specified non-resident supplier or platform operators who are required to register will again be quarterly filers and will not be entitled to ITCs but are not required to file information returns other than their simplified GST/HST returns. Like accommodation platform operators, these registrants should be able to file their simplified GST/HST returns online and remit net tax online and should be entitled to calculate net tax and remit net tax in US dollars or euros if appropriate elections are made.

Supplies of Tangible Personal Property

The application of the proposed registration and collection regime for suppliers of tangible personal property turns on the concept of a “qualifying tangible personal property supply.” This is a supply made by way of sale of tangible personal property that is to be delivered to a recipient in Canada, unless the supply is exempt or zero-rated, or unless the supply is delivered to the recipient by mail or courier from an address outside of Canada. In other words, the supply must be a taxable supply of tangible personal property delivered from inventory maintained in Canada.

A non-resident supplier may be required to register under the normal GST/HST rules if the total consideration for qualifying tangible personal property supplies made in any 12-month period beginning after June 2021 exceeds \$30,000, excluding supplies made to non-resident persons who are not consumers.

The operator of a specified distribution platform may also be required to register under the normal GST/HST rules if the total consideration for qualifying tangible personal property supplies made through the platform by unregistered suppliers in any 12-month period beginning after June 2021 exceeds \$30,000, again excluding supplies made to non-residents who are not consumers. The platform operator is deemed to have supplied the tangible personal property, the supply is deemed to be a taxable supply, and the platform operator is deemed not to make a supply to the non-resident person who otherwise made the supply.

If a non-resident supplier or platform operator is required to register, then the ordinary place of supply rules should apply to determine the province in which the supply of the tangible personal property is made. The registrant would be required to collect GST/HST at the appropriate rate.

If a platform operator registers for GST under the ordinary rules (as opposed to the proposed regime), the platform operator may be deemed to have paid any GST paid by the non-resident supplier on importation of the tangible personal property. If no other person is entitled to an ITC in respect of this GST, then the platform operator may be able to claim an ITC. For some platform operators, this may create an incentive to register for GST under the ordinary rules if they will have to collect GST/HST in any event.

A non-resident supplier or platform operator that is required to register because of supplies of tangible personal property is subject to substantially the same reporting obligations as are imposed on a normal non-resident registrant. Two critical differences exist, however. First, a person who carries on a business of warehousing tangible personal property for supply by a non-resident person must file information returns. Second, the operator of a distribution platform through which qualifying tangible personal property supplies are made must file an annual information return in a form to be prescribed by future regulations.

Conclusion

The proposed registration and collection regime appears broadly consistent with the OECD’s recommendations for the imposition of value-added taxes on supplies made by persons not carrying on business in a destination country. This regime should have the effect of levelling the

playing field between Canadian businesses and non-residents making supplies through digital platforms, as well as levelling the playing field between non-resident-owned businesses carried on through bricks and mortar operations in Canada and their digital competitors.

The Department of Finance is inviting comments and suggestions relating to these legislative proposals until February 1, 2021. We encourage any clients who are potentially impacted by these legislative proposals to consider making a submission.

Felesky Flynn LLP is pleased to be of assistance to you or your clients in determining their GST/HST collection and payment obligations. Please do not hesitate to contact any of our lawyers should you require assistance with these or any other tax matters.