CRA/TEI
LIAISON MEETING
DECEMBER 7, 2010

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CRA / TEI
LIAISON MEETING
DECEMBER 7, 2010
AGENDA

13:00 – 13:15 Opening/Introduction

- Brian McCauley / Pierre Bertrand
- Paul O'Connor / Kim Berjian

13:15 – 14:45 Technical Questions and Discussion

1. **Recaptured Input Tax Credits (RITCs)** (Discussion Leader: Carol Nixon)
   - Question # 1a and 1d (Owen Newell) and 1c (Patrick McKinnon)
2. **Audit Issues** (Discussion Leader: Carol Nixon)
   - Question # 2 (Catherine Séguin-Ouimet)
3. **NETFILE** (Discussion Leader: Kim Berjian)
   - Question # 3a Verbal (Heather Dewar) and 3b Verbal (Danielle Zion)
4. **Joint Ventures** (Discussion Leader: Martina Krummen)
   - Question # 4c (Gunar Ozols)
5. **Financial Services** (Discussion Leader: Carol Felepchuk)
   - Question # 5 Presentation (Dawn Weisberg / Ken Syer / Ivan Bastasic)

14:45 – 15:00 Refreshment Break

15:00 – 16:30 Technical Questions and Discussion (Continued)

6. **Point of Sale Rebates** (Discussion Leaders: Richard Taylor and Anne Giroux)
   - Question # 6a (i) (Catherine Séguin-Ouimet), 6a (ii) (Owen Newell) and 6a (iii) (Dave Caron / Phil Nault)
7. **Carrying on Business** (Discussion Leader: Sunil Purbhoo)
   - Question # 7 (Jeff Frobel)
8. **Place of Supply Rules** (Discussion Leader: Martina Krummen)
   - Question # 8a (Jeff Frobel) and 8b (Patrick McKinnon)
9. **Non-GST Issues: Insurance Premium Tax** (Discussion Leader: Edgard Goharghi)
   - Question # 9 (Michael Hamilton)
10. **Feedback on HST Technical Information** (Costa Dimitrakopoulos)
    - Feedback/Suggestions where current HST technical information could be clarified and what other HST technical information products would be helpful
11. **Feedback on Business Registration On-Line** (Joanne Davis)
    - Feedback/Suggestions for improving the user experience when registering on Business Registration On-Line

16:30 Closing Remarks

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CRA ATTENDEES

LEGISLATIVE POLICY & REGULATORY AFFAIRS BRANCH (LPRAB)

Brian McCauley	Assistant Commissioner, *LPRAB*
Pierre Bertrand	Director General, *Excise & GST/HST Rulings*
Ivan Bastasic	Director, *Financial Institutions & Real Property*
Phil Nault	Director, *Public Service Bodies and Governments*
Costa Dimitrakopoulos	Director, *General Operations and Border Issues*
Owen Newell	Manager, *General Operations*
Patrick McKinnon	Manager, *Border Issues*
Dave Caron	Manager**,** *Aboriginals Affairs*
Dawn Weisberg	Manager, *Financial Institutions*
Ken Syer	Manager, *Specialty Tax*
Gunar Ozols	A/Manager, *Goods*
Jeff Frobel	Industry Sector Specialist, *Border Issues*
Patricia Taylor	Industry Sector Specialist, *General Operations*
Nathalie Robitaille	Senior Rulings Officer, *Softwood Lumber and Other Taxes*

COMPLIANCE PROGRAMS BRANCH (CPB)

Lisa Anawati	A/Director General, *GST/HST Audit and Examination*
Michael Hamilton	Manager, *Specialty Audits*
Catherine Séguin-Ouimet	A/Manager, *GST/HST Technical Guidance*
Jonathan Shimizu	Senior Programs Officer, *Specialty Audits*

ASSESSMENT AND BENEFIT SERVICES BRANCH (ABSB)

Heather Dewar	Director, *Electronic Services*
Danielle Zion	Director, *GST/HST Returns and Rebates Processing*
Joanne Davis	A/Director, *Business Registration and Corporation Programs*
Mark Mayer	Manager, *My Business Account and Services Promotion and Liaison*
Piero Urgolo	Manager, *Authentication Management Services Section*
Antonio Aprile	Manager, *Represent a Client and Discounter Services Section*
Cindy Elder	Senior Programs Officer, *Business Registration Support Section*

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TEI ATTENDEES

Paul O'Connor	*TEI Washington*, President
Timothy J. McCormally	*TEI Washington,* Executive Director
Eli J. Dicker	*TEI Washington,* Chief Tax Counsel
Dan De Jong	*TEI Washington*, Tax Counsel

CANADIAN COMMODITY TAX MEMBERS

Kim Berjian	*ConocoPhillips Canada*
Carol Felepchuk	*TD Bank Financial Group*
Richard Taylor	*Rogers Communications Inc.*
Michael J. Willis	*Lafarge Canada Inc.*
Robert J. Smith	*Air Canada*
Diane M. Sekula	*CIT Financial Ltd.*
Martina Krummen	*SNC-Lavalin Group Inc.*
Tim Penny	*Xerox Canada Ltd.*
Sunil Purbhoo	*General Electric Canada Inc.*
Carol Nixon	*Lanxess Inc.*
Pierre Bocti	*Hewlett-Packard (Canada) Co.*
Anne Giroux	*Sears Canada Inc.*
Edgard Goharghi	*Imperial Tobacco Canada*
Robert C. Leprich	*Molson Canada*
Dave Card	*Spectra Energy*

Tax Executives Institute, Inc. (hereinafter "TEI" or "the Institute") welcomes the opportunity to present the following questions on Canadian commodity tax issues, which will be discussed with representatives of Canada Revenue Agency (CRA) and the Department of Finance during TEI's December 7-8, 2010, liaison meetings. The Canada Revenue Agency appreciates the opportunity to listen to comments and respond to the questions.

QUESTION # 1: Recaptured Input Tax Credits (RITCs)

As a temporary measure beginning July 1, 2010, and effective through June 30, 2018, large businesses and certain financial institutions (other than selected listed financial institutions) are required to recapture input tax credits for the provincial part of the harmonized sales tax (HST) paid or payable on specified property and services in British Columbia and Ontario.

a. *Amended Returns*. Generally, if a registrant fails to report RITCs in the appropriate reporting period, taxpayers must correct those omissions or errors on an amended return for that period. Questions have arisen concerning what constitutes an error that requires an amended return. For example, an invoice is delayed in the mail and received after the appropriate reporting period. The invoice is paid promptly upon receipt. Does this constitute an error requiring an amended return?

b. *Penalties*. The penalty for not reporting an amount as required under the RITC rules is calculated as follows:

- A "base penalty" equal to five percent of the amount that should have been reported minus the amount reported; plus

- One-fifth of the amount calculated above for each complete month (up to a maximum of five months) that begins on the day the return was required to be filed and ends on the earlier of (i) the day the person reports the particular amount and reporting period, and (ii) the day the notice of assessment is sent for the particular reporting period.[1]

[1] Canada Gazette, Part II, Vol. 144, Extra No. 4, *Electronic Filing and Provision of Information (GST/HST) Regulations* (June 17, 2010).

The penalty imposed under this section is excessive, especially when compared with penalties imposed for failure to answer a demand ($250 for each occurrence) or failure to provide information when required ($100 for each failure).[2] Is there any effort to make the penalty more reasonable?

* * *

In addition to discussing the above issues during both the CRA and Finance liaison meetings, TEI requests a written response from CRA concerning the following two questions:

c. *Internet Services*. Under the old Ontario Retail Sales Tax (ORST) Act, Ontario was the only province not to tax Internet services. In the *Ontario Sales Tax Guide 651*, the Ontario Ministry of Revenue provided examples of Internet services that included web hosting, advertising fees, etc. Similar guidance has not been issued under the federal goods and services tax (GST) or HST.

(i) May registrants rely on *Guide 651* for determining whether a telecommunication service qualifies as an Internet service and thus is not subject to the RITC rule for HST purposes in Ontario and British Columbia?

(ii) If not, when will CRA issue administrative guidance on what is considered an Internet service to assist registrants in identifying RITCs?

d. *Employee Reimbursements*. Consider the following example:

A fully commercial GST-registered corporation (*i.e.*, eligible for full ITCs) in Ontario (Supplier A) has a customer in the province who needs repairs to its equipment permanently affixed to the real property in Ontario.

Supplier A sends its employee to the customer's site to fix the equipment, which will take two days to complete. The round-trip mileage to the customer's site is 226 kilometers. The employee uses his own vehicle to travel to the site and is reimbursed at 50 cents per kilometer.

[2] ETA §§ 283 & 284.

Company A also provides the employee the option of submitting his out-of-pocket expenditures or accepting a per diem allowance of $75 per night for lodging and $56.50 per day for meals with no receipts. (For income tax purposes, assume that these allowances are reasonable.)

The employee files the following expense report:

Mileage Allowance	$113.00
Lodging Allowance	$ 75.00
Meals Allowance	$113.00 ($56.50 x 2 days)
Total	$ 301.00

The example prompts the following questions:

(i) 13/113 of the $113.00 mileage allowance (*i.e.*, $13.00) may be taken as an initial ITC. Do the recapturing rules apply to the $13.00, *i.e.*, is 5/13 or $5.00 allowed as an ITC and 8/13 reported as an Ontario RITC? Or is the full $13.00 allowed as an ITC?

(ii) 13/113 of the $75.00 lodging allowance ($8.63) may be taken as an initial ITC. Please confirm that the lodging allowance is not subject to the recapture rules.

(iii) 13/113 of the $113.00 ($13.00) meals allowance may be taken as an initial ITC. Company A uses, however, the 50-percent reduction provision when the expense account is initially processed. Thus, the eligible ITC is $6.50. Please confirm that the recapturing rules apply to this $6.50 amount, *i.e.*, only 5/13 or $2.50 is allowed as an ITC and 8/13 ($4.00) reported as an Ontario RITC.

ANSWER # 1: Recaptured Input Tax Credits (RITCs)

1a. An error requiring an amended return would include an over or under reported RITC as a result of, for example, a computational error or an omission of an RITC from an eligible ITC that arose during a reporting period.

The issuance of the invoice on a specified date within a reporting period creates an ITC for the recipient, and hence the requirement for an RITC for that reporting period. Based on the definition of specified input tax credit in section 29 of the New Harmonized Value-Added Tax System Regulations No. 2, and the prescribed time to report that specified provincial input tax credit in paragraph 30(d) of those regulations, the receipt of the invoice described above would require an amended return.

Finance Canada has been apprised of the concerns raised by the TEI members.

1c.

(i) The term "Internet service" used in the Ontario publication to which the question refers is not a term that is used in the *Excise Tax Act* or its regulations and is therefore not relevant for GST/HST purposes.

Paragraph 28(2)(d) of the *New Harmonized Value-Added Tax System Regulations, No. 2* excludes "access to the Internet" for purposes of the definition of a "specified property or service" in subsection 236.01(1) of the ETA. This is not a new term for GST/HST purposes. The interpretation of the term "Access to the Internet" for purposes of this provision is the same as it has been and continues to be for purposes of the HST place of supply rule that applies with respect to supplies of Internet Access. This place of supply rule is currently found in section 32 of the *New Harmonized Value-Added Tax System Regulations* and was in section 10 of the former *Place of Supply (GST/HST) Regulations* which had been in effect since April 1, 1997.

(ii) In terms of guidance with respect to the meaning of the term "Access to the Internet" for GST/HST purposes, the term could therefore not possibly include any of the items that are described in the bulleted listed in the Ontario publication as "Internet related services" other than the item in the list that is actually referred to as access to the Internet. If there is any uncertainty with respect to whether a supply that is made in a particular situation would be considered to be a supply of access to the Internet for GST/HST purposes or whether a particular supply that is made by electronic means would be subject to the recaptured ITC provisions, a GST/HST ruling should be requested from the CRA with respect to that situation, as opposed to relying on the Ontario publication to make that determination.

Consideration will be given to updating relevant existing GST/HST publications to both confirm as indicated above that the interpretation of access to the internet for GST/HST purposes, including for purposes of the recaptured ITC provisions**,** remains the same as it was before the introduction of those provisions, and to provide further guidance with respect to whether certain supplies made by electronic means would be subject to the application of the recaptured ITC provisions.

1d.

(i) Section174 of the *Excise Tax Act* deems the person paying the allowance to have consumed or used any property or service in relation to the allowance. In order for an allowance to qualify under section 174, it must meet several conditions, one being the reasonableness of the allowance under the *Income Tax Act* (ITA), which as you have indicated, would have been met.

13/113 of the $113.00 mileage allowance would be deemed to be the amount of the HST paid on the allowance. Input tax credits with respect to allowances paid for qualifying motor vehicles for use in Ontario and British Columbia are subject to recapture. Motor vehicle allowances cover many components (fuel, depreciation, insurance, licensing, registration, etc.) so the view has been expressed that only a portion of the ITC for the provincial component of the HST on a motor vehicle allowance should be subject to recapture.

The CRA, and the Department of Finance in consultation with the governments of Ontario and British Columbia, are in the process of determining an administrative factor that GST/HST registrants may use in

determining what portion of an ITC for a motor vehicle allowance would be subject to recapture. Persons would have the option of using this administrative factor, or using their own reasonable allocation based on the composition of the motor vehicle allowances that they pay.

Until such time, the CRA is advising large businesses to recapture the full amount of the motor vehicle allowance (8/13ths of $13), and adjust these recaptured amounts later once the use of an administrative factor is approved. The CRA will update GST/HST Technical Bulletin, B104, *Harmonized Sales Tax – Temporary Recapture of Input Tax Credits in Ontario and British Columbia,* to inform registrants on the use of this factor.

(ii) 13/113 of the $75.00 lodging allowance ($8.63) is deemed to be the amount of HST paid on the allowance. An ITC on this amount would be available based on the extent of use in commercial activity. The ITC taken on the lodging allowance is not subject to the recapture rules.

(iii) 13/113 of the $113.00 ($13.00) meals allowance is deemed to be the amount of HST paid on the allowance. An ITC on this amount would be available based on the extent of use in commercial activity, for example $13.00, subject to the 50% clawback under subsection 236(1) of the ETA resulting in an ITC of $6.50. 8/13 of the $6.50 ($4.00) would be reported as an RITC at line 1401 of Schedule B to the GST/HST NETFILE return.

QUESTION # 2: Audit Issues

a. *Compliance Relief for Calendar Year 2010*. Because of the delay in issuing regulations relating to the HST, TEI recommends that CRA provide some administrative penalty relief upon audit for the 12-month period following the implementation date of the HST (July 1, 2010).

b. *Substantiating RITCs and Proxies*. ITCs are not subject to recapture in respect of certain specified energy or telecommunication services. To simplify compliance, proxies (eligible recovery percentages) may be used to determine (i) the portion of "specified energy" considered to be used directly in the production of tangible personal property (TPP) for resale, or for activities that are eligible scientific research and experimental development (SR&ED) activities; and (ii) the proportion of the consideration not attributable to specified telecommunications. What documentation will taxpayers be required to provide to substantiate the RITCs and the use of proxies?

c. *Use of Formulae.* What documentation is required to substantiate the use of formulae in calculating RITCs when not using proxies? Are formulae developed by (i) internal engineers, or (ii) external engineers, acceptable?

ANSWER # 2: Audit Issues

a. Reporting penalties have been implemented to encourage accurate reporting of information required to properly allocate GST/HST revenues among the federal and provincial governments. It is important for businesses to make best efforts to fully and accurately meet their obligations.

Penalties will be applied wherever considered necessary to achieve future reporting compliance and/or where registrants have not made reasonable efforts to comply with reporting requirements.

The CRA will practice “administrative tolerance” with respect to the new rules. The rule of thumb will be: “Be tolerant and recognize that this is new for everyone”. In considering the application of penalties, consideration may be given to whether a registrant has acted in good faith and made reasonable efforts to fully and accurately meet his obligations, particularly during transition to Ontario/BC HST. This being said, each situation will be looked at on a case by case basis and the relief accorded where necessary. The usual principles of fairness and due diligence will continue to apply.

b. Subsection 286(1) requires that a person must keep sufficient books and records in such form containing such information as will enable the determination of the person's GST/HST liabilities and obligations or the amount of any rebate or refund to which the person is entitled. An auditor must be satisfied that all of the conditions as set out in the legislation are met and that available documentation enables the amount of RITCs to be determined. For example:

-In respect of the use of a production proxy, documentation that supports the determination of their major activity would be required.

-For SR&ED proxies, the company must have salary and wages that are eligible for SRED purposes under the *Income Tax Act* to use this proxy; therefore, the most recently filed T2 return could be used.

-For telecommunications proxies, the claim would be based on the services indicated on the invoices as such they would be required to substantiate any claims.

c. Each company is going to be unique in its calculations so it is hard to be definitive in a global answer. Whatever documentation they reviewed/prepared/created/whatever to support the final percentage must be made available. So in the case of an internal study, an energy metering information would be required if it is the basis of the final percentage recommended in the study. This percentage allocation is no different than any other situation where inputs must be allocated between taxable and exempt supplies. The method needs to be fair and reasonable so all assumptions would also need to be stated.

QUESTION # 3: NETFILE

a. *Use of MyBusiness*. MyBusiness is an excellent online tool to permit taxpayers to review their CRA accounts and decrease the administrative burden for both taxpayers and CRA. There are, however, several challenges with accessing MyBusiness. A taxpayer must provide a code or the line 150 amount from his or her personal tax return to receive a password for accessing an employer's corporate information. The internal policies of many large tax departments forbid employees from providing personal information to access the system.

All corporations must file an RC59 with CRA to authorize an employee to access a corporation's tax information. Under this process, only authorized persons may access a particular corporate account. The tax director normally signs this document.

TEI recommends that a process similar to that used for the RC59 be used for access to MyBusiness by corporate employees.

b. *Issues relating to Electronic Filing of Returns, Electronic Payments, and Amended Returns*. TEI members are experiencing some challenges with the electronic filing of excise tax returns. Taxpayers cannot amend the returns electronically once they have been submitted. Assuming CRA can determine that the return has been amended, is an upgrade planned to permit amendments? Also, taxpayers would like to be able to save a draft return for review and approval before filing. Is an upgrade planned to permit this process?

For internal control purposes, many taxpayers are required to have a review process in place for tax filings, including the HST. One process that works well for taxpayers is the integration of the electronic filing process with the banking system, which permits the taxpayer to prepare, review, and approve the returns online. We understand that the CRA wants to continue this process; we request an update on when the new specifications will be given to the selected banks. Is there anything that TEI can do to help accelerate the process?

ANSWER # 3: NETFILE (verbal)

QUESTION # 4: Joint Ventures

Under the GST system, a joint venture (JV) is different from a partnership because the JV is not included in the definition of a "person" and thus cannot register and account for the GST in its own right. Section 273 of the Excise Tax Act provides for a simplified remittance and compliance process for JVs. Under this provision, a joint election can be made by the JV participants to elect one party as the JV "operator," who accounts for the GST collected by the JV and claims the ITCs in relation to the expenses incurred by the JV.

a. *Prescribing Additional Activities*. Under the Joint Venture (GST/HST) Regulations, the JV election may generally be made for certain prescribed activities, including activities relating to the construction of real property (*e.g.*, feasibility studies, design work, development activities and the tendering of bids undertaken in the furtherance of a JV for the construction of real property). In addition, CRA has administratively accepted numerous additional activities for the JV election, including the maintenance of roads.

The lack of clarity with respect to whether other activities would similarly be administratively accepted has created audit issues for some TEI members. During the liaison meeting, we would like to address the following issues:

(i) Will Finance prescribe a list of additional administratively accepted activities?

(ii) If so, will a process be implemented to ensure that new activities may be prescribed on a timely basis?

b. *Expansion of Election*. Has Finance considered broadening the election to permit all joint ventures engaged in commercial activities to make the election?

c. *Activities under the Regulations*. In addition, does CRA consider the following activities covered by the current regulations:

(i) Project management services relating to real property to be constructed; and

(ii) Environmental reports, services provided to obtain federal and provincial authorization and permits, as well as supervision and surveillance services directly or indirectly related to construction contracts?

ANSWER # 4: Joint Ventures

c. Subsection 3(1) of the *Joint Venture Regulations* provides that

"3. (1) Subject to subsection (2), for the purposes of subsection 273(1) of the Act, the following activities are prescribed activities:

(a) the construction of real property, including feasibility studies, design work, development activities and the tendering of bids, where undertaken in furtherance of a joint venture for the construction of real property; and

(b) the exercise of the rights or privileges, or the performance of the duties or obligations, of ownership of an interest in real property, including related construction or development activities, the purpose of which is to derive revenue from the property by way of sale, lease, licence or similar arrangement."

Where a joint venture is formed for the purpose of constructing real property, paragraph 3(1)(a) prescribes, on an inclusive basis, certain other activities if they are undertaken in furtherance of the joint venture. Activities which are not specifically included in paragraph 3(1)(a), but which are essentially similar in nature to those that are included, would be eligible activities for purposes of the joint venture election. Where the activities described in parts (i) and (ii) of your question are undertaken in furtherance of a joint venture for the construction of real property, they qualify for the election. It is a question of fact whether any particular activity is undertaken in furtherance of a particular joint venture.

Where paragraph 3(1)(b) applies, and where the activities in question are for the purpose of deriving revenue from the property by way of sale, lease, licence or similar arrangement, and which property is the object of the joint venture, they would qualify for the election. Again, it is a question of fact whether the activities in question are in furtherance of a particular joint venture.

Where such activities result in the making of supplies by the operator to the other co-venturers in respect of which an election under subsection 273(1) of the Act has been made, such supplies are deemed not to be supplies pursuant to paragraph 273(1)(c) . As a result, no tax is payable on any consideration paid by the co-venturers. For paragraph 273(1)(c) to apply, the supply has to be made and acquired in the course of the joint venture and must be acquired by the co-venturer exclusively in the course of the co-venturer's commercial activities.

QUESTION # 5: Financial Services

a. Pension Plans. During the meeting, TEI would like to discuss the following issues:

(i) On September 23, 2009, the Department of Finance released draft legislation, explanatory notes, and a backgrounder concerning several measures aimed at improving and streamlining the application of the GST to pension plans and the financial services sector. During our liaison meetings, please provide a review of the obligations of employers and pension plans stemming from that backgrounder and the HST regulations relating to registrations, elections, deemed supplies, excluded activities, rebates, the special attribution method (SAM) formula, and returns.

(ii) Would Finance consider exempting pension plans from the selected listed financial institution (SLFI) requirements where less than 10 percent of the members are outside a single participating province or less than 10 percent of the members are outside the non-participating provinces?

(iii) Consider the following example:

A fully commercial, GST-registered corporation *(i.e.*, eligible for full ITCs), in Ontario has a pension plan for its employees set up in a trust. The corporation uses the calendar year.

Pre-2010 and during 2010, the corporation followed Technical Information Bulletin (TIB) 032R in allocating its employer vs. plan trust expenses for GST purposes. Most of the pension plan expenses incurred are initially charged to the corporation, which pays the supplier's invoices and recaptures the GST. Subsequently, any TIB 032R plan trust expenses are charged to the plan trust with GST invoiced, which the plan trust absorbs as a cost. GST was invoiced in the first two quarters of 2010 and Ontario HST in the last two quarters.

It is our understanding that under the deemed supply rule, these invoiced, plan-trust supplies for the four quarters in 2010 must be included in the deemed supply base for determining the amount of tax that the corporation must remit on December 31, 2010; in effect, it must account for the tax twice on the same supplies.

Although this "perceived duplicated" tax is subsequently factored into the ultimate tax adjustment, it creates cash-flow issues. Please provide the rationale for the inclusion of the GST/HST invoiced, plan-trust supplies in the deemed supply rule.

b. *Other Investment Plans*. During our liaison meeting, please review the new HST regulations for other investment plans that an employer might use to confer benefits to its employees.

c. *Annual Information Return.*

(i) Please discuss the changes under consideration for the Annual Information Return. Will *de minimis* financial institutions be relieved of this obligation? Will entities such as pension plans be required to prepare these returns?

(ii) Is consideration being given to incorporating this return into an SLFI's annual return to eliminate duplicate reporting?

d. *Taxation of Financial Services*. Is Finance considering an overall review of the taxation of financial services, including expanding the tax base to include both fee and margin services?

e. *Annual Filings*. How would a financial institution that is a monthly or quarterly filer change its filing frequency to annual? Would a letter to CRA suffice?

f. *Invoicing*. The FI Backgrounder explains that financial institutions may ask suppliers to list the federal and provincial portion of the HST separately to permit proper reporting of the amounts. May the HST continue to be shown as a single amount, and the provincial and federal portions displayed as memo items?

ANSWER # 5: Financial Services (Presentation)

Harmonized Sales Tax

New Rules for Certain Investment Plans

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Investment Plan Definition

Listed financial institution (LFI)

- segregated fund of insurer (subpar. 149(1)(a)(vi)) or

- investment plan (subpar. 149(1)(a)(ix)) other than a trust governed by:
  - RRSP
  - RRIF or
  - RESP

Investment Plan Definition con't

- includes trusts governed by:
  - registered pension plan (PEPP)
  - employees profit sharing plan (PIP)
  - registered supplementary unemployment benefit plan (PIP)
  - deferred profit sharing plan (PIP)
  - employee benefit plan (PIP)
  - employee trust (PIP) or
  - retirement compensation arrangement (PIP)
- a corporation exempt from tax under ITA by reason of par. 149(1)(o.1) or (o.2) of ITA (PEPP)
- employee life and health trust (PIP)

Selected Listed Financial Institution (SLFI) Definition

- listed financial institution (LFI) under subpar. 149(1)(a)(i) to (x)

- permanent establishment (PE) in a participating province and any other province
  - expanded PE definition for pension entity of pension plan (PEPP) or private investment plan (PIP)
    - province where plan member is resident
    - plan member is individual with right to receive benefits under plan

- one year test (not two years)

Qualifying Small Investment Plan (QSIP)

- "unrecoverable tax" not greater than $10,000 annualized
  - "unrecoverable tax"

    A – B (A and B as defined in SAM formula)
- prescribed SLFI if QSIP in current year and:
  - SLFI throughout **either** of two previous years and **not QSIP**, and
  - not SLFI in third previous year

  unless apply not to be SLFI
- prescribed SLFI if QSIP elects to be SLFI (Form RC4606)

GST/HST Registration

- voluntary registration for all investment plans resident in Canada (par. 240(3)(c))

- registration required if:
  - not small supplier or
  - make certain elections
    - reporting entity election
    - consolidated filing election or
    - tax adjustment transfer election

SLFI Investment Plans Reporting Periods

- calendar fiscal year
  - existing GST/HST registrants with other fiscal year end (not December 31, 2010) have two fiscal years in transitional year

- reporting periods
  - calendar year for GST/HST registrants
    - unless elect fiscal months or quarters
  - calendar month for non-registrants
    - file return only if net tax to remit

Final Return (GST494) for SLFIs

- GST494 return due 6 months after fiscal year
  - registrants
  - non-registrants

- existing registrant with two fiscal years in transitional year must file two GST494 returns

Special Attribution Method (SAM Formula)

SAM formula used by SLFIs:

- to calculate provincial part of the HST for a participating province, based on a formula approach

- determines amount added to or deducted from SLFI's net tax

SAM Formula

SAM: [(A – B) x C x D/E] – F + G

Where:

(A-B) is unrecoverable GST and federal part of HST for all of Canada

C is attribution percentage for participating province based on type of SLFI

D/E is ratio of province tax rate to GST rate (gross up factor)

F is provincial part of HST for province paid or payable by the SLFI

G is used for specific adjustments

Provincial Attribution Percentage (Element C)

Pension entities

- defined contribution

  total value of assets attributable to members resident in participating province

divided by

  total value of assets attributable to members resident in Canada

- defined benefits

  total value of actuarial liabilities of plan attributable to members resident in participating province

divided by

  total value of actuarial liability attributable to members resident in Canada

Provincial Attribution Percentage Private Investment Plans

- deferred profit sharing plan
- employees profit sharing plan
- retirement compensation arrangement

total value of assets attributable to members resident in participating province

divided by

total value of assets attributable to members resident in Canada

Provincial Attribution Percentage Private Investment Plans

- employee benefit plan
- employee life and health trust
- registered supplementary unemployment benefit plan
- employee trust

number of members resident in participating province

divided by

number of members resident in Canada

Attribution Point

- section 51 election for quarterly, monthly, weekly or daily attribution points

- defined benefits pension entity
  - most recent calculation of actuarial liabilities in particular year and 3 immediately preceding years or September 30 of particular year

- defined contribution pension entity
  - September 30 of particular year

- all other investment plans
  - last day percentage reasonably available for particular and immediately preceding year or September 30 of particular year

Element G (Prescribed Amounts)

Recapture of input tax credits (RITCs)

- definition of large business includes:
  - investment plan even if RITC threshold amount of $10 million not exceeded
  - person related to investment plan
- ITCs in respect of provincial portion on specified property or services
- recapture through SAM formula

Element G (Prescribed Amounts)

Pension rules

- sections 172.1, 232.01, 232.02 and 261.01

- section 46 of draft SLFI Regulations
  - Prescribed Amounts

Special Reporting for Investment Plans

- reporting entity election
- consolidated filing election
- tax adjustment transfer election
- request for SLFI consolidated group GST/HST registration (Form RC4602)

Information Requirements

GST/HST Notice 259

- information requested by distributed investment plan required to be provided:
  - investor percentage as of September 30
  - number of units held as of that day
  - by later of:
    - November 15
    - 45 days after request
- not applicable if “specified investor”
  - QSIP and investment < $10 million
  - provide province of residence and number of units

General Transitional Rules

- general rule: HST generally applies where consideration due or paid on or after **May 1**, **2010** for supply provided on or after **July 1**, **2010**

- SLFI investment plans must **self-assess** British Columbia and Ontario provincial part of HSTon consideration that becomes due or paid without having become due after **October 14, 2009** and before **May 2010** for supply provided after **June 2010**.

SLFI Transitional Rules

Specific Transitional SLFI rules (SAM formula):

- pro-rating for transitional reporting period
- adjustments for provincial part of HST self-assessment under general transitional rules
- adjustments where GST payable in transitional period but property/service in respect of subsequent period
- adjustments for post-implementation payments for transitional or pre-transitional reporting period supplies
- ITC stockpiling rule

Forms for SLFI Investment Plans

GST/HST Notice 255, *Elections for Certain SLFIs under the HST*

- Form RC4601, *GST/HST Reporting Entity and Tax Adjustment Transfer Elections and Revocations for an SLFI*
- Form RC4602, *Request for a Group GST/HST Registration Number for SLFIs with Consolidated Filing*
- Form RC 4603, *GST/HST Tax Adjustment Transfer Election and Revocation for an SLFI*
- Form RC4604, *GST/HST Reporting Entity, Consolidated Filing and Tax Adjustment Transfer Elections and Revocations for an SLFI*
- Form RC4605, *Total Tax Recovery Rate Election and Revocation for an SLFI*
- *Form RC4606, Election or Revocation for a Qualifying Small Investment Plan to be Treated as a SLFI*
- Form GST497, *Election under the Special Attribution Method for Selected Listed Financial Institutions and Notice of Revocation*

QUESTION # 6: Point of Sale Rebates

a. *Sales Made Off Reserve*. In a June 23, 2010 backgrounder, the Ontario Ministry of Revenue provided guidance with respect to First Nations peoples (referred to as Status Indians, Indian Bands and councils of an Indian band living off-reserve in Ontario). Effective September 1, 2010, the "current retail sales tax exemption for Status Indians, Indian bands and councils of an Indian band will continue for qualifying off-reserve supplies (including sales and leases) as Ontario moves to the HST." Thus, these First Nations peoples are entitled to an exemption from paying the eight-percent Ontario component of the HST on qualifying property or services at point-of-sale. The point-of-sale exemption applies to qualifying off-reserve acquisitions or importations of property or services that are for personal consumption or exclusively for consumption or use by the band or the council of the band. Although framed by the Ontario Ministry of Revenue as an extension of the exemption granted under the prior ORST Act, it nevertheless is a departure from the harmonization of excise taxes across Canada because it creates a special rule based on where the customer lives. In addition, this partial exemption does not apply to all goods and services but only certain ones sold to certain First Nations peoples living off reserve.

This policy — announced two weeks before the implementation of the HST in Ontario — requires changes to the logic of billing and point-of-sale systems, which may or may not be possible based on the hardware and software limitations of such systems.

TEI requests CRA to provide a written response to the following comments:

(i) The less than three-month lead time to implement this new requirement was insufficient to permit many registrants to re-program their billing systems to apply the lower rate to a subgroup of tax-exempt customers. In the future, TEI requests a more reasonable period of time — such as six months — be provided to implement the necessary systems changes. In addition, if registrants were unable to comply with the five-percent tax rate because of systems limitations, TEI requests that CRA show administrative tolerance in respect of penalties for the transition period.

(ii) With respect to the point of sale rebate to First Nations peoples, registrants are required to report such amounts on their tax returns. It has been CRA's position that such rebates may be shown on invoices as a tax of five percent. In these circumstances, please explain why registrants must report the eight-percent portion of the HST that was never charged on the invoice as a form of rebate.

(iii) Because Ontario differentiates between First Nations peoples living off and on reserve, registrants must now determine whether an individual providing a status card is entitled to a full or partial HST exemption. The only tool available to make such decision is the INAC website (http://www.ainc-inac.gc.ca/index-eng.asp), which lists the name of reserves throughout Canada with a postal code. This web site was not established for GST/HST purposes, however, and is a limited tool because the postal code listed on the website is not necessarily the only one that would cover the reserve. TEI recommends that, if the status card is produced and its number noted, that should be sufficient for purposes of the exemption.

ANSWER # 6: Point of Sale Rebates

(i) Reporting penalties have been implemented to encourage accurate reporting of information required to properly allocate GST/HST revenues among the federal and provincial governments. It is important for businesses to make best efforts to fully and accurately meet their obligations.

Penalties will be applied wherever considered necessary to achieve future reporting compliance and/or where registrants have not made reasonable efforts to comply with reporting requirements.

The CRA will practice "administrative tolerance" with respect to the new rules. The rule of thumb will be: "Be tolerant and recognize that this is new for everyone". In considering the application of penalties, consideration may be given to whether a registrant has acted in good faith and made reasonable efforts to fully and accurately meet his obligations particularly during transition to Ontario/BC HST. This being said, each situation will be looked at on a case by case basis and the relief accorded where necessary. The usual principles of fairness and due diligence will continue to apply.

(ii) Under section 3 the *Draft Credit for Provincial Relief (HST) Regulations,* registrants making supplies of qualifying property or services to eligible Ontario First Nations purchasers and who credit the purchasers with an amount equal to the provincial part of the Harmonized Sales Tax (HST) are not required to comply with the disclosure requirements of subsections 223(1) or 223(1.1) of the Excise Tax Act (ETA). These suppliers are allowed to show the HST at the net rate of 5% on the invoice and not the full 13% HST. For example, suppliers may indicate:

- the total amount of the HST payable (or the total HST rate) with the credited amount shown separately;
- the total HST payable as an amount net of the credited amount; or
- the total price of the qualifying property or service that includes HST at a net rate of 5%.

For the purpose of calculating net tax under subsection 225(1) of the ETA for reporting net tax, subsection 234(3) allowing for a deduction of an amount credited pursuant to the *Deduction for Provincial Rebate (GST/HST) Regulations,* does not apply to qualifying off-reserve supplies made to Ontario First Nations. Suppliers who have credited eligible Ontario First Nations purchasers an amount equal to the provincial part of the HST when making supplies of qualifying property or services must report the 13% HST collected or collectible at line 105 of the GST/HST Return even though they are permitted to disclose HST net of the credit when invoicing, as described above.

Although the 13% HST is reported at line 105 and used in the calculation of net tax at line 109, registrants may also claim a credit for the amount equal to the 8% provincial part of the HST that they credited to the purchasers at the point of sale. The suppliers will record this amount at line 111 of the return reducing the amount owing and file the CRA form GST189, *General Application for Rebate of GST/HST*, using reason code 23 with the GST/HST return.

(iii) HST generally applies in the same way as GST, and its application is consistent with the provisions of the *Indian Act*. Goods and services sold to Indians, Indian bands, and band-empowered entities that are relieved of the GST are generally also relieved of the HST. Goods and services sold to Indians, Indian bands, and band-empowered entities that are subject to GST are generally also subject to HST.

This means that, as in all provinces with the HST, in Ontario services performed entirely on a reserve and goods acquired on a reserve by an Indian customer are fully relieved of the HST. Full relief also applies to goods acquired at a location off a reserve by an Indian purchaser and subsequently delivered to a reserve by the vendor or an agent of the vendor. Further, the CRA's remote store policy enables vendors who meet certain conditions to provide point-of-sale tax relief to Indians, Indian bands and band-empowered entities on the acquisition of goods without the need to deliver those goods to a reserve (for more information, please see **http://www.cra-arc.gc.ca/E/pub/gl/p-246/README.html**). These supplies are fully relieved of HST under the CRA's Technical Information Bulletin B-039, *GST/HST Administrative Policy — Application of the GST/HST to Indians*. There is no requirement under the *Indian Act* or B-039 that the Indian purchaser has to reside on a reserve.

When full relief of the GST/HST is not available on off-reserve purchases, in Ontario, relief equal to the provincial part of the HST may apply to status Indians, Indian bands and councils of Indian bands. The Ontario First Nations point-of-sale relief is equal to the 8% provincial part of the HST on qualifying off-reserve property or services acquired by eligible First Nation purchasers.

As the administration of the Ontario First Nation point-of-sale relief is the responsibility of the Government of Ontario, and is based on *Ontario Regulation 317/10* made under Ontario's *Retail Sales Tax Act* (accessible online at **http://www.e-laws.gov.on.ca/html/source/regs/english/2010/elaws_src_regs_r10317_e.htm**) , we recommend that you seek clarification concerning the vendor's responsibilities with respect to the certificate of Indian status cards and determining residency of First Nation customers. The Ministry of Revenue of Ontario can be reached as follows.
The telephone number is: 1 866 668-8297.

Request for written interpretations should be sent to:

Ministry of Revenue
Tax Advisory Services Branch
Retail Sales Tax Section
33 King Street West, 3rd Floor
Oshawa ON L1H 8H5.

QUESTION # 7: Carrying on Business

Policy Statement P-051R2, *Carrying on business in Canada*, outlines CRA's position on when a person is carrying on business in Canada. For leasing, when determining whether a non-resident lessor is carrying on business in Canada, the examples suggest that CRA considers the place where the non-resident lessor acquires the leased property and the place where the property is delivered to the lessee to be the key factors. CRA's position appears to be contrary to jurisprudence and, as a result, has caused a great deal of uncertainty in the area of cross-border leasing.

Attached in Appendix A are six examples of lease terms. Please identify the relevant factors for determining when a non-resident lessor is considered to be carrying on business in Canada and the basis for this conclusion.

APPENDIX A

QUESTION #7, FACT PATTTERN #1

1. A non-resident lessor, engaged in the business of supplying industrial equipment outside Canada through a lease, enters into an agreement to lease equipment to a resident registrant.

2. The lease agreement for the equipment is concluded in Canada.

3. Pursuant to the lease, the lessee acquires possession of the equipment outside Canada at the beginning of the lease. The lessee subsequently imports the equipment for use at its business facilities in Canada.

4. The lessee is responsible for all maintenance and servicing of the equipment during the term of the lease.

5. The non-resident lessor does not solicit business in Canada.

6. The non-resident lessor has no agents or employees or facilities (either management, sales or service) in Canada.

7. The non-resident lessor is not listed in any directories in Canada.

8. The non-resident lessor has a bank account in Canada.

9. The lease payments are made in Canada.

APPENDIX A

QUESTION #7, FACT PATTTERN #2

1. A non-resident lessor, engaged in the business of supplying industrial equipment outside Canada through a lease, enters into an agreement to lease equipment to a resident registrant.

2. The lease agreement for the equipment is concluded in Canada.

3. Pursuant to the lease, the lessee acquires possession of the equipment outside Canada at the beginning of the lease. The lessee subsequently imports the equipment for use at its business facilities in Canada.

4. The lessee is responsible for all maintenance and servicing of the equipment during the term of the lease.

5. The non-resident lessor does not solicit business in Canada.

6. The non-resident lessor has no agents or employees or facilities (either management, sales, or service) in Canada.

7. The non-resident lessor is not listed in any directories in Canada.

8. The non-resident lessor has no bank account in Canada.

9. The lease payments are made outside Canada.

APPENDIX A

QUESTION #7, FACT PATTTERN #3

1. A non-resident lessor engaged in the business of supplying industrial equipment outside Canada through a lease enters into an agreement to lease equipment to a resident registrant.

2. The lease agreement for the equipment is concluded in Canada.

3. Pursuant to the lease, the lessee acquires possession of the equipment outside Canada at the beginning of the lease. The lessee subsequently imports the equipment for use at its business facilities in Canada.

4. The lessor is responsible for all maintenance and servicing of the equipment during the term of the lease.

5. The non-resident lessor does not solicit business in Canada.

6. The non-resident lessor has no agents or employees or facilities (either management, sales or service) in Canada.

7. The non-resident lessor is not listed in any directories in Canada.

8. The non-resident lessor has no bank account in Canada.

9. The lease payments are made outside Canada.

APPENDIX A

QUESTION #7, FACT PATTTERN #4

1. A non-resident lessor, engaged in the business of supplying industrial equipment outside Canada through a lease, enters into an agreement to lease equipment to a resident registrant.

2. The lease agreement for the equipment is concluded outside Canada.

3. Pursuant to the lease, the lessee acquires possession of the equipment outside Canada at the beginning of the lease. The lessee subsequently imports the equipment for use at its business facilities in Canada.

4. The lessor is responsible for all maintenance and servicing of the equipment during the term of the lease.

5. The non-resident lessor does not solicit business in Canada.

6. The non-resident lessor has no agents or employees or facilities (either management, sales or service) in Canada.

7. The non-resident lessor is not listed in any directories in Canada.

8. The non-resident lessor has a bank account in Canada.

9. The lease payments are made in Canada.

APPENDIX A

QUESTION #7, FACT PATTTERN #5

1. A non-resident lessor, engaged in the business of supplying industrial equipment outside Canada through a lease, enters into an agreement to lease equipment to a resident registrant.

2. The lease agreement for the equipment is concluded outside Canada.

3. Pursuant to the lease, the lessee acquires possession of the equipment outside Canada at the beginning of the lease. The lessee subsequently imports the equipment for use at its business facilities in Canada.

4. The lessee is responsible for all maintenance and servicing of the equipment during the term of the lease.

5. The non-resident lessor does not solicit business in Canada.

6. The non-resident lessor has no agents or employees or facilities (either management, sales or service) in Canada.

7. The non-resident lessor is not listed in any directories in Canada.

8. The non-resident lessor has no bank account in Canada.

9. The lease payments are made outside Canada.

APPENDIX A

QUESTION #7, FACT PATTTERN #6

1. A non-resident lessor, engaged in the business of supplying industrial equipment outside Canada through a lease, enters into an agreement to lease equipment to a resident registrant.

2. The lease agreement for the equipment is concluded in Canada.

3. Pursuant to the lease, the lessee acquires possession of the equipment outside Canada at the beginning of the lease. The lessee subsequently imports the equipment for use at its business facilities in Canada.

4. The lessee is responsible for all maintenance and servicing of the equipment during the term of the lease.

5. The non-resident lessor does not solicit business in Canada.

6. The non-resident lessor has no agents or employees or facilities (either management, sales or service) in Canada.

7. The non-resident lessor is not listed in any directories in Canada.

8. The non-resident lessor has no bank account in Canada.

9. The lease payments are made in Canada.

ANSWER # 7: Carrying on Business

With respect to that part of the question referring to the examples in GST/HST Policy Statement P-051R2 involving leases of tangible personal property, our position with respect to this issue remains as set out in our response to question #8 from our meeting in 2006. In particular, as indicated in that response, the policy statement clearly indicates that the factors that are significant for purposes of determining whether a non-resident is carrying on business in Canada for GST/HST purposes in a particular case, and whether the non-resident consequently has a significant presence in Canada, ultimately depends on the nature of the business activity under review, and more specifically, the type of supply being made. In addition to Examples 1 to 5 of the policy statement, the policy statement also uses the example in the narrative of a supply of property by way of lease to illustrate this point by stating that factors that are of greater importance in such a case are the place where the property is acquired by the non-resident lessor and the place where the property is delivered to the lessee.

With respect to the examples in the Appendix, as indicated in the policy statement, the determination of whether a non-resident is carrying on business in Canada is relevant for purposes of subsection 240(1) of the Excise Tax Act, which generally provides that every non-resident person who carries on business in Canada, other than a small supplier, must register for GST/HST purposes if the non-resident person makes a taxable supply in Canada. Based on the information provided, the supply being made by the non-residents in all of the examples in the Appendix is a supply of tangible personal property by way of lease and the lessees in all of the examples are acquiring possession of the property outside Canada. Pursuant to subsection 142(2) of the ETA, a supply of tangible personal property otherwise than by way of sale is deemed to be made outside Canada if possession or use of the property is given or made available outside Canada to the recipient of the supply. As a result, none of the non-residents in the examples in the Appendix would be considered to be making a taxable supply in Canada of the leased property and, more importantly, would not be required to register under subsection 240(1) on that basis regardless of the issue of carrying on business. There would therefore be no requirement for GST/HST purposes for a determination to be made with respect to whether the non-residents in the examples in the Appendix are carrying on business in Canada.

QUESTION # 8: Place of Supply Rules

a. *Single vs. Multiple Supplies*. With the introduction of the HST in Ontario and British Columbia in July 2010, new place of supply rules have been introduced for certain services. These rules include significant changes in the application of taxes to services relating to real property. Generally, the place of supply rules relating to real property contain three basic application rules that can be summarized as follows (similar rules apply to services provided in relation to TPP):

Rule 1:

The service will be considered to be made in a participating province if the real property is located **primarily** (50 percent) in the participating province. If the work performed is in relation to one building, the location of that building would determine the place of supply. If the services relate to more than one building, the services will be considered performed in the participating province in which the **"greatest proportion"** of buildings is located; this province will determine the applicable tax rate.

Participating provinces include New Brunswick, Nova Scotia, Newfoundland, Ontario, and British Columbia. Non-participating provinces include Prince Edward Island, Quebec, Manitoba, Saskatchewan, and Alberta, as well as the Northwest and Nunavut Territories and the Yukon. Where the supply is made primarily in non-participating provinces, only GST will apply.

Rule 2:

If the real property is situated primarily in a participating province, but the **"greatest proportion"** cannot be determined because there is an equal proportion of buildings in two or more participating provinces, the participating province with the highest rate is considered to be the place of supply.

Rule 3:

If the place of supply cannot be determined under Rule 2 because the two participating provinces have the same rate of tax, that particular rate is applied. Generally, the place of supply would be determined by the business address of the supplier most closely connected with the supply, provided that this address is located in one of the specified provinces. Alternatively, the place of supply would be considered to be in the specified province that is closest in proximity to the business address of the supplier that is most closely connected with the supply.

Where services are provided under one agreement and relate to one building, it is easy to apply the place of supply rules — and determine the applicable tax rate. The location of the building would determine the place of supply and the GST/HST would be collected accordingly. Questions have arisen, however, concerning the application of the rules where services are provided under a single contract for buildings located across Canada.

First, how should one determine the "greatest proportion"? Is it based on the number of buildings, square footage, value of the real property, or another method?

Second, the "greatest proportion" factor may be relevant only in determining the place of supply for a national agreement where a single supply is made. Consideration should be given to situations where multiple supplies are made under the same agreement. If there is a single supply, one tax rate will apply to the entire consideration payable under the agreement. If there are multiple supplies, however, we believe that multiple tax rates will apply because the rate determination will be made on a supply-by-supply basis. TEI invites discussion of this issue.

b. *Deemed Delivery*. TEI requests that CRA provide written responses to the following questions:

(i) Consider the following example:

A Co. is an Ontario-based, GST registrant engaged in 100-percent commercial activity. A Co. supplies tangible personal property (TPP) to B Co., which is located in British Columbia.

The terms of sale are FCA Hamilton, ON, and B Co. takes legal delivery of the goods in that Province. B Co. is a regular customer of A Co. and, at the time of placing a purchase order, instructed A Co. to contact B Co.'s common carrier directly to advise when the TPP would be ready for pickup at A Co.'s premises. B Co. provided the common carrier with contact information when the purchase order was initiated.

In the above example, B Co. retains the common carrier — it negotiates the freight rate and perils of risk, is accountable to resolve delays, and pays all freight charges, including fuel surcharges associated with the service. TIB B-078, *Place of Supply Rules under the HST*, discusses "deemed delivery," as outlined in Schedule IX, Part II, section 3:

Tangible personal property is deemed to be delivered in a particular province, and not to any other province, if the supplier ships the property to a destination in the particular province that is specified in the shipping contract for the property, or otherwise transfers possession of the property to a common carrier or consignee retained by the supplier on behalf of the recipient to ship the property to such a destination in the particular province on behalf of the recipient.

The deemed delivery concept is revisited in the Place of Supply Regulations, Part I, Division I, section 3.[3] Please confirm that Ontario HST applies to the transaction.

[3] *Canada Gazette*, Part II, Vol. 144, No. 12, *New Harmonized Value-added Tax System Regulations* (June 9, 2010).

(ii) Consider the following examples:

D Co. is a Quebec-based, GST and QST registrant, engaged in 100-percent commercial activity. D Co. supplies corporeal movable property (TPP) to E Co., located in British Columbia.

Under its contract with D Co., E Co. takes legal delivery of the goods in Quebec. Freight is "prepaid and charge"; thus, D Co. contacts a common carrier to ship the goods to E Co.'s manufacturing plant in Victoria, BC.

The common carrier invoices D Co. D Co. will pay the carrier's invoice and invoice E Co. for the cost of the freight as a separate line item on D Co.'s sales invoice to E Co.

Based on the deemed delivery concept applicable to transactions with harmonized provinces, please confirm that the 12-percent HST applies to the transaction.

(iii) The facts are the same as above, except that E Co. makes all the freight arrangements to pick up the corporeal movable property from D Co.'s Quebec-based plant (*i.e.*, D Co. has no involvement with the freight carrier).

Please confirm that only GST applies to this transaction.

ANSWER # 8: Place of Supply Rules

With respect to the first question, section 14 of Division 3 of Part 1 of the *New Harmonized Value-Added Tax System Regulations* to the *Excise Tax Act* is the relevant provision to determine the province in which a supply of a service in relation to real property. It provides that a supply of a service in relation to real property is made

(a) in a participating province if the real property that is situated in Canada is situated primarily in participating provinces and

an equal or greater proportion of the real property is not situated in another participating province, or

(ii) if subparagraph (i) does not apply, the tax rate for the participating province is the highest among the participating provinces for which no greater proportion of the real property is situated in another participating province; and

(b) in a non-participating province if the real property that is situated in Canada is not situated primarily in participating provinces.

For purposes of this rule, the determination of the relevant proportion of the real property is based on the physical size of the entire real property (for example, based on square footage) pursuant to its legal description. Factors such as the value of the real property or the number of properties (unless they are of equal size) would therefore not be relevant to the determination.

With respect to the second question, the place of supply rule for a supply of a service in relation to real property applies to each supply of a service that is being made. We agree that where based on the facts it is determined that multiple supplies of services are made, regardless of whether the supplies are made pursuant to a single contract or multiple contracts, the determination of the place of supply is made on a case-by-case basis by applying the relevant place of supply rule to each supply of a service that is made.

b.

(i) Based on the information provided, we agree that the taxable (other than zero-rated) supply of the goods would be made in Ontario pursuant to section 1 of Part II to Schedule IX of the *Excise Tax Act* and that HST at a rate of 13% would consequently apply to the supply.

(ii) Based on the information provided, we agree that the taxable (other than zero-rated) supply of the goods would be made in BC pursuant to sections 1 and 3 of Part II to Schedule IX of the ETA and that HST at a rate of 12% would consequently apply to the supply.

(iii) Based on the information provided, we agree that the taxable (other than zero-rated) supply of the goods would be made in Quebec pursuant to section 1 of Part II to Schedule IX and that GST at a rate of 5% would consequently apply to the supply.

QUESTION # 9: Non-GST issues: Insurance Premium Tax

Part I of the Excise Tax Act (ETA) imposes a 10-percent tax on insurance premiums against risks in Canada that are placed with:

- An insurer authorized under the laws of Canada or a province to transact the business of insurance, if the contract is entered into or renewed through a broker or agent outside Canada; or

- An insurer not authorized under the laws of Canada or a province to transact the business of insurance.

This "self-assessed" tax was introduced in 1942 in the Special War Revenue Act (now the ETA). Before April 1997, the tax was administered by the Office of the Superintendent of the Financial Institutions and was transferred at that time to CRA. The statute provides that the tax does not apply "to the extent that the insurance is not, in the opinion of the Commissioner, available in Canada."[4] The term "not available in Canada" is not defined in the ETA, and the only reasons CRA deems acceptable are the unavailability of the particular class of insurance from authorized insurers or the lack of market capacity at that particular time for that class of insurance. The latter exception has not been defined.

In spite of the lack of guidance, the tax has been imposed retroactively and administered in a subjective and arbitrary manner. Taxpayers have been denied the benefit of the exemption despite possessing letters from an insurer denying coverage.

[4] R.S., 1985, c. E-15, s. 4; 1999, c. 17, s. 147.

ANSWER # 9: Non-GST issues: Insurance Premium Tax

The CRA assumed responsibility for the administration of the tax on insurance premiums effective April 1, 1997. The Office of the Superintendent of Financial Institutions (OSFI) formerly held this mandate.

Since the transfer of this responsibility, the CRA has published three documents. In February 1998, Excise Tax and Special Levies Notice ET/SL 36 was released, outlining basic facts on Insurance Premiums other than Marine. Updated version ET/SL 36R was issued in February 2005. These notices outlined what was exempt from tax, who is required to pay the tax and how to apply for an exemption from the tax. The latter also provides interpretation on terms included within the legislation.

In February 2009, CRA released Memorandum 7-1 – Special Levies – Insurance Premiums under the Excise Taxes and Special Levies Memoranda Series. This memorandum provide more information on the filing of returns, exemptions, payments, assessments, objections and includes a listing of types of marine insurance which are exempt from this tax.

Compliance initiatives are carried out by the CRA in order to ensure a level playing field for all taxpayers for any particular tax program, including Part 1 tax on insurance premiums. Imposing the tax prospectively would not be fair to those taxpayers who have been compliant with the legislation.

QUESTION # 10: HST Technical Information

Feedback on HST Technical Information:

- Feedback/Suggestions where current HST technical information could be clarified and what other HST technical information products would be helpful.

QUESTION # 11: Business Registration on-Line

Feedback on Business Registration On-Line:

- Feedback/Suggestions for improving the user experience when registering on Business Registration On-Line.

CONCLUSION

Tax Executives Institute and the Canada Revenue Agency appreciate this opportunity to present, listen and/or respond to the various comments and questions for discussion.