CRA / TEI
LIAISON MEETING
DECEMBER 6, 2011
AGENDA

13:00 – 13:10 Opening/Introduction

- Brian McCauley / Pierre Bertrand
- David Penney / Kim Berjian

13:10 – 14:00 Presentation/Discussion

- GST/HST Rulings 2012 and Beyond (Pierre Bertrand)
- Compliance Programs Branch New Approach to Large File Audits (Girish Shah)

14:00 – 14:30 Technical Questions and Discussion

1. **Provincial Matters and Harmonized Sales Tax -** Questions 1(a) and 1(b) (Costa Dimitrakopoulos)
2. **Recaptured Input Tax Credits (RITCs) -** Question 2(a) (Catherine Seguin), Questions 2(c) and 2(d) (Gunar Ozols)
3. **Input Tax Credits Section 180 Pass Trough ITCs and Services** (Finance only)
4. **Input Tax Credits – Imported Goods** - Questions 4(i) to 4(v) (Patrick McKinnon)

14:30 – 14:45 Refreshment Break

14:45 – 16:10 Technical Questions and Discussion (Continued)

5. **Drop-shipment Rules and Commingled Petroleum Products –** Question 5 (Jeff Frobel)
6. **Documentary requirements for Procurement Cards –** Question 6(i) (Catherine Seguin)
7. **Rates for Reimbursements of Automobile Expenses –** Question 7(b) (Gunar Ozols)
8. **Financial Services –** Questions 8(a)(i), (ii), (iv), 8(b)(i) and (ii) (Lorrie McAnulty)
9. **Calculation of Threshold for Purposes of *De Minimis* Financial Institutions** (Finance only)
10. **Place of Supply – Goods – Unknown Destination at Time of Invoicing** Questions 10(i) and 10(ii) (Jeff Frobel)
11. **Place of Supply – Personal Services** Questions 11(a)(i) to 11(a)(iv), and Questions 11(b)(i) to 11(b)(vii) (Patrick McKinnon)
12. **Point of Sale Rebates** – Question 12 (Philippe Nault and Karen Bennett)
13. **Format for the CRA/TEI Roundtable at the May 2012 TEI Conference in Gatineau, Quebec** (Kim Berjian)

16:10 – 16:15 Closing Remarks

Tax Executives Institute, Inc. welcomes the opportunity to present the following questions on Canadian commodity tax issues, which will be discussed with representatives of Canada Revenue Agency and the Department of Finance during TEI's December 6-7, 2011, liaison meetings.[1]

QUESTION # 1: Provincial Matters and the Harmonized Sales Tax

Earlier this year, residents of British Columbia approved a referendum to repeal the Harmonized Sales Tax (HST) and reinstate the Provincial Sales Tax (PST). On August 26, 2011, the British Columbia Ministry of Finance published its Action Plan to Re-implement PST. The Action Plan notes that the process of transitioning back to the PST will require much effort and a minimum of 18 months to achieve. In contrast, Quebec agreed on September 30 to make changes to the Quebec Sales Tax (QST) to harmonize it with the federal Goods and Services Tax (GST).

a. *HST and British Columbia*. Please provide an update on the timetable, transitional rules, and any other legislative or administrative changes that will be required to rescind the HST in British Columbia?

b. *QST and GST*. Please provide any available details concerning the agreement announced on September 30, 2011, with the province of Quebec to harmonize the QST with the GST?

c. *Other Provinces (Finance Only)*. Is Finance negotiating with other provinces to replace their provincial sales taxes with the HST?

[1] Unless otherwise noted, topics are for discussion at the meetings with both CRA and the Department of Finance. Questions for CRA requesting a written response are noted.

ANSWER # 1: Provincial Matters and the Harmonized Sales Tax

a.

- The Department of Finance Canada is continuing to work with the BC Ministry of Finance to determine the timeframe for the transition to GST and PST in the province.

- The CRA will continue to administer the HST during the transition back to GST in British Columbia, and GST/HST registrants conducting business in BC must continue to collect and report the HST. The CRA is developing a transition strategy that will address service and compliance programs during the transition.

b.

- The Memorandum of Agreement (MoA) announced on September 30, 2010 forms the framework for concluding a Canada-Quebec Comprehensive Integrated Tax Collection Agreement (CITCA).

- The Department of Finance Canada is still negotiating the CITCA with the *Ministère des Finances du Québec*.

- The MoA provides for *Revenu Québec* to administer an amended Quebec Sales Tax (QST) in addition to continuing to administer the GST/HST in the province, and for the CRA to administer an Amended QST in respect of Selected Listed Financial Institutions.

- The CRA will continue to work closely with the Department of Finance Canada and *Revenu Québec* to ensure a smooth implementation of the CITCA currently being negotiated.

QUESTION # 2: 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 HST paid or payable on specified property and services in British Columbia and Ontario. Although the HST has been repealed in British Columbia, it remains in effect while the province develops transitional rules for a return to the PST.

a. *Audit Issues (CRA Only).* The rules for reporting RITCs can be difficult to apply in practice. Please provide an update on the compliance issues being discovered upon audit of returns that include RITCs?

b. *TEI Submission (Finance Only).* Reporting RITCs pursuant to the time frames required in the current regulations is not possible, and the inability to comply exposes businesses to significant penalties and increased administrative costs. On March 7, 2011, the Institute submitted a letter urging Finance to amend paragraph 30(d) of the New Harmonized Value-added Tax System Regulations, No. 2 to permit reporting RITCs either (1) within 90 days of the invoice date; or (2) in the period in which it is accounted for unless there has been a deliberate or undue delay in the reporting. Could Finance provide an update on this issue?

c. *Reimbursed Expenses – Generally.* Many common business arrangements require customers to reimburse suppliers for certain expenses. The GST/HST treatment of those transactions remains unclear in certain situations. Consider the following example:

Company A provides taxable services to Company B. Compensation for these services is determined, in part, by the expenses incurred by Company A in providing them. The expenses are not incurred by Company A as agent of Company B nor are the supplies to which the expenses relate re-supplied by Company A to Company B; the reimbursement of expenses is simply part of the formula for determining the consideration payable for the overall services provided. Some of the reimbursed expenses are subject to the RITC mechanism.

(i) Please confirm that it is Company A and not Company B that is required to account for the RITCs on these expenses.

(ii) Would the answer change if some of the expenses to be reimbursed by Company B consist of meals and entertainment expenses incurred by Company A that are identified as such on Company A's invoices Company B?

d. Reimbursed Expenses – Start-up Costs. The treatment of reimbursed costs also remains unclear where one company incurs start-up costs attributable to a related company which consist at least partly of taxable supplies. Consider the following example:

Company A forms a new subsidiary – Company B. Prior to making its first taxable supply, Company B obtains its GST/HST registration number and begins setting up its general ledger, computer systems, purchasing and sales departments and modules, etc. Company A provides support to Company B and incurs expenses for which it is entitled to be reimbursed by Company B as start-up costs. Some of these expenses may be legal fees relating to the incorporation of Company B but others are operational in nature (e.g., telecommunications services subject to RITCs, purchases and/or leases of passenger vehicles and gasoline to operate these vehicles, meals and entertainment expenses incurred by Company A's employees working on the project to establish Company B that are subsequently reimbursed by Company A). Company A issues invoices to Company B that clearly identify the nature of these expenses.

Which of the two companies, if any, is subject to the RITC rules respecting the aforementioned expenses originally incurred by Company A and re-charged by Company A to Company B?

ANSWER # 2: Recaptured Input Tax Credits (RITCs)

a. At this time, much of our RITC compliance information comes from reviews at the pre-assessment stage. Not enough audits of large registrants have been completed to provide a conclusive insight.

In general, most of the issues we have noticed through pre-assessment stage relate to a lack of knowledge than any other systemic problem.

Some of the early indications from audit – and as I said we don't have enough to draw conclusions – include:

- RITCs not reported;
- RITCs calculated incorrectly;
- Proxy percentages used but elections not filed;
- RITCs reported by adding on to GST payable;
- Specified Energy ratios recalculated.

c.

(i) Section 236.01 of the *Excise Tax Act* (the ETA) requires GST/HST registrants that are large businesses to recapture specified provincial input tax credits, which are the portion of input tax credits (ITCs) for the provincial part of the HST paid or payable on specified property or services acquired in, or brought into, Ontario or British Columbia for consumption or use in those provinces. These recaptured ITCs are referred to as RITCs.

Specified property or services are prescribed in subsection 28(1) of the *New Harmonized Value-Added Tax System Regulations No. 2* (the Regulations). They consist of:

- qualifying motor vehicles,
- certain property and services in respect of qualifying motor vehicles,
- for Ontario only, motive fuel, other than diesel for use in qualifying motor vehicles,

- specified energy,
- a service described in paragraph (a) of the definition "telecommunication service" in subsection 123(1) of the ETA,
- access to a telecommunications circuit, line, frequency, channel or partial channel, or to other similar means of transmitting a telecommunication (but not including a satellite channel), for use in providing a service described in paragraph (a) of the definition "telecommunication service" in subsection 123(1) of the ETA, and food, beverages and entertainment to which subsection 67.1(1) of the *Income Tax Act* applies.

Subsection 28(2) of the Regulations lists exclusions to the above prescribed specified property or services. Specifically, under paragraph 28(2)(g), property or services are not prescribed and consequently not subject to recapture, when acquired in, or brought into, Ontario or British Columbia exclusively for the purpose of:

- being supplied by a person,
- becoming a component of tangible personal property that is to be supplied by a person, or in the case of telecommunications services or property described in subsection 28(1) that are acquired by a person operating a telecommunication service, being used directly and solely in the making of a taxable supply of a telecommunication service by the person.

In the facts as given, Company A is supplying taxable services to Company B, the consideration of which is determined, in part, by the expenses incurred by Company A. The facts state that the expenses are not incurred by Company A as agent of Company B, nor are the supplies to which the expenses relate resupplied by Company A to Company B.

Where Company A, a large business, incurs expenses that are specified property and services as inputs to its supply of taxable services to Company B, then Company A is subject to the RITCs for the HST paid or payable on these specified property and services. Company B has not acquired a supply of specified property or services from Company A. Therefore, Company B is not subject to RITCs for the HST payable to Company A.

(ii) Paragraph 28(1)(h) of the Regulations prescribes specified property or services as including food, beverages or entertainment acquired in Ontario or British Columbia and in respect of which subsection 67.1(1) of the *Income Tax Act* (the ITA) applies or would apply if the person were a taxpayer under that Act. Subsection 67.1(2) of the ITA lists exceptions where subsection 67.1(1) would not apply. One of these exceptions, paragraph 67.1(2)(c), is where an amount is paid or payable by a person in respect of the consumption of food or beverages or the enjoyment of entertainment if the amount is an amount for which the person is compensated and the amount of the compensation is reasonable and specifically identified in writing to the person paying the compensation.

If, on the invoice to Company B, Company A identifies the meals or entertainment in a manner that satisfies the requirements of paragraph 67.1(2)(c) of the ITA, then Company A has not acquired specified property or services and is not subject to RITCs for the HST paid or payable on these meals and entertainment.

Although the amount that Company B pays for these meals and entertainment is subject to 67.1(1) of the ITA, and any ITC claimed by Company B for this amount is subject to the 50% addition to net tax under section 236 of the ETA, Company B has not acquired the meals and entertainment. Since Company B has not acquired specified property or services, Company B is not subject to RITCs with respect to the amount of meals and entertainment shown on Company A's invoice.

d. Under section 236.01 of the *Excise Tax Act* (the ETA), Company A, as a GST/HST registrant that is a large business, will generally be required to recapture specified provincial input tax credits, which are the portion of input tax credits (ITCs) for the provincial part of the HST paid or payable on specified property or services acquired in or brought into Ontario or British Columbia for consumption or use in those provinces. These recaptured ITCs are referred to as RITCs.

Under subsection 27(10) of the *New Harmonized Value-Added Tax System Regulations No. 2* (the Regulations), Company B, as an associate of Company A, a large business, is deemed to be a large business upon GST/HST registration.

Specified property or services are prescribed in subsection 28(1) of the Regulations and consist of:

- qualifying motor vehicles,
- certain property and services in respect of qualifying motor vehicles,
- for Ontario only, motive fuel, other than diesel for use in qualifying motor vehicles
- specified energy,
- a service described in paragraph (a) of the definition "telecommunication service" in subsection 123(1) of the ETA,
- access to a telecommunications circuit, line, frequency, channel or partial channel, or to other similar means of transmitting a telecommunication (but not including a satellite channel), for use in providing a service described in paragraph (a) of the definition "telecommunication service" in subsection 123(1) of the ETA, and
- food, beverages and entertainment to which subsection 67.1(1) of the *Income Tax Act* applies.

The question of which company is subject to the RITC rules will depend on whether there is an agency relationship between Company A and Company B, whether Company A has consumed or used the specified property or services in the course of making other supplies to Company B, or whether Company A has resupplied the specified property or services to Company B. To make this determination, CRA would look at all the circumstances surrounding the transactions between the two companies, including any contracts between the companies. Whether the acquisitions of specified property or services by Company A are itemized on an invoice issued to Company B would only be one factor in making this determination.

If Company A is acting as agent of Company B in acquiring these prescribed property or services, then Company B would be the person entitled to the input tax credits (ITCs) in respect of these specified property or services. Consequently, Company B, and not Company A, would also be the person subject to the RITCs in respect of the acquisition of these specified property or services.

Subsection 28(2) of the Regulations lists exclusions from the above property or services being prescribed. Specifically, under paragraph 28(2)(g), property or services are not prescribed and consequently not subject to recapture, when acquired in or brought into Ontario or British Columbia exclusively for the purpose of:

- being supplied by a person,
- becoming a component of tangible personal property that is to be supplied by a person, or
- in the case of telecommunications services or property described in subsection 28(1) that are acquired by a person operating a telecommunication service, being used directly and solely in the making of a taxable supply of a telecommunication service by the person.

If Company A is not acting as agent of Company B in acquiring these property or services, but acquires them instead exclusively for one of the purposes listed in paragraph 28(2)(g) of the Regulations, then Company A has not acquired prescribed specified property and services. Company A would not be subject to RITCs with respect to the ITCs paid or payable on these property or services.

Under subsection 123(1) of the ETA, a "supply" is defined as "…the provision of property or service in any manner…." Where there is no principal and agent relationship, and one person alone enters into an agreement for the purchase of taxable property or services, then it alone is the recipient (that is, the person who is liable to pay the consideration for the supply) of the initial supply from the third party. As the recipient of the supply, that person will incur the liability for any GST/HST on the purchase. If that person uses or consumes that property or service in the provision of a taxable supply of a service to another person, then that property or service becomes an input into the supply of the service, regardless of how it is invoiced to that other person.

However, under an agreement whereby one person agrees to purchase, other than as an agent, taxable property or service from a third party on behalf of another person who will use or consume all or some of that property or service, any allocation of costs under that agreement to that other person in respect of this purchase would be considered a separate resupply of the property or service in question. The tax status of that resupply will depend on the nature of the property or service being resupplied and whether there are provisions in the ETA to exempt the resupply. If the resupply is taxable, then the GST/HST is applicable on the "reimbursements" by the other person and collectible by the first person (that is, the recipient of the original supply).

Therefore, where Company A has resupplied these property or services to Company B, then Company B having acquired prescribed property or services from Company A (such as qualifying motor vehicles and gasoline for use in qualifying motor vehicles), would be subject to RITCs for the tax paid or payable to Company A.

It would be a question of fact whether Company A operates a telecommunication service such that it would be relieved from any RITC requirement for the telecommunication property or service that it acquires. It would also be a question of fact whether Company A has supplied Company B with a telecommunication service or property as prescribed in paragraph 28(1) of the Regulations.

Paragraph 28(1)(h) of the Regulations prescribes "food, beverages or entertainment acquired in a specified province and in respect of which subsection 67.1(1) of the *Income Tax Ac*t (the ITA) applies or would apply if the person were a taxpayer under that Act" as specified property or services. Subsection 67.1(2) of the ITA lists several exceptions where subsection 67.1(1) of that Act will not apply. One of these exceptions, paragraph 67.1(2)(c), is where an amount is paid or payable by a person in respect of the consumption of food or beverages or the enjoyment of entertainment if the amount is an amount for which the person is compensated and the amount of the compensation is reasonable and specifically identified in writing to the person paying the compensation.

If on the invoice to Company B, Company A identifies the meals or entertainment in a manner that satisfies the requirements of paragraph 67.1(2)(c) of the ITA, then subsection 67.1(1) of the ITA does not apply to these meals and entertainment expenses. Therefore, Company A has not acquired specified property or services and Company A is not subject to RITCs for the HST paid or payable on these meals and entertainment expenses.

If Company A has resupplied the meal and entertainment expenses to Company B, then Company B has acquired food, beverages or entertainment in respect of which subsection 67.1(1) of the ITA applies. Since Company B has acquired specified property or services in this situation, Company B is subject to RITCs for the HST paid or payable on the supply of these meals and entertainment expenses.

QUESTION # 3: Input Tax Credits – Section 180 Pass Through ITCs and Services
(Finance Only)

Unregistered nonresidents must pay HST/GST on certain imports of goods into Canada. These nonresidents are generally not entitled to an input tax credit for those taxes. The *Excise Tax Act* provides relief in certain situations. Specifically, section 180 of the *Excise Tax Act* deems a person to have paid tax in respect of a supply of property equal to the tax under *Excise Tax Act* Division III or subsection 179(1) in respect of the importation of goods. This deeming provision provides a mechanism to pass through a tax amount paid by one party that is unable to meet the input tax credit conditions to another party who will be in a position to recover the tax paid. This works very well when a nonresident vendor supplies goods but provides no relief when the vendor is a service provider.

Consider the following example:

> A U.S. moving company (US MoveCo) has a contract with a multinational firm (MNCo) engaged exclusively in commercial activities to handle all of MNCo's employee moves. US MoveCo subcontracts with a Canadian moving company (Canadian MoveCo) to handle the Canadian moves for MNCo's Canadian subsidiaries (also engaged exclusively in commercial activities and registered for GST/HST). US MoveCo (a U.S. resident corporation not registered for GST/HST) is invoiced by Canadian MoveCo (Canadian resident, registered moving company) for moving charges plus GST/HST as the services were provided in Canada. US MoveCo then invoices the full value of charges to MNCo's Canadian subsidiaries – including the GST/HST that US MoveCo was charged by Canadian MoveCo and unable to claim as an input tax credit. US MoveCo has no ability to transfer to MNCo's Canadian subsidiaries the GST/HST paid by US MoveCo to Canadian MoveCo for recovery by MNCo's Canadian subsidiaries as an input tax credit since section 180 applies only to goods, and the drop shipment rules of section 179 are not applicable. This results in GST/HST being unrecoverable merely because the underlying supply is a service rather than a good.
>
> Will Finance consider extending equitable treatment to the supply of services?

ANSWER # 3: Input Tax Credits – Section 180 Pass Through ITCs and Services
(Finance Only)

QUESTION # 4: Input Tax Credits – Imported Goods

Incoterms 2010 created two new Incoterms and related rules (DAT – Delivered at Terminal and DAP – Delivered at Place) to replace previous Incoterms 2000 DAF, DES, DEQ, and DDU. Under the two new Incoterms, delivery occurs at a named place of destination.

The official explanation describing the use of the Incoterm DAP requires the seller to clear the goods for export, where applicable. However, the seller has no obligation to clear the goods for import, pay any import duty, or carry out any import customs formalities.

Consider the following example:

A GST/HST registered party (Seller) sells standard rated taxable goods to a GST/HST registered customer (Purchaser) using the Incoterm DAP Hamilton, Ontario. Purchaser is acquiring the goods for consumption, use, or supply exclusively in its commercial activities and meets all of the other conditions to claim a full input tax credit of the GST/HST paid with respect to its acquisition of the goods. The goods are sourced in the U.S. and will be imported into Canada. The agreement calls for Purchaser to be the importer of record.

Please confirm that for purposes of the *Excise Tax Act*:

(i) For GST/HST purposes, the supply from Seller to Purchaser is considered a supply made in Canada and thus Seller is required to charge and collect *Excise Tax Act* Division II tax at a rate of 13% on its invoice to Purchaser.

(ii) Purchaser will be able to claim a full input tax credit for the 13% Division II HST paid on Seller's invoice (assuming standard documentation requirements are met).

(iii) Purchaser, who is the importer, will pay *Excise Tax Act* Division III tax at a rate of 5% of the value of the goods being imported on its importation of the goods into Canada.

(iv) Purchaser, who is the importer, and who has paid 5% GST on the value of the imported goods will be able to claim a full input tax credit for the Division III tax paid on importation (assuming standard documentation requirements are met). Note: Reference GST/HST Policy Statement P-125R, Example #10.

(v) If Purchaser is not able to claim an input tax credit for the 5% *Excise Tax Act* Division III GST paid on importation per (iv) above, can Purchaser seek reimbursement of the 5% GST from Seller entitling Seller to recover the 5% *Excise Tax Act* Division III tax as an input tax credit (assuming standard documentation requirements are met)?

ANSWER # 4: Input Tax Credits – Imported Goods

(i) Based on the information provided, we agree that for GST/HST purposes, the supply from Seller to Purchaser is considered to be a supply made in Canada that is made in Ontario and thus Seller is required to charge and collect Division II tax at a rate of 13% on its invoice to Purchaser.

(ii) Based on the information provided, we agree that Purchaser will be able to claim a full input tax credit for the 13% Division II HST paid on Seller's invoice (assuming standard documentation requirements are met).

(iii) Based on the information provided, we agree that Purchaser, who is the importer, will pay Division III tax at a rate of 5% of the value of the goods being imported on its importation of the goods into Canada.

(iv) Based on the information provided and for the reasons explained in Example #10 of GST/HST Policy Statement P-125R *Input Tax Credit Entitlement for Tax on Imported Goods* (and Example #12 of that policy statement, as the case may be), we agree that Purchaser, who is the importer of record and has the import documentation, will be able to claim a full input tax credit for the Division III tax paid on the importation (assuming standard documentation requirements are met).

(v) See the answer to 4(iv) above.

QUESTION # 5: Drop-shipment Rules and Commingled Petroleum Products

Historically, CRA has interpreted the drop shipment rules of section 179 of the *Excise Tax Act* to exclude situations where there is commingling of the goods such as oil or gas in a pipeline. This position is based on physical possession of identifiable tangible personal property transferring between parties, as opposed to merely acquiring physical possession of an equivalent quantity of like property.

In the *Tenaska Marketing Canada* case,[2] the Federal Court of Canada ruled that section 144.01 of the *Excise Tax Act*[3] applies to natural gas even though it is commingled with other natural gas in the pipeline.

In light of this decision, can a person use the deeming provisions of section 179 of the *Excise Tax Act* if there is commingling of the goods?

[2] *Tenaska Marketing Canada v. Canada*, 2006 FC 583, [2006] 4 F.C.R. D-40.

[3] Section 144.01 deems a continuous transmission commodity (*e.g.*, oil, gas, or electricity) not to be exported when transported outside Canada in the course of a shipment originating in Canada and ultimately delivered in Canada.

ANSWER # 5: Drop-shipment Rules and Commingled Petroleum Products

The CRA's interpretation of the drop-shipment provisions in section 179 of the *Excise Tax Act* has not changed as a result of the Federal Court of Canada case that is referred to in the question. This case dealt solely with the application of section 144.01 of the ETA and does not have any impact on the application of the drop-shipment provisions in section 179 of the ETA.

QUESTION # 6: Documentary Requirements for Procurement Cards

In June 2005, CRA issued GST/HST Notice 199: *Procurement cards – Documentary requirements for claiming input tax credits*. The purpose of that notice was to set-out the conditions that must be met in order for CRA to exempt a registrant from meeting the input tax credit (ITC) documentation requirements on procurement card transactions. The complexity and compliance requirements in GST/HST Notice 199 were discussed at TEI meetings with Finance in December 2005 and 2006, and a working group was established to develop an acceptable alternative to GST/HST Notice 199. The working group developed a draft proposal that would incorporate the documentation requirements for procurement card transactions into the *Excise Tax Act*. When Ontario announced it would harmonize with the GST, Finance re-assigned staff to work on that initiative and the procurement card project was put on hold. Because there is merit in developing an alternative approach to GST/HST Notice 199, TEI recommends that the procurement card project be re-started.

(i) How many registrants have received an approval to use the procedure set-out in GST/HST Notice 199?

(ii) Would Finance consider re-starting the procurement card project and commit staff accordingly?

(iii) Given that some work has been done on this project already, would Finance agree to a fast-track approach with the goal being a formal announcement on proposed changes by June 30, 2012?

ANSWER # 6: Documentary Requirements for Procurement Cards

(i) In audit, we have received a few phone calls about the policy but there have not been many actual applications. So far, we have received one application under GST/HST Notice 199 in February 2010 which was approved in August 2010.

QUESTION # 7: Rates for Reimbursements of Automobile Expenses

a. *Automobile Expenses (Finance Only).* For 2011, will Finance revise the reasonable per-kilometre allowance rates for the deductibility of automobile expenses reimbursed to employees? The reimbursement rates used by registrants affects the amount of GST/HST that they may recover. These rates have remained unchanged since 2008 yet fuel and insurance costs have been escalating.

b. *Factor for Motor Vehicle Allowance (CRA and Finance).* At last year's TEI-CRA liaison meeting, we were informed that CRA and Finance, in consultation with the governments of Ontario and British Columbia, were "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." Please provide an update on these consultations.

ANSWER # 7: Rates for Reimbursements of Automobile Expenses

b. Section 174 of the *Excise Tax Act* (the ETA) has been recently amended and the rates of tax that are deemed to be paid with respect to allowances are set out in section 3 of the *New Harmonized Value-Added Tax Regulations No. 2 (SOR/DORS/2010-151).*
Motor vehicle allowances generally include a component that covers the cost of fuel; however, fuel purchased in BC is subject to a point of sale rebate equal to the 7% provincial component of the HST. New subsection 234(4.1) of the ETA (found in section 2.2 of the *Deduction for Provincial Rebate (GST/HST) Regulations*) prevents any input tax credit, rebate, refund or remission under the ETA or any other Act of Parliament, to be credited, paid, granted or allowed to the extent that the amount can be determined directly or indirectly, in relation to an amount that is subject to a point of sale rebate. As a result, only part of the deemed tax paid on an allowance for motor vehicle use in BC can be claimed as an input tax credit (ITC) or as a rebate.

Because section 174 deems the person paying the allowance to have consumed or used any property or service in relation to the allowance, ITCs with respect to allowances paid for qualifying motor vehicles for use in Ontario and BC 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 Department of Finance, in consultation with the governments of Ontario and British Columbia, have been in discussions as to whether GST/HST registrants may use an administrative factor in determining what portion of an ITC for a motor vehicle allowance would be subject to recapture, and also in determining what portion of the motor vehicle allowance for use in BC would be attributable to fuel. Persons would have the option of using this administrative factor, or using their own reasonable allocation. Until such time as an administrative factor is decided upon, persons should continue to use a reasonable allocation based on the composition of the motor vehicle allowances that they pay.

QUESTION # 8: Financial Services

a. *Pension Plans.* What additional changes are being considered to simplify the current rules for pension plans and other investment plans?

(i) Would Finance/CRA consider modifying the legislation/administrative practice to confirm that deemed supplies will only exist in situations where an operation or process is being carried out "in house," and not in situations where only a portion of a full-time equivalent headcount is utilized to support the pension plan?

(ii) Would Finance/CRA clarify through the legislation or in an administrative publication whether it is acceptable to calculate the amount of a deemed supply using fully-burdened internal costs (as opposed to market rates)?

(iii) Would Finance consider amending the rules so that no deemed supply would exist when an actual supply of services was made by the employer, and GST/HST charged on that supply?

(iv) Would Finance/CRA consider recognizing the pension plan as the recipient of services where they were contracted for by the employer as administrator for the operation of the pension plan and paid for by the pension plan so long as no input tax credits were taken by the employer?

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

b. *Master Trusts*. The new rules for pension entities have the effect of deeming all GST/HST on pension related expenses incurred by employers participating in a pension plan to have been paid by the relevant pension entity. The pension entity is also entitled to claim a rebate equal to 33% of the GST/HST it has actually paid, as well as the GST/HST deemed to have been paid under section 172.1 of the *Excise Tax Act* during the claim period. Master trusts are not eligible for the GST/HST rebate for pension entities.

Master trusts add complications to the deemed supply and SLFI rules. Generally, master trusts are set up when one employer is sponsoring more than one pension plan. The participating plans (pension trusts) hold units in the master trust. The master trust agreement provides for the collective investment and reinvestment of the assets of the participating trusts. Investment management fees are usually charged as a single amount. The master trust will allocate between pension trusts based on percentage holdings. Unless stipulated in the master trust agreement that investment management fees are payable by the individual pension trusts, generally the fees should be viewed as a supply to the master trust. There is no deemed supply by the employer.

(i) For GST/HST purposes, does the employer make a supply to the master trust (no deemed supply) or to each pension trust (deemed supply)?

(ii) Please confirm that there would be no deemed supplies under section 172.1 by the employer to the master trust in circumstances described in the above scenario.

c. *Financial Institution GST/HST Annual Information Returns*. What changes are being contemplated to help alleviate the complexity of certain information requirements currently found within the Annual Information Return?

(i) Would Finance consider relieving *de minimis* financial institutions of this annual obligation to complete the returns?

(ii) Is consideration being given to incorporating the Annual Information Return into a SLFI's annual GST/HST Return to avoid burdensome duplicative reporting?

(iii) Would it be possible to exclude the reporting of items which have already been reported to the CRA or Canada Border Services Agency (CBSA) through another return or process?

(iv) How will industry be able to participate and provide input and feedback to develop improvements to this return?

d. *Taxation of Financial Services (Finance Only).* Could Finance please provide an update on the review of the GST/HST treatment of financial services that was announced in early 2010?

(i) Will Finance consider implementing a regime that would include the taxation of financial services, including expanding the tax base to include both fee and margin-based services?

(ii) Would the zero-rating of supplies made to businesses be considered?

(iii) How will industry be able to participate in this review and provide input and feedback?

ANSWER # 8: Financial Services

a.

(i) We assume that the "in-house" supplies in question are a reference to deemed taxable supplies of "employer resources" made pursuant to subsection 172.1(6) or subsection 172.1(7) of the ETA. An employer that is deemed to have made a taxable supply under section 172.1 is also deemed to have collected tax in respect of the deemed taxable supply, meaning that the employer must self-assess tax equal to the deemed tax collected. The deemed tax collected on deemed taxable supplies under these provisions must be calculated with reference to the fair market value of the particular employer resource in question.

For purposes of subsections 172.1(6) and (7), an "employer resource" is essentially anything acquired, created, developed and/or produced by the employer, including the employee labour and overhead required to do these things.

The legislation does not provide a threshold value under subsections 172.1(6) or (7) for deemed supplies. While the significance or materiality of a particular situation could be taken into account on audit, all employer resources, regardless of their value, are subject to the requirements of those provisions. However, we understand that the Department of Finance is currently examining issues of materiality with respect to the scope of the application of "employer resources" for the purposes of section 172.1.

(ii) Tax in respect of a deemed supply is calculated based on the fair market value ("FMV") of a "specified resource" for purposes of subsection 172.1(5) and the FMV of an "employer resource" for purposes of subsections 172.1(6) and (7).

In determining the FMV of a "specified resource" acquired from a third party at arm's length, for purposes of subsection 172.1(5), reference may be made to the invoice, the agreement for the supply, the purchase order or requisition to determine a FMV based on cost if no other method is readily available.

In determining the FMV of an "employer resource" for purposes of subsections 172.1(6) or (7), a reasonable allocation of the value of all associated internal costs should be made.

(iv) Generally, the pension entity of the pension plan would not be the recipient of a supply of services contracted for by the employer. The word, "recipient" is defined, in part, in subsection 123(1) of the ETA as follows:

> (a) where consideration for the supply is payable under an agreement for the supply, the person who is liable under the agreement to pay that consideration,
>
> (b) where paragraph (a) does not apply and consideration is payable for the supply, the person who is liable to pay that consideration…

Where the employer is liable to pay consideration under a contract for services, the employer would be considered to be the recipient of the supply. Recent jurisprudence has confirmed this view[4]. The employer would, in such circumstances, be entitled to claim an ITC provided that all of the conditions of section 169 of the ETA are met.

[4] *Her Majesty The Queen v. General Motors of Canada Limited*, 2008 FCA 114, paragraph [54]

b.

(i) We understand that the Department of Finance is currently examining issues with respect to the scope of the application of section 172.1 to master trusts. However, based on current provisions in the ETA, subsections 172.1(5) and (6) of the ETA will generally only apply where specified resources and employer resources (collectively the "resources") are acquired, used or consumed by an employer for supply to a "pension entity". Whether an employer is making a supply to a pension entity or to a master trust must be determined on a case-by-case basis by examining the relevant plan documents and agreements.

If an employer resource is acquired by the employer for consumption or use in pension activities but not for supply to a pension entity, the deeming provisions of subsection 172.1(7) must be considered. Subsection 172.1(7) deems the employer to have collected tax in respect of the employer resource and allows a "specified pension entity" to claim a rebate on the eligible amount created by the deemed tax paid. Notwithstanding that a master trust may exist within the pension plan arrangement, the employer will be required to self-assess on the deemed tax collected under subsection 172.1(7) where the conditions of that provision are met. The deemed tax paid by the pension entity in respect of the deemed taxable supply will be an eligible amount for which the pension entity may claim a rebate.

(ii) In cases where an employer makes an actual supply to a non-pension entity such as a master trust, neither of subsections 172.1(5) nor (6) could apply since those provisions require that the resource in question be acquired, used or consumed, as the case may be, for supply to a pension entity. However, the employer may be deemed to have made a taxable supply and to have collected tax pursuant to subsection 172.1(7). Under that subsection, if a participating employer consumes or uses an employer resource in the course of a pension activity in respect of the pension plan, the employer will be deemed to have made a taxable supply for which it will be deemed to have collected tax. In addition, the specified pension entity will be deemed to have paid tax in respect of the deemed taxable supply.

QUESTION # 9: Calculation of Threshold for Purposes of *De Minimis* Financial Institutions
(Finance Only)

A common large business group structure is a parent company with wholly- or majority-owned operating subsidiaries. Typically, the parent issues all the external debt and other financing, and is the named insured party on the group insurance policies. The parent also acts as "banker" to the group, and invests in short-term commercial paper and similar instruments the surplus cash that is concentrated from operating subsidiary bank accounts on a daily basis (often referred to as a "cash sweep" arrangement). Other than an administrative service fee to the subsidiaries and charges for interest on loans to related corporations, the parent typically makes no supplies. Paragraph 149(1)(c) of the *Excise Tax Act* makes the parent company a *de minimis* financial institution where the short-term third-party interest income of the parent in the preceding tax year exceeds $1 million on an annual basis.

Will Finance consider amending paragraph 149(1)(c) of the *Excise Tax Act* to exclude from the $1 million annual limit interest income that is earned by the parent company of a group of closely-related corporations from the investment of short-term surplus funds, where those funds are generated through the commercial activities of the operating corporations of the group?

ANSWER # 9: Calculation of Threshold for Purposes of *De Minimis* Financial Institutions

(Finance Only)

QUESTION # 10: Place of Supply – Goods – Unknown Destination at Time of Invoicing

Please consider the following scenario involving place of supply rules when the destination of a good is unknown at the time of the sale:

A Quebec-based manufacturer (Supplier), registered for GST and QST, accepts an order from a customer (ManitobaCo) whose head office is located in Manitoba and from which the purchase order is issued. Supplier will address and send any invoices to the Manitoba location of ManitobaCo for payment.

The order consists of two pieces of equipment (*e.g.*, lathes) each worth $500,000 not including any Canadian sales tax or other taxes. Supplier agrees to deliver the equipment to ManitobaCo's site – *i.e.*, Supplier will engage a freight carrier to take the goods from Supplier's plant in Quebec to the ManitobaCo site; Supplier will pay the freight carrier; and such freight cost has been factored into the $500,000 unit selling price.

ManitobaCo is in the process of building two manufacturing facilities – one in British Columbia and the other in Ontario.

At the time of the order, ManitobaCo does not know whether both lathes will be shipped to Ontario or British Columbia, or one lathe will be shipped to each facility. The uncertainty of the destination of the shipment results in part from the fact that the Supplier's date of completion of manufacturing of the lathes is not guaranteed and ManitobaCo does not have a definitive date upon which each new site will be prepared to accept delivery of the lathes.

If both ManitobaCo sites are not available when the lathes are ready for shipment, the lathes will be stored either at Supplier's plant in Quebec, at one of ManitobaCo's sites outside Ontario and British Columbia, or a third party storage facility. If the third-party storage facility option is used, the supply of the storage service will be acquired by ManitobaCo and paid for directly by ManitobaCo to the storage service facility provider.

The terms of payment between Supplier and ManitobaCo are 100% due and payable upon receipt of the order.

Supplier issues an invoice to ManitobaCo for $1 million with a billed to address of Manitoba.

(i) What Canadian sales tax applies on Supplier's invoice for $1,000,000 to ManitobaCo?

(ii) When ManitobaCo subsequently advises Supplier where to ship the two lathes (*e.g.*, one unit to British Columbia and one unit to Ontario), is there a requirement for Supplier to issue a subsequent invoice to ManitobaCo for any Canadian sales taxes only and if so what would be the correct Canadian sales tax(es) to invoice?

ANSWER # 10: Place of Supply – Goods – Unknown Destination at Time of Invoicing

(i) For HST purposes, a supply of a good by way of sale is generally considered to be made in the province in which the good is delivered or made available to the recipient, which is based on the province in which legal delivery of the property to the recipient occurs. However, for purposes of this rule, the supply of the property is deemed to be made in a province where the supplier either ships the property to a destination in the province that is specified in the contract for carriage of the property, or transfers possession of the property to a common carrier or consignee that the supplier has retained on behalf of the recipient to ship the property to such a destination.

The rate of the provincial component of the HST, if any, that would apply to the taxable (other than zero-rated) supply made in Canada of the tangible personal property by way of sale depends on the province in which the property is considered to have been delivered to ManitobaCo. In each case, this generally depends on what the parties have agreed to with respect to the delivery of the property and what in fact ultimately occurs in that regard. As reflected in the question, the information provided is insufficient to conclusively determine the province in which the supplies of the tangible personal property are made.

(ii) As is normally the case, a supplier is required to collect and disclose tax at the rate that is determined to be payable in respect of a taxable supply. This could include where a supply of tangible personal property that was initially thought to be made in a non-participating province is subsequently determined to be made in a participating province.

QUESTION # 11: Place of Supply – Personal Services

a. *Training Courses Provided to an Unregistered Nonresident.* A GST/HST registered company is in the business of providing management training courses to individuals. (Assume that the supply of these courses does not qualify for zero-rating under section 18 of Part V of Schedule VI to the *Excise Tax Act*.) The company usually invoices the employers of the individuals and these employers can be located anywhere in the world.

The company provides the training courses at one of its three premises in Canada – Montreal, Toronto, and Vancouver. The individual participants travel to one of these training sites where the course is presented in a classroom setting.

Please confirm that for purposes of the *Excise Tax Act*:

(i) The provision of a management training course at a physical location in Canada is a supply of a service.

(ii) The above service is a "personal service" since the service is performed in Canada in the presence of the individual to whom the service is rendered.

(iii) In the case of a management training course where the participant physically attends the course in Montreal, Toronto, or Vancouver, the supply of the training course is subject to the GST (and QST); the Ontario HST; and the British Columbia HST respectively.

(iv) If the company is invoicing a U.S. resident corporation not registered for GST/HST because one of its employees has come to Canada to take the course in Toronto, the Ontario HST is applicable on the invoice since the supply is not a zero-rated supply, in particular as it does not meet the conditions in section 7 of Part V of Schedule VI to the *Excise Tax Act*.

b. *Training Courses Delivered Online.* A GST/HST registered company is in the business of providing management training courses to individuals. (Assume that the supply of these courses does not qualify for zero-rating under section 18 of Part V of Schedule VI to the *Excise Tax Act*.) The company usually invoices the employers of the individuals and these employers can be located anywhere in the world.

The courses are delivered entirely on-line and all of the software and other telecommunications requirements for the course are hosted on one of three identical servers located at three sites in Canada – Montreal, Toronto, and Vancouver.

The individual participants sign up on-line for the course. These participants usually provide their name and their company's billing information including the company's address they are associated with. (Sometimes payment for the course is made by credit card.) Once approved, the participant then goes on-line and completes the course. The course does not include any interactive component with a "live" moderator / presenter linked into the training session.

Please confirm that for purposes of the *Excise Tax Act*:

(i) Whether the provision of the on-line training course described above is considered to be a supply of a service or a supply of intangible personal property (IPP)?

(ii) If the on-line course is a supply of a service, please confirm that the service would **not** be a "personal service" since the service is **not** performed in the presence of the individual to whom the service is rendered.

(iii) If the on-line course is a supply of a service, would the place of supply of the service be based on the geographical address provided by the participant when registering on-line? (This address may be within or outside Canada.)

(iv) In the alternative, if the supply of the on-line course is considered to be a supply of IPP, would the place of supply be based on the geographical address provided by the participant when registering on-line? (This address may be within Canada or outside Canada.)

(v) If the company is invoicing a U.S. resident corporation that is not registered for GST/HST because one of its employees is taking the on-line course from a location outside Canada, and provides the U.S. address of its employer when completing the registration, what Canadian sales tax applies, if any?

(vi) Would the responses provided in questions (i) to (v) above change if the on-line course was fully interactive and the training was being delivered by a "live" presenter / moderator who the participant could communicate with on-line while taking the course? Would the physical location of the "live" presenter have any relevance in determining the tax consequences?

(vii) Given the evolution of technology in the area of on-line training and the expansion of the features and capabilities in delivering courses to participants on-line, have Finance/CRA developed principles in this field and are there factors which are viewed as determinative when contemplating the nature of the supply?

ANSWER # 11: Place of Supply – Personal Services

a.

(i) A training course could be considered to be the supply of a service in certain circumstances. However, whether the provision of what is referred in the question as a management training course at a physical location would be considered to be a supply of a service would depend on the facts. There are insufficient facts provided in the question to make this determination.

(ii) If the supply is determined to be a supply of a service, it could be considered to be a service that would be considered to be a "personal service" for purposes of the place of supply rule in section 17 of the *New Harmonized Value-Added Tax System Regulations*. It would have to be established based on the facts that the service is all or substantially all performed in the presence of the individual or individuals to whom the service is rendered.

(iii) If the place of supply rule in section 17 of the *New Harmonized Value-Added Tax System Regulations* applies to the supply, the supply of the course provided in Montreal would be deemed to be made in a non-participating province if the Canadian element of the service is not performed primarily in the participating provinces. Also, the supply of the course provided in Toronto and Vancouver would be deemed respectively to be made in Ontario and British Columbia and subject to the HST rates for those provinces if an equal or greater proportion of the service is not performed in each case in another participating province.

(iv) If the supply is determined to be a supply of a service, and the company is invoicing a U.S. resident corporation not registered for GST/HST because one of its employees has come to Canada to take the course in Toronto, the Ontario HST is applicable on the invoice since the supply is not a zero-rated supply, in particular as it does not meet the conditions in section 7 of Part V of Schedule VI to the *Excise Tax Act*.

b.

(i) The conclusive determination of whether the provision of the on-line training course described in the question would be considered to be a supply of a service or a supply of intangible personal property would require consideration of all relevant facts. However, based on the limited information provided in the question it would appear that the supply would be a supply of intangible personal property.

(ii) If the supply were determined to be a supply of a service, the service would not be considered to be a "personal service" for purposes of section 17 of the *New Harmonized Value-Added Tax System Regulations* since the service is not performed all of substantially all in the presence of the individual to whom the service is rendered.

(iii) Generally, if the supply were determined to be a supply of a service, the place of supply would be based on an address of the recipient of the supply that the supplier obtains in the ordinary course of its business where that address is in Canada. Specifically, subsection 13(1) of the *New Harmonized Value-Added Tax System Regulations* provides in part that a supply of a service is made in a province if, in the ordinary course of business of the supplier, the supplier obtains an address in the province that is:

(a) if the supplier obtains only one address that is a home or a business address in Canada of the recipient, the home or business address in Canada obtained by the supplier;
(b) if the supplier obtains more than one address described in paragraph (a), the address described in that paragraph that is most closely connected with the supply; or
(c) in any other case, the address in Canada of the recipient that is most closely connected with the supply.

The address of the recipient in Canada that is provided when registering on-line could therefore determine the place of supply.

(iv) Generally, if the supply is determined to be a supply of intangible personal property, the place of supply would be based on an address of the recipient of the supply that the supplier obtains in the ordinary course of its business where that address is in Canada.

Specifically, section 8 of the *New Harmonized Value-Added Tax System Regulations* provides in part that a supply of intangible personal property in respect of which the Canadian rights can be used otherwise than only primarily in participating provinces and otherwise than only primarily outside participating provinces is made in a particular province if the following conditions are satisfied:

(i) in the ordinary course of business of the supplier, the supplier obtains an address (in this paragraph referred to as the "particular address") that is

(A) if the supplier obtains only one address that is a home or a business address in Canada of the recipient, the home or business address in Canada obtained by the supplier,

(B) if the supplier obtains more than one address described in clause (A), the address described in that clause that is most closely connected with the supply, or

(C) in any other case, the address in Canada of the recipient that is most closely connected with the supply,

(ii) the particular address is in the particular province, and

(iii) the intangible personal property can be used in the particular province.

The address of the recipient in Canada that is provided when registering on-line could therefore determine the place of supply.

(v) If the supply is determined to be a supply of a service and the supplier does not obtain an address in Canada of the recipient in the ordinary course of its business, the place of supply could be determined by the place of supply rule in subsection 13(2) of the *New Harmonized Value-Added Tax System Regulations*, which provides that a supply of a service is made

(a) in a participating province if the Canadian element of the service is performed primarily in participating provinces and

(i) an equal or greater proportion of the Canadian element of the service is not performed 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 service is performed in another participating province; and

(b) in a non-participating province if the Canadian element of the service is not performed primarily in participating provinces.

The rate of tax would depend on the province in which the supply is deemed to be made under the place of supply rule.

If the supply is determined to be a supply of intangible personal property and the supplier does not obtain an address in Canada of the recipient in the ordinary course of its business, the place of supply could be determined by the place of supply rule in paragraph 8(c) of the *New Harmonized Value-Added Tax System Regulations*, which provides that the supply of the intangible personal property would be made in the province for which the tax rate is the highest among the tax rates for the provinces in which the intangible personal property can be used. The supply of intangible personal property could qualify for zero-rating under section 10.1 of Part V of Schedule VI to the *Excise Tax Act* where the conditions of that provision are met.

(vi) If the on-line course were fully interactive, this could affect the characterization of the supply. This would require consideration of a complete set of facts and the information provided in the question is insufficient to make such a determination. Depending on whether the supply is determined to be a supply of a service or intangible personal property, the place of supply and consequential application of tax would be as described in the responses to questions (i) to (v), as the case may be. The physical location of the "live" presenter would only have relevance in determining the tax consequences if the supply were determined to be a supply of a service and if the province in which the service is performed were a factor in the relevant place of supply rule.

(vii) The CRA has indicated in GST/HST Technical Information Bulletin B-090 *GST/HST and Electronic Commerce* factors that indicate whether a supply made by electronic means is a supply of intangible personal property or a service.

Factors that generally indicate that a supply made by electronic means is one of intangible personal property are:

- a right in a product or a right to use a product for personal or commercial purposes is provided;
- a product is provided that has already been created or developed, or is already in existence;
- a product is created or developed for a specific customer, but the supplier retains ownership of the product; and
- a right to make a copy of a digitized product is provided.

Factors that generally indicate that a supply made by electronic means is a service are:

- the supply does not include the provision of rights, or if there is a provision of rights, the rights are incidental to the supply;
- the supply involves specific work that is performed by a person for a specific customer; and
- there is human involvement in making the supply.

A determination of the nature of a supply that is made by electronic means based on applying these factors requires consideration of all relevant facts.

QUESTION # 12: **Point of Sale Rebates** (CRA Only)

The *Excise Tax Act* provides an exemption for sales of goods and services made on reserve to First Nations peoples (referred to as Status Indians, Indian Bands and councils of an Indian band living off-reserve in Ontario). Goods and services purchased off reserve are also exempt if they are delivered to a reserve by the registrant. The provinces that have not harmonized their tax systems apply similar exemptions for purposes of their provincial sales taxes. To be eligible for this exemption, First Nations peoples must supply sellers with documentation that proves their status and that shows delivery will occur on reserve. CRA accepts a Certificate of Indian Status card as proof of exempt status, but that documentation does not identify whether the individual lives on or off reserve.

CRA does not provide a centralized database registrants can use to check whether an address provided by a First Nations person is on reserve. The only tool available to sellers for making a determination of eligibility for the exemption 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 (at least until CRA creates a tool with accurate information registrants can access to verify delivery on reserve).

Clarification of the Intent of Question 12 as per e-mail correspondence of November 23, 2011 between Dan De Jong of Tax Executives Institute and Ken Syer of the Canada Revenue Agency:

Registered vendors supply IPP online such as downloadable software, or services such as telecommunications services, to First Nations individuals on a reserve in Canada. The First Nations individual states that the delivery will be made to an on-reserve address but there is no approved resource for the vendor to use which confirms that the particular address is on a reserve. The only documentation that the First Nations consumer provides the vendor is a copy of an First Nations Indian Status Card. How does the supplier substantiate GST/HST relief on the delivery to a reserve for an online IPP purchase in this situation?

ANSWER # 12: Point of Sale Rebates (CRA Only)

The CRA's policy with respect to tax relief on supplies of property and services made to Indians, Indian bands and band-empowered entities can be found in Technical Information Bulletin B-039, *GST/HST Administrative Policy - Application of the GST/HST to Indians* (B-039). The policy is consistent with the provisions of the *Indian Act* and the December 13, 1990, press release issued by the Department of Finance, entitled *Guidelines Announced on Indian Purchases and the GST*. Any changes to this administrative policy to broaden the relief as proposed by TEI would require a legislative change and should be directed to the Department of Finance.

Property and services supplied to Indians, Indian bands, and band-empowered entities are relieved of the GST/HST where the conditions in B-039 are met. More specifically, property acquired on a reserve by an Indian, Indian band or unincorporated band-empowered entity is fully relieved of the GST/HST. Relief also applies to property acquired at a location off a reserve by an Indian, Indian band or unincorporated band-empowered entity where the property is delivered to a reserve by the vendor or an agent of the vendor. Remaining conditions in B-039 must be met.

Where the supply of property is intangible personal property (IPP) which cannot be delivered to a reserve, the CRA applies the connecting factors test to determine the situs of the IPP at the time of the supply.

Software downloaded via the internet

Software acquired in digital format by electronic means, (i.e. downloaded via the internet) is a supply of IPP. The CRA takes the position that the software will meet the condition of being "situated on a reserve" where the following two connecting factors are met:

- the software is provided to an Indian that lives on a reserve, to a band on a reserve, or to a band-empowered entity that maintains a physical premises on a reserve, at the time of the transaction, and
- the software provider can establish that the software is downloaded onto a computer located on a reserve at the time of acquisition of the IPP.

Where the two connecting factors are met, and the software provider obtains sufficient documentation (e.g. a copy of the Indian's Certificate of Indian status card provided either by mail, or facsimile) as evidence for audit purposes, the software may be supplied relieved of tax where all other conditions of B-039 have been met.

Where it is not possible for a vendor to substantiate that an internet sale was made to an Indian (e.g. Certificate of Indian status card is not available) at the time of the sale, the vendor is required to charge the tax. If after the fact the Indian purchaser provides a copy of the Certificate of Indian status card by mail or facsimile to the vendor, and the vendor is satisfied that the remaining conditions in B-039 have been met, the vendor may refund the amount to the purchaser. However, there is no requirement in the ETA that the vendor must refund the amount after the sale has been made.

If the vendor is not satisfied that the IPP is situated on a reserve and charges an amount as GST/HST and does not refund the amount to the purchaser, the purchaser may be eligible for a rebate of the amount paid as tax if the connecting factors were met, the purchaser was eligible for relief of tax (e.g. the purchaser is an Indian) and all other conditions in B-039 have been met. The purchaser may file a rebate application with the CRA under section 261 of the ETA. Sufficient information to verify that tax was paid, the IPP was situated on a reserve at the time of purchase and that the claimant is an Indian (submit a copy of the purchaser's Certificate of Indian status card) must be submitted with the rebate application.

Telecommunication services (Cellular phone service)

Where the conditions of B-039 are met, a telecommunication service (a telephone service) that has a hook-up on a reserve is relieved of the GST/HST when provided to an Indian. For cellular or mobile phones, the location of the service will be considered on a reserve where the service contract is entered into by an Indian and the account/billing address is on a reserve. The account/billing address is not synonymous with the mailing address as not all reserves have a postal service within the boundaries of the reserve. Where the account/billing address is an off-reserve location, the telecommunication service will be subject to the GST, or the HST in the harmonized provinces. However, in Ontario point-of-sale relief may apply to the provincial part of the HST. For more information in this regard you are invited to contact the Ontario Ministry of Revenue at 1-866-668-8297 or visit **www.ontario.ca/revenue**.

Generally, sufficient documentation as evidence for audit purposes would be a copy of the Indian's Certificate of Indian status card provided either by mail, or facsimile and validation that the address provided by the Indian in respect of the account/billing address is on a reserve. The determination of whether an address is in fact situated on a reserve may require alternative forms of evidence, e.g., a declaration signed by the Indian and/or the use of an internet based mapping/locator program such as Google Maps or MapQuest.

CONCLUSION

Tax Executives Institute appreciates this opportunity to present its comments and questions for discussion.