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Re: *GST/HST Technical Information Bulletin B-103*

Dear Mr. McKinnon:

In June, the Canada Revenue Agency released Draft GST/HST Technical Information Bulletin B-103, *Harmonized Sales Tax – Place of supply rules for determining whether a supply is made in a province* (Draft TIB 103). These rules provide guidance on the application of Part 1 of the *New Harmonized Value-added Tax System Regulations*, which are generally applicable to supplies made on or after May 1, 2010, and update the rules for supplies of services and intangibles.

Much has changed since CRA published its last round of guidance on this critical issue, especially with Ontario and Prince Edward Island adopting the HST¹ and the economy evolving into one based increasingly on the provision of services and use of intangible assets. Tax Executives Institute acknowledges the extensive changes made to the prior version of Draft TIB 103, and commends CRA for its thorough and thoughtful approach to re-drafting the guidance. The expanded use of examples and charts substantially clarifies the operation of the rules for determining the place of supply for a transaction. TEI appreciates the opportunity to provide the following comments on Draft TIB 103 and, in doing so, shares the common goal of making the document as useful, clear, and comprehensive as possible.

¹ British Columbia also adopted the HST in 2010, but residents of the province approved a referendum in 2011 to repeal the HST and reinstate the Provincial Sales Tax (PST). The return to the PST will occur on April 1, 2013.

TEI is the preeminent association of business tax executives worldwide. The Institute's 7,000 professionals manage the tax affairs of 3,000 of the leading companies across all industry sectors in North America, Europe, and Asia. Canadians constitute 10 percent of TEI's membership, with our Canadian members belonging to chapters in Calgary, Montreal, Toronto, and Vancouver, which together make up one of our nine geographic regions, and must contend daily with the planning and compliance aspects of Canada's business tax laws. Many of our non-Canadian members including those in Europe and Asia work for companies with substantial activities in Canada. The comments set forth in this letter reflect the views of the Institute as a whole, but more particularly those of our Canadian constituency.

I. Services “in relation to” Real Property and Feasibility Studies

Draft TIB 103 contains special rules applicable to services rendered “in relation to” real property, but does not define how closely related services must be to real property to meet the “in relation to” standard triggering the application of these special rules. The only guidelines CRA has issued in this area are in GST/HST Policy Statement P-169R.² The purpose of GST/HST Policy Statement P-169R, however, is to expand on the guidelines contained in GST/HST Memoranda Series Chapter 4.5.3, which concerns *Exports – Services and Intellectual Property* and, specifically, the meaning of the phrase “in respect of.” This difference between “in relation to” and “in respect of” could lead to differing interpretations. Thus, TEI urges CRA to amend Draft TIB 103 to address when services will be viewed as rendered “in relation to” real property.

To assist in fashioning this clarification, TEI recommends the inclusion of the following examples:

- A. *Pre-feasibility study or feasibility study services.* Feasibility services in support of planned improvements to an existing property would certainly be performed “in relation to” that real property. Uncertainty exists, however, where the services analyze the suitability of multiple site locations for a particular project to assist a client in deciding where to locate that project (In other words, does the lack of a single identified location mean the services are not “in relation to” real property?). Would the answer change if the study included a recommendation by the feasibility service provider for the location of the project?

Many businesses do not treat a pre-feasibility study or feasibility study not intended for a specifically identified site as performed “in relation to” real property because the relationship between the services and any single piece of real property is not direct. Given the absence of specific guidance in this area, TEI urges CRA to address these types of arrangements in an example added to Draft TIB 103.

- B. *Services rendered to a client in respect of a pre-feasibility engineering study for a mine.* Mining companies often hire contractors to investigate sites to determine whether they contain sufficient natural resources to make a mining project economically viable. These

² GST/HST Policy Statement P-169R, *Meaning of “in respect of real property situated in Canada” and “in respect of tangible personal property that is situated in Canada at the time the service is performed”, for Purposes of Schedule VI, Part V, Sections 7 and 23 to the Excise Tax Act.*

studies do not provide guidance on the construction and development of the site, but rather draw conclusions about the viability of a project as a whole.

Although these pre-feasibility services relate to specific parcels of real property, many businesses take the position that these services are not “in relation to” real property because they occur prior to a party’s decision to begin a project. Given the absence of more specific guidance in this area, TEI urges CRA to address these types of arrangements in an example added to Draft TIB 103.

II. Services “in relation to” Real Property and Apportionment

Businesses providing real estate-related maintenance services often enter into agreements to provide those services to multiple locations under a single contract. Page 90 of Draft TIB 103 sets forth the general rule for determining the place of supply for arrangements where the real property is located at various locations in Canada. Under the general rule, the place of supply is the province in which the greatest proportion of the real property is located. Draft TIB 103 states:

The determination of the relevant proportion of the real property that is situated in a province is based on the physical size of the entire real property (for example, based on square footage, square yards or acres) pursuant to its legal description. The value of the real property or the number of properties (unless they are of equal size) is not relevant to this determination.

TEI generally agrees with the use of relative physical size for basic real estate-related service contracts, but regrets that the approach does not adequately address many other industry-specific arrangements. For example, it would be challenging for businesses providing maintenance and operating services for communications / electrical tower sites to use that standard since it is difficult to determine the physical size of that category of real property and it can be difficult to obtain legal descriptions. A similar interpretative challenge will arise where the properties being maintained / operated include both communications towers and outbuildings. Thus, TEI urges CRA to add an alternative method to Draft TIB 103 that bases the place-of-supply determination on the total number of properties included in a contract where the agreement relates to communications / electrical towers and associated outbuildings.

III. British Columbia HST Phase-out

Draft TIB 103 contains examples referring to British Columbia as a “participating province” for purposes of the *Excise Tax Act*. While British Columbia will remain a participating province until April 1, 2013, when it reverts to the PST, Draft TIB 103 will likely be finalized only shortly before that time. TEI suggests removing references to British Columbia as a participating province in the examples to diminish the likelihood of confusion of applying the final rules after the province reverts to the PST.

IV. Quebec Enhanced Harmonization

Despite the announcement of enhanced harmonization, Quebec will not be a participating province for purposes of the *Excise Tax Act*. To avoid potential misunderstandings, TEI suggests including some examples highlighting that Quebec is not a participating province.

V. Deemed Delivery

TEI acknowledges the usefulness of addressing the deemed delivery concept and commends CRA for providing helpful guidance in Draft TIB 103.

VI. Clarification of Some Examples

CRA could increase the clarity of Example 2 on page 11 addressing sales of goods by adding the following sentence at the end of the example: “Note that the place of supply is unchanged even where the supplier does not invoice the purchaser for the freight service.”

The second sentence of Example 6 on page 13 would benefit from replacing “its” with “retailer’s” to help avoid confusion regarding the party being referenced. The revised wording would be, “The retailer requests that the wholesaler retain a carrier on behalf of the retailer for carriage of the goods to the retailer’s Alberta premises.”

VII. Repairing, Maintaining, Cleaning, Adjusting, and Altering

TEI appreciates the guidance on page 104 of Draft TIB 103, which provides general meanings for the terms “repairing, maintaining, cleaning, adjusting, and altering property,” as well as the examples that follow. The general definitions, however, are quite broad, and registrants and auditors may have differing interpretations of them. Thus, TEI urges CRA to provide more specific guidance in respect of these terms. It would be helpful for these terms to be defined within the regulation itself, but absent such an amendment, TEI suggests expanding Draft TIB 103. TEI would be pleased to work with CRA to develop examples addressing common transactions.

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TEI’s comments were prepared under the aegis of the Institute’s Canadian Commodity Tax Committee, whose chair is Robert Smith. If you should have any questions about our recommendations, please do not hesitate to call Mr. Smith at 514.832.8198 (or Robert.Smith@mckesson.ca) or Kim N. Berjian, TEI’s Vice President for Canadian Affairs, at 403.233.5480 (or Kim.N.Berjian@conocophillips.com).

Respectfully submitted,

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International President

cc: Kim N. Berjian, 2012-2013 TEI Vice President for Canadian Affairs
Robert Smith, 2012-2013 Chair of TEI’s Canadian Commodity Tax Committee