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January 29, 2021

Department of Finance Canada
90 Elgin Street
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Via Email: fin.gsthst2020-tpstvh2020.fin@canada.ca

RE: Comments on Certain Sales Tax Measures in the Fall Economic Statement 2020

Dear Sir or Madam:

The Department of Finance's ("Finance") *Fall Economic Statement 2020 Supporting Canadians and Fighting COVID-19* (the "Statement") announced proposals for three new tax frameworks applicable to e-commerce: (i) Cross Border Digital Products and Services; (ii) Goods Supplied through Fulfillment Warehouses; and (iii) Platform-based Short-Term Accommodations. Tax Executives Institute, Inc. ("TEI") is writing to provide comments on the first two of these measures, pursuant to Finance's request for comments in the Statement. We appreciate the opportunity to comment on the Statement and would be pleased to further discuss our comments with Finance.

About Tax Executives Institute

TEI is the preeminent international association of in-house tax professionals worldwide. The Institute's nearly 7,000 professionals manage the tax affairs of over 3,000 of the leading companies across all industry sectors in North America, Europe, and Asia. Canadians constitute approximately 15 percent of TEI's membership.

TEI Comments

Alignment with Québec

Some of the Statement's proposals are similar to the non-resident electronic commerce registration framework for suppliers of digital property and services implemented by the Government of Québec on January 1, 2019.

The Ministère des Finances du Québec recently stated its intention to harmonize the Québec sales tax (“QST”) with the Statement’s measures for applying the Goods and Services Tax (“GST”) and Harmonized Sales Tax (“HST”) to electronic commerce relating to property sales made through fulfillment warehouses located in Canada, as well as sales of short-term accommodation made through a digital platform.¹ The Ministère des Finances du Québec has also indicated it is still assessing harmonization decisions for the digital products and services measures.

We understand that while the Statement’s proposed measures are similar to Québec’s measures, there are a number of differences with the existing provisions under Chapter VIII.1 of Title I of *An Act respecting the Québec sales tax*. One example is the difference between the definition of “distribution platform operator” under subsection 211.1(1) of the draft federal proposals and an operator of a “specified digital platform” under Chapter VIII.1 regarding whether a party collecting payments is an operator.²

Further, the definition of “distribution platform operator” under paragraph 211.1(1)(a) of the draft federal proposals includes a person who “controls or sets the essential elements of the transaction between the supplier and the recipient” Paragraph (b) of the definition includes a person who is involved in collecting, receiving, or charging consideration. It therefore seems that paragraph (a) is broad enough to include persons who are not involved in charging or collecting consideration.

Québec’s measures clarify what is meant by “essential elements of the transaction” by including in its definition of “specified digital platform” the “essential elements of the transaction between the specified supplier and the recipient such as billing, the terms and conditions of the transaction and the terms of delivery”

Further, paragraph 3 of section 477.6 of *An Act respecting the Québec sales tax* restricts the tax collection requirement to a person receiving an amount for the taxable supply. It was confirmed by Revenu Québec at its 2019 Liaison meetings with TEI that only a distribution platform operator receiving such an amount as consideration for a taxable supply is subject to the measures.

In sum, the GST/HST measures appear to apply more broadly than the QST measures.

¹ Ministère des Finances du Québec, *Information Bulletin 2020-15*, December 21, 2020, available at http://www.finances.gouv.qc.ca/documents/Bulletins/en/BULEN_2020-15-a-b.pdf.

² The draft federal proposals are available at <https://www.budget.gc.ca/fes-eea/2020/drleg-apl/eta-lta-1120-l-en.pdf>.

Such differences may lead to inconsistent application of the GST/HST and QST despite the intent of the Comprehensive Integrated Tax Coordination Agreement between the Government of Canada and the Government of Québec (“CITCA”). Such differences may also undermine the simplicity intended by the non-resident registration frameworks for GST/HST and QST.

It is TEI’s view that such differences should not be viewed as an exception under Part V of the CITCA nor part of Québec’s tax policy flexibility under Annex A. Therefore, TEI recommends that the Department of Finance work together with the Ministère des Finances du Québec to ensure alignment by July 1, 2021 between the federal and Québec measures.

Agency Commissions and Commissions of Distribution Platform Operators

Under the draft legislative provisions for new Subdivision E of Division II, subsection 211.14(1) provides that a supply made by a specified non-resident supplier to a specified Canadian recipient is deemed to be made in Canada for the purposes of Part IX of the Excise Tax Act (Canada) (“Excise Tax Act”).

A business registered under Subdivision D of Division V may provide billing agency services to a specified non-resident supplier by billing specified Canadian recipients for supplies of intangible personal property or services on behalf of a specified non-resident supplier. Such billing agency services would give rise to a supply by the registrant agent/billing agent to the specified non-resident supplier.

It appears that the commissions for the supply of acting as a billing agent would not meet the requirement of the zero-rating provision under section 5 of Part V of Schedule VI of the Excise Tax Act as a result of the supply of the specified non-resident supplier being deemed to be in Canada under subsection 211.14(1). Should this be the case, the registrant would be required to charge GST/HST to the specified non-resident supplier on such commissions even though the specified non-resident supplier would be ineligible to claim input tax credits on this amount.

Subparagraph 211.13(2)(a)(ii) of the draft proposals addresses this issue when the registrant is a digital platform operator as the provision deems the registrant agent not to have made a supply to the specified non-resident supplier of services. Where the registrant is not a digital platform operator, however, it appears the registrant would have to charge the specified non-resident GST/HST on the agency commissions.

Such a difference could lead to confusion and dispute of whether GST/HST applies between registrant billing agents and specified non-resident suppliers who offer both billing arrangements (i.e., billing agent and supplies through a platform) in respect of the same intangible personal property and/or services.

TEI recommends that the Department of Finance clarify its intent and the application of the proposed new rules and zero-rating provisions to billing agent services provided by registrants to specified non-resident suppliers, given the apparent different application of GST/HST resulting from the interplay of section 5 of Part V of Schedule VI of the Excise Tax Act and proposed subsections 211.13(2)(a)(ii) and 211.14(1).

Elections Under Subsection 177(1.11) for Persons Registered under Subdivision E

Suppliers registered under Subdivision D of Division V may wish to supply intangible personal property (“IPP”) or services through specified distribution platforms run by distribution platform operators registered under proposed Subdivision E. These GST/HST registrants may want to make elections under subsection 177(1.11) with the operators registered under Subdivision E.

Proposed subsection 211.1 (2), however, does not appear to permit suppliers registered under Subdivision D of Division V to appoint a distribution platform operator registered under Subdivision E to act as billing agent and remit GST/HST. Subsection 211.1(2) states a reference to registration does not include registration under Subdivision E. The subsection does not exclude subsection 177 (1.11). Subsection 177(1.11) only applies to registrants that act as agent of a supplier.

This issue arose with respect to distribution platform operators registered under Division II of Chapter VIII.1 and suppliers registered under Division I of Chapter VIII of an *Act Respecting the Quebec Sales Tax*.

TEI recommends that the proposed sections be amended to permit distribution platform operators registered under Subdivision E to act as billing and tax remittance agents for suppliers registered under Subdivision D of Division V. Further, TEI recommends the Minister of Finance work with the Ministère des Finances du Québec to harmonize the recommended change in an *Act Respecting the Quebec Sales Tax*.

Distribution Platform Operators – Practical Considerations

Many existing distribution platform operators in Canada currently sell property and services for both registrant and non-registrant (e.g., non-resident, non-registered) suppliers. They may also make their own supplies through the platform.

Currently, these distribution platform operators are only responsible for GST/HST, QST, and Provincial Sales Tax (“PST”) on their own supplies. Where other vendors using the platform are registered, the distribution platform operator will charge and collect tax as indicated by the vendor. It is, however, the vendor who is responsible to remit that tax and has ultimate

responsibility for identifying which supplies are subject to tax and which supplies are not subject to tax.

The information technology system (“IT”) behind the distribution platform, moreover, is programmed to credit the tax collected accounts only for sales made by the distribution platform operator. Sales made by other vendors on the site are credited to the balance sheet as a payable to the vendor, whether or not those sales include GST/HST, PST, or QST. The treatment for all third-party vendors on the platform is therefore identical.

Assume for example the sale of a \$1,000 laptop by a distribution platform operator. A sale made by the operator of the platform to a customer in Ontario will yield \$1,130 (i.e., revenue of \$1,000 and HST collected of \$130). The IT system that communicates with the platform site and the operator’s ERP system will credit the operator’s revenue account with \$1,000 and credit the GST/HST collected account with \$130.

Conversely, consider the same sale on the distribution platform by a third-party vendor. If the vendor is registered, the platform will calculate tax on the sale to the customer in Ontario. The customer will pay \$1,130 for the supply. However, the IT system will credit a payable account for the third-party vendor for the full amount collected (i.e., \$1,130).

Finally, consider the same sale on the distribution platform by a non-resident, non-registered supplier. The platform will not calculate tax on the sale to the customer. However, the IT system will behave in the same manner. It will credit a payable account for the third-party vendor by the full amount collected (i.e., \$1,000). The IT platform ignores the accounting treatment of the tax for all third-party vendors.

The proposed amendments will require distribution platform operators to re-program their IT systems to differentiate between registered vendors and non-registered vendors, creating three potential paths of communication with their ERP systems:

1. sales made by the operator crediting revenue and tax collected;
2. sales made by registered third party vendors crediting a payable to the vendor;
and
3. sales made by non-registered third-party vendors crediting a payable to the vendor and the operator’s tax collected account.

Based on the above, we have some practical considerations we hope you can consider.

Timing

The July 1, 2021, implementation date could be difficult for some platform operators to meet. This issue is compounded by possibly needing to implement a different system for Quebec if it does not harmonize and the current restrictions in many provinces resulting from COVID-19.

While we do not request this date be amended, we request the Department of Finance provide for some tolerance for operators who have difficulty in meeting the implementation date. We will submit a similar request to the Canada Revenue Agency.

Reliance on Third Party Vendors

Distribution platform operators will take on some risk of non-collection of tax for certain third-party vendors whose registration status changes. A third-party vendor may, for example, notify a distribution platform operator that it is registered for GST/HST purposes and distribution platform operator can verify the vendor's registration status at the time of the notification. Continuing verification for all third-party vendors, however, is cumbersome and a significant compliance burden. Would the registrant third-party vendor be solely liable GST/HST on those supplies or is the platform operator potentially liable under the proposed rules?

We request that where the operators have done their due diligence to collect and validate the third-party vendor's GST/HST registration numbers on or before July 1, 2021, or after July 1, 2021 where a new seller is onboarded, that the operator not be liable for any non-remittance of GST/HST collected by the registrant third-party vendors in respect of sales made on the operator's platform.

Elections Under Subsection 177(1.11)

Distribution platform operators are considering making elections under subsection 177(1.11) (i.e., billing agent elections) to help solve the challenging IT systems changes set forth above. There can be, however, numerous third-party vendors for which the election must be made, creating a substantial compliance burden. TEI requests giving platform operators the option of making a billing agent election for all third-party vendors to ease this burden. TEI requests electronic signatures be accepted on the billing agent elections if our recommendation of making a single billing election for all third-party vendors is not adopted.

Further, where such an election is in place, the operator will be jointly liable. However, in many cases the operator is relying on the third-party vendor to provide the GST/HST status of the item being sold. As a result, we request that distribution platform operators not be liable for failure to charge, collect, and remit GST/HST on behalf of GST/HST registered third-party vendors

where a billing agent election is in place and the third-party vendor indicated the supply is not subject to GST/HST.

Confirmation Requests

Goods Shipped from Outside Canada to a Consumer in Canada

Based on our review of the proposals, it is our understanding that distribution platform operators will not be required to charge GST/HST to consumers on goods that are sold and shipped from outside Canada directly to a consumer in Canada. It is our understanding that a supply of tangible personal property to be sent by mail or courier to the recipient at an address in Canada from an address outside Canada by the supplier, or by another person acting on behalf of the supplier, would not be considered to be a supply of “qualifying tangible personal property” under proposed section 211.22.

Please confirm.

Delivery Outside Canada

Please confirm that distribution platform operators would not be required to charge GST/HST to consumers where the non-resident seller structures the sales so legal delivery takes place outside Canada and arranges shipping and importation on behalf of consumers (so the supply is “made” outside of Canada with the consumers shipping the goods to themselves across the border).

Distribution Platform Operator Deemed Not to Have Made a Supply

The draft legislative provisions for operators at paragraph 211.22(b) (and similarly 211.13(1)(b) and 211.13(2)(a)(ii)) provide that a distribution platform operator is deemed not to have made a supply to a “person” of services relating to a “particular supply” (essentially a supply through the platform for which the platform operator is collecting tax).

We seek to confirm the scope of what services would be included within this provision. Is this limited to services such as platform listing services or could this include all other additional services provided by the operator, to the extent that these are connected in some way to the underlying supply? Are there any specific examples of services that this provision was intended to cover?

Previously Announced Measures

The Department of Finance Budget announcements generally include previously announced measures which reiterate the Federal Government’s intention to carry-on implementing previous announcements (e.g., joint venture elections). Please confirm that while the Fall

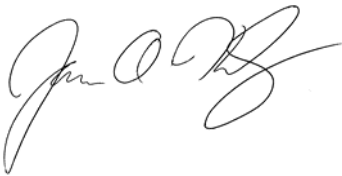
Economic Statement does not include a previously announced measures section, those previously announced measures remain as measures to be implemented.

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We thank you for the opportunity to provide these comments. Please contact Don Mills at don.mills@canopygrowth.com or 613-852-5641 should you have any questions.

Respectfully Submitted,

TAX EXECUTIVES INSTITUTE



James A. Kennedy
International President