The Top 10 Things

An Income Tax Practitioner Should Know About Commodity Taxes

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A Presentation at a Lunch Meeting
of the OBA's Tax Section

Toronto, Ontario: February 11, 2003

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Number 10

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Just because there's no income tax doesn't mean there's no commodity tax.

GST and RST provisions do not "fit like a glove" with common corporate transactions (e.g., section 85 rollovers). An independent analysis of the relevant GST and RST provisions is required.

In Ontario, for example, a sale of TPP is generally taxable, although an exception lies in Ontario Regulation 1013(13). However, there is never any guarantee that this 1960's regulation will apply to a given, income tax driven, corporate transaction.

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Partnerships are persons.

Partnerships are persons under the GST and RST legislation, which contrasts with the *Income Tax Act*.

Accordingly, a partnership taking on an "operating" role in an income tax structure, needs to be registered for GST (and RST). It will also have to collect, remit and account for GST and RST.

Detailed GST rules governing partnerships will have to be complied with – section 272.1 of the *ETA*.

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Provincial retail sales taxes don't just apply to goods

There is a common misconception that RST only applies to goods.

That is not presently the case.

In recent years, all RST provinces – BC, SK, MB, ON, PEI – have begun expanding their tax bases, to include many different kinds of "taxable services". Computer software is also taxed everywhere.

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Ontario has funny ideas about leases.

- Ontario's view is that tax crystallizes at the outset of a lease and, therefore, every payment made afterwards is subject to RST.
- Accordingly, when exercising a lease-purchase option, Ontario wants RST.
- Ontario also probably still RST on "Early Termination" payments.

Number 6

GST can sometimes apply twice.

There are really three taxing Divisions for GST purposes.

Two of them – Division II and Division III – can can apply to *cross-border movements of goods.* Depending on how a transaction is structured, both Divisions could apply to the same transaction – resulting in a double-tax obligation.

Non-residents usually screw this up – even sophisticated ones.

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GST "self-assessments" exist.

When acquiring services or intangibles from Non-Residents, GST self-assessment obligations can sometimes arise, under Division IV.

Similarly, self-assessments can arise in certain other instances (e.g., purchase of "real property", builder's, etc.).

Just because the supplier is not collecting GST is no guarantee that the GST is not payable.

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An "acceptable transfer price" under the *ITA* won't cut the mustard for Customs (or *SIMA*).

- **When dealing with Canada Customs, the income tax "transfer price" rarely relevant.**
- **Instead, a GATT based valuation code is used, with adjustments, an usually results in a different number.**
- **Recognize that there is a classic Customs / Income Tax "Whipsaw" that drives the two numbers apart.**

Number 3

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Nobody understands the NAFTA.

Just because goods are imported from the U.S. does not make them duty free. The NAFTA "*Rules of Origin*" determine whether a good is a NAFTA good, and are among the most complex rules you'll ever read.

Virtually everybody has mistakes in their NAFTA Certificates, and many exporters have no clue how the "rules of origin" work. Be on guard for this, and other non-compliance issues.

Number 2

Beware of “Management Fees”.

As in the case of transfer pricing, in order to properly apply commodi
taxes, one has to relate the fees paid to the actual functions performed.

How you characterize things is important for commodity tax purpose
and calling something a “management fee” will not excuse a prop
characterization of the charge.

Management fees can also be dutiable for customs valuation purposes
adding to the VFD of imported goods, and increasing duties or GST.

Number 1

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Never, ever, tell anybody that what they have is *exempt* custom software !

While Ontario's rules are codified, they are undeveloped and, in some instances, practically unworkable. Time and time again, one sees that the technical answer is that RST applies to the software being acquired, or used.

Often complex structuring is required to reverse this result.

And unless that can be done, the software remains a taxable good for RST purposes.

Questions

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