Ten Things to Know about

GST & PST

Presented at the 2005 Annual Conference of the Ontario Private Campgrounds Association

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ROBERT G. KREKLEWETZ

MILLAR KREKLEWETZ LLP

ROBERT G. KREKLEWETZ, LL.B., M.B.A.

Rob is a partner at MILLAR KREKLEWETZ LLP, with an LL.B. from Osgoode Hall Law School, and a M.B.A. from York University.

Extensive Customs, Trade & Commodity Tax Experience. Rob's practice focuses on **Commodity Taxes**, which encompasses all issues involving Canada's Goods and Services Tax (GST) and Harmonized Sales Tax (HST), as well the various other provincial sales taxes, including Ontario RST and Quebec QST. All elements of Millar Kreklewetz's practice include **Tax and Trade Litigation**, and Rob has acted as lead counsel in the CITT, Tax Court of Canada, Federal Court of Appeal, Ontario Court of Justice, and the Ontario Court of Appeal. Rob's practice area also focuses on **Customs & Trade** matters, including Periodic Verification Audits and Voluntary Disclosures concerning Valuation, Tariff Class Origin, or Marking issues, and NAFTA Origin Verification Reviews, Forfeitures, Seizures, and other NAFTA & WTO issues.

Tax & Trade Litigation. Tax & Trade Litigation is an integral element of Rob's practice, and Rob litigates tax and trade matters before all relevant bodies, tribunals and courts, including the Tax Court of Canada, Canadian International Trade Tribunal, Federal Court, Federal Court of Appeal, and Canada's various provincial Superior Courts and Courts of Appeal, and the Supreme Court of Canada. At MILLAR KREKLEWETZ LLP, we believe our "hands-on" tax and trade knowledge, combined with our litigation skill, gives us a competitive advantage. Rob's practice also includes planning and representation work before all government levels.

Client Base. MILLAR KREKLEWETZ LLP has some of the best tax and trade files in Canada, and Rob advises blue chip corporate clients who are international leaders in:

- Airlines, Avionics & Aerospace
- Oil & Gas
- Chemicals & Petrochemicals
- Forestry Products
- Steel
- Drugs & Pharmaceuticals
- Medical Testing & Health Services
- Computer Hardware & Software
- Information Technology
- IT & Internet Solutions
- Banking
- Financial Services
- Leasing
- Publishing
- Public Sector
- Manufacturing
- Wholesaling
- Retailing
- Direct Mail
- Direct Selling

Speaking Engagements / Publications / Memberships. Rob has published over **325 articles and papers**, and spoken at over **125 conferences**.

Accordingly, Rob regularly addresses the Tax Executive Institute (TEI) – at its Annual Canadian and International Conferences, and at various provincial Chapter Meetings – and also speaks frequently before other organizations on like the Canadian Tax Foundation (CTF), Canadian & Ontario Bar Associations (CBA/OBA), Canadian Institute of Chartered Accountants (CICA), and Certified General Accountants (CGA).

Rob also regularly addresses industry-specific associations like the Canadian Association of Importers & Exporters (CAIE), American Petroleum Institute (API), American Toy Industry Association (TIA), Canadian Finance and Leasing Association (CFLA), and the Canadian and U.S. Direct Sellers Associations (DSA). Rob is also a frequent speaker at other professional conferences held by organizations like the Strategy Institute, Infonex, IIR and Federated Press.

Rob is a regular contributor to the Tax Foundation's Tax Highlights publication, writing exclusively on commodity tax, customs & trade matters, and also contributes regularly to a number of other publications like Carswell's GST and Commodity Tax Reporter, the OBA's Tax Newsletter, Federated Press's Sales and Commodity Tax Journal, and the CAIE's Tradeweek publication.

Rob is a member of the OBA's Tax and International Law Executives, a member of the CFLA's Tax Committee, and Chair of the DSA's Taxation Committee. Rob is also a member of several federal and provincial consultation groups, consulting both with the federal Department of Finance, and the Ontario Ministry of Finance.

The Real Important Stuff – Unfortunately Left to the Bottom. Rob is married to Franceen, has a beautiful $7^1/_2$ year-old boy named William (the "Conqueror"), who has a 2 year-old little menace, named Richard (the "Lion-Hearted").

While Rob concedes that Commodity Tax, Customs & Trade is truly scintillating, what he really enjoys is spending time with his family, playing golf with his boys, and attempting to finish at least one woodworking project he starts.

We are proud to announce that the International Tax Review has ranked us as the top Canadian law firm in our field for three consecutive years – "Indirect & State and Local Taxes".

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
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THE ROAD MAP

General Focus of the Presentation

Commodity taxes like the GST and PST are integral parts of "tax compliance" for any business, and members of the Ontario Private Campground Association are no different.

This presentation will present Ten (10) separate GST and RST issues that businesses in your industry ought to be aware of, from the very basic, to the most sophisticated.

Navigating Through the Materials

While many readers will be familiar with GST and PST, some will not be so familiar, and there is an emphasis in these materials in ensuring that the "building blocks" necessary for understanding both GST and PST are in place for all readers.

Accordingly, these Materials are broken into three separate parts, as follows.

Part I is a narrative outline of the basic points to be made during the Presentation, and summarizes some of the points made.

Part II contain a fairly comprehensive introduction to Canada's GST system.

Part III contain an equally comprehensive introduction to Canada's provincial sales tax systems, with an emphasis on Ontario's provincial Retail Sales Tax Act (the "RSTA") and the provincial sales tax that it imposes ("PST").

Audience participation is welcomed,
and questions will be entertained at any time.

Time for Questions will also be available
at the end of the presentation.

Electronic Copy of these Materials

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PART I

The TOP 10 Things You Should Know About GST & PST for Ontario Private Campgrounds

No. 10 –

Yes, I you are required to register and charge and collect these taxes !

GST

For GST purposes, persons making over $30,000 in annual taxable supplies (actually, $30,000 in any prior 4 quarters, including taxable supplies by related persons) are required to register and charge and collect GST.

For Private Campgrounds, taxable supplies for GST purposes will include virtually everything that customers are charged for, from their campground and trailer sites, to fees for boats, boat launching, wharfage, freezer service, gas and oil, live and artificial bait, repair parts and labour.[1]

Many basic groceries, however, will remain not subject to GST.

PST

For Ontario PST purposes, and generally speaking, any persons who, in the ordinary course of business, either (a) sell or license tangible personal property, (b) sell or render a taxable service are required to register as "vendors" under the RSTA, and begin charging and collecting RST on their taxable sales and services.

Registration Required even for Small Sales amounts. You must register for a Vendor Permit even if your sales are small - there is no minimum.

How to Register. You may register online by visiting www.trd.fin.gov.on.ca, by phone, mail, or in person at any Ministry of Finance tax office. You may also register at any Ontario Business Connects workstation or through their Internet site at www.cbs.gov.on.ca/obc. Generally, it takes approximately three weeks from the time you register to receive any paperwork.

Once registered, and in receipt of your Ontario Vendor Permit, you must post a copy at each business location (e.g., office, convenience store, etc.), and produce it for inspection by a purchaser on request.

There is no expiry date on the Vendor Permit, but a Vendor Permit will cease to be valid on change in ownership. If you sell or close your business, you must contact your local Ministry of Finance tax office, return the Vendor Permit, and cancel your registration (all within 15 days).

No. 9 –

No RST on Site Fees, but you do have to charge RST on just about everything else !

No Real Taxable Services. While Ontario taxes, as a "taxable service" certain "transient accommodation" (imposing a 5% tax on such transient accommodation), Private Campgrounds are generally able to take advantage of an exemption found in section 1 of Regulation 1013, which <u>excludes</u> from the definition of "transient accommodation:

(1) tent or trailer sites supplied by a camp or trailer park.

While it is expected that this aspect of the exemption would capture most Private Campground situations, there are also exemptions available in Ontario for the following types of supplies:

(2) lodging where less than four rooms, suites of rooms, apartments, cottages or cabins are provided for the accommodation of tenants;

(3) lodging if the charge for the lodging is $10 or less per day or $70 or less per week;

(4) rooms, situated in an hotel or other lodging place, that do not contain beds and that are used for displaying merchandise or holding meetings, dinners, receptions or entertainment, or

(5) lodging, including the provision of prepared food products provided under an arrangement that combines the provision of lodging and prepared food products at a single price, supplied at a summer camp or similar place operated primarily for the purpose of providing a camping or other similar recreational experience to persons who are disabled, disadvantaged or underprivileged and who would not otherwise have an opportunity to attend a summer camp or similar place.

Basic Registration Requirements

GST

- $30,000 Small Supplier Threshold
- Related Party Look Through

PST

- Selling Taxable Goods or Services in the "ordinary course of business
- No Small Supplier Threshold

MILLAR KREKLEWETZ LLP

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Web: www.taxandtradelaw.com

Taxable Services. While charges for basic tent and trailer site rentals will remain exempt of RST purposes (i.e., specifically exempted from the "transient accommodation" definition of taxable services, and not otherwise taxable as representing a charge for the use of real property), other taxable services provided in conjunction with those site fees could well attract PST, as for example:

- For plans, like the american plan or modified American plan
- housekeeping plans (daily or weekly)

Taxable Goods. Like the situation for GST, the RST *will* apply to most sales of taxable goods, including the following items (and services), which are taxable at a full 8 % rate:

- live and artificial bait, including fishing tackle
- boats and boat rentals (with or without a guide)
- motors, including outboard motor rentals
- repair parts, and labour for the same
- maps
- motor oil
- post cards

Disposable Items Provided Free of Charge subject to Self-Assessment. Where disposable items are provided to guests free of charge, such as, soap, facial and toilet tissues, shower caps, paper laundry bags, etc., the business must pay RST on those items.

Exempt Supplies of TPP. Certain supplies of goods or services will remain exempt as follows:

- boat launching
- freezer service
- governmental licences
- boats rented with an operator
- gas and oil (premixed by manufacturer) *
- services of a guide
- gasoline (without oil) *
- wharfage

* These may be taxed by other legislation, including the *Gasoline Tax Act* or the *Fuel Tax Act.* Special rates of tax apply, for example, to pre-mixed gas, as follows:

- 22:1 to 50:1 (Gas to oil mix) is taxable @ 4 cents/gallon or 1 cent/litre
- 16:1 to 20:1 (Gas to oil mix) is taxable @ 7 cents/gallon or 1 1/2 cents/litre

Telecommunications. In addition, resellers of telecommunication services are required to charge RST on the sale of taxable telecommunication services, such as, telephone and telegraph services, community antenna television and cable television, transmissions by microwave relay stations or satellite, and pay television.

Recreational Equipment and Facilities. PST will also apply to rental charges for recreational equipment, such as golf clubs, skis, boats and motors, tennis racquets and balls, and towels. <u>This equipment may be, however, purchased by the Campground Owner on an "exempt" for resale basis</u>.

No PST will apply for pure "facilities" fees, however, if charges for the use of facilities are shown separately on the customer's bill. These include golf courses, ski tows, tennis courts, swimming pools, saunas, and similar recreational facilities.

No. 8 –

Snack Bars & Convenience Stores

- Figuring Out How GST & RST Applies

to Basic Groceries is Hard to Do !

While both GST and PST does not apply to certain "basic groceries", the difficulties like in the exceptions to the rules.

GST

The zero-rating provision is found in Part III of Schedule VI to the *Excise Tax Act,* as follows:

PART III

BASIC GROCERIES

1. Supplies of food or beverages for human consumption (including sweetening agents, seasonings and other ingredients to be mixed with or used in the preparation of such food or beverages), other than supplies of:

(a) wine, spirits, beer, malt liquor or other alcoholic beverages;

(c) carbonated beverages;

(d) non-carbonated fruit juice beverages or fruit flavoured beverages, other than milk-based beverages, that contain less than 25% by volume of

(i) a natural fruit juice or combination of natural fruit juices, or

(ii) a natural fruit juice or combination of natural fruit juices that have been reconstituted into the original state,

or goods that, when added to water, produce a beverage included in this paragraph;

" 9 "

You shouldn't be charging RST on Site Fees, but SHOULD be charging RST & GST on almost *everything* else

MILLAR KREKLEWETZ LLP

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Web: www.taxandtradelaw.com

(e) candies, confectionery that may be classed as candy, or any goods sold as candies, such as candy floss, chewing gum and chocolate, whether naturally or artificially sweetened, and including fruits, seeds, nuts and popcorn when they are coated or treated with candy, chocolate, honey, molasses, sugar, syrup or artificial sweeteners;

(f) chips, crisps, puffs, curls or sticks (such as potato chips, corn chips, cheese puffs, potato sticks, bacon crisps and cheese curls), other similar snack foods or popcorn and brittle pretzels, but not including any product that is sold primarily as a breakfast cereal;

(g) salted nuts or salted seeds;

(h) granola products, but not including any product that is sold primarily as a breakfast cereal;

(i) snack mixtures that contain cereals, nuts, seeds, dried fruit or any other edible product, but not including any mixture that is sold primarily as a breakfast cereal;

(j) ice lollies, juice bars, flavoured, coloured or sweetened ice waters, or similar products, whether frozen or not;

(k) ice cream, ice milk, sherbet, frozen yoghurt or frozen pudding, non-dairy substitutes for any of the foregoing, or any product that contains any of the foregoing, when packaged or sold in single servings;

(l) fruit bars, rolls or drops or similar fruit-based snack foods;

(k) ice cream, ice milk, sherbet, frozen yoghurt or frozen pudding, non-dairy substitutes for any of the foregoing, or any product that contains any of the foregoing, when packaged or sold in single servings;

(l) fruit bars, rolls or drops or similar fruit-based snack foods;

(m) cakes, muffins, pies, pastries, tarts, cookies, doughnuts, brownies, croissants with sweetened filling or coating, or similar products where

(i) they are prepackaged for sale to consumers in quantities of less than six items each of which is a single serving, or

(ii) they are not prepackaged for sale to consumers and are sold as single servings in quantities of less than six,

but not including bread products, such as bagels, English muffins, croissants or bread rolls, without sweetened filling or coating;

(n) beverages (other than unflavoured milk) or pudding, including flavoured gelatine, mousse, flavoured whipped dessert product or any other products similar to pudding, except

(i) when prepared and prepackaged specially for consumption by babies,

(ii) when sold in multiples, prepackaged by the manufacturer or producer, of single servings, or

(iii) when the cans, bottles or other primary containers in which the beverages or products are sold contain a quantity exceeding a single serving;

(o) food or beverages heated for consumption;

(o.1) salads not canned or vacuum sealed;

(o.2) sandwiches and similar products other than when frozen;

(o.3) platters of cheese, cold cuts, fruit or vegetables and other arrangements of prepared food;

(o.4) beverages dispensed at the place where they are sold;

(o.5) food or beverages sold under a contract for, or in conjunction with, catering services;

(p) food or beverages sold through a vending machine;

(q) food or beverages when sold at an establishment at which all or substantially all of the sales of food or beverages are sales of food or beverages included in any of paragraphs (a) to (p) except where

(i) the food or beverage is sold in a form not suitable for immediate consumption, having regard to the nature of the product, the quantity sold or its packaging, or

(ii) in the case of a product described in paragraph (m),

(A) the product is prepackaged for sale to consumers in quantities of more than five items each of which is a single serving, or

(B) the product is not prepackaged for sale to consumers and is sold as single servings in quantities of more than five,

and is not sold for consumption at the establishment; and

(r) unbottled water, other than ice.

RST

Similarly, the exemption for basic groceries found in the RSTA provides, in subsection 7(1) as follows:

1. Food products for human consumption except,

i. candies, confections, snack foods and soft drinks, other than soft drinks sold with prepared food products from an eating establishment, as defined by the Minister, at a total price for all soft drinks and prepared food products sold as part of the transaction that does not exceed four dollars, and

ii. prepared food products purchased from an eating establishment, as defined by the Minister, the price of which exceeds four dollars.

Basic Application of the Taxes

GST
- All Goods, Services, and Intangibles
- Exceptions: Zero-rated or Exempt Supplies

PST
- Most Goods; Limited Taxable Services
- No "Site Fees"

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Web: www.taxandtradelaw.com

Thus, in Ontario, the while may grocery items will be exempt of PST, the following items will bear PST, and you will be required to charge and collect PST on these items:

- Meals (including coffee, tea milk or juice) when the full amount of the charge if it is more than $4.00
- snack foods (including candy and confections) sold for 21¢ or more *
- soft drinks, except when sold with prepared food products for $4.00 or less
- other taxable goods sold for 21¢ or more *

* There is a specific exemption in subsection 7(1) of the RSTA for supplies of TPP valued at less than 21¢. Accordingly, small sales of candy and bubblegum etc., to kids, may generally escape PST.

No. 7 –

Bad Things Happen When you Bundle Taxable and Exempt Charges

Determining accurately what one is required to charge GST & PST on, and when is either zero-rated for GST purposes, or exempt for PST purposes is the first step towards tax compliance.

But accurately charging tax on these taxable and exempt charges can be difficult when items are "bundled" together.

PST and prepared meals is a good example, as by themselves, things like milk and bread may be exempt of PST, but when bundled together as a prepared meal, and sold for charges of $4.00 of more, they become taxable.

But less obvious "bundling" may also give rise to the imposition of PST on an assessment.

For example, charging an "all in fee" for trailer or tent site rental, <u>and</u> a meal plan, or the tent or trailer rental, may lead an RST auditor to impose tax on the whole fee. Generally speaking, the auditor is looking for such charges to be specifically broken out on the invoice to the customer. Where the invoice does not break out the separate charges, but "bundles" them together, there is a chance that the auditor will simply impose the tax on the bundles charges.

When facing this situation, Campground Owners should attempt to persuade the auditor to accept an after-the-fact "unbundling" of the charges, which ought to be done on a reasonable basis.

No. 6 –

Bad Things Happen When Pass on Your Own (GST Exempt) Expenses to Customers

Suppose you have taken out an umbrella insurance policy for your campground, and want to pass on the cost of that insurance to your customers.

Or suppose that you have just received a significant increase in your campground's Property Tax Assessment (maybe you are fortunate enough to have lake-front access), and want to pass on a special "Property Tax Fee" to your customers.

Many GST registrants incorrectly assume that because the original supply acquired by them (e.g., insurance, governmental tax) is either exempt of GST, or bears no GST, that when that is passed on to their customers, the same rule applies.

Such is NOT the case, and the "resupply" of those expenses from the Campground owner to the customers will generally be regarded as a separate supply of taxable services by the Campground to the customer, and subject to GST.

In effect, the CRA views these payments to the Campground as "additional rent".

Accordingly, the failure to charge GST on these amounts will give rise to a GST assessment for "non-collection" of charges.

The only exception to this line of reasoning would arise where the fees, expenses or charges that are being passed on by the Campground to the customers can be characterized as expenses that were incurred by the Campground as the "agent" for the customer.

It would be expected, in the Private Campground context, that this exception would not generally apply.

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No. 5 – Remember to offer your Non-Resident Customers a point of sale GST Rebate !

Since June 1998 the GST Rebate for non-resident travelers has applied to GST paid in respect of campground charges, and GST registrants are now able to provide that GST Rebate directly to their non-resident customers at the point of sale.

The GST Rebate applies to all GST related to one's camping accommodation, so long as provided to an individual (as opposed to a supply made to a business), and relating to a stay that is less than one month. Camping accommodation would include the campsite rental fees at a recreational trailer park or campground, and also include fees for water, electricity, waste disposal services, and charges for hook-ups when supplied with the campsite.

Remember, however, that the GST Rebate applies on the GST paid by **non-resident visitors**.

Technical Application of the Rules. Section 252.1 of the ETA offers a rebate of GST paid on camping accommodation to non-resident visitors and non-resident re-suppliers under certain conditions.

Notably, the definition of camping accommodation also includes the use of water, electricity and waste disposal services if accessed by means of an outlet or hook-up at the campsite and are supplied with the campsite.

Camping accommodation is by definition for periods less than one month of continuous occupancy.

The relevant portions of the provision provides as follows:

252.1(1) …

"camping accommodation" means a campsite at a recreational trailer park or campground (other than a campsite included in the definition "short-term accommodation" in subsection 123(1) or included in that part of a tour package that is not the taxable portion of the tour package, as defined in subsection 163(3)) that is supplied by way of lease, licence or similar arrangement for the purpose of its occupancy by an individual as a place of residence or lodging, if the period throughout which the individual is given continuous occupancy of the campsite is less than one month. It includes water, electricity and waste disposal services, or the right to their use, if they are accessed by means of an outlet or hook-up at the campsite and are supplied with the campsite.

252.1(2) **Accommodation rebate to non-resident persons** — Where

(a) a non-resident person is the recipient of a supply made by a registrant of short-term accommodation, camping accommodation or a tour package that includes short-term accommodation or camping accommodation,

(b) the accommodation or tour package is acquired by the person otherwise than for supply in the ordinary course of a business of the person of making such supplies, and

(c) the accommodation is made available to a non-resident individual,

the Minister shall, subject to subsection (8) and section 252.2, pay a rebate to the person equal to the tax paid by the person in respect of the accommodation.

(3) **Accommodation rebate to non-resident suppliers** — Where

(a) a particular non-resident person who is not registered under Subdivision d of Division V is the recipient of a supply of short-term accommodation, camping accommodation or a tour package that includes short-term accommodation or camping accommodation, (b) the accommodation or tour package is acquired by the person for supply in the ordinary course of a business of the person of making such supplies,

(c) a supply of the accommodation or tour package is made to another non-resident person and payment of the consideration for that supply is made at a place outside Canada at which the supplier, or an agent of the supplier, is conducting business, and

(d) the accommodation is made available to a non-resident individual,

the Minister shall, subject to subsection (8) and section 252.2, pay a rebate to the particular person equal to the tax paid by the particular person in respect of the accommodation.

Rapid Calculation Option. Note that the provision includes a rapid calculation option, where the non-resident may claim $1 per night for camping accommodation, rather than claiming the actual tax paid, with a similar formula for camping accommodation offered as part of a tour package ($1 per night of camping accommodation included as part of the tour package, and $5 per night of short-term accommodation): see subsection 252.1(4).

Point of Sale Rebate. Under subsection 252.1(8) of the ETA, a campground may pay or credit the rebate to the non-resident to which they would be otherwise entitled to claim, provided the recipient paid tax in respect of the supply. Certain conditions apply.

Basic Groceries and Exceptions

GST

- All Basic Groceries except Defined Items

PST

- All Basic Groceries except “Snack Foods, Candy and Confections”, and “Prepared Meals”

Read the Rules !

MILLAR KREKLEWETZ LLP

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The specific rule provides as follows:

(8) Rebate paid by registrant — Where

(a) a registrant makes a supply of short-term accommodation, camping accommodation or a tour package that includes short-term accommodation or camping accommodation to a non-resident recipient who either is an individual or is acquiring the accommodation or tour package for use in the course of a business of the recipient or for supply in the ordinary course of a business of the recipient of making such supplies,

(b) the registrant pays to, or credits in favour of, the recipient an amount on account of a rebate under subsection (2)or (3) to which the recipient would be entitled in respect of the accommodation if the recipient had paid the tax in respect of the supply and had satisfied the conditions of section 252.2,

(c) the amount paid or credited is equal to

(i) in the case of a supply of a tour package, the amount that would be determined in respect of the supply under paragraph (5)(b), and

(ii) in the case of a supply of short-term accommodation, or camping accommodation, that is not part of a tour package, the tax paid by the recipient in respect of the supply, and

(d) in the case of a rebate under subsection (2),

(i) payment of the consideration for the supply is made at a place outside Canada at which the registrant, or an agent of the registrant, is conducting business, or

(ii) where the accommodation is supplied as part of a tour package that includes other property or services (other than meals or property or services that are provided or rendered by the person who provides the accommodation and in connection with it), a deposit of at least 20% of the total consideration for the tour package is paid

(A) by the recipient to the registrant at least 14 days before the first day on which any short-term accommodation, or camping accommodation, included in the tour package is made available under the agreement for the supply of the tour package, and

(B) by means of a credit card or charge card issued by, or a cheque, draft or other bill of exchange drawn on an account outside Canada with, a non-resident institution that is a bank, cooperative credit society, trust company or similar institution,

the registrant may claim a deduction under subsection 234(2) in respect of the amount paid or credited, and the recipient is not entitled to any rebate or to any refund or remission of tax in respect of the accommodation.

No. 4 –

The GST treatment of “seasonal” campground licences is *much different* than long-terms residential residents.

For GST purposes, a distinction ought to be drawn between the licensing (i.e., “renting”) of short-term, or at most “seasonal” use of a private campground, and the longer-terms leasing or licencing of a “residential” nature.

Generally speaking, and while each situation would have to be reviewed based on its own particular facts and agreements, the general rule is as follows: (1) licences of short-term or seasonal campground sites would be subject to the GST at 7%, with the campground therefore entitled to claim “input tax credits” or “ITCs” for GST paid in respect of that portion of the business; on the other hand, (2) long-term “residential sites” would be expected to be exempt of GST (pursuant to subparagraph 7(a)(i) of Part I of Schedule V of the ETA), meaning that while no GST would have to be charged to one’s “residential” customers, the Campground would also be *precluded* from taking any ITCs on that portion of the business.

Exempt Nature of Residential Accommodation. Supplies, including leases and licences of real property, are subject to the GST/HST unless specifically exempt.

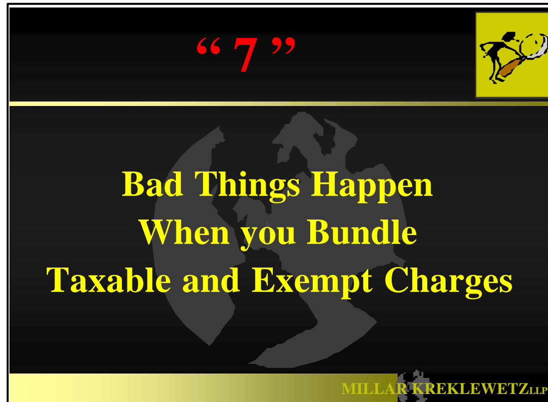
The tax status of long-term “residential” accommodation (usually expected to be under a “lease”, but perhaps under a license) might be exempt pursuant to the application of section 7 of Part I of Schedule V of the ETA which provides as follows:

"A supply

(a) of land (other than a site in a residential trailer park) made, under a lease, licence or similar arrangement which provides for continuous possession or use of the land for a period of at least one month, to

(i) the owner, lessee or person in occupation or possession of a residential unit that is or is to be affixed to the land for the purpose of its use and enjoyment as a place of residence for individuals, or

(ii) a person who is acquiring possession of the land for the purpose of constructing a residential complex on it in the course of a commercial activity,



(b) of a site in a residential trailer park made, under a lease, licence or similar arrangement which provides for continuous possession or use of the site for a period of at least one month, to the owner, lessee or person in occupation or possession of

(i) a mobile home, or

(ii) a travel trailer, motor home or similar vehicle or trailer, situated or to be situated on the site ..."

Paragraph 7(b) thus exempts certain supplies of sites forming part of a "residential trailer park" (defined below) while the paragraph 7(a) exemption pertains to supplies of sites that do not form part of a "residential trailer park".

The question then is what "residential trailer park" means in the context of paragraph 7(b).

Paragraph 7(b) of Part I of Schedule V. A "residential trailer park" of a person is defined in subsection 123(1) as:

"... the land that is included in a trailer park of the person or, where the person has two or more trailer parks that are immediately contiguous to each other, the land that is included in those contiguous trailer parks, and any buildings, fixtures and other appurtenances to the land that are reasonably necessary for

(a) the use and enjoyment of sites in the trailer parks by individuals residing in or occupying mobile homes, or travel trailers, motor homes or similar vehicles or trailers, situated or to be situated on those sites, or

(b) the purpose of engaging in the business of supplying those sites by way of lease, licence or similar arrangement,

but does not include such land and appurtenances or any part of them unless the land encompasses at least two sites and all or substantially all of the sites in the trailer parks

(c) are supplied, or are intended to be supplied, under a lease, licence or similar arrangement under which continuous possession or use of a site is provided for a period of at least

(i) one month, in the case of a mobile home or other residential unit, and

(ii) twelve months, in the case of a travel trailer, motor home or similar vehicle or trailer that is not a residential unit, and

(d) if the sites were occupied by mobile homes, would be suitable for use by individuals as places of residence throughout the year ..."

Implications. Generally speaking, most Private Campgrounds housing seasonal or residential customers would NOT be expected to qualify for the exemption provided in paragraph 7(b) above because they would NOT be considered to be "residential trailer parks" within the meaning of the definition above (being excluded under either the paragraph (c) or (d) exclusionary language.

On the other hand there could be application under the paragraph 7(a) exemption where the campground sites are rented for periods of longer than 1 month, and rented to a person that *affixes* a "residential unit" to the site, and uses it as a place of residence.

CRA's Views on the matter. While recognizing the seasonal Campground usage will not generally qualify as an 'exempt' use of the land (i.e., because the trailers or tents are not generally affixed to the land as a "residential complex" and used for "residence" within the meaning of the GST legislation, the CRA is of the view that long-terms use of the Campground space can qualify as "exempt" use: See CRA Ruling 49116 (January 10, 2005), *GST/HST Treatment of Site Leases.*

Specifically, CRA does view certain park-model unit Mobile Homes (the "Homes"), that meet Canadian Standards Association Z240 building standards, to be capable of constituting "residential units", and in certain circumstances, to be viewable as being "affixed" to their sites. (See also GST Policy Statement P-223)

Motor homes and other RV trailers (e.g., travel trailer, motor home, camping trailer or other vehicle designed for recreational use) would not generally meet these requirements in the CRA's view.

On the other hand, if the particular RV meets the conditions of GST Policy Statement P-104 (*Meaning Of 'Mobile Home', 'Residential Unit' And 'Residential Complex' In The Context Of Mini-Homes, Park Model Trailers, Travel Trailers And Motor Homes*), the CRA might still characterize the RV a "mobile home", and therefore a "residential unit".

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

Bundling Issues

Key Points

- Mainly an RST Issue
- Affects mixing of "Taxable" and "Exempt" Supplies
- Audit Position: Separate Charges or All Taxable
- Self Help: Unbundle Everything

MILLAR KREKLEWETZ LLP

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ROBERT G. KREKLEWETZ
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E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

It appears that while the general policy is that units such as travel trailers and motor homes will not generally be considered as "mobile homes" as they are not designed to be placed or installed on a foundation similar to that of a mobile home and are normally for recreational use, where the unit is permanently affixed to land in the same manner as a house it will generally be considered to be a residential unit. Whether a particular home or trailer is "permanently affixed" to land in the same manner as a house is a question of fact to be determined with reference to the particular circumstances of a given situation, but would include a review of the following factors by the CRA:

- the type of home or trailer in question;
- the use of the home and the applicable land;
- the actual degree of permanency with the land;
- applicable provisions of any agreements relating to the permanency and means of affixation of the home or trailer to the land; and
- the removal or ownership of the home or trailer at the end of the lease.

The important question for "seasonal" campgrounds use is therefore whether the "seasonal" use includes Mobile Homes of the type described above, or RVs that are intended to be permanent with their respective sites and, by extension, are "permanently affixed" to them.

Generally speaking the determination will start with whether they are physically attached to the land[2] – although that will not be conclusive in and of itself. Reference to underlying documents will also be important, including any express restrictions on the RV being used for "residential purposes", and requirement that the licensees vacate their RVs at the end of a camping season.

Self-supply Implications. Where the exemption in subparagraph 7(a) applies, there is a significant self-supply self-assessment obligation imposed on the campground owner under subsection 190(3) of the ETA. Specifically, subsection 190(3) requires a person who first supplies land by way of a lease that is exempt under subparagraph 7(a) to account for the GST/HST on the fair market value of the land so leased.

Pursuant to subsection 190(3), if the campground were the first person to supply the land except, it would be deemed to have made and received a taxable supply by way of sale of the relevant land and to have paid tax in respect of that deemed supply.

In the result, the campground would have been required to have included the GST in their net tax calculations for the reporting period in which the land was first leased to residential units – meaning that many campgrounds in these situation could expect latent GST obligations and exposure.[3]

New residential rental property rebate ("NRR"). Note also that a person who makes a supply of land that is exempt under subparagraph 7(a) may be eligible for a NRR if, in entering the lease agreement, the person is deemed to have made and received a taxable supply by way of sale of the land and to have paid tax in respect of that deemed supply.

Accordingly, if the leases of the exempt land, being exempt supplies pursuant to subparagraph 7(a)(i), results in the campground being deemed to have paid tax under subsection 190(3), it may be eligible for a NRR for each site if the eligibility conditions for the NRR are satisfied.[4]

Tax paid in error. Finally, where tax has been erroneously charged and collected in respect of sites that fall within the paragraph 7(a) exemption, that GST may be refunded to the affected customers subject to subsection 232(1).

Subsection 232(1) indicates that you may, within two years after the day the amount was so charged or collected, refund or credit the tax.

Where such action is taken, subsection 232(3) would require you to issue a credit note in the amount of the refund or credit. If the amount refunded or credited has been included in determining net tax for the reporting period in which it issued the credit note or for a previous reporting period, you may deduct that amount in determining your net tax for the reporting period in which the credit note is issued, on line 107 of your GST/HST return.

Prior to doing this, however, campground owners in this situation are advised to seek legal advice, as they will undoubtedly need to take steps towards dealing with their own GST obligations under subsection 190(3), etc.

Input tax credits ("ITCs"). Where leases of exempt land are made to residential customers, ITCs are generally (as indicated above), *precluded* in respect of these business activities.

QUESTIONS ?

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

Where both “commercial” (i.e., GST taxable) and exempt activities are arising in the context of the same campground, an ITC allocation method must be chosen, and campground owners in this situation are again commended to seek legal assistance in doing so.

Note that if a particular input is used at least 90% of the time in making exempt supplies, the campground would not be able to claim any ITCs for the tax paid on the input, pursuant to subsection 141(4) of the ETA.

No. 3 –

For everyone with wet seats now,
there are things called “Voluntary Disclosures”

For both GST and PST purposes, the tax administrations offer a form of “penalty” amnesty in programs referred to as “Voluntary Disclosures”.

Here, and assuming that the Voluntary Disclosure is truly “voluntary” in the sense that it has started without any prior contact from the relevant tax administration, the taxpayer is “permitted” to voluntarily provide all of the relevant and complete tax information, including all details relevant to the non-compliance, and pay relevant taxes and interest.

In exchange, the tax administration waives applicable penalties and also agrees not to seek any sort of quasi-criminal prosecutions for the misdeeds.

No. 2 –

Auditors are not your friends !
(But you can’t shoot them either)

Discussion on this topic will be confined to the presentation.

No. 1 –

While the Assessment is NOT the end of the Road,
the Road is a Long Toll Road.

Discussion on this topic will be confined to the presentation.

QUESTIONS ?

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

PART II
OVERVIEW OF CANADA'S GST SYSTEM

Introduction

Canada's federal value-added taxation system is called the Goods and Services Tax (the "GST") and is provided for in Part IX of the *Excise Tax Act* (the "*ETA*"). The GST, while commonly considered to be a single tax, is actually imposed under three separate taxing divisions, on three distinct types of transactions. Together, the three taxing divisions create a comprehensive web of taxation.

Its basic design is aimed at taxing virtually all (1) supplies of *domestic* goods, services, and intangibles,[1] all (2) supplies of *imported* goods, services, and intangibles, and (3) relieving from tax a number of *exported* goods, services, and intangibles.

Under Division II of the *ETA*, for example, GST is imposed on domestic supplies, or "taxable supplies made in Canada". In turn, Division III imposes GST on most "importations" of "goods", while Division IV imposes tax on "imported taxable supplies", which amount to certain services and intangibles acquired outside of Canada, but consumed, used or enjoyed in Canada. The "zero-rating" of exports from Canada (both goods, services, and intangibles) is facilitated through various enumerated categories in Part V of Schedule VI of the *ETA*.

What this means is that taxpayers engaged in cross-border transactions can find themselves subject to GST under any one of Divisions II, III or IV (and, in some instances, subject to a "double-tax" under more than one division).

Not surprisingly, then, determining how the GST applies to a particular transaction, and determining how the impact of the GST can be minimized, requires an understanding of how each of these taxing divisions operates, as well as an appreciation of a number of other special rules in the *ETA*. That includes the rules regarding "zero-rated exports" in Part V of Schedule VI of the *ETA* (the "Export Schedule"), and the rules regarding "non-taxable importations" found in Schedule VII of the *ETA*.

With the fairly recent addition of an 8% "harmonized sales tax" ("HST") to transactions involving Canada's Atlantic provinces, businesses with exposure in those areas will see that what was once a 7% risk, is now a 15% risk – all usually measured on gross revenues (i.e., the "consideration" for the supplies).

Division II & "Taxable Supplies Made in Canada"

When Canadians speak of the GST, they are most often referring to the GST that is imposed under Division II of the *ETA*. Division II is entitled *Goods and Services Tax,* and imposes tax on "every recipient of a taxable supply made in Canada": s. 165(1).

While applying only to domestic supplies (e.g., taxable supplies "made in Canada"), Division II affects a large number of cross-border transactions, including supplies made in Canada by registered non-residents,[2] unregistered non-residents who carry on business in Canada, and supplies which are drop-shipped in Canada on behalf of unregistered non-residents. Division II can also affect certain goods exported from Canada. Having said all of this, there are a number of general rules governing when a "taxable supply" will be regarded as having been made "in Canada", and forcing a supplier to register and begin charging and collecting GST.

There are also some other special rules applying to unregistered non-residents who do not carry on business in Canada, all of which will be touched on further below.

What is a "Taxable Supply". Before engaging in a consideration of whether a supply is made "in Canada" or "outside Canada", it is usually a good "first step" to assess whether the supply is "taxable" or "exempt". (This is because the Division II GST only applies to "taxable" supplies made "in Canada".) A "taxable supply" is defined in subsection 123(1) of the *ETA* to be a supply that is made in the course of a "commercial activity". Since "commercial activity" is quite broadly defined, a taxable supply would generally include most supplies made in the course of a business, or in an adventure or concern in the nature of trade.

Significantly, however, a "taxable supply" specifically excludes the making of "exempt" supplies enumerated in Schedule V of the *ETA*.

“ 5 ”

Remember to offer your Non-Resident Customers a point of sale GST Rebate !

MILLAR KREKLEWETZ LLP

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

Supplies Made “in Canada”. If a supply is “taxable”, one can then proceed on with the issue of whether that supply is made “in Canada”, such that the taxing provisions in Division II impose the GST on it. As indicated, the *ETA* contains a number of general rules for determining when a supply is made “in Canada”,[4] and these are found in s. 142. For example, if the supply under consideration is a “sale” of “goods”, the applicable rule is that the goods will be supplied “in Canada” if “delivered or made available” in Canada. Other rules apply for other types of supplies (e.g., a supply of leased goods, a supply of services, intangibles or real property like land). Understandably, some of these rules can be quite complex, and require some detailed consideration.

Special Non-Residents Rule. The general “place of supply rules” found in s. 142 of the *ETA* must always be read in context with a number of other rules which affect the determination of whether a particular supply is made “in Canada” for purposes of the Division II GST.

For non-residents, the most important of these rules is found in s. 143 of the *ETA*, which deems all supplies of property and services made in Canada by non-residents to be made outside Canada, unless:

(a) the supply is made in the course of a business carried on in Canada; or

(b) at the time the supply is made, the person is registered.

What this means is that for most unregistered non-residents, the general “place of supply” rules found in s. 142 of the *ETA* are unimportant: as long as the unregistered non-resident is not “carrying on business” in Canada, it is kept outside the GST system; accordingly, it is neither required to register for the GST, nor charge, collect and remit GST on its supplies to Canadians.[5] The significance of that rule obviously brings up the meaning of terms like “non-resident”, “registered”, and “carrying on business in Canada”.

Residents & Non-Residents. While a complete discussion is outside the scope of this presentation, the *ETA* does have some complex rules regarding the meaning of “non-resident” and “resident”.[6] For example, s. 132 of the *ETA* provides that a corporation will be considered a “resident” of Canada if it has been “incorporated” or “continued” in Canada, and not continued elsewhere. While this might suggest that all corporations incorporated or continued outside of Canada would qualify as “non-residents” of Canada, there are other rules which may impact like, for example, the *ETA*’s “permanent establishment” rules.

Permanent Establishments. A special rule in s. 132(2) of the *ETA* provides that where a person who is otherwise a “non-resident” (e.g., a corporation incorporated in the U.S.) has a “permanent establishment in Canada, the person shall be deemed to be resident in Canada in respect of, but only in respect of, activities of the person carried on through that establishment”. The effect of this rule, of course, would be to deem the non-resident to be a “resident” in respect of any activities carried on through a Canadian permanent establishment, which has the ancillary effect of *excluding* the “non-resident” from use of the special “non-resident’s rule” referred to above. Accordingly, a non-resident with a Canadian permanent establishment might (unhappily) find that its activities in Canada have effectively brought itself *into* the GST system, requiring it to take positive steps to register for the GST, and to begin charging, collecting, and remitting the GST to the Canada Revenue Agency (“CRA” – formerly the “Canada Customs and Revenue Agency”, or “CCRA”).

CRA has recently released its new interpretation on the meaning of permanent establishment in GST Policy P-208R, *Meaning of Permanent Establishment in Subsection 123(1) of the Excise Tax Act (the Act),* (March 23, 2005).

Carrying on Business. As we saw, the other main requirement for use of the “non-residents rule” in s. 143 was that the non-resident not “carry on business” in Canada. The concept of “carrying on business” is not defined in the *ETA*, and falls to be determined by the facts of the situation, and a number of tests developed largely from income tax jurisprudence. That jurisprudence suggests that to “carry on” a business is a factual-based analysis, focused on a couple of primary factors, and an inexhaustive set of secondary factors. The two primary factors are:

GST Rebate for Non-Residents

Key Points

- GST Only
- Available to Non-Resident Customers
- For GST Paid to YOU
- Read the rules, and get CRA's Requirements

MILLAR KREKLEWETZ LLP

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

(a) the place where the contract for the supply was made; and

(b) the place where the operations producing profits take place.

In terms of the "place where a contract is made", the jurisprudence generally accepts that the important elements of the contract are its offer, and its subsequent acceptance, and that the place the contract is "accepted" is the place it was made.

The CRA has recently re-vamped its interpretation of the phrase "carrying on business", and the attendant registration requirements in the ETA, effectively discarding any reliance on the traditional jurisprudential position referred to above, and imposing multi-faceted tests of its own. Readers are accordingly cautioned to approach the meaning of "carrying on business" with caution, and seek professional advice. The CRA's views are set out in GST Policy P-051R2, *Carrying on Business in Canada.*

Summary of Application of Division II Tax. For non-residents, most will want to ensure that they are "unregistered" and "not carrying on business" in Canada – so as to ensure the proper application of the "non-residents rule" in s. 143. The application of that rule will "exonerate" non-residents from charging, collecting and remitting the GST in respect of transactions with Canadian residents.

On the other hand, for most readers, the Division II tax will usually be payable (e.g., you will be a resident Canada, or a non-resident carrying on business in Canada) – which raises a contemporaneous requirement to register for the GST.

Even where Division II tax is payable, that is not usually the end of the "GST story". Depending on your business activities, there may be additional GST imposed on your business under either Division III or Division IV, as discussed below.

Division III & "Imported Goods"

Division III is entitled *Tax on Importation of Goods* and imposes tax on "every person who is liable under the *Customs Act* to pay duty on imported goods, or who would be so liable if the goods were subject to duty": s. 212.[7]

Accordingly, the Division III GST applies to most goods imported into Canada. Here, the supplier is under no obligation to charge or collect tax. Rather, the importer of the goods is required to pay the tax when clearing them with Canada Customs.

As indicated above, even if a person (like an unregistered non-resident, not carrying on business in Canada) has successfully shielded itself from any Division II GST obligations (i.e., because of the special non-residents rule in s. 143), the Division III tax can still apply to any goods imported by the non-resident. And many other taxpayers and consumers now fully know, from their personal cross-border shopping experiences, the GST also applies to imported goods.

The surprising element here, however, is that since there is no provision in the *ETA* creating a mutual exclusivity between Division II and Division III taxes, "double-taxation" can happened in many cross-border transactions. In those situations, *both* the Division II and Division III tax will apply to a particular movement of goods from outside of Canada, to inside of Canada.

The key to minimizing tax in these situations, then, is to understand when and how this can occur, and how to either avoid it, or how to unlock one or both of the taxes that have been paid.

Newly proposed rules in s. 178.8 of the ETA (proposed by Notice of Ways and Means Motion on October 3, 2003) will significantly change the manner in which importers of goods to Canada will be entitled to claim ITCs for the GST paid under Division III of the ETA and, accordingly, importers are cautioned to seek professional advice on this question.

Interplay of Division III Tax with Customs Valuation Rules. As mentioned, the GST's Division III tax is payable on the "duty paid value" of the imported goods, as determined under the *Customs Act.* Significantly, then, the provisions in the *Customs Act* and *Customs Tariff* which affect the "value for duty" of imported goods are still important for GST purposes – even if the goods being imported are otherwise "duty free". This means that even those duties on imported goods may have long-since been removed, the CRA will still be interested in a proper valuation of the imported goods, for GST purposes, and will continue to focus on issues like whether dutiable royalty payments, assists, "subsequent proceeds", and "buying commissions" have been included in the "value for duty" of goods. Where these additions are left out, GST will be regarded as having been short-paid, and customs assessments (or other positive "voluntary correction" obligations – see *infra*) will arise.

“ 4 ”

The GST treatment of “Seasonal” Campground Sites is much different than Long-Term Residential Sites

MILLAR KREKLEWETZ LLP

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

This effectively means that when combined with its “customs cousins”, Division III can have the effect of taxing more than simply goods, but also certain payments for intellectual property or services.

While GST registrants carrying on commercial activities will only experience cash-flow strain (e.g., between the time GST paid and the time it is recovered via ITC), persons involved in partially or wholly exempt activities (e.g., financial institutions, municipalities, universities, schools, and hospitals) would find these amounts to be “hard costs”, and not all recoverable.[8]

Division IV & “Imported Taxable Supplies”

The third taxing division under which GST might be payable is Division IV, which is entitled *Tax on Imported Taxable Supplies Other than Goods*, and which imposes tax on “every recipient of an imported taxable supply”: s. 218(1). Since an “imported taxable supply” is defined quite broadly, Division IV captures most transactions not otherwise taxable under Divisions II or III and, as indicated above, can catch a number of international transactions involving services or intangibles. The rules defining “imported taxable supplies” are remarkably complex, and to the extent taxpayers are again involved in somewhat less than “exclusive” commercial activities, special attention should be paid to these rules: they will create a self-assessment obligation equal to the 7% GST, multiplied by the amounts paid abroad for the ultimate use, in Canada, of intellectual property, other intangibles or services.

Zero-Rating Provisions

Even if Division II tax somehow applies to a transaction involving a good, service or intangible (i.e., because the supply was made “in Canada”), there is a general intention in the *ETA* that if the supply is for consumption, use or enjoyment *outside* of Canada, it should be free of GST.[9]

This intention is manifested in Part V of Schedule VI of the *ETA*, which sets out a number of zero-rating rules for *export situations*, some of the more important ones of which are as follows.

Zero-Rated Goods. Some of the rules for zero-rating exported goods are provided for as follows:

> **Section 1: Exported Goods**. A supply of tangible personal property (other than an excisable good) made by a person to a recipient (other than a consumer) who intends to export the property where ...
>
> (b) upon delivery of the TPP to the recipient, the TPP is exported ”as soon as is reasonable” having regard to the “circumstances surrounding the exportation”, and having regard to the “normal business practice of the recipient”,
>
> (c) the TPP is not acquired by the recipient for consumption, use or supply in Canada before the exportation,
>
> (d) after the supply is made, the TPP is not further processed, transformed or altered in Canada, “except to the extent reasonably necessary or incidental to its transportation”.
>
> (e) the supplier of the TPP maintains evidence satisfactory to the Minster of the exportation by the recipient (or the recipient issues the supplier with a special s. 221.1 export certificate – see *infra*) indicating that all the conditions above have been met.
>
> **Section 12: Supply via Common Carrier.** A supply of tangible personal property where the supplier delivers the property to a common carrier, or mails the property, for export.

Dovetailing with these rules are special “Export Certificate” rules aimed at certain registered persons whose business consists of export trading activities. These persons would include “export trading houses” who export goods which are not manufactured by them. The bulk of their business activity is purchasing domestic goods for export (e.g., a transaction likely subject to GST), warehousing them, and then exporting them.

Zero-Rated Services. Some of the rules for zero-rating exported services are provided for as follows:

> **Section 5: Agents’ and Manufacturers’ Rep Services.** Agents’ services are zero-rated when provided to a non-resident under s. 5 of the Export Schedule. Also zero-rated are services “of arranging for, procuring or soliciting orders for supplies by or to the person” -- which would seem to cover the “manufacturers’ representatives” situation. In both instances, however, the services must be in respect of “a zero-rated supply to the non-resident”, or a “supply made outside Canada by or to the non-resident”.
>
> **Section 7: General Services.** A supply of a service is zero-rated when made to a non-resident person, but not in the case of the following services:
>
> (a) a service made to an individual who is in Canada at any time when the individual has contact with the supplier in relation to the supply;
>
> (a.1) a service that is rendered to an individual while that individual is in Canada;
>
> (b) an advisory, consulting or professional service

Exempt vs. Taxable Business

Key Points

- GST Only
- Will Affect Campgrounds with Long-Term Residences affixed to Site
- No GST for Them – But BIG Problems for You
- Self Assessment Obligation, and ITC Apportionment
- Get Advice

MILLAR KREKLEWETZ LLP

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
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E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

(c) a postal service;

(d) a service in respect of real property situated in Canada;

(e) a service in respect of tangible personal property that is situated in Canada at the time the service is performed;

(f) a service of acting as an agent of the non-resident person or of arranging for, procuring or soliciting orders for supplies by or to the person;

(g) a transportation service; or

(h) a telecommunication service.

Section 8: Advertising Services. The supply of advertising services is zero-rated if meeting the following conditions: a supply of a service of advertising made to a non-resident person who is not registered under Subdivision d of Division V of Part IX of the *ETA* at the time the service is performed.

Section 23: Advisory, Professional or Consulting Services. A supply of the following services is also zero-rated, A supply of an advisory, professional or consulting service, made to a non-resident person, but not including a supply of

(a) a service rendered to an individual in connection with criminal, civil or administrative litigation in Canada, other than a service rendered before the commencement of such litigation;

(b) a service in respect of real property situated in Canada;

(c) a service in respect of tangible personal property that is situated in Canada at the time the service is performed; or

(d) a service of acting as an agent of the non-resident person or of arranging for, procuring or soliciting orders for supplies by or to the person.

Zero-Rated IPP. Zero-rated IPP is currently limited to the following supplies of *intellectual* property – which is notably a smaller subset of IPP, and which would be expected to exclude things like "contractual rights":

Section 10: Intellectual Property. A supply of an invention, patent, trade secret, trade-mark, trade-name, copyright, industrial design or other intellectual property or any right, licence or privilege to use any such property, where the recipient is a non-resident person who is not registered under Subdivision d of Division V of Part IX of the *ETA* at the time the supply is made.

PART III

OVERVIEW OF CANADA'S RST SYSTEMS

Introduction

Who Still Has Them. Only 5 of Canada's provinces still levy a stand-alone provincial RST (i.e., BC, SK, MB, ON and PEI).[10] Québec ("QB") has a system (the "QST") which is partially harmonized to the GST, while the Atlantic provinces of Nova Scotia ("NS"), New Brunswick ("NB"), and Newfoundland & Labrador ("NF") have a fully harmonized system, incorporated into the *ETA* (the "HST").

Alberta ("AB") and Canada's two territories do not presently employ retail sales taxing systems.

Broad Comparisons. If broad comparisons can be drawn, these RST systems are "old generation" systems, and ancestors of the more recent attempts by Québec and the Atlantic Provinces (NS, NB, and NF) – to implement partially and fully harmonized systems. To understand how the "old generation" RST systems work, it is useful to consider both where they came from, and why they evolved the way they did.

Where did they Came From ? – The Historical Background. Retail sales taxes grew out of the economic depression of the 1930s, and were a product of the needs for greater tax revenues to fund increasing need for social programmes.

Interestingly enough, the first RST system was neither federal or even provincial: it was a municipal sales tax initiative, implemented by the City of Montreal, on May 1, 1935, which applied a 2% tax on tangible personal property ("TPP"). Within the year, however, Canada's provinces followed suit, with Alberta being the first to enact a provincial system, on May 1, 1936. (Unfortunately for Alberta, its RST system proved so unpopular, it was repealed less than two years later, and never replaced). Other provincial initiatives were somewhat more successful, with Saskatchewan implementing a system on August 2, 1937, Québec imposing a 4% tax on July 1, 1940, BC imposing a tax on July 1, 1948, New Brunswick on June 1, 1950, and Newfoundland by November 15, 1950. PEI and Nova Scotia waited until January 1, 1959 and July 1, 1960, respectively. Ontario and Manitoba became the last provinces to implement RST systems, with Ontario's tax applying on September 1, 1961, and Manitoba's applying on June 1, 1967.

“ 3 ”

For everyone with *wet seats*, “Voluntary Disclosures” Will Help You.

MILLAR KREKLEWETZ LLP

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

Why Did They Evolve the Way They Did ? – Some Constitutional Limitations. In understanding how current RST systems operate, it is useful to observe that each system evolved within constitutional limitations imposed on the provinces by s. 92(2) of the *Constitution Act, 1867* – formerly the *British North American Act.*

Constitutionally, provinces are limited to “Direct Taxation within the Province in order to the raising of the Revenue for Provincial Purposes”.

Understanding the scope of the limitation is useful. “Direct taxation” is generally accepted as a tax imposed on the person who will ultimately bear it, and was set out by the economist John Stuart Mill's as follows:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs ... Direct taxes are either on income or on expenditure ...

While a number of constitutional decisions were taken on a number of provincial attempts to tax such things as fuel and tobacco, one of the more important was the Privy Council’s decision in *Atlantic Smoke Shops Ltd. v Conlon*, (1943) A.C. 550. The Court had to consider the constitutionality of New Brunswick's tax on purchasers of tobacco, and then set out the following standard for assessing an indirect or direct tax:

> It is a tax which is to be paid by the last purchaser of the article, and, since there is no question of further resale, the tax cannot be passed on to any other person by subsequent dealing. The money for tax is found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact re-sells it. If so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and far-fetched, while for the purpose of classifying the tax, it is the general tendency of the impost which has to be considered.

Thus the crux of the matter fell to determining whether the “general tendency” of the tax was such that it would be borne by the person on whom it was imposed. Not surprisingly, the constitutional validity of a “retail sales tax” was eventually upheld by the Supreme Court of Canada (“SCC”).[11]

> **Example.** A simple example of a “indirect tax” would be one imposed on a good that was purchased *for resale*. Since the initial purchaser (e.g., a wholesaler) would be taxed, but would also be generally expected to resell the TPP, and recover that tax in its purchase price, there could be seen to be a general tendency that the tax imposed on the wholesaler would be passed and borne by a another person (i.e., the retail purchaser). That fact makes the tax an “indirect” one – and one which none of the Provinces are constitutionally capable of levying.[12] It was probably with this concern in mind that Quebec – when making the transition from its *Retail Sales Tax Act* to its now partially harmonized QST – decided to employ the concept of “non-taxable supplies” for the purpose of recognizing instances where a provincial tax ought not be the charged on purchases acquired by businesses for purposes of resale. The concern was likely that if the QST were imposed on these purchases, it might well be considered a indirect tax – even though businesses would be entitled to a refund of the tax paid on most of their inputs.

Inter-Jurisdictional Comparisons

The following description discusses in general how the existing RST systems operate. While an attempt has been made to canvass all existing RST systems at every stage, there is an obvious focus on the RST system currently in place in Ontario.

What are their Common Concepts ? It was only with reference to this base constitutional jurisprudence that Canada’s “old generation” RST systems were formulated. Accordingly, it is not surprising that each of the remaining five RST systems have a number of very common elements – many of which can be directly related to their constitutional antecedents. What are some of the common elements ?

First and foremost, one sees that all of the RST systems are (1) aimed at imposing taxes on *the final consumer or user* of the property or services being taxed. Thus while there may well be significant differences between the structures of the taxing systems,[13] or the tax bases or the tax rates, each RST system can be seen to apply a tax at the “consumer” and “user” level .[14]

Voluntary Disclosures

Key Points

- Only available if "Voluntary"
- Must be "Complete" and include Taxes & Interest
- Benefit: No Additional Penalties or Prosecution
- Use a Lawyer

MILLAR KREKLEWETZ LLP

QUESTIONS ?

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

If other generalizations can be made, most RST systems also (2) apply only if the TPP or taxable services are acquired within the province for "consumption" or "use" within the province, or acquired elsewhere, but brought into the province for consumption or use therein; (3) levy the tax directly on the retail purchaser/consumer, but require "collection" of the tax by vendors, as "agent" of the province, and under threat of "penalty" for non-collection; (4) contain either special exemptions for purchases for "resale", or leave these untaxed in the first place; and (5) contain special rules for determining other applicable exemptions.

How do they differ from the QST & GST/HST ? – Some Principal Differences. While the RST systems have some commonality, there are two main differences between these systems and their QST or GST/HST counterparts: the *comparatively narrow* tax base used by the RST systems, in comparison to their QST or the GST/HST counterparts; and over-all focus of the tax and provisions made for universal credits for business inputs.

Narrower Tax Bases. The most obvious is the differences in the respective tax bases. While the QST and GST/HST are all-encompassing taxes, the RST systems are aimed at comparatively narrow tax bases. For example, the GST/HST is levied on virtually all tangible personal property ("TPP"), intangible personal property ("IPP"), real property, and services.

On the other hand, the various RST systems are usually aimed at levying tax on transactions involving only TPP, and certain specially defined "taxable services". (Saskatchewan's recent expansion of its tax base to include a large number of specifically defined "taxable services" has now become the exception to this general rule).

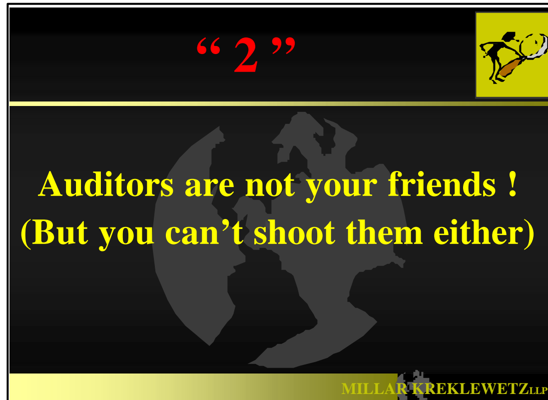
Having said that, these provinces generally employ an all encompassing definition of TPP (see *infra*) which is capable of not only capturing virtually all TPP, but what might otherwise be conceived of as a service, and even some IPP.

For example, each RST system now attempts to tax computer software. In terms of the specially defined "taxable services", most provinces attempt to tax services related to TPP (e.g., like services to install, assemble, dismantle, repair, adjust, restore, recondition, refinish, or maintain TPP), as well as certain other special-nature services.

Focus of the Tax & Treatment of Inputs. The second difference between the QST/GST/HST model and the various RST systems lies in the overall focus of the taxes, and the consequent treatment of business "inputs".

While the GST/HST, for example, is a multi-stage value-added tax, with a comprehensive system for taxing the value-added at each stage of the production process, and crediting tax paid at earlier stages of that process (e.g., through ITCs), the RST systems are aimed at (theoretically) imposing the RST only on the ultimate consumer of the taxable good or service. In other words, these systems attempt to create a "single incidence" tax. This poses a problem for business inputs, since situations arise where a business may be paying the RST on its business inputs, and then charging and collecting the RST again on the value of its production. Absent rules to "remove" this cascading of tax, the final manufactured product may well bear double and triple layers of tax.

While each RST system has some rudimentary rules providing for some limited exemptions (e.g., an exemption where TPP is purchased for "resale"), these rules are nothing like the "universal" ITC system available for commercial businesses paying the GST. Thus while the GST system ensures that every Canadian consumed good, service or intangible bears, at the most, a 7% GST component, the effective rate of RST imposed on fully manufactured Canadian TPP may be much higher than the stated provincial rate. Even more troubling, to the extent there is RST imbedded in manufactured TPP, the TPP will carry that RST even when exported from Canada.



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Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

> **Example of Cascading RST.** Consider Kco, an Ontario woodworking business, which builds and sells custom-made children's beds – miniature four-posters, in fact. Assume 10 beds are produced each year and sold for $1000 each, ultimately yielding $800 in Ontario RST (8% times $10,000).
>
> To manufacture the beds, Co purchases a number of raw materials, which can be purchased exempt of Ontario RST, as well as a taxable desk and computer for $5,000, paying an additional $400 in Ontario RST. Assuming that the RST paid on the inputs is reflected in the final selling price of the beds, the effective rate of Ontario RST on the beds is much higher than 8%, perhaps approaching 12% in this simplistic example. One effect of this "cascading" of tax is to make Kco susceptible to competition from manufactures in other jurisdictions (e.g., the Harmonized Provinces) who might be entitled to ITCs for the RST paid on their business inputs, enabling them to sell their beds on a cheaper basis.

While all the taxes are at least theoretically aimed at imposing the tax burden on the ultimate consumer of a taxable item, the manner in which that is accomplished is much different across the various systems. This is markedly different than the GST/HST system – and, for that matter, the QST system – which generally affords universal input tax credits/refunds for most business inputs.

Imposition of the Tax – The "Charging Provisions". RST is generally imposed by virtue of an all-encompassing "charging provision", like that found in s. 2(1) of the Ontario Act:

> 2.(1) *Tax on Purchaser, of [TPP]* — Every *purchaser* of *tangible personal property*, except the classes thereof referred to in subsection (2), shall pay to Her Majesty in right of Ontario a tax in respect of the *consumption* or *use* thereof, computed at the rate of 8 per cent of the *fair value* thereof.
>
> *Charging provisions in the other RST systems are found in ss. 5 and 6 of the BC Act; s. 5 of the SK Act; s. 2 of the MB Act; and s. 4 of the PEI Act.*

While not entirely obvious, the addition of specially defined words, like those in *italics* above, make such charging provisions incredibly encompassing. In Ontario, s. 1 of the Ontario Act defines, among others, the following words:

> *TPP*, to mean just about anything that can be touched: "personal property that can be seen, weighed, measured, felt or touched or that is in any way perceptible to the senses and includes computer programs, natural gas and manufactured gas".
>
> *Purchaser,* to mean not only (a) a "consumer or person who acquires [TPP] anywhere", but also persons (b) acquiring TPP for the benefit of some other person, and (c) certain persons acquiring TPP for purposes of promotional distribution. Until recently, "purchaser" also included persons acquiring a taxable service at a sale in Ontario in order to fulfil warranty or guarantees or other contract for the service, maintenance or warranty of TPP.[15]
>
> *Consumption* and *use,* to include all concepts of use, and the incorporation of something into another thing.
>
> *Fair Value,* to capture virtually every type of payment that could be expected to pass from a purchaser of TPP or services to the person from whom the TPP or services were acquired.

Sometimes definitions of certain words are contained in regulations underlying the particular legislation. Thus, for example, Ontario's Reg. 1013(1) helps define TPP by excluding things like gold and silver in their primary forms. Ontario is particularly notorious for hiding important definitions in regulations, and one can also find special definitions for "manufacturer", "contractor", "food products", and a number of other important terms.

Treatment of Certain "Taxable Services" & Specially Taxed Items. Each RST system taxes more than simply TPP. Some define a whole host of "taxable services", which in Ontario include, for example, most (i) telecommunication services, (ii) labour provided to install, assemble, dismantle, adjust, repair or maintain TPP, (iii) contracts for the service, maintenance or warranty of TPP. These are taxed at a rate of 8%, while "transient accommodation" is also defined as a "taxable service", but taxed at a special rate of 5%.

There are a number of other "specially taxed" items as well, with tax rates often much higher than the general 8% rate.

Basic Audit Strategies

Key Points

- Understand Basic Auditor Powers & Your Obligations
- Auditors can "Estimate" your Obligations
- Audit Tools: Bank Deposits; Net Worth Assessments
- Get Advice early On

MILLAR KREKLEWETZ LLP

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E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

For example, each of the following is subject to a special Ontario RST: liquor, beer and wine – s. 2(2); places of amusement – s. 2(5); "insurance premiums" – s. 2.1; "brew-your-own" beer and wine – s. 3.1; "new passenger vehicles or sport utility vehicles" – s. 4.1; "used motor vehicles" – s. 4.2; and the acquisition of a taxable service for the purpose of repairing, replacing, servicing or maintaining TPP under a warranty or guarantee or similar contract – s. 2.0.1. Like the case in BC and Manitoba, Ontario has now legislated a mandatory collections system for the RST exigible on items of non-commercial TPP accompanying returning residents to Ontario, as they cross the Canada-U.S. border.

In terms of the other RST systems, virtually all tax things like wine, spirits, and beer, telecommunications, and transient accommodation, but there are still some significant differences. BC and PEI tax "legal" and "professional" services, respectively, and Manitoba taxes certain types of "electricity".

As mentioned previously, Saskatchewan has recently taken this approach to an extreme, and now applies its RST against a wide variety of professional services.

Timing of the Tax. A pre-requisite of every valid tax is some indication as to when a validly imposed tax is *payable*. The general rule in most RST systems is that the tax is payable at the time of the sale, and Ontario's rule is found in s. 2(6) of the *RSTA*:

> 2(6) *When Tax Payable* — A purchaser shall pay the tax imposed by this Act at the time of the *sale*, or the promotional distribution of an admission.
>
> *Timing provisions in other RST systems are s. 5 of the BC Act; s. 5 of the SK Act; s. 2(2) of the MB Act; and s. 7(1) of the PEI Act.*

Sale is, like the other terms defined in s. 1 of the Ontario Act, defined in the broadest sense, and includes, in the case of TPP, "any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, including a sale on credit or where the price is payable by instalments, or any other contract whereby at a price or other consideration a person delivers to another person [TPP]".

In the case of a "taxable service", *sale* is the "provision of any charge or billing, including periodic payments, upon rendering or providing or upon any undertaking to render or provide to another person a taxable service". Thus the general rule becomes as follows: tax is usually payable up-front.

Timing of RST on Leases. A special "timing" rule is usually found for leases of TPP which, by their very nature, do not involve the up-front acquisition of property. In most RST systems, the rule is like that found in s. 2(7) of the Ontario Act, with tax payable at the time of the rental payment, or other consideration paid under the lease as, for example again in Ontario, the payment on the exercise of a "purchase option".

Amounts Included in the Tax Base. The existing RST systems use one of three measures for determining what amounts are taxed: the "fair value" standard in MB, ON, PEI; "value" in Saskatchewan; and "purchase price" in BC.

While there are a number of legislative "additions" to each of these terms (usually making it necessary to review each definition), some generalizations can be drawn.

GST. First, unlike the situation in Quebec – where GST is included in the QST tax base – GST is not generally included in any sales tax base in existing RST systems (the only exception being PEI). Each RST system does include all other federal customs or excise duty in its tax base, however.

Financing Charges. So long as financing charges are broken out (e.g., "unbundled") in the price or invoice for taxable TPP or services, they are not required to be included in the sales tax base in any of the existing RST systems. Where bundling of financing charges is occurring, tax will generally apply on the whole amount being charged for the taxable TPP or services, including the bundled financing charges.

“ 1 ”

The Assessment is NOT the end of the Road !

(But the Road is a Long Long Toll Road)

MILLAR KREKLEWETZ LLP

QUESTIONS ?

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

Delivery Charges. The tax status of delivery charges across the RST systems is rather complex. Most other RST systems (e.g., BC, SK, MB) will require RST to be charged on any delivery charges made in respect of TPP sold on a “delivered basis” (i.e., “FOB purchaser”), but allow for some relief for delivery charges in respect of TPP sold on an “FOB vendor” basis. (In some cases, as in SK and MB, delivery charges for FOB “vendor” sales are taxed if the TPP originates from outside of the particular province). Ontario taxes virtually all types of delivery charges, whether or not broken out, and whether or not the sale is made FOB “purchaser” or “vendor”.

Installation Charges. Most RST systems tax installation charges, whether bundled with contract prices for taxable TPP, or broken out separately. This is generally accomplished by defining such installation to be a “taxable service” in its own right. Saskatchewan, which was once the only province not to include installation as a “taxable service”, recently moved to close that loop-hole, and now defines “repair and installation services” among the various “taxable services” that it began to tax as part of its 2000 budget.

Treatment of “Trade-ins”. A number of RST systems, like that in Ontario, Manitoba and PEI allow “trade-ins” of TPP to reduce the tax base of the new TPP sold. BC and Saskatchewan do not allow for that treatment, although BC does allow limited “trade-in” treatment on purchases of “passenger vehicles.” Where relief is available, some special rules and conditions would generally apply.

> *For SK’s administrative prohibition for Trade-In, see s. 8(14) of the SK Administrative Guides.*

Temporary Imports. Most RST systems have special rules for TPP that is temporarily imported to the province. Since the general importation rules would require a self-assessment of RST on the full value of the imported TPP (see *infra*), these “temporary import” rules are relieving in nature, and usually result in a partial taxation of the imported TPP.

While the rules may differ, each of the other RST systems offer this same type of relief, and generally tax the TPP by applying 1/36 of its value to the regular tax rate, for each month the TPP is employed in the province.

In Ontario, for example, if TPP is imported for less than 12 months, tax is payable on a tax base equal to the “net book value” of the TPP, divided by 36, and is payable each month the TPP is present in Ontario.

Where equipment is leased, the RST systems generally attempt to tax the equipment on the basis of the lease payments being made.

> *Temporary importation rules for other RST systems are in s. 11 of the BC Act and Reg. 2.38; s. 5(9.1) of the SK Act and Reg. 1(17.3); s. 17 of MB Reg. 75/88R; s.2(21) of the Ontario Act and Reg. 1012(15.4); and s. 37 of PEI Reg. EC262/60.*

Most of the RST systems also deal expressly with the temporary importation of “big ticket” items like aircraft, railway rolling stock, and inter-provincially used transportation equipment. (In some systems, some of these items are completely exempt).

Exemptions. Each RST system imposes its own distinct set of exemptions. There are some commonalties among the exemptions afforded by the various RST systems, with the two most important ones being for *TPP purchased for resale* and *TPP delivered outside of a province by a vendor.* These exemptions exist for obvious constitutional reasons since in the absence of a “resale” exemption, the general tendency of the RST might well be interpreted as an “indirect” one; and in the absence of an exemption for TPP delivered “outside” a province, there might be some issue as to whether the RST was a direct tax “within the province”. Some other exemptions that are generally common across each of the existing RST systems are as follows: [16]

> Books; food and beverages for human consumption; children’s clothing and footwear; most motive fuels (for reason only that they are taxed under separate provincial systems); fuel oil; wood; certain pharmaceuticals and medical supplies (usually if prescribed); agricultural feeds and certain purchases by farmers; raw materials and components for use in manufacturing; and catalysts and direct agents.

Administrative & Court Appeals

Key Points

- Assessment can be "Objected to"
  - Involves "appeal" to different Government Branch
  - GST – Within 90 days of Assessment
  - RST – Within 180 days of Assessment
- Further Appeal to Court for RST and GST
- Costly → Ounce of Prevention worth Pound of Cure

MILLAR KREKLEWETZ LLP

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Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

Some notable exemptions specific to particular provinces are:

> BC: human organs, tissue, and semen; portable buildings manufactured and sold in the province for non-residential use; prescribed energy conservation equipment and materials; prototypes; repossessed TPP on which tax has been paid; 2-wheel bicycles; vitamins and dietary supplements; and, since 2001, production and manufacturing equipment.

> SK: beer, wine, and spirits; mail order records, cassettes, and tapes when purchased by subscription; and prototypes for R&D purposes.

> MB: flood control sandbags; private purchases of used TPP (except snowmobiles, aircraft and registrable vehicles); used furniture valued at $100 or less; and prototype equipment for mining

> ON: Gifts of cars between family members; liquor, beer, or wine purchased for consumption at a special event; R&D TPP; and production and manufacturing equipment.

> PEI: anti-pollution TPP; electricity production equipment; equipment to produce telephone service by telephone utilities; and production and machinery equipment.

Notably present in Ontario and British Columbia is an exemption for "production machinery and equipment". While Ontario was historically the only province to have afforded such an exemption, British Columbia announced a similar exemption as part of its 2001 budget, which change was effective July 1, 2001.

Exemptions by Nature of the Purchaser. Most RST systems have special exemptions by nature of the purchaser, although these are diverse. For example, the federal government (or related departments) is RST exempt in Saskatchewan, but taxable elsewhere. Similarly, provincial and municipal governments (including all departments, boards, and commissions) are generally taxable in all RST systems.

Some provinces, like Ontario, have special exemptions for certain TPP purchased by certain hospitals, and certain additional exemptions for certain types of hospital equipment, when purchased by a hospital.

Exemption Permits. Most RST systems require "purchase exemption certificates" ("PECs") to be provided by purchasers seeking to claim an exemption, whether the exemption be for "resale" or otherwise. In Ontario, the PEC can be included in the purchase order, letter or on Ontario's prescribed form, but must be signed by the purchaser. A customer may submit a single or blanket PEC, with blanket PECs valid for up to four years from the date of issue. The purchaser would make reference to the blanket PEC when making subsequent purchases of items which it covers. The customer's vendor permit number should generally be shown on the PEC. (Ontario does have the concept of a "G" permit holder, who are not required to issue PECs; all that is required is the G Permit holder provide the vendor with the G Permit number, although it might well be advisable for the vendor to obtain a copy of the permit.)

Vendor Registration & Collection Requirements. Each RST system creates a vendor-registration and vendor-collection system. Under these systems, a vendor selling taxable TPP or taxable services in the province is usually required to register for the system (i.e., obtain a "RST licence", often called a "vendor permit"), and thereafter to begin charging, collecting and remitting RST in respect of its taxable supplies. In Ontario, for example, the relevant rule is found in s. 5 of the Ontario Act, which provides as follows:

> 5.(1) *Vendor Permits* — No vendor shall sell any taxable [TPP] or sell any taxable service or own or operate any place of amusement the price of admission to which is taxable unless the vendor has applied for, and the Minister has issued to the vendor, a permit to transact business in Ontario and the permit is in force at the time of such sale.

> *Collection requirements in other RST systems are s. 92 of the BC Act; s. 4 of the SK Act; s. 5 of the MB Act; and s. 13 of the PEI Act.*

Issues with Non-Resident Collection. The traditional issue relating to vendor collection requirements under RST systems is when and why a non-resident vendor, with little or no connection to a particular province, needs to register under that province's RST system. The answer comes, in part, from the definition of "vendor" employed in each RST system.

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

In BC, for example, the definition of "vendor" provides as follows:

> "*vendor*" means a person, including an assignee, liquidator, administrator, receiver, receiver manager, trustee or similar person, who, in the ordinary course of the person's business, in British Columbia, sells [TPP] to a purchaser at a retail sale in British Columbia.
>
> *"Vendor" is defined in s. 3(o) of the SK Act; s. 1 of the MB Act; s. 1 of the Ontario Act; and s. 1(t) of the PEI Act.*

With the exception of Ontario, all other RST systems contain a similar "carrying on business in the Province" wording. Ontario's provision does not require the vendor to be carrying on business "in Ontario", but that requirement is administered in practice – as it would probably have to be in order for Ontario's registration requirement to be within its constitutional authority. The Ontario Act defines "vendor" to mean, among other things, "a person who, in the ordinary course of business, (a) sells or licenses [TPP], [or] (b) sells or renders a taxable service ...".

Extra-territorial Registration Provisions. Some provinces (like BC, Manitoba and Quebec) have recently employed extra-territorial registration requirements, which effectively deem out-of-province vendors to be "vendors" required to be registered for local provincial sales taxes, on the basis of certain activities related to the province (e.g., soliciting goods for sale, and sending those goods into the province). As the constitutional (and practical) effects of these measures are uncertain, readers are cautioned to seek professional advice on these matters.

Carrying on Business. As indicated above, whether one "carries on business" in a particular jurisdiction falls to be determined by the facts of the situation. A number of legal tests have also been developed, largely from jurisprudence under the *Income Tax Act* ("*ITA*"), as reviewed above. As most readers will already appreciate, that jurisprudence suggests that to determine whether a person is "carrying on business" in Canada requires a factual-based analysis, focused on a couple of primary factors, and a inexhaustive set of secondary factors.[17]

The two primary factors are: (a) the place where the contract for the supply was made; and (b) the place where the operations producing profits take place. In terms of the "place where a contract is made", the jurisprudence generally accepts that the important elements of the contract are its offer, and its subsequent acceptance, and that the place the contract is "accepted" is the place where it was made.

Voluntary Registration. Each RST system allows non-residents selling TPP or taxable services into a province to *voluntarily* register, which sometimes, is the path of least resistance for persons wishing to carry on business on a national scale, although located in one particular province (or, indeed, located outside of Canada).

Collection Provisions. Once registered, each RST system imposes a *collections* obligation on vendors of the TPP or taxable services, always imposing this obligation as an "agent" of the Crown. In Ontario, this requirement is found in s. 10:

> 10. *Vendor to be Collector* — Every vendor is an agent of the Minister and as such shall levy and collect the taxes imposed by this Act upon the purchaser or consumer.
>
> *Vendor collections obligations are s. 93(1) of the BC Act; s. 8.1 of the SK Act; s. 9(2) of the MB Act; and s. 19 of the PEI Act.*

While constitutionally limited to imposing "direct taxes" on consumers, the RST systems generally enforce a vendor's obligations to collect tax by imposing penalties for non-compliance. Ontario's "vendor non-compliance" penalty is found in s. 20(3) of the Ontario Act, which provides as follows:

> 20(3) *Penalty for Non-Collection of Tax* — The Minister may assess against every vendor who has failed to collect tax that the vendor is responsible to collect under this Act a penalty equal to the amount of tax that the vendor failed to collect, but, where the Minister has assessed such tax against the purchaser from whom it should have been collected, the Minister shall not assess the vendor.
>
> *While sometimes only imposing a "deemed amount of tax collected by not remitted", similar provisions can be at s. 116(1) of the BC Act, s. 58 of the SK Revenue And Financial Services Act; and s. 22 of the PEI Revenue Administration Act.*

There is a general four year limitation on s. 20(3) penalties – see s. 20(5) – although there is no limitation period in cases where the vendor's non-compliance is attributable to neglect, carelessness, wilful default or fraud. (In such cases, an additional 25% penalty can also apply: see s. 20(4)).

There is currently some issue in my mind as to whether a penalty assessed against a vendor can be "recovered" as tax by a vendor from a purchaser.

There is also currently some issue whether such penalties lie where the vendor has been duly diligent.

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

Ontario generally takes the position that a vendor can pursue a purchaser for such recovery, but there are technical problems in the Ontario Act suggesting that anything collected from a purchaser on account of "tax" would have to be remitted to the Ontario Ministry of Finance in any event. Additionally, contract law principles would seem to make it difficult for a vendor to pursue a purchaser for a "penalty" imposed on it by statute. Accordingly, there have been occasions where I have suggested to purchasers that vendors seeking recourse for "penalties" levied under section 20(3) may be without valid claims against the purchasers.

Assessments & Appeals. Each RST system is based on voluntary compliance, as enforced by substantive audit activity. Assessments are, as would be expected, limited by statutory limitation periods, generally at least 4 years in length in Ontario and PEI, but up to 6 years in BC, Saskatchewan and Manitoba – although in some cases there is a 3 year limitation imposed on assessing vendors for failure to collect tax. In cases of wilful default or fraud, the statute of limitations is always extendable, and in some RST systems (most notably, Ontario), the limitations period can be extended to instances only of misrepresentation that is attributable to "neglect, carelessness or wilful default".

Statute of limitations rules are found at s. 115 of the BC Act; s. 18 of the Ontario Act; and s. 38 of Revenue Tax Act Regulations made under the PEI Act. While the SK and MB Act's do not specify a period of time after which a Notice of Estimate or Assessment for a particular year may not be issued, In SK, Estimates are generally assumed to be limited to a six-year period under SK Limitation of Actions Act. In MB, Assessments are generally limited by administrative practice to "two years" prior to the commencement of the audit, although the Assessments may be up to 6 years for "own use" situations.

Appeal Rights. All RST systems provide for appeal rights to assessments issued, both at the administrative level, and to the provincial superior courts.

Timing for the appeals ranges from 90 days in BC (s. 118(2)); 30 days in SK (s. 61 of the SK Revenue and Financial Services Act; 60 days in MB (s. 18(1)); 180 days in Ontario (s. 24); and 60 days in PEI (s. 9).

Generally speaking, RST assessed is payable on issuance of the Notice of Assessment, and must be paid irrespective of administrative or judicial appeals. Under some RST systems (e.g., SK), a notice must first be issued (i.e., after the appeal is commenced) before payment becomes mandatory. Where an appeal is won, the amounts paid are repaid, with interest.

Directors & Officers Liability. Each RST system contains a special provision by which a director (or sometimes officers or mere agents) can be made personally liable for a corporation's tax debts. In a number of instances, however, there are either limitations placed on the administration's ability to pursue directors (e.g., unsuccessful attempts must first be made to collect the tax liability from the corporation), and/or the director's are given the ability to make out complete "due diligence" defences.

Directors' Liability provisions are found at s. 48.1 of the SK Revenue and Financial Services Act; s. 22.1 of the MB Revenue Act and s. 24.1 of the MB Act; s. 43 of the Ontario Act; and s. 22.1 of the PEI Revenue Admin. Act.

Voluntary Disclosure Programmes. A number of RST systems have voluntary disclosure programmes, aimed at allowing taxpayers or vendors with RST exposure to come forward on a voluntary basis and, in return, to avoid civil penalties or criminal prosecutions in respect of the liability. In effect, then, all that would be payable would be the net tax owing, plus statutory interests charges. In all instances, the voluntary disclosure is required to be "voluntary" – in the sense that it is not in any way prompted by a contact by a particular provincial administration – and "full", with most systems requiring full payment of the tax and interest. Currently, all RST systems with the exception of PEI have some form of voluntary disclosure or another. Saskatchewan is currently the only jurisdiction which waives *both interest and penalty* on a voluntary disclosure.

Waiver of Interest and Penalty. Like the federal situation under the GST/HST legislation, some RST systems are beginning to be augmented with legislative provisions allowing for the waiver of interest and penalties. For example, s. 58.1 of the SK *Revenue and Financial Services Act* allows Saskatchewan to waive or cancel all or any part of any interest or penalty otherwise payable by a vendor or consumer. Absent these sorts of provisions, the only relief would be tax remission, which is generally done at the Executive Level of government, by Order of Council.

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

GAAR. Currently Manitoba is the only RST system with any semblance of a "general anti-avoidance rule" (see s. 245 of the *ITA*).

Self-Assessment Obligations. A hallmark of each RST system is a series of rules regarding self-assessment obligations in certain instances. While many RST systems now incorporate international collections agreements for the collection of RST on non-commercial importations, the RST payable on commercial importations is generally left up to the importer, both in terms of TPP imported from another country, and TPP imported from another Canadian province or territory. Generally speaking, however, the self-assessment obligation is imposed only on persons who ordinarily reside in the particular province.

Self-assessment is also required in most cases where TPP is "manufactured" for "own use", or otherwise acquired on an exempt basis (e.g., for "resale"), but thereafter committed to a different use. When such TPP is permanently put to a taxable use, the user generally falls into the definition of "purchaser", and is required to self-assess and remit tax based on the fair value of the TPP at the time of the change in use. Accordingly, vendors who permanently withdraw TPP from inventory for business or personal use must account for tax on the fair value of the TPP at that time. Special valuation rules apply to printed matter and certain other TPP manufactured for own use.

Treatment of Business Organizations and Reorganizations. The treatment of business organizations and reorganizations is also particularly complex. Bear in mind here, that the focus is on the treatment of certain sales of TPP resulting from such transactions, since the transfer of 'shares' would never generally be expected to give rise to RST liability, since such a transaction would amount only to a transfer of an "intangible". The issue arises, then, in the context of TPP, usually situated in a province, and usually tax-paid, that is to be transferred to another corporation as a result of a business organization or reorganization. While I have summarized some of the treatments across RST systems below, there are often a number of exceptions and additional conditions and requirements to the "general" rules. Accordingly, the rules in each particular RST system ought to be consulted before considering the full RST treatment afforded to any of these transactions.

Amalgamations. As a general rule, the transfer of TPP by virtue of an *amalgamation* is generally either legislated to be exempt, or treated as exempt through administrative practice.

Wind-Ups. The transfer of TPP by virtue of a *wind-up* is generally either legislated to be exempt, or treated as exempt through administrative practice in every RST system other than Ontario. Ontario has a special rule which taxes the transfer unless the particular corporation being wound-up has previously paid tax in respect of its consumption or use of the TPP.

Related-Party Transfers. Each RST system has rules aimed at relieving tax from TPP transferred between related parties. The rules, however, can often be quite difficult to meet. For example, most RST systems require at least a 95% shareholding between corporations before they can be considered to be related.

Bulk Sales Transactions. Most RST systems have provisions aimed at ensuring that purchasers of TPP "in bulk" (e.g., a business being acquired through the acquisition of "assets") obtain a retail sales tax clearance certificate from the vendor indicating that all sales taxes have been paid by the vendor. The vendor is then required to obtain the same from the particular provincial tax administration, thereby ensuring that in the "sale by way of assets" situation, the particular province does not suffer tax leakage because a tax debtor divests itself of all its assets. (Normally, the only time a purchaser would acquire a vendor's liabilities – for taxes or otherwise – would be in the instance where it purchased a business by way of shares, thereby acquiring all assets and all liabilities). Where "bulk sales certificates" are not obtained, the purchaser is made personally liable for any sales taxes due. Currently, the RST systems in all of the RST Provinces have bulk sales requirements.

Bulk sales provisions can be found in s. 99 of the BC Act; s. 51(2) of the SK Revenue and Financial Services Act; s. 8 of the MB Act; s. 6 of the Ontario Act; and s. 56 of the PEI Act.

Government Structure & Resources. The last point in terms of the structures of the various RST systems is the structure of the bureaucratic agencies overseeing the systems, which can often play an important part in the informal resolution of assessment and appeal matters.

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

In Ontario, for example, the Ontario Act falls under the auspices of the Ministry of Finance, and within that Ministry, the Retail Sales Tax Branch, administers retail sales tax policy set by the Ministry. Although the Retail Sales Tax Branch has input into legislation, largely through its Tax Advisory section (and in view of its practical experience), there is another body, called the Tax Design and Legislation Branch of the Office of the Budget and Taxation which has the primary input into the drafting of legislation and the wording of exemptions.

In terms of the day-to-day administration of the Ontario Act, the Audit Branch, Appeal Branch, and Collections Branches all have separate parts to play, as does the Special Investigations Branch. Separate from each of these branches, is the Office of Legal Services.

Needless to say, it can sometimes get quite involved determining just who in the Ministry of Finance has the "call" on even the most simple of audit, assessment or appeal issues.

Often times, in order to resolve matters at the Appeals or Court stage of the assessment process, consensus is need from up to 3 or 4 separate branches (e.g., the Office of Legal Services, Appeals, Tax Advisory, and possibly the first-line Audit Branch). When Branches disagree, the Deputy Minister and his ADM are often required to sign-off on the final decision.

Resources. While secondary resources for determining the application of RST systems are notoriously lacking, most RST administrations attempt to publish at least their view of how the particular legislation is to be administered. In Ontario, for example, this is done through separate series of *Sales Tax Guides* and *Information Bulletins* and through the limited public dissemination of a RST Handbook called *UOST* – short for the "Understanding Ontario Sales Tax" Handbook.

While *Sales Tax Guides* are published as needed, on a topic by topic basis (e.g., Ontario Sales Tax Guide No. 210: *Partnerships*), *Information Bulletins* are usually published after an Ontario budget, or on changes to regulations, outlining changes in the law and administrative practice. *UOST* is a handbook initially compiled by the Retail Sales Tax Branch as a training aid, and as an internal reference manual for the application of Ontario RST. In many respects, the manual is the most detailed piece of "general" information available in terms of specific Ontario administrative policies. While UOST was once available in electronic form, Ontario has since made it "unavailable", ostensibly on the basis that it was "out of date".

My understanding is that an electronic version continues to be updated and in use at the Retail Sales Tax Branch, and it may well be that an electronic version of UOST is available – albeit, only to those willing to avail themselves of Ontario's *Freedom of Information Act.*

Finally, Ontario's Retail Sales Tax Branch maintains what I understand to be a formidable collection of "unsanitized" written rulings, issued and catalogued on a number of subjects. Given that the rulings contain "confidential information", Ontario has traditionally resisted publishing them, even in a semi-sanitized form. While some rulings are now being published by Ontario, it is my understanding that they are not representative of all of the issued rulings to date. While these and some other rulings are commonly distributed amongst industry, caution should always be taken in relying on them, since the Ontario Ministry of Finance has no compunction in observing that a ruling letter issued to one person is not binding upon the Ministry in respect of the activities of another person – even if very closely related.

Other RST systems also have detailed governmental sources of information, although perhaps BC is the only system that comes close to Ontario in terms of the availability of that information. BC may well have more accessible information, since its own internal training manual ("TIM" - Tax Interpretation Manual) is widely available, and in electronic format.

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

ENDNOTES

PART I

1. Special rules exist for supplies of long-term accommodation. Unless otherwise expressly dealt with, the balance of these Materials and the Presentation will assume that no long-term accommodation is provided by the Readers.

   If the assumption is incorrect, the rules described herein will be significantly different, as "exempt" supplies may be occurring, leading to significantly different GST treatments. Seek advice if you are unsure of who to deal with your situation.

2. The following factors will be relevant in determining whether a "residential unit" is affixed to its site:
   - the unit is connected to utilities;
   - the unit is placed on concrete pads and skirted;
   - the unit is left in place for an indefinite period of time;
   - the unit is available for use on a year round basis; and
   - the unit is used often enough to constitute a place of residence.

3. See for example, paragraphs 64 to 67 of GST/HST Memoranda Series section 19.2.3, *Residential Real Property - Deemed Supplies*.

4. See for example Technical Interpretation Bulletin B-087, *GST/HST New Residential Rental Property Rebate*.

PART II

1. For "domestic" supplies, the principal exceptions are goods, services, or intangibles enumerated in Schedules V or VI of the *ETA*. For "imported" goods, the principal exception is goods enumerated in Schedules VII of the *ETA*.

2. "Registered" or "registered under the *ETA*" is used to refer to persons who are registered in accordance with subdivision d of Division V of the *ETA*, which establishes who must be registered for the GST, and how they must register.

3. Bear in mind that a "taxable" supply will include the sorts of "zero-rated" supplies that are enumerated in Schedule VI of the *ETA*. The difference between the two is that a simply "taxable" supply is taxed at a rate of 7%, while a zero-rated supply is taxed at a rate of 0% (effectively removing the GST from the zero-rated supply).

4. In reviewing the general and specific rules discussed below, and in determining whether a particular taxable supply is made "in Canada" or "outside Canada", remember the significance of these rules: (1) Where a taxable supply is made "inside" Canada it will be taxable under Division II, and not generally taxable under any other provision in the *ETA* (although there are some exceptional situations where double-tax can occur); (2) If, on the other hand, the taxable supply is made "outside Canada", it will be outside the purview of Division II tax, and would only be subject to GST, if at all, under Division III (imported goods) or Division IV (imported services and other intangibles).

5. Note the distinction between charging, collecting and remitting the Division II GST on supplies made by the non-resident "in Canada", and the non-resident's obligation to pay GST at the border on goods imported to Canada under Division III. Many non-residents incorrectly assume that the "special non-residents rule" referred to just above somehow relates to the Division III obligations regarding imported goods. It does not. Accordingly, one could have a situation where, as a non-resident, one is entitled to deliver goods to Canadian customers *without* charging GST to the Canadian customer (i.e., because of the application of the non-residents rule in s. 143), but still required to pay the GST at the border because of the application of Division III.

   Many non-residents are confused in the application of the GST in these situations, increasing the likelihood that the GST rules are either not being fully complied with, or that some of this "double" GST is not being fully unlocked (see *infra*).

6. Also outside the scope of this presentation is a full discussion regarding the "registration" requirements in the *ETA*. Suffice to say that s. 240 of the *ETA* requires every person making taxable supplies in Canada in the course of a commercial activity to register for GST. Limited exceptions exist, including exceptions for certain "small suppliers" making less that $30,000 of supplies annually, and for non-residents who do "not carry on any business in Canada" – which dovetails with the special rule in s. 143 discussed just above.

7. Section 214 provides that Division III tax shall be paid and collected under the *Customs Act* as if the tax were a customs duty levied on the goods. In turn, the *Customs Act* provides that the person who "reports" the goods in accordance with that Act (i.e., the importer of record), is jointly and severally liable, along with the owner, for the duties levied on the imported goods. Accordingly, Division III tax is often applied to persons not actually owning imported goods, but merely reporting them for customs purposes.

8. Persons engaged in "commercial activities" are generally entitled to claim full input tax credits ("ITCs") for the GST paid, under s. 169 of the *ETA*. As this can only be done on the regular GST return following the day on which the GST became payable, there is often only a cash-flow issue involved in the payment of the GST. On the other hand, persons engaged in "exempt activities" are generally precluded from claiming ITCs, making the GST they pay unrecoverable, and a "hard cost". (In certain instances, where the exempt person is also a "public service body", limited rebates may be available for the GST paid – these would include, for example, municipalities, universities, schools, hospitals and charities, but not financial institutions).

9. This is consistent with the general policy in the GST legislation of removing all taxes and artificial costs from the cost base of Canadian exports, in order to eliminate the competitive disadvantages that would face Canadian exporters in the international markets as a result of these artificial costs.

PART III

10. The existing RST systems are as follows: in BC, the *Social Services Tax Act* applies at a general rate of 7%; in SK, the *Provincial Sales Tax Act* applies at a rate of 6%; in MB the *Retail Sales Tax Act* applies at a rate of 7%; in ON the *Retail Sales Tax Act* applies at a rate of 8%; and in PEI, the *Revenue Tax Act*, 1988 applies at a rate of 10%.1

    The Ontario *Retail Sales Tax Act* will be referred to here as simply the Ontario Act. Other provincial legislation referred to above will be referred to in the same way (e.g., the BC Act, the SK Act, etc.).

11. See *Cairns Construction Ltd. v. Government of Saskatchewan,* [1960] S.C.R. 619.

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ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

ENDNOTES

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(Continued)

12. The logical result of this is the creation of purchase exemptions in every RST systems which, one can see, are not so much a matter of provincial generosity as they are a constitutional imperative.

13. The structures of the taxing systems in ON, PEI and MB tend to be very similar perhaps due to the timing of their respective taxes (all enacted within about 7 years of each other in the early 1960s). BC and SK, with somewhat older systems, tend to be quite different in structure, although containing each of the (constitutionally required) elements described just above.

14. While QB's QST is a sales tax system levied on purchases at all levels of the production and distribution chain, business purchasers are usually afforded refunds on business inputs, helping confirm that the QST is intended to be borne by the ultimate consumer or purchaser.

15. The recent addition of a separate charging provision in section 2.0.1 of the Ontario Act has recently obviated the need for defining purchaser in this manner, and these words were removed from the definition: see s. 2.0.1 of the Ontario Act, as added by 2000, c. 10, s. 24, effective May 3, 2000.

16. Please note that a number of exceptions and conditions apply to some of these exemptions, meaning that in each case, the actual legislative rules ought to be consulted prior to determining if a particular supply is an exempt one.

17. According to the jurisprudence, other factors could include: (a) the place where the TPP was delivered, (b) the place where the payment was made, (c) the place where the TPP in question was manufactured, (d) the place where the orders were solicited, (e) the place where the inventory of the TPP is maintained, (f) the place where the company maintains a branch or office, (g) the place where agents or employees, who are authorized to transact business on behalf of the non-resident person, are located, (h) the place where bank accounts are kept, (i) the place where back-up services are provided under the contract, and (j) the place in which the non-resident person is listed in a directory.