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BUDGET 2021: PROPOSED GST/HST AMENDMENTS

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E-Commerce Transactions

Why the Change?

In the Federal Government's Economic Statement, released on November 30, 2020, (the "**Economic Statement**"), the government proposed a streamlined GST/HST registration and compliance regime for foreign businesses that make taxable supplies of services and property through e-commerce into Canada (the "**E-Commerce Regime**"). The E-Commerce Regime was proposed to come into force July 1, 2021. The E-Commerce Regime, when in force, will require foreign vendors, that would not otherwise have to register for the GST/HST because they did not carry on business in Canada (the "**Traditional Regime**"), to register to charge and collect GST/HST from consumers.

While the government already imposes GST/HST directly on consumers in respect of the types of e-commerce transactions described above, consumers do not generally self-assess and pay GST/HST, as required, nor does the government have a practical way of enforcing compliance. As a result, the government has suffered material losses of tax revenues.

The E-Commerce Regime is based on the model e-commerce VAT rules developed by the Organisation for Economic Co-operation and Development, which were previously adopted for Quebec Sales Tax purposes in 2019 by the Quebec Government, and represent an effective way to impose and collect GST/HST on imported taxable supplies of services and intangible personal property ("**IPP**") (e.g., subscriptions to access specialty streaming networks).

Unlike with respect to imported goods, the government cannot enforce GST/HST collection on e-commerce transactions at the border. The Traditional Regime, established 30 years ago, has not kept pace with the impact of technology on retail sales, which has disrupted the traditional "bricks and mortar" model and resulted in a seamless, integrated, international marketplace (accelerated by the physical restrictions imposed on individuals during the COVID-19 pandemic).

Under the Traditional Regime, unregistered, foreign retailers of consumer services and IPP enjoyed a competitive advantage over registered, Canadian retailers that are required to charge and collect GST/HST.

Consumers could make purchases from foreign e-commerce retailers without effectively paying any GST/HST. The E-Commerce Regime should put Canadian retailers on an equal competitive footing with their international rivals. In effect, the E-Commerce Regime breaks down the barriers to imposing GST/HST collection, reporting and remittance obligations across borders on foreign businesses.

How Will the Change Work?

A non-resident business, neither registered, nor required to be registered, for the GST/HST under the Traditional Regime, will generally have to register under the E-Commerce Regime where it makes taxable supplies of services or IPP to consumers (or other persons unregistered for the GST/HST) in Canada of more than $30,000 annually. The appropriate GST/HST rate to charge will be determined by the usual place of residence of the customers.

A "distribution platform operator" (a critical intermediary between a supplier and unregistered consumers/customers in Canada) will have to register to charge, collect, report and remit GST/HST on transactions made through the operator. A distribution platform operator "controls or sets the essential elements of the transaction between the supplier and recipient" (i.e., online marketplaces through a digital platform). A distribution platform operator could also be a person "involved, directly or through arrangements with third parties, in collecting, receiving or charging the consideration for the supply and transmitting all or part of the consideration to the supplier." A website that simply allows vendors to list their goods for sale or is solely a payment processor will not be a "distribution platform operator".

"Accommodation platform operators" that facilitate or expect to facilitate, over a 12-month period, more than $30,000 in taxable supplies of short-term accommodation in Canada, where the underlying third-party suppliers of the accommodation are not registered, will also be required to register and collect and remit the GST/HST on such supplies. An "accommodation platform operator" will be an intermediary in these transactions with a similarly critical role as a "distribution platform operator".

The E-Commerce Regime streamlines and simplifies GST/HST compliance in a number of ways. Under the E-Commerce Regime, there will be no input tax credits ("**ITCs**") allowed or netted from GST/HST collectible. There will be quarterly electronic reporting and remittance of GST/HST through a portal. A supplier may apply to the Minister of National Revenue for approval to report and remit in the foreign currency in which the supplier bills, if the currency is a "qualifying foreign currency", which includes the U.S. dollar, Euro, and any other "foreign currency that the Minister may specify." Unlike the Traditional Regime, no GST/HST security is required to be posted by a non-resident without a permanent establishment in Canada. Where a customer provides the supplier or operator with satisfactory evidence of its GST/HST registration under the Traditional Regime, the supplier/operator will not charge and collect GST/HST under the E-Commerce Regime.

What Else will Change as of July 1, 2021?

The government has also expressed concerns about uncollected GST/HST on sales of goods made by foreign, non-registrant vendors, who sell and distribute to consumers through third party warehouses in Canada (or otherwise arrange for the drop-shipment of goods to consumers within Canada). Where the vendor makes these sales through a distribution platform operator, the operator would be required to register for the GST/HST under the Traditional Regime and charge and collect GST/HST from consumers.

If goods are not sold through a distribution platform operator, the foreign vendor has to register under the Traditional Regime and charge and collect GST/HST from consumers. In order to provide the Canada Revenue Agency (the "**CRA**") with an audit trail to enforce GST/HST compliance, a fulfillment business in Canada has to notify the CRA of its business, and maintain records of its non-resident clients (vendors) and the goods stored on their behalf.

What Changed in Budget 2021 Relative to What was Announced in the Economic Statement?

In Budget 2021, the government addressed certain concerns voiced by stakeholders regarding the e-commerce GST/HST proposals made in the Economic Statement.

In order to encourage foreign vendors to register under the E-Commerce Regime, the proposed rules simplify and streamline GST/HST compliance. As a compromise to stakeholder concerns about equity and fairness, Budget 2021 relaxes the rules to provide certain limited exceptions to the general rule precluding GST/HST refunds, rebates, credits and adjustments. The exceptions include allowances for GST/HST bad debt and price adjustments, rebates of the provincial component of HST for qualifying items, and rebates for taxes paid in error.

Responding to concerns on behalf of platform operators who rely on false information from suppliers in determining whether to charge and collect GST/HST, the rules will impose joint and several liability for GST/HST on both the supplier and the platform operator. However, the platform operator will be relieved of any tax liability, to the extent that it did not charge and collect tax as the result of having reasonably relied in good faith on information provided by the third-party supplier.

Another substantive change announced in Budget 2021 is that the CRA will have the authority to register a person under the E-Commerce Regime after written notification to the person. Another change excludes zero-rated supplies (relieved from GST/HST) from the supplies during a 12-month period used to calculate whether the $30,000 threshold for the requirement to register under the E-Commerce Regime is exceeded.

The Economic Statement imposed obligations on platform operators to file annual information returns with the CRA if they facilitate short-term accommodation situated in Canada or any sale by an unregistered vendor

of goods that are located in a fulfillment warehouse in Canada. That way, the CRA can have an additional way of tracking GST/HST compliance by platform operators. Budget 2021 clarifies that this requirement is only relevant to platform operators that are registered, or required to be registered, for the GST/HST.

Budget 2021 indicates that, in accordance with best practices in other jurisdictions, the CRA will work with affected businesses and platform operators to assist them in complying with their new GST/HST obligations under the E-Commerce Regime, and will seek to administer the new regime effectively and fairly during a 12-month transition period from July 1, 2021. The CRA will exercise administrative discretion in its enforcement of the new measures if businesses and operators show that they have taken reasonable measures to comply.

Relaxation of GST/HST New Housing Rebate Conditions

Under the existing rebate provisions in the GST/HST legislation and regulations, a GST/HST New Housing Rebate is restricted if there are multiple buyers, not all of whom were related, and not all of the buyers (or their relations) were acquiring the home for use as their (or a relation's) primary place of residence. There were a number of Court cases that upheld denying the GST/HST New Housing Rebate on this basis, such as in situations where an unrelated party (perhaps a friend or a non-qualifying relation) was added to the agreement of purchase and sale (the "**APS**") and/or title to obtain mortgage financing.

Budget 2021 proposes to remove this restriction in respect of an APS for a new home entered into after April 19, 2021. Instead, the GST/HST New Housing Rebate will be available as long as the new home is acquired for use as the primary place of residence of any one of the purchasers or a relation of any one of the purchasers. Similar proposed amendments will apply to relax the conditions for GST/HST New Housing Rebates for owner-built homes.

Relaxation of Prescribed Documentary Information Requirements for ITC Claims

The existing prescribed ITC documentary information requirements become more onerous at certain dollar thresholds – (i) below $30, (ii) $30 or more, but less than $150, and (iii) $150 or more. Recognizing that these thresholds have remained unchanged since the establishment of the GST more than 30 years ago, and in order to simplify compliance for businesses registered under the Traditional Regime, the government proposes to increase these thresholds to (i) below $100, (ii) $100 or more, but less than $500, and (iii) $500 or more.

Under the existing GST/HST legislation, a supplier and its "billing agent" registered for the GST/HST may jointly elect to have the billing agent report and remit the GST/HST charged and collected by the billing agent on supplier's behalf. There is a similar election available where an agent at law facilitates a taxable supply on a supplier's behalf.

The prescribed ITC documentary information requirements require the supplier's name, and/or the name

under which the supplier does business, depending on the dollar amount of the taxable supply/ies. Alternatively, these requirements can be met by providing this information for an "intermediary". An "intermediary" currently includes a registrant agent (but not a billing agent) acting on the supplier's behalf in making the taxable supply. To harmonize with the rules allowing a registered billing agent to bill, report and remit GST/HST instead of the supplier under a joint election, Budget 2021 proposes to extend the definition of "intermediary" to a "billing agent".

By Jamie Wilks

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.