Canada Revenue Agency | Agence du revenu du Canada

GST/HST Policy Statement P-200: PLACE OF SUPPLY OF INTANGIBLE PERSONAL PROPERTY AND REAL PROPERTY

Obsolete: This policy statement is superseded by GST/HST Memoranda Series, Chapter 3, Memorandum 3.3, *Place of Supply*, April 2000.

Date of Issue:

January 1, 1996

Subject:

Place of supply of intangible personal property and real property

Legislative Reference(s):

Paragraphs 133(a), 142(1)(c), 142(2)(c), 142(1)(d) and 142(2)(d), and subsections 136(1) and 143(1) of the *Excise Tax Act* (Act)

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January 1, 1991

Issue and Decision:

Under the provisions of paragraph 133(a) of the Act, the entering into of an agreement to provide property or a service is treated as a supply of the property or service at the time the agreement is entered into. It is, therefore, important to determine the place of supply of the property or service in order that a determination can be made as to whether or not the supply is made in Canada and subject to the Goods and Services Tax (GST) under Division II, is an exempt supply and not subject to the tax, or is a supply made outside Canada and thus not subject to the GST under Division II.

If the supply is a taxable supply made in Canada, subsection 152(1) establishes the time at which the consideration for a taxable supply becomes due. Subsections 165(1) and (2) outline the rates of tax applicable to taxable supplies made in Canada and section 168 deals with the timing of the liability for payment of the tax imposed under Division II on taxable supplies made in Canada.

Subsection 142(1) sets our the general rules for determining when a supply is made in Canada. Subsection 142(2) sets out the converse rules for determining when supplies are determined to be made outside Canada and thus not subject to Division II tax.

However, in certain situations, the deeming provisions in subsections 142(1) and 142(2) do not appear, on a surface reading, to provide a definitive result as to where the supply is made. Depending on the facts, situations can arise whereby a supply appears not to be deemed to be made in or outside Canada, or a supply appears to be deemed to be made both in and outside Canada. There are also situations not described by either subsection 142(1) or 142(2).

In these situations, to determine whether subsections 142(1) or 142(2) apply to deem a supply to be made in (or outside) Canada, the Department will look to the facts of the case presented and the application of general legal principles. Some of the factors which can be considered when making the determination include where the contract was concluded (i.e., contract terms), where the property may be used, the residence status of the recipient and the supplier, the registration status of the recipient and the supplier (if a non-resident), and the actions of the parties. There may be other factors, depending upon the specific case, which will also assist in determining the place of supply. When applying general legal principles, it is necessary to refer to the civil law rules (as in Quebec) or the common law rules of the jurisdiction governing the contract under which the supply is being made.

One of the factors mentioned above concerns the contract terms. A contract is a written or spoken agreement between two or more parties, intended to be enforceable by law. When determining where a contract was concluded, it is important to understand that there are two parts to a contract, an offer and an acceptance. An offer generally contains two ideas: (1) an intimation of willingness to be bound, and (2) a statement of the price required. The acceptance also contains two ideas: (1) the acceptance of the offeror's proposal, and (2) either the promise requested by the offeror or the performance of the act required. Generally speaking, a contract is concluded at the place where the offer to provide the property or services is accepted.

It is also important to understand that even though a supply is determined to be made in Canada based on general legal principles, the supply may still be deemed to be made outside Canada under the provisions of subsection 143(1) provided the supplier is a non-resident and the conditions outlined in the subsection are met.

SAMPLE RULING NO. 1

Our understanding of the facts and transactions is as follows:

Statement of Facts

1. A corporation (Vendor), carrying on business in Canada and the United States (U.S.), sells its business, including the intangible assets related thereto (business assets). The business assets situated in Canada and used in the Canadian business will be sold to a Canadian corporation (Canco) and the business assets situated in the U.S. and used in the U.S. business will be sold to a U.S. corporation (USco).

2. Both Canco and USco are wholly-owned subsidiaries of a U.S. Corporation (Parent) which does not carry on business in Canada. The Parent is an unregistered non-resident.

3. The Parent will make a payment to the Vendor for the Vendor's covenant not to compete with respect to the business sold to Canco and USco. The covenant will be enforceable in accordance with the laws of one of the states in the U.S. and will stipulate that the Vendor will not compete in the business against Canco in Canada or USco in the U.S. The covenant is considered to be a supply of intangible personal property.

4. Acceptance of the consideration for the covenant is in Canada at the premises of the Vendor.

5. The covenant does not relate to real property situated in Canada as no real property will be purchased from the Vendor.

6. The covenant does not relate to tangible personal property ordinarily situated in Canada. The covenant relates to tangible personal property which may be leased, in future, by the Vendor to clients rather than tangible personal property which is currently being leased by the Vendor to clients.

7. There is no service to be performed in Canada by the Vendor.

Ruling Requested

The supply of the covenant by the Vendor to the Parent does not constitute a supply "made in Canada" for purposes of paragraph 142(1)(c) of the *Excise Tax Act* (Act). The supply of the covenant is, therefore, not subject to the GST at 7%.

Ruling Given

The supply of the covenant by the Vendor is made in Canada. Subparagraph 142(2)(c)(i) does not apply as the supply of the covenant may be used in Canada. Therefore, the supply of the covenant is subject to the GST at 7%, calculated on the total consideration for the supply.

This ruling is subject to the general limitations and qualifications outlined in Section 1.4 of the GST Memoranda Series. We are bound by this ruling provided that none of the above issues is currently under audit, objection or appeal, there are no relevant changes in the future to the *Excise Tax Act*, and you have fully described all necessary facts and transactions for which you requested a ruling.

Rationale

The provisions of subparagraph 142(1)(c)(i) do not apply because, although the covenant may be used in Canada, the recipient of the supply (the Parent) is not resident in Canada nor registered for GST purposes. The provisions of subparagraph 142(1)(c)(ii) do not apply because the covenant does not relate to real property situated in Canada, to tangible personal property ordinarily situated in Canada or to a service to be performed in Canada. However, the Vendor is located in Canada and is making a supply of the covenant to the Parent. In addition, the covenant provides, in part, that the Vendor will not compete in Canada in the business supplied to Canco. Therefore, based on the facts, the supply is made in Canada.

SAMPLE RULING NO. 2

Our understanding of the facts and transactions is as follows:

Statement of Facts

1. A non-resident company (non-resident) sells vacation credits to residents of Canada. The sales will occur in Canada.

2. The non-resident is not registered for Goods and Services Tax (GST) purposes.

3. The vacation credits are purchased for a lump sum payment and the purchasers (i.e., recipients) are entitled to reserve vacation time at any of the non-resident's 20 resort properties in Canada or the 40 resort properties located in the United States (U.S.).

Ruling Requested

The Department administratively allow pro-rating of the GST so that the tax at 7% will only apply to one-third of the value of the consideration for the supply of the vacation credits (i.e., the lump sum payment) based on the fact that only 20 of the 60 resort properties are located in Canada.

Ruling Given

The supplies of vacation credits are made in Canada and, as a result, subject to the GST at the standard rate of 7%, calculated on the total consideration for the supply. The provisions of subsection 143(1) of the *Excise Tax Act*, which deem supplies by non-residents to be made outside Canada, do not apply as the non-resident is considered to be making the supplies in the course of a business carried on in Canada.

This ruling is subject to the general limitations and qualifications outlined in Section 1.4 of the GST Memoranda Series. We are bound by this ruling provided that none of the above issues is currently under audit, objection or appeal, there are no relevant changes in the future to the *Excise Tax Act*, and you have fully described all necessary facts and transactions for which you requested a ruling.

Rationale

The provisions of subparagraphs 142(1)(c)(ii) and 142(2)(c)(ii) and paragraphs 142(1)(d) and 142(2)(d) of the *Excise Tax Act* (Act) do not produce a definitive result, as follows:

(A) If the supply of vacation credits is considered to be a supply of intangible personal property (IPP), the result is as follows:

- Under subparagraph 142(1)(c)(ii), the vacation credits relate to real property situated in Canada (e.g., 20 resort properties). The supply of the IPP appears, therefore, to be deemed to be made in Canada.
- On the other hand, under subparagraph 142(2)(c)(ii), the vacation credits relate to real property situated outside Canada (e.g., 40 resort properties). Therefore, the supply of the IPP appears to be deemed to be made outside Canada.

(B) Alternatively, if the supply of vacation credits is considered, because of subsection 136(1) of the Act, to be a supply of real property, paragraph 142(1)(d) appears to deem the supply to be made in Canada (e.g., 20 resort properties are located in Canada) and paragraph 142(2)(d) appears to deem the supply to be made outside Canada (e.g., 40 resort properties are located in the U.S.).

However, the sales of the vacation credits will occur in Canada. Therefore, it appears that the contracts will be concluded in Canada. Other factors indicating the supplies are made in Canada are that the credits may be used to reserve time at resort properties in Canada and the recipients are residents of Canada.

Having determined that the supplies of vacation credits are made in Canada, it must now be determined if subsection 143(1) of the Act will apply to deem the supplies to be made outside Canada. Although the non-resident is not registered for GST purposes, it certainly appears that the supplies of vacation credits by the non-resident are made in the course of a business carried on in Canada — the vacation credits are being supplied in Canada and the non-resident has 20 resort properties in Canada. As a result, paragraph 143(1)(a) would exclude the supplies from being deemed to be made outside Canada.

SAMPLE RULING NO. 3

Our understanding of the facts and transactions is as follows:

Statement of Facts

1. A Canadian author sells the worldwide publishing rights to her novel to a non-resident publisher. The author retains the movie rights to the novel.

2. The publisher is not registered for GST purposes.

3. The author will be paid a commission for the publishing rights. The commission will be based on an initial payment of $50,000 plus a sliding percentage, calculated on the value of the novels sold (10% of the sale price for the first 50,000 copies of the novel, and 15% of the sale price for all remaining copies of the novel).

4. Acceptance of the consideration for the publishing rights (i.e., the commissions) is made in Canada at the premises of the author.

Ruling Requested

The supply of the publishing rights, which is a supply of intangible personal property, is not deemed to be made in Canada under the provisions of subparagraph 142(1)(c)(i) because the rights are not being supplied to a recipient who is resident in Canada or registered for GST purposes. The supply is, therefore, outside the scope of the GST.

Ruling Given

The supply of the publishing rights is made in Canada. As the supply is a right to use intellectual property which is being made to a non-resident who not registered for GST purposes, the supply may be zero-rated (i.e., subject to the GST at 0%) under the provisions of Schedule VI, Part V, section 10 to the *Excise Tax Act*.

This ruling is subject to the general limitations and qualifications outlined in Section 1.4 of the GST Memoranda Series. We are bound by this ruling provided that none of the above issues is currently under audit, objection or appeal, there are no relevant changes in the future to the *Excise Tax Act*, and you have fully described all necessary facts and transactions for which you requested a ruling.

Rationale

The author is located in Canada. In addition, the supply is not deemed to be made outside Canada under the provisions of subparagraph 142(2)(c)(i) because the supply may be used in Canada (i.e., the worldwide publishing rights would include Canada).