LegalEase®

SorbaraLAW
Sorbara, Schumacher, McCann LLP

Avoiding GST on the Importation of Software

A non-resident who sells software into Canada may be required to levy Canadaôs Goods and Services Tax (ñGSTò or Canadaôs VAT) even though the non-resident does not carry on business in Canada. This depends on whether the software is ñoff the shelfò or custom, whether it is licensed or sold and whether the non-resident is already a GST registrant. To skip this analysis and register for GST out of an abundance of caution can therefore subject a sale to GST when GST would not otherwise apply.

Off-the-Shelf Software

Off-the-shelf software is pre-packaged, commercially available software that one may pull ñoff the shelfò in a shop. Such software typically comes with a standardized (ñshrink wrapò) licence agreement which binds the customer by reason of the customer having opened the box or loaded the software. This kind of software is considered to be tangible personal property and, as such, is always subject to GST on importation. The key, then, for the supplier is to ensure that delivery is made outside Canada, *i.e.*, *Ex Works*ò *before* importation.

Off-the-Shelf software that is sold online is considered to be *in*tangible property. Unlike tangible personal property, it is not taxed upon importation. Instead, the supply is deemed to have been made in Canada. The supplier is therefore required to levy the GST without the *Ex Works* alternative available to bricks and mortar suppliers.

Custom Software

Customized software is altogether different. If a client commissions the supplier to (a) write new software which the client will own outright or (b) modify the clientôs existing software, the Canada Revenue Agency focuses on the fact that the client owns the software and so considers the supplier to charge for the programming *service* rather than the program. Since services are only subject to GST if performed in Canada, programming services performed abroad are exemptò *unless the supplier is a GST registrant*. It is therefore important to understand the GST implications before rushing to become a registrant.

In practice, suppliers of custom software will often send employees to Canada to install the software and provide training. If, in doing so, the supplier is considered to carry on business in Canada then the supplier must become a GST registrant and levy GST. Thus, not only will the installation and training services become taxable, but so also will the software, for the reasons just described. However, a good Canadian tax advisor can enable the supplier to perform installation and training services in Canada without being considered to carry on business in Canada.

It is therefore essential to consult a Canadian tax advisor prior to entering into any agreement so that the non-resident supplier can avoid those GST registration, withholding and remittance requirements that are so commonly and unnecessarily incurred by the unwary.

About the Author
Patrick Westaway, B.A. (Hons), LL.B.

Patrick Westaway is Tax Counsel to Sorbara, Schumacher, McCann LLP, a full service law firm based in Waterloo, Ontario. Patrick advises on a broad range of Canadian taxation issues such as corporate tax planning, structuring inbound investments, corporate reorganizations, cross-border financings, tax opinions for public disclosure documents, tax assessments, personal tax matters, wealth preservation, and on federal and provincial sales tax matters (HST/GST/PST). Patrick also practices corporate and commercial law with an emphasis on the implementation of matters related to his tax planning practice.

Practice Groups:

Corporate Tax Planning, Corporate and Commercial

This article is intended only to inform and educate. It is **not legal advice.** Be sure to contact a lawyer to obtain legal advice on any specific matter.