

# GST/HST Technical Information Bulletin

July 2002

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## GST/HST AND ELECTRONIC COMMERCE

This Bulletin does not replace the law found in the *Excise Tax Act* and its Regulations. It is provided for your reference. As it may not completely address your particular operation, you may wish to refer to the Act or appropriate Regulation or contact any Canada Customs and Revenue Agency (CCRA) tax services office for additional information. If you are located in the Province of Quebec, please contact the Ministère du Revenu du Québec (MRQ) for additional information.

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La version française de ce bulletin est intitulée *La TPS/TVH et le commerce électronique*.



Canada Customs  
and Revenue Agency

Agence des douanes  
et du revenu du Canada

Canada

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## **Introduction**

This bulletin explains the Canada Customs and Revenue Agency's (CCRA's) interpretation of key provisions of the *Excise Tax Act* (the "Act") relevant to electronic commerce, and outlines how the CCRA's administrative policies pertain to transactions made by electronic means. For the purposes of this bulletin, all references to "electronic commerce" relate only to supplies made over the Internet.

The technology underlying electronic commerce facilitates the delivery of products and services by suppliers to customers located throughout the world. A business will often have no physical presence in its customers' jurisdiction, or its only physical presence in that jurisdiction may be a server (i.e., a computer that holds the files for one or more Web sites). Products (e.g., publications) that could previously be supplied solely in a tangible form can now be supplied electronically in a digitized form, and services that once required the physical presence of personnel at a customer site may now be performed from a remote location by electronic means. These aspects of electronic commerce fundamentally alter the way business is conducted and raise several interpretative issues concerning the administration of the GST/HST.

The following issues are dealt with in this bulletin:

- Characterization of supplies

The characterization of supplies (i.e., determining whether the supply is one of property or services) is fundamental to the application of the GST/HST, as it affects the place where a supply is considered to be made, the tax rate that applies to a supply, the manner in which tax is collected, and the timing of liability for tax in respect of a supply. Supplies made by electronic means (including digitized products) are considered to be either intangible personal property or services.

- Place of supply

The GST/HST applies at a rate of 7% GST or 15% HST to taxable (other than zero-rated) supplies of intangible personal property and services made in Canada, including such supplies made by electronic means. The legislation includes place of supply rules to determine whether a supply is made in Canada. Special rules also apply to determine whether a supply made in Canada is made in any of the HST participating provinces of Nova Scotia, New Brunswick, and Newfoundland and Labrador.

- Supplies to non-residents

A supply of intangible personal property or a service made in Canada, including supplies made by electronic means, may be relieved of tax under the export provisions of the Act that zero-rate certain supplies of intangible personal property and services made in Canada to a non-resident person.

- Non-resident registration

Every non-resident person, other than a small supplier, who is carrying on business in Canada and is making taxable supplies in Canada, including supplies made by electronic means, is required to register for GST/HST purposes and to charge GST/HST on its taxable (other than zero-rated) supplies made in Canada. As well, a non-resident person who has a permanent establishment in Canada (which could include a server) is treated as a resident of Canada, and is subject to the same GST/HST obligations as a domestic supplier in respect of activities carried on through that permanent establishment.

### **Registration requirements**

In the context of electronic commerce, every person who makes a taxable supply of intangible personal property or services in Canada in the course of a commercial activity engaged in by the person in Canada must register for GST/HST purposes, unless the person is a small supplier, or a non-resident person who does not carry on any business in Canada.

Non-resident persons (other than small suppliers) making taxable supplies of intangible personal property or services in Canada are required to register for GST/HST purposes if the supplies are made through a permanent establishment in Canada, or in the course of carrying on business in Canada. For example, a server at a particular location in Canada could constitute a permanent establishment of a non-resident person (refer to the discussion on page 27), and the person would be required to register for GST/HST purposes if the person makes taxable supplies in Canada through that permanent establishment (unless the person is a small supplier).

### **Voluntary registration**

A person who is not required to register for the GST/HST may voluntarily apply to register if, amongst other things:

- (a) the person is engaged in a commercial activity in Canada;
- (b) the person is a non-resident who, in the ordinary course of carrying on a business outside Canada:
  - has entered into an agreement to supply services to be performed in Canada; or
  - has entered into an agreement to supply intangible personal property that is to be used in Canada, or that relates to either real property situated in Canada, to tangible personal property ordinarily situated in Canada, or to services that are to be performed in Canada.

For more detailed information concerning non-resident registration, refer to page 27.

### **Characterization of Supplies**

For GST/HST purposes, “property” and “service” are defined in subsection 123(1) of the Act.

“Property” means *“any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money.”*

“Service” means *“anything other than*

*(a) property,*

*(b) money, and*

*(c) anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person.”*

A supply made by electronic means is not a supply of tangible personal property. Although tangible personal property is not defined in the Act, it generally includes objects or things that may be seen and touched, and that are movable at the time the supply is made. Electronic commerce allows suppliers to deliver certain products to their customers that have been traditionally regarded as tangible personal property, in an electronic or “digitized” form. Such supplies are not considered to be tangible personal property.

As a result, a supply made by electronic means is characterized as either a supply of intangible personal property or a supply of a service. In determining whether a particular supply made by electronic means is a supply of intangible personal property or a supply of a service, the CCRA will consider a number of factors. This approach considers the nature of the agreement between the supplier and the customer, and whether the agreement is in substance for work (or work and materials), or for property (including a right or interest of any kind).

Factors that generally indicate that a supply made by electronic means is one of intangible personal property are:

- a right in a product or a right to use a product for personal or commercial purposes is provided, such as:
  - intellectual property or a right to use intellectual property (e.g., a copyright); or
  - rights of a temporary nature (e.g., a right to view, access or use a product while on-line);
- a product is provided that has already been created or developed, or is already in existence;
- a product is created or developed for a specific customer, but the supplier retains ownership of the product; and
- a right to make a copy of a digitized product is provided.

Factors that generally indicate that a supply made by electronic means is a service are:

- the supply does not include the provision of rights (e.g., technical know-how), or if there is a provision of rights, the rights are incidental to the supply;
- the supply involves specific work that is performed by a person for a specific customer; and
- there is human involvement in making the supply.

The following examples illustrate the application of this approach to supplies that are made by electronic means. They describe a range of typical supplies made by electronic means between suppliers and their customers (e.g., between businesses and consumers), but are not intended to reflect all types of transactions or contractual arrangements for such supplies. Consequently, the characterization of the supplies in the examples is provided for illustrative purposes, and businesses are encouraged to request a GST/HST ruling from the CCRA for certainty in respect of characterizing a particular transaction.

As well, each example describes a single supply unless otherwise stated. Refer to Policy Statement P-077R, *Single and Multiple Supplies*, for more information on single and multiple supplies.

The examples have been grouped for ease of reference, as follows:

- I. Electronic ordering and downloading of digitized products
- II. Software maintenance contracts
- III. Application and Web site hosting and data warehousing
- IV. Supplies related to on-line sales
- V. Subscription to databases and Web sites
- VI. Information provided by electronic means

### **I. Electronic ordering and downloading of digitized products**

These supplies typically involve a customer downloading a digitized product from a supplier, and are generally characterized as supplies of intangible personal property. A limitation with respect to the frequency, even to a single occurrence, or period of use of a downloaded copy of a digitized product, even to a single occurrence, does not alter the nature of the supply.

#### Example 1: Electronic ordering and downloading of digitized products

*A customer selects an item from an on-line catalogue of software or other digitized products and orders it electronically directly from a commercial supplier. There is no separate charge to the customer for using the catalogue. The product is downloaded onto the customer's computer. For a separate fee, the customer will receive updates and add-ons to the product, which are also downloaded directly to the customer's computer.*

The supply in this example (i.e., the software or other digitized products, updates, and add-ons), is delivered electronically. The product is already in existence as it is listed in the catalogue and is available for downloading. The customer is provided with a copy of the product, as well as the right to use the product. Consequently, the supply is characterized as a supply of intangible personal property. Similarly, the supply of the updates and add-ons is characterized as a supply of intangible personal property.

Example 2: Limited duration software and other digitized information licences

*A customer receives the right to use software or another digitized product for a period of time that is less than the useful life of the product. The product is downloaded to the customer's computer. Upon termination of the licence, all copies of the digitized product are deleted or become unusable.*

This is a supply of intangible personal property. Except that the software or other digitized product can only be used temporarily, the characteristics of the supply are the same as in Example 1. Limiting the period of use does not affect the characterization of the supply as one of intangible personal property. This rationale applies even if the digitized product can only be used once.

Example 3: Subscription to a Web site that allows the downloading of digitized products

*A supplier makes a Web site available to subscribers that features copyrighted digitized products (e.g., music). Subscribers pay a fixed periodic fee to access the site and to select and download digitized products.*

This supply is one of intangible personal property. The subscribers are acquiring a right to use the digitized product and to copy it (by downloading) and the product is already in existence.

**II. Software maintenance contracts**

These supplies typically involve the provision of software updates with technical support. Technical support may be provided on-line, through the use of a trouble-shooting database, or by communications (e.g., telephone or e-mail) with technicians. These supplies are characterized as either as supplies of intangible personal property or of services, depending upon the principal object of the supply.

Example 4: Software maintenance

*A supplier and customer enter into a software maintenance contract, which typically bundles software updates with technical support. The customer is given the right to copy and use the product for personal or commercial purposes and is charged a single annual fee for the software updates and the technical support. The principal object of the contract is the software updates.*

As the principal object of the supply is the provision of a software update delivered electronically, the supply is characterized as one of intangible personal property.

Example 5: Customer support over a computer network

*A software supplier provides a customer with on-line technical support, including installation advice and trouble-shooting information. This support is in the form of on-line technical documentation, a trouble-shooting database, and, as a last resort, communication with a technician by e-mail.*

If the technical support is essentially the supply of a right to use existing technical information in the form of on-line documentation and access to a trouble-shooting database, and the interaction with the technician is incidental, the supply would be characterized as one of intangible personal property.

If technical support is provided through interaction with technicians, and the provision of any rights to documentation or databases is incidental, the supply would be characterized as a supply of a service, since it is of specific work performed for a specific customer.

### **III. Application hosting, Web site hosting, and data warehousing**

These supplies include remote access and use of software, space on and access to servers to store data or run software, and technical support. They are characterized as either intangible personal property or services.

#### Example 6: Application hosting – separate licence

*A customer with a perpetual licence to use a software product enters into a contract with a host entity, whereby the host entity loads a copy of the software on servers owned and operated by the host and provides technical support to protect against system failures. The customer can access, execute and operate the software application remotely. The application is executed either at the customer's computer after it is downloaded, or remotely on the host's server. This type of arrangement could apply, for example, to financial management, inventory control, human resource management or other enterprise resource management software applications. The customer has no control over the equipment used by the host entity.*

The agreement between the host entity and the customer is to host software on a server maintained by the host entity. Since the software licence is held by the customer, there is no provision of rights in the software or for the use of the software between the host entity and the customer. The host entity is essentially providing the space to store and run the software application on its equipment, as well as technical support. Consequently, this is characterized as a supply of a service.

#### Example 7: Application hosting – bundled contract

*For a single fee, a user enters into a contract whereby a host entity, which is also the copyright holder, allows access to one or more software applications, hosts the applications on a server owned and operated by the host, and provides technical support for the hardware and software. The user can access, execute and operate the software application remotely. The contract is renewable annually for an additional fee. The principal object of the contract is the provision of software applications.*

This is similar to the supply in Example 6. However, as the host entity (rather than the customer) is the copyright holder for the software, the customer is being provided with the right to use the software. Although the supplier is also hosting the software application(s) on its server(s), and providing technical support for the hardware and the software, the supply is essentially the provision of a right to use software. Consequently, it is characterized as a supply of intangible personal property.

#### Example 8: Service provider

*A supplier has a licence to use a software application in the course of its business. It hosts the software on a server that it owns, operates and maintains. The supplier enters into an agreement with a customer to manage a particular back-office function (e.g., the customer's payment processing), and provides the*

*customer with access to the software application, enabling the customer to perform specific tasks when required (e.g., data entry, addition of tombstone data for new suppliers and clients). However, the supplier is responsible for the major aspects of the payment processing, such as cheque issuance and bank verification, and uses the software application to automate these tasks. The customer has no right to copy the software or use it other than for the specific functions assigned by the supplier, and at no time does the customer have possession or control of the software (since it resides on the supplier's server).*

The supply in this instance is for the management of a particular business function, such as payment processing. In making the supply, the supplier has the licence for the necessary software, equipment and personnel necessary to process payments. The customer is provided with access to the software for specific tasks, such as entering data. The provision of the right to use the software for these specific tasks is incidental to the overall supply being made by the supplier (e.g., processing payments on behalf of a customer). Since the supply does not involve the provision of rights (other than incidentally) or other property, it is characterized as a supply of a service.

#### Example 9: Web site hosting

*An Internet Service Provider (ISP) hosts its customers' commercial Web sites on its servers. The ISP does not obtain any rights in the copyrighted material on the site. Customers can remotely manipulate the site, including modifying its content, but do not possess or have direct control of the server(s) used to host the site. The customer pays a fee based on the passage of time.*

This is similar to Example 6. The agreement between the supplier and the customer is to host the customer's Web site on a server maintained by the supplier, and the customer maintains all rights in the site. There is no supply of rights or of property between the supplier and the customer, and therefore the supply is characterized as a supply of a service.

#### Example 10: Data warehousing

*A customer stores its computer data on servers owned and operated by a supplier. The customer can access, upload, retrieve and manipulate data remotely. No software is licensed, or rights transferred, to the customer in this transaction. The customer does not have control over or possession of any specific equipment used by the supplier in the data storage. For example, a retailer may store its inventory records on the supplier's hardware, and the retailer's employees may remotely access this information to allow them to determine whether orders can be filled from current stock.*

This is similar to Example 9. The agreement between the supplier and customer is to store the customer's computer data on a server maintained by the supplier. Since there is no provision of rights or property, the supply is characterized as a supply of a service.

#### **IV. Supplies related to on-line sales**

These supplies include advertising, referral, and representation on behalf of on-line suppliers of goods or services. The suppliers provide a means of bringing consumers and merchants together on-line, but do not supply the goods or services being advertised or marketed. These supplies are generally characterized as supplies of services.



### Example 11: Advertising

*Companies pay a fee to Web site operators to place advertisements on their Web sites. Advertising rates may be determined in a number of ways, including the cost per thousand “impressions” (i.e., the number of times the advertisement is displayed to a user), or the number of “click-throughs” (i.e., the number of times the advertisement is clicked by a user). For example, “banner ads,” which are small graphic images embedded in a Web page, allow a company’s Web page to be loaded to a user’s computer when clicked by the user.*

An advertising service is a service of creating a message and a service directly related to the communication of such a message. The message must be oriented towards soliciting business, attracting donations, or calling public attention in the form of an information notice, political announcement, or other similar communication.

By publicizing companies’ messages on the Internet (i.e., placing advertisements on Web sites), the Web site operators are supplying an advertising service to the companies.

### Example 12: On-line shopping portals

*A Web site operator hosts electronic catalogues of various merchants on its servers. Shoppers can select products from these catalogues and place orders on-line. The Web site operator has no contractual relationship with the shoppers, and merely transmits orders to the merchants, who are responsible for accepting and filling them. The merchants pay the Web site operator a commission based on a percentage of the value of orders placed through the site.*

By hosting the catalogues, the Web site operator is communicating a message intended to solicit business for the merchants. This is a supply of an advertising service.

### Example 13: On-line auctions

*A Web site operator displays a vendor’s items for purchase by auction. On-line shoppers purchase items directly from the owner of the items, rather than from the operator. The vendor compensates the Web site operator with a percentage of the sale price or a flat fee. The vendor and on-line shoppers have only the incidental use of the software to perform certain tasks in respect of the transactions (e.g., payment processing), but are not provided any rights to use the software.*

The supply by the Web site operator to the vendor is considered to be a supply of a service. No rights in property or for the use of property are supplied between the operator and the vendor.

## **V. Subscriptions to databases and Web sites**

These supplies typically involve a provider making digitized content available to customers for search, retrieval and use. They are generally characterized as supplies of intangible personal property.

Example 14: Data retrieval

*A supplier makes a vast repository of information available to customers for search and retrieval purposes. Customers pay a fee which enables them to access the data and to search and extract specific information from the repository. In some instances, the supplier adds significant value in terms of content (e.g., analysis of raw data), but the resulting product is not prepared for a specific customer and there is no obligation to keep the contents confidential. Such products might include special industry or investment reports, which are either sent electronically to subscribers, or are made available for purchase and download from an on-line catalogue or index.*

The supply to the customers is a supply of intangible personal property. The supplier is providing customers with a right to access and use the repository of information (i.e., a product already in existence), as well as the software programs required to search and retrieve information from the repository. Although there may be human involvement in maintaining the repository of information (e.g., by adding content or raw data analysis), this is considered to be an input to the supply as there is no human involvement on the part of the supplier when a customer accesses and retrieves information.

Example 15: Access to an interactive Web site

*A supplier makes a Web site featuring digitized content available to subscribers, including information, music, video, games, and activities, whether or not developed or owned by the supplier. The subscribers pay a fixed periodic fee for access to the site. The principal value of the site to subscribers is interacting with the site while on-line, as opposed to getting a product or services from the site. The supplier also charges companies a fee for placing their banner or pop-up ads on the site.*

In this example there are two separate supplies: the provision of the right to access the content on the Web site, and the placement of banner or pop-up ads.

The subscribers' right to access the content on the Web site is a supply of intangible personal property. In essence it is a supply of a right to use software, and the right to access other digitized content on the Web site. Although a copy of a digitized product is not provided, there is a supply of a right to view, access or use a product while the customer is on-line. As in Example 14, any human involvement occurs behind the scenes in establishing and maintaining the Web site, but there is no human involvement on the part of the supplier when subscribers access the site and its digitized content.

The placement by the supplier of the banner or pop-up ads on its site is a supply of an advertising service, as in Example 11.

## **VI. Information provided by electronic means**

These supplies range from professional advisory services to the periodic electronic delivery of data to subscribers in accordance with their personal preferences. If the supply is of an existing product or a product created for a group of customers who receive rights to the product (e.g., subscriptions for data delivered on a periodic basis), it is characterized as a supply of intangible personal property. If there is human involvement in the making of the supply, or specific work is performed by a person for a specific customer, and the supply does not involve the transfer of rights, it is characterized as a supply of a service.

### Example 16: Electronic access to professional advice (e.g., consulting)

*A consultant, lawyer, doctor or other professional service provider advises clients through e-mail, video conferencing, or other remote means of communication.*

The supply of the advice to clients, delivered by electronic means, is a supply of a service, as it involves specific work that is performed for a specific client, and does not involve a supply of rights to an existing product.

### Example 17: Undisclosed technical information

*A customer is provided with undisclosed technical information concerning a product or process (e.g., narrative description and diagrams of a secret manufacturing process).*

If the customer is provided with the right to use information by way of licence, whether the information is in existence or is developed specifically for the customer, the supply is one of intangible personal property.

If the supply is one of developing information for a specific customer, and the customer owns the information, it is characterized as a supply of a service.

### Example 18: Information delivery

*A supplier delivers data electronically on a periodic basis to subscribers (e.g., news clippings or stock market quotations), in accordance with their personal preferences. The principal value to the customers is the convenience of receiving information in a customized format tailored to their specific needs.*

The supply is one of a right to customized information. There is no human involvement on the part of the supplier in the making of the supply. Consequently, the supply is characterized as one of intangible personal property.

Example 19: Content acquisition transactions

*A Web site operator pays various content providers for news stories, information, and other on-line content to attract users to a site. Alternatively, the Web site operator might hire a content provider to create new content specifically for the Web site.*

This could be characterized as either a supply of a service or intangible personal property, depending upon the facts.

Where the supply made by the content provider is of the right to use copyrighted content, it is considered to be a supply of intangible personal property, regardless of whether the content is already in existence (e.g., it has already been published), or it is developed specifically for the customer. Where the content provider develops content specifically for the Web site operator, and the Web site operator owns the content, the supply is characterized as a supply of a service.

**Telecommunication services**

The characterization of supplies made by electronic means extends beyond determining whether a supply is intangible personal property or a service, to determining whether a supply may be a telecommunication service. The definition of a telecommunication service in the Act is broad, and because of the nature of electronic commerce, a number of typical supplies made by electronic means are also telecommunication services.

If a supply is characterized as a telecommunication service it is subject to special place of supply and zero-rating rules for telecommunication services. These rules are addressed in more detail on pages 18, 22 and 27.

For GST/HST purposes, a “telecommunication service” is defined in subsection 123(1) of the Act as:

- (a) the service of emitting, transmitting or receiving signs, signals, writing, images or sounds or intelligence of any nature by wire, cable, radio, optical or other electromagnetic system, or by any similar technical system, or*
- (b) making available for such emission, transmission or reception telecommunications facilities of a person who carries on the business of supplying services referred to in paragraph (a)*

A “telecommunications facility” is defined in subsection 123(1) of the Act as:

*any facility, apparatus or other thing (including any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, or any part thereof) that is used or is capable of being used for telecommunications*

## Characterization indicators

For GST/HST purposes, it is important to distinguish between a supply that is a supply of a telecommunication service, and the use of telecommunications as a means by which other property and services are supplied.

A supply is generally considered to be a supply of a telecommunication service where its predominant purpose is to:

- provide for the emission, transmission or reception of signs, signals, etc. (e.g., voice or data) through a telecommunications network or similar technical system;
- make available a telecommunications facility for the emission, transmission or reception of signs, signals, etc. through a telecommunications network or similar technical system; or
- provide a means through which other services or intangible personal property (e.g., content in a digitized format) are delivered, rather than to provide the services or intangible personal property.

A supply is not generally a supply of a telecommunication service where:

- a telecommunication service is used or consumed by the supplier in making a supply of a service or property (other than a telecommunication service);
- it includes the provision of a telecommunication service, but only as a means of delivering another service or property; or
- it is incidental to the supply of another service or property.

## Examples

In the following examples the above-noted indicators are used to determine whether the supplies in question are characterized as telecommunication services.

### Internet access service

*An ISP is a company that provides users with Internet access, for which they pay a fee. The connection is made by a modem, which allows the user to send and receive data over a telephone line. The telephone line is supplied to the user by a third party telephone service provider. To access the Internet, a user “calls” the ISP to log on (if not already connected), and the user’s request for a particular Web site is routed to the server hosting the desired data.*

This is a supply of a telecommunication service. The predominant purpose of the service is to provide the consumer with a connection, allowing the transmission and reception of data over the Internet. Generally, this is the predominant purpose of the service even where an ISP provides content or access to content as part of its service. The recipient is generally looking to the ISP to supply the means by which access to the Internet is obtained.

### E-mail

*A company contracts with a vendor to provide e-mail services. For a fee, the vendor will ensure that the company's personnel can send and receive intra-office and external e-mails. The vendor dedicates space on a server for the composition, reception and storage of e-mail messages sent to or by the company. The company is provided with e-mail addresses (ID), a mailbox, and the use of a network, thus allowing its employees to send, receive and store information on a secure basis. The company addresses its outgoing e-mail to a mail recipient's e-mail address, and the mail is routed to the server and forwarded to its final destination. Incoming mail addressed to the company is routed to the server and directed to a particular employee.*

This is a supply of a telecommunication service. The predominant purpose of the service is to allow the company to send and receive e-mail. The vendor is providing the company with a service of transmitting text, images, etc., by means of its server and the use of a network.

### Web site hosting

*A company enters into an agreement with an ISP to provide Web site hosting services for the company's Web site. Under the agreement, the ISP is responsible for housing the Web site on a server it owns and maintains, which includes ensuring the security of the server and that the Web site is accessible over the Internet. The server is linked to the Internet through dedicated lines acquired from a telephone service provider. The company is responsible for the design and content of the Web site. The agreement only addresses the Web site hosting arrangements and does not deal with Internet access.*

This is not a supply of a telecommunication service. The predominant purpose of the supply is the storage and maintenance of the Web site on a server in a manner that allows access to the Web site on the Internet. In making the supply of this service the ISP uses or consumes a number of inputs (e.g., telecommunication services, hardware and software).

### Internet access services, e-mail and personal Web page

*A consumer pays a fee to an ISP for Internet access. In addition to the Internet access, the consumer receives e-mail services and space on the ISP's server to create and maintain a personal Web page. The consumer determines the content of the Web page, but it is hosted on the ISP's server.*

The service provided by the ISP is a supply of a telecommunication service. This is a typical transaction between an ISP and an individual consumer. The ISP is making a single supply which includes providing the consumer with a connection to the Internet, an e-mail account, and space on the ISP's server. The predominant purpose of the supply to the consumer is the Internet connection. As in the case of Internet access services, the supply of a connection to the Internet is considered to be a telecommunication service.

Voice telephony services provided through the Internet

*A consumer pays a fee to a company for long distance “telephone calls” made over the Internet. The consumer is able to place these calls from his or her computer or telephone any place in the world. The calls are routed through the networks that make up the backbone of the Internet.*

This is a supply of a telecommunication service. The predominant purpose of the supply is to provide the transmission of voice communication. The supplier of the voice telephony is providing a traditional voice telephone service, except that the service is being provided over the Internet.

Electronic Data Interchange (EDI) transmission of income tax returns

*A company is engaged by an approved EFILE tax preparer to electronically file income tax returns for its clients. The tax preparer completes all of the income tax returns prior to submitting them to the company for electronic transmission. Upon receipt of the returns, the company validates the format of the returns, encrypts the data, validates the values indicated in the tax return boxes (e.g., SIN numbers), and electronically submits the returns to the CCRA.*

This is a supply of a telecommunication service. The predominant purpose of the supply is the electronic transmission of data. The validation and encryption are part of the service of transmitting the data.

Preparation and EDI transmission of income tax returns

*A consumer pays a fee to a tax preparer to prepare and electronically file his or her income tax return with the CCRA. The tax preparer completes the income tax return, validates the format and values, encrypts the data, and electronically transmits the return to the CCRA.*

This is not a supply of a telecommunication service. The tax preparer is making a single supply which comprises a number of elements, including preparation of the tax return and its transmission to the CCRA. The predominant purpose of the supply is the preparation of the tax return. Therefore, the supply is not a telecommunication service.

Provision of digitized products (e.g., film, video, music)

*A consumer selects and orders a digitized product from a commercial supplier. For a fee, the digitized product is available for downloading by the consumer.*

This is not a supply of a telecommunication service. The supply of a digitized product that is readily available for download over the Internet is the supply of intangible personal property. In this instance, a telecommunication service is used or consumed by the supplier in making the supply of the digitized product.

### Web-based broadcasting

*A consumer pays a subscription fee for access to a Web site with audio and/or visual content that is streamed (i.e., broadcast in real time) over the Internet. A copy of the content is not provided to the consumer.*

The supply of the audio and/or visual content streamed over the Internet is a telecommunication service. The predominant purpose of the supply is to provide the consumer with the broadcast content. This is analogous to a traditional radio or television broadcasting service, which is considered to be a telecommunication service for GST/HST purposes.

### **Place of Supply**

Whether a supply is made in or outside Canada, and, if made in Canada, whether it is made in or outside a participating province (i.e., Nova Scotia, New Brunswick or Newfoundland and Labrador), affects the rate of tax that applies to that supply. Where a taxable (other than zero-rated) supply of property or a service is made in Canada, tax at the rate of 7% or 15% applies to that supply, depending on whether it is made in a participating province.

Generally, a supply of property or services made outside Canada is not subject to the GST/HST. However, the GST/HST may apply to property or services acquired by a resident outside Canada and subsequently imported into Canada. While tax is not collected at the border for taxable importations of intangible personal property or services, resident recipients of such supplies may be required to self-assess the tax.

The general rules for determining whether a supply is made in or outside Canada are set out in section 142 of the Act. However, section 143 of the Act overrides the general place of supply rules found in section 142 for supplies made by a non-resident who is not carrying on business in Canada and is not registered for GST/HST purposes at the time the supply is made.

Non-resident registration and carrying on business in Canada are explained starting on page 27.

### **I. Supplies made in Canada**

#### **Intangible personal property**

Pursuant to paragraph 142(1)(c) of the Act, a supply of intangible personal property is deemed to be made in Canada if the property may be used in whole or in part in Canada, or the property relates to real property situated in Canada, tangible personal property ordinarily situated in Canada, or to a service to be performed in Canada. Paragraph 142(2)(c) of the Act provides that a supply of intangible personal property is deemed to be made outside Canada if the property may not be used in Canada, or the property relates to real property situated outside Canada, to tangible personal property ordinarily situated outside Canada, or to a service to be performed wholly outside Canada.

The expression “may be used” in paragraph 142(1)(c) is interpreted to mean “allowed to be used.” In other words, a supply of intangible personal property could be considered to be made in Canada even if



it is not actually used in Canada. The fact that the supply may be made to a recipient who is outside Canada has no bearing on whether the supply is made in Canada.

In determining whether intangible personal property may be used in Canada, reference may be made to any written agreement for the supply that contains terms governing the place of use of the intangible personal property. This is common practice in a business-to-business transaction. In consumer transactions there may be a general restriction as to the use of the intangible personal property, to which the recipient agrees either expressly or implicitly upon acquisition of the supply. The restriction may be explained on the Web site through which a product is supplied.

#### Example

*A Canadian resident who is registered for the GST/HST supplies software to customers in electronic format. Both resident and non-resident customers pay an annual fee which entitles them to receive the software electronically by e-mail. There are no restrictions with respect to the place of use of the software.*

The supply of the software is deemed to be made in Canada, as it is a supply of intangible personal property which may be used in whole or in part in Canada. Even if the recipient is a non-resident person, the place of supply is still in Canada.

#### **Services**

Pursuant to paragraph 142(1)(g), a supply of a service is deemed to be made in Canada if the service is, or is to be, performed in whole or in part in Canada. Paragraph 142(2)(g) provides that a supply of a service is deemed to be made outside Canada if the service is, or is to be, performed wholly outside Canada.

Although the word “performed” is not defined in the Act, the place where a service is performed is traditionally the place where the person physically doing the work is situated. For example, if a non-resident supplier sends a technician to Canada to provide programming services, the place of performance is in Canada as the service is physically performed in Canada.

Where all of the activities carried out by the supplier in performing a service are clearly undertaken in Canada (i.e., the employees performing the service are in Canada, or the supplier’s equipment used to provide the service is located in Canada), the place of performance of the service is in Canada.

Where part of the activities carried out by the supplier in performing a service are carried out in Canada, the place of supply of the service is considered to be in Canada. For example, a supplier may prepare a report in Canada in respect of programming services carried on outside Canada. As the report is a component of the services supplied, the place where the report is prepared must be considered when determining the place of supply.

Electronic commerce allows services to be provided remotely. A supplier can provide a service to a customer in Canada without physically being in Canada. For example, a supplier can have a technician perform work from outside Canada by electronically accessing a customer’s computer located in

Canada, rather than sending the technician to Canada. Work is being performed both at the location of the service provider, as well as the location of the customer's property that is the object of the service. It is therefore necessary to take into account the location of the customer's property when determining the place of performance.

Whether a service is performed in whole or in part in Canada is a question of fact. Each supply in respect of a service must be examined on a case-by-case basis to determine whether that service is performed in whole or in part in Canada. However, a supply of a service is performed at least in part in Canada if:

- the service requires a person to perform a task (i.e., the supplier acts through one or more of its employees), and the person performing or physically carrying out the task is situated in Canada at the time the activity is done;
- the service includes operations performed by a supplier's equipment (e.g., computer equipment), and the equipment is located in Canada;
- the supply involves doing something to or with a recipient's equipment by accessing it from a remote location, and the recipient's equipment is located in Canada (however, this does not apply to a service wholly performed outside Canada, where the results are subsequently delivered electronically to a recipient's computers in Canada, e.g., a programming service carried out at the supplier's location outside Canada and e-mailed to a recipient in Canada); or
- any activity related to the performance of the service is undertaken in Canada.

### **Telecommunication services**

Section 142.1 of the Act sets out place of supply rules for determining when a supply of a telecommunication service is made in Canada. This section overrides the general place of supply rules in section 142, but remains subject to section 143, which deems supplies made by non-resident persons to be made outside Canada in certain situations.

Pursuant to paragraph 142.1(2)(a), a telecommunication service is deemed to be made in Canada where it consists of making available telecommunications facilities, and the facilities or any part thereof are located in Canada.

#### Example

*An ISP located in Canada provides Internet access to customers. Internet access is a telecommunication service which involves making available telecommunications facilities.*

The supply of the Internet access is deemed to be made in Canada as the facilities or part thereof which enables connection to the Internet are located in Canada.

In the case of a telecommunication service other than making telecommunications facilities available, the service is deemed to be made in Canada where:

- the telecommunication is emitted and received in Canada; or

- the telecommunication is emitted or received in Canada and the billing location for the service is in Canada.

### Billing location in Canada

The billing location for a telecommunication service is a factor only where the telecommunication is either emitted or received in Canada, but not both emitted and received in Canada. Pursuant to subsection 142.1(1) of the Act, the billing location is considered to be in Canada if the fee for the service is charged or applied to an account the recipient has with the telecommunication service supplier that relates to a telecommunications facility used or made available for use by the recipient to obtain telecommunication services, and that telecommunications facility is ordinarily located in Canada. The billing location is not necessarily the same as the billing address, or the place to which an invoice is sent.

Where the fee for a service is not charged or applied to an account the recipient has with the telecommunications provider, the billing location is considered to be in Canada if the telecommunications facility used to initiate the service is located in Canada.

## **II. Supplies made in a participating province**

There are special place of supply rules for determining whether a supply that is made in Canada is made in a participating province. If a taxable (other than zero-rated) supply is made in a participating province, tax at the HST rate of 15% must be collected on that supply.

Section 144.1 of the Act provides that a supply is deemed to be made in a province if it is made in Canada and is, under the rules set out in Schedule IX, made in the province. In any other case the supply is deemed to be made outside of the province. A supply that is made in Canada and that is not made in a participating province is deemed to be made in a non-participating province.

### **Intangible personal property**

The relevant place of supply rules for supplies of intangible personal property made by electronic means are in section 1 and paragraphs 2(d) and 3(d) of the Part III of Schedule IX to the Act.

### Canadian rights

Pursuant to subparagraph 2(d)(i) of Part III of Schedule IX, a supply of intangible personal property that does not relate to real property, tangible personal property, or services is considered to be made in a province if all or substantially all of the Canadian rights in respect of the property may be used only in that particular province. “Canadian rights” refers to that part of the intangible personal property that may be used in Canada.

This rule is not specific to the participating provinces and may locate the place of supply of a supply made in Canada of intangible personal property in any province, provided that the use of the property is restricted to that province. For example, if business software acquired over the Internet is restricted to use in Ontario, the place of supply is considered to be in Ontario.

### Example

*An Application Service Provider (ASP) is a third-party entity that manages and distributes software to customers across a wide area network from a central data centre. An ASP in Nova Scotia acquires software by means of the Internet from a software company in Newfoundland. The ASP only acquires a single licence for the application, and is precluded from using the product in its other locations.*

For GST/HST purposes, the place of supply is deemed to be in Nova Scotia, as the Canadian rights in respect of the property are restricted to that province.

### Place of negotiation

Pursuant to subparagraph 2(d)(ii) of Part III of Schedule IX, a supply of intangible personal property that does not relate to real property, tangible personal property or services will also be considered to be made in a particular province if the place of negotiation of the supply is in the province, and the property may be used otherwise than exclusively outside that province. Where there are no restrictions regarding the use of the intangible personal property in a particular province, it will always be considered that the property may be used otherwise than exclusively outside the province where the place of negotiation occurred.

Pursuant to section 1 of Part I of Schedule IX, the “place of negotiation” of a supply means the location of the supplier’s permanent establishment at which the individual principally involved in negotiating an agreement for the supplier ordinarily works or to which that individual ordinarily reports in the performance of his or her duties relating to the supplier’s activities in the course of which the supply is made. “Negotiating” includes the making or acceptance of an offer.

Subsection 132.1(2) of the Act defines a permanent establishment for purposes of the place of supply rules set out in Schedule IX. Generally, the meaning of permanent establishment is as defined in various provisions of the *Income Tax Regulations* under the *Income Tax Act*, based on the type of person. For more information, refer to Memorandum 3.4, *Residence*, of the GST Memoranda Series.

### Example

*A Canadian supplier with a permanent establishment in Ontario negotiates to supply business application software to other businesses. Purchasers access the supplier’s Web site which is hosted on servers at its establishment in Ontario, and are able to completely download the software from the site. There are no provisions in the software agreements that restrict its use to a particular province.*

In this example, the place of negotiation is in Ontario. As there are no restrictions limiting the use of the software, the place of supply is also in Ontario.

### Other rules

Where subparagraphs 2(d)(i) and 2(d)(ii) of Part III of Schedule IX fail to locate the place of supply of intangible personal property (that does not relate to real property, tangible personal property or services) in a particular province, the supply is considered to be made in a participating province under section 3 of Part III of Schedule IX in the following circumstances:

- the place of negotiation of the supply is in Canada and the Canadian rights that relate to the property can only be used primarily in the participating provinces; or
- the place of negotiation of the supply is outside Canada, the property can only be used exclusively in Canada, and the Canadian rights can only be used primarily in the participating provinces.

In either case, the supply of the intangible personal property is considered to be made in the participating province with the greatest proportion of the Canadian rights that may be only used in the participating provinces.

### **Services**

#### Canadian element

Pursuant to paragraph 2(a) of Part V of Schedule IX to the Act, a service is considered to be supplied in a particular province if all or substantially all of the Canadian element of the service is performed in that province. Pursuant to section 1 of Part V of Schedule IX, the “Canadian element” of a service is the portion of the service that is performed in Canada. This rule is not specific to the participating provinces and may locate the place of supply of a supply made in Canada in any province.

#### Example

*A transportation company contracts with an ISP in Manitoba to host a financial management software licensed to the company. The software is hosted on servers at the ISP’s facilities in Winnipeg. The ISP maintains the servers and provides technical support to the company’s employees, who access and use the software remotely. All of the services supplied by the ISP are performed in Manitoba.*

The supply of the hosting service is made in the province of Manitoba, as all or substantially all of the Canadian element of the service is performed in that province.

#### Place of negotiation

A supply of a service is also considered to be made in a particular province, pursuant to paragraph 2(b) of Part V of Schedule IX, if the place of negotiation for the supply is in the province, and all or substantially all of the service is not performed outside that province.

#### Example

*A supplier in Ontario enters into a contract with a retail company in Quebec to design the retailer's Web site. The supplier does not retain any rights to the design or the site. The contract is negotiated by the ISP's sales representative, who works out of the ISP's permanent establishment in Ottawa. Approximately half of the Web site design work is performed in Ottawa, and the other half is performed in Quebec.*

The supply of the service is made in Ontario, as the place of negotiation for the supply is in Ontario, and all or substantially all of the service is not performed outside that province.

### Other rules

Where paragraphs 2(a) and 2(b) of Part V of Schedule IX fail to locate the place of supply of a service in a particular province, the supply may be considered to be made in a participating province pursuant to section 3 of Part V of Schedule IX.

In accordance with section 3, a supply of a service is made in a participating province in the following circumstances:

- the place of negotiation of the supply is in Canada and the Canadian element of the service is performed primarily in the participating provinces; or
- the place of negotiation of the supply is outside Canada, all or substantially all of the service is performed in Canada, and the Canadian element of the service is performed primarily in the participating provinces.

In either case, the supply of the service is made in the participating province in which the greatest proportion of the Canadian element of the service is performed.

### **Telecommunication services**

Pursuant to section 2 of Part VIII of Schedule IX to the Act, if a telecommunication service consists of making telecommunications facilities available (other than a service of granting sole access to a telecommunications channel, e.g., to a telecommunications circuit, line, frequency, channel or partial channel, excluding a satellite channel), the supply of the service is made in a particular province if:

- all of the facilities are ordinarily located in that province; or
- not all of the facilities are ordinarily located in the province, but the invoice for the supply is sent to an address in that province.

For other telecommunication services (except a service of granting sole access to a telecommunications channel), the supply is considered to be made in a particular province if the telecommunication:

- is both emitted and received in that province;
- is either emitted or received in that province, and the billing location for the service is in that province; or

- is emitted in the province and received outside the province, and the billing location for the service is not in a province in which the telecommunication is emitted or received.

#### Billing location in a particular province

Pursuant to section 1 of Part VIII of Schedule IX to the Act, the billing location for a telecommunication service is considered to be in a particular province if the telecommunications supplier charges or applies the fee for the service to the recipient's account relating to telecommunications facilities that are used or are available for use to obtain telecommunication services, and all those facilities are ordinarily located in that province.

If the telecommunications company does not charge or apply the fee for the service to the recipient's account, the billing location is considered to be in a particular province if the telecommunications facility used to initiate the service is located in that province.

#### **Prescribed supplies**

For GST/HST purposes, some electronic commerce supplies are specifically identified as being made in a particular province. A computer-related service and Internet access are both identified in the *Place of Supply (GST/HST) Regulations* (the "Regulations") as being made in a particular province in certain circumstances.

A "computer-related service" as defined in section 1 of the Regulations means:

- a technical support service that is provided by means of telecommunications and relates to the operation or use of computer hardware or software; or
- a service involving the electronic storage of information and the computer-to-computer transfer of information.

In determining whether a supply of a computer-related service or Internet access is made in a province, it is important to know whether the supply is made to a "single final recipient" or "multiple final recipients." The rules for determining place of supply vary, according to the final recipient(s). A "final recipient," in respect of a computer-related service or Internet access, means a person who is the recipient of a supply of the service or access and who acquires it otherwise than for the purpose of supplying it to another person.

### Single final recipient

Subsection 10(1) of the Regulations provides that when there is to be a single final recipient of a supply of a computer-related service or Internet access made by a particular supplier, and the recipient acquires the supply under an agreement either with the supplier or another supplier, the supply is made in a particular province if the recipient avails itself of the service or access at a single ordinary location in that province, and:

- the particular supplier maintains information sufficient to determine that location; or
- it is the normal business practice of the particular supplier to obtain information sufficient to determine that location.

Failing this, the supply will be made in a particular province if the mailing address of the recipient of the supply is in that province.

### Multiple final recipients

Subsection 10(2) of the Regulations applies where there are to be multiple final recipients of a supply of a computer-related service or Internet access made by a particular supplier and each recipient acquires the supply under an agreement with either the particular supplier or another supplier.

Where, in the case of each recipient, there is a single location at which the recipient avails itself of the service or access and

- either the particular supplier maintains information sufficient to determine that location; or
- it is the normal business practice of the particular supplier to obtain information sufficient to determine that location;

the supply is made in the province, if any, that would be determined, under the place of supply rules for intangible personal property under Part III of Schedule IX (discussed on page 20), or for services under Part V of Schedule IX (discussed on page 22), to be the province in which the particular supply is made if the service were performed or the Internet access were attainable in each province in which, and to the same extent to which, the final recipients avail themselves of the service or access. In other words, the place of supply rules in Schedule IX are to be applied to the supply of Internet access as a supply of intangible personal property and to the supply of a computer-related service as a supply of any service.

In any other case the supply of the computer-related service or Internet access will be made in a particular province if the mailing address of the recipient is in that province.



## Supplies Made to Non-Residents

As noted previously, a taxable (other than zero-rated) supply of property or a service made in Canada is subject to GST/HST at the rate of 7% or 15%, depending on whether the supply is made in a participating province. However, if the supply is made to a non-resident person, the supply may be zero-rated under the provisions of Part V of Schedule VI to the Act as an exported supply.

A non-resident person who has a permanent establishment in Canada is deemed by subsection 132(2) of the Act to be a resident in Canada in respect of the activities carried on through that permanent establishment. Therefore, a supply of a service or intangible personal property made to the non-resident would not be zero-rated where the supply is in respect of activities carried on through that permanent establishment (refer to the discussion on permanent establishment on page 28).

### Intangible personal property

Pursuant to section 10 of Part V of Schedule VI to the Act, a supply of intangible personal property made to a non-resident is only zero-rated where the non-resident is not registered at the time the supply is made and the supply is one of intellectual property or of any right, licence or privilege to use such property. Intellectual property includes an invention, patent, trade secret, trade-mark, trade-name, copyright or industrial design.

### Example 1

*A non-resident non-registered customer purchases software from a Canadian registrant and downloads the software from the supplier's Web site.*

The supply of the software by electronic means is considered to be a supply of intangible personal property, and as there are no restrictions with respect to its use, it is deemed to be made in Canada. However, the supply in this instance is zero-rated under section 10 of Part V of Schedule VI, as the supply of software is a supply of intellectual property.

### Example 2

*A GST/HST registrant operates an interactive Web site. Subscribers pay a fee to access the site, which features digitized content, including music, videos, games, and other activities. The subscribers are not able to download permanent copies of the content to their computers, but can interact with it while on-line. They are provided with a password to enter the site, and can access it at any time from any location.*

This is a supply of intangible personal property, which is made in Canada as there are no restrictions as to where the intangible personal property may be used. The registrant will be required to charge its non-resident subscribers tax at the rate of 7% or 15%, as the supply is not a supply of intellectual property, and therefore is not zero-rated under the provisions of section 10 of Part V of Schedule VI.

#### General zero-rating provision

Section 7 of Part V of Schedule VI to the Act is the general zero-rating provision for exported services. Pursuant to this section, a supply of a service made to a non-resident person is zero-rated. However, this provision does not apply to:

- a service made to an individual who is in Canada at any time when in contact with the supplier in relation to the supply;
- a service that is rendered to an individual while the individual is in Canada;
- an advisory, consulting or professional service;
- a postal service;
- a service in respect of real property situated in Canada;
- a service in respect of tangible personal property that is situated in Canada at the time the service is performed;
- a service of acting as an agent of a non-resident person or of arranging for, procuring or soliciting orders for supplies by or to the person;
- a transportation service; or
- a telecommunication service.

If the conditions for zero-rating are met, supplies that are characterized as supplies of services that are provided by electronic means are zero-rated when provided to a non-resident person. This includes supplies of Web site hosting and Web site design when provided by a registrant to a non-resident.

#### Example

*A Canadian company registered for GST/HST purposes provides Web site hosting services to resident and non-resident clients. The company enters into an agreement with a non-resident client that is not an individual to host that client's Web site. The site is maintained on the Canadian company's servers at its office in Canada.*

The provision of the Web site hosting service to the non-resident is zero-rated under section 7 of Part V of Schedule VI.

#### Specific zero-rated services

There are specific zero-rating provisions for certain exported services in Part V of Schedule VI to the Act, including some of those excluded from the general provision in section 7, such as:

- a supply of an advertising service made to a non-resident person who is not registered for GST/HST purposes at the time the service is performed (section 8);
- a supply of a service of instructing non-resident individuals in certain courses or administering certain examinations in respect of those courses when the supply is made to a non-resident who is not an individual and is not registered for GST/HST purposes (section 18); and
- a supply made to a non-resident person of certain advisory, professional or consulting services (section 23).

If the supply of any of these services is made by electronic means to a non-resident person, the supply is zero-rated, provided that all of the requirements for zero-rating are met.

#### Example

*A non-resident person who is not registered for GST/HST purposes pays a fee to a registered Canadian Web site owner to place banner ads for its business on the Web site.*

The Canadian Web site owner is not required to collect the GST/HST on the fee, as the supply to the non-resident is an advertising service that is zero-rated under section 8 of Part V of Schedule VI.

#### Telecommunication services

Pursuant to Section 22.1, Part V of Schedule VI to the Act, a supply of a telecommunication service is only zero-rated if the supply is made by a registrant who carries on the business of supplying telecommunication services to a non-resident who is also in the business of supplying such services and who is not a GST/HST registrant and if the telecommunication is not emitted and received in Canada.

## **Non-Resident Registration**

### **I. Non-residents with a permanent establishment in Canada**

Under subsection 132(2) of the Act, a non-resident person who has a permanent establishment in Canada is considered to be resident in Canada in respect of, but only in respect of, the person's activities carried on through that permanent establishment. As a result, a non-resident person who makes taxable supplies through a permanent establishment in Canada is required to register for GST/HST purposes under subsection 240(1) of the Act as a resident person, and to collect tax on its taxable (other than zero-rated) supplies made in Canada, unless the person is a small supplier.

Under subsection 240(6) of the Act, a non-resident person who is required to register or who registers voluntarily under subsection 240(3) and who does not have a permanent establishment in Canada is required to provide and maintain security.

“Permanent establishment”, for GST/HST purposes, is defined in subsection 123(1) as:

*(a) a fixed place of business of the particular person ...*

*through which the particular person makes supplies, or*

*(b) a fixed place of business of another person (other than a broker, general commission agent or other independent agent acting in the ordinary course of business) who is acting in Canada on behalf of the particular person and through whom the particular person makes supplies in the ordinary course of business;*

In an electronic commerce environment, non-resident suppliers can make supplies into Canada with the assistance of computer equipment, such as servers, located in Canada, and Web sites stored on such servers. The issue that can arise for GST/HST purposes is whether a non-resident person making supplies into Canada through a Web site or server in Canada is considered to have a permanent establishment in Canada.

At a minimum, a “place of business” of a person requires that a certain amount of physical space be at the disposal of the person. A Web site, which merely consists of software and electronic data, is not tangible property, and therefore does not have a location that can constitute a place of business. As a result, the Web site of a non-resident person, including a Web site that is being hosted in a typical Web site hosting arrangement, does not, in itself, constitute a permanent establishment of the non-resident person for GST/HST purposes.

A server on which a Web site is stored is tangible property having a physical location. The server may constitute a place of business of a non-resident person, if it is at the disposal of the person (i.e., operated and owned or leased by the person). A non-resident person who has its Web site hosted on a server of an independent ISP in Canada would not generally be regarded as having the ISP’s server at its disposal.

A server that is at the disposal of a non-resident person can qualify as a permanent establishment of the non-resident person for GST/HST purposes, even if no personnel are required at its location to operate it. However, the functions carried out by the non-resident person through the server must, on their own, be an essential and significant part of the business activity of the enterprise as a whole, or constitute other core functions of the enterprise.

For example, although the operation of a server by a non-resident ISP that is in the business of hosting the Web sites of other businesses would be considered to be an essential and significant part of that non-resident’s particular business activity, a server will not result in a non-resident person having a permanent establishment at its location if the operations carried on through that server are restricted to preparatory or auxiliary activities.

Computer equipment, such as a server that is at the disposal of a non-resident person, may on its own qualify as a permanent establishment of the person, provided that the server is located in Canada and the activities carried out by the person through the server are a significant and essential part of its business activity.

Finally, an ISP that hosts a Web site of a non-resident person on its servers in Canada will not generally be an agent of the non-resident person, either because the ISP does not usually have the authority to conclude contracts in the name of the non-resident person, or because the ISP is an independent agent acting in the ordinary course of its business, as evidenced by the fact that it typically hosts Web sites of many different businesses.

## **II. Non-residents without a permanent establishment in Canada**

Under subsection 240(1) of the Act, every non-resident person who makes taxable supplies in Canada in the course of a business carried on in Canada (other than as a small supplier), is required to register for GST/HST purposes. As a registrant, the non-resident is required to collect tax on its taxable (other than zero-rated) supplies made in Canada.

If a non-resident person does not make taxable supplies in the course of a business carried on in Canada and has not voluntarily registered for GST/HST purposes, supplies of property or services made in Canada by that person are generally deemed to be made outside Canada. The non-resident is therefore not required to collect tax on such supplies.

However, tax may be payable under Division III of the Act and will be collected by Canada Customs at the border on the taxable importation of goods, or through self-assessment under Division IV by Canadian residents on imported taxable supplies of intangible personal property and services.

A non-resident person may register voluntarily for the GST/HST under subsection 240(3) if, among other things, in the ordinary course of carrying on business outside Canada, the non-resident regularly solicits orders for the supply by the person of tangible personal property for export to, or delivery in, Canada, or has entered into an agreement for the supply by the person of services to be performed in Canada or of intangible personal property to be used in Canada.

A non-resident person may carry on business in Canada without having a permanent establishment in Canada.

### Carrying on business in Canada

It is important to determine whether a non-resident person is carrying on business in Canada for purposes of determining the person's obligations in relation to registration requirements and for purposes of determining the tax status of supplies made in Canada by the person. The factors that the CCRA will consider, both in a traditional and electronic commerce environment, in determining whether a

non-resident person is carrying on business in Canada in a particular situation include:

- the place where agents or employees of the non-resident are located;
- the place of delivery;
- the place of payment;
- the place where purchases are made;

- the place from which transactions are solicited;
- the location of an inventory of goods;
- the place where the business contracts are made;
- the location of a bank account;
- the place where the non-resident's name and business are listed in a directory;
- the location of a branch or office;
- the place where the service is performed; and
- the place of manufacture or production.

The importance of a given factor in a specific case depends upon the nature of the business activity under review, and, as always, the particular facts and circumstances of each case.

In general, a non-resident person must have a significant presence in Canada to be considered to be carrying on business in Canada. Isolated transactions carried on in Canada as part of a business that is carried on by a non-resident person outside Canada may not result in the person being considered to be carrying on business in Canada, given that the above-noted factors will usually not be met to a sufficient degree.

Some of the factors that are relevant for businesses engaged in conventional business transactions may not be applicable to businesses engaged in electronic commerce (i.e., engaged in the making of supplies delivered by electronic means over the Internet). This would be the case for factors that relate to a physical presence in Canada, such as the place where the goods in question are manufactured. In addition, some factors must be interpreted to take into account the particular nature of electronic commerce. For example, in determining the place where payment is made, it may be more appropriate, depending upon the circumstances, to consider the place where approval for the electronic transfer of funds takes place, rather than the place of posting or receipt of cheques.

### Examples

The following examples illustrate the above-noted approach to determining whether a non-resident making supplies by electronic means is carrying on business in Canada without having a permanent establishment in Canada.

#### Example 1

*A non-resident corporation supplies downloadable audio files by way of sale. The non-resident has a Web site hosted on its own server located at its main office in the United States, and advertises its Web site on the Internet. The advertisements are directed to the Canadian market. The Web site and server are fully interactive: the Canadian customer may view product listings of music and other advertising, place orders (including payment for audio files selected), and download a copy of the purchased audio files without any contact with the non-resident's personnel. The place of contract is in Canada. The customer pays by credit card and an independent ISP located in Canada processes payments for the non-resident. Once the audio files are received by the customer, they may be used in Canada. All customer service and after-sales support is provided by means of telephone or e-mail communication by the non-resident's personnel located in its main office in the United States.*

In this example the non-resident is not considered to be carrying on business in Canada. Of the list of factors to be considered, only the following would indicate some business activity of the non-resident in Canada: advertising is directed to potential customers in Canada; the place of contract is in Canada; product purchases are made in Canada; and payment is processed in Canada. However, in general these factors would not, by themselves, indicate that the business was being carried on in Canada.

Example 2

*A non-resident vendor supplies the right to use various software applications to customers in Canada. The non-resident owns a Web site stored on a server in Canada. The server that stores and provides access to the Web site is owned and operated by an independent ISP and is therefore not at the non-resident's disposal. The non-resident advertises its software applications on its Web site, directed to the Canadian market, and also advertises its software applications and Web site in Canadian newspapers. The software applications are stored on the server as part of the Web site. Canadian customers can order software applications by completing and submitting order forms on-line. Once a form is submitted, the order is processed automatically and the customer is granted a right of access to the selected software applications. Customer access is controlled and monitored by use of a computer-generated user ID and password. Customers are invoiced electronically, automatically, according to the number of hours the applications are used, and may pay by credit card or cheque. An ISP located in Canada processes payment for the vendor. Finally, an independent contractor located in Canada provides after-sales customer support on behalf of the non-resident.*

In this example the facts support the conclusion that the non-resident is carrying on business in Canada. Of the list of factors to be considered, the following would indicate that the non-resident has significant business activity in Canada: advertising in Canadian newspapers; the use of independent contractors located in Canada for after-sales support; and the provision of payment processing by independent ISPs located in Canada. In addition, the activities carried out by means of the automated, interactive Web site stored on a server in Canada also indicate a significant business presence in Canada.

**Enquiries**

If you wish to make a technical enquiry on the GST/HST by telephone, please call one of the following toll-free numbers:

1-800-959-8287 (English service)

1-800-959-8296 (French service)

General enquiries about the GST/HST should be directed to Business Enquiries at one of the following toll-free numbers:

1-800-959-5525 (English service)

1-800-959-7775 (French service)

If you are in the Province of Québec, please call the following toll-free number:

1-800-567-4692 (Ministère du Revenu du Québec)

All GST/HST technical information bulletins and other Canada Customs and Revenue Agency (CCRA) publications are available on Internet at the CCRA site <http://www.ccra-adrc.gc.ca/> under the heading "Technical Publications " under "more" in "Tax".