

Harmonized Sale Tax (HST) – Frequently Asked Questions

These questions are a follow up to the webinar presentation provided by Deloitte & Touche LLP on July 22, 2010. The purpose is to provide additional guidance surrounding the determination of the place of supply specifically to services.

The following responses to the questions have been prepared by Deloitte & Touche LLP. The conclusions are based on the facts and/or assumptions within the questions provided. If any fact or assumption listed was incorrect, it may materially affect the response. New or amended legislation and policies concerning HST continue to be released and may override the conclusions provided. As the GST/HST is a very fact specific driven transactional tax, we recommend the use of these responses as a guideline. These responses are not intended to substitute for competent professional advice specific to your situation.

The Canada Revenue Agency has published GST/HST Technical Information Bulletin B-103 (June 2010) which provides an outline of the application of the place of supply rules. This should be referenced for additional information surrounding the place of supply rules.

Question 1:

My question concerns client disbursements. If we determine that legal fees on a file are subject to HST, do the disbursements corresponding to that file also get billed at the HST rate? Or at the GST rate?

Deloitte's Response:

Certain disbursements will be considered taxable when supplied by the lawyer with the tax rate of the disbursement corresponding to the GST or HST rate as applied to the fees being charged.

Lawyer disbursements can be classified into two (2) categories:

- a) Incurring as agent – GST/HST will not apply to these disbursements upon being reimbursed. The lawyer has no GST/HST obligation for incurring this expense. The expense is incurred as an agent of their client (e.g.; the client's expense). If GST/HST was paid, it is considered incurred by the client. If it was GST-exempt, it will remain GST-exempt (e.g.; land transfer tax paid on real property).
- b) Not incurred as agent – GST/HST will apply on these disbursements upon being reimbursed. While some expenses are incurred in order to be able to provide a service such as giving an opinion to the client in respect of title to property, if they are not incurred as an agent of the client they are considered expenses of the lawyer.

The treatment of the disbursement as being subject to GST or HST will follow the tax status of the service being provided. If the service is a general service, the general rules will apply. If the service is in relation to real or tangible personal property, the respective rules in relation to that type of property will apply.

Question 2:

In the context of the general rule which says that supplies of services will not apply to supplies of services in relation to real property, would that include legal fees on real estate transactions? All of the examples in the CRA publication are more directly related to a property, (i.e. paintings).

Deloitte's Response:

The characterization of the type of service being provided is the underlying issue to adopting the correct GST or HST application. We recommend caution in determining the correct characterization of the type of service being provided.

Services in relation to property (real or tangible) must have some direct link to the underlying property. The Canada Revenue Agency provides very little guidance on this issue. We can provide general criteria that the CRA appears to be following:

- a) The service is physically performed on the property
- b) The direct object of the service is the property
 - i. Enhancing value
 - ii. Affecting the nature of the property
 - iii. Affecting the management of the property
 - iv. Affecting the environment within the limits of the property

Or,

- c) The purpose of the service is:
 - a. The (actual or proposed) transfer or conveyance of the real property
 - i. Real estate services in relation to the property,
 - ii. Lease/rental of the property
 - iii. Legal services rendered in connection to the (actual or potential) owner/beneficiary
 - b. Relates to the mortgage interest or security interest in the property (as the case may be), or
 - c. The determination of the title to the property.

To put this in perspective, if the lawyer's service was to provide a tax opinion on the GST/HST status on the sale of real property, this is considered a general service. If instead the lawyer's service was to transfer the title of the real property from person A to person B, this is considered a service in relation to real property. The place of supply determination is specific to the type of service being provided (e.g.; general services or services in relation to property).

Question 3

A Saskatchewan-based financial institution retains a Saskatchewan lawyer for advice on foreclosing against a B.C. property against which it has a registered mortgage. Saskatchewan lawyer provides advice to the Saskatchewan-based financial institution, and further retains, as its agent, a B.C.-based lawyer to commence and conclude a foreclosure action on the mortgage. What, if any, part(s) of this transaction is subject to HST?

Deloitte's Response:

Disbursements:

The retention of the BC-based lawyer will be treated as a disbursement. The response in question 1 will serve as a guide to the tax treatment of this expense. As it is incurred by the lawyer and not in the capacity of an agent, the fee is subject to GST/HST when it is reimbursed by the client. However, whether the rate is GST at 5% or HST at 12% will depend on the determination of the place of supply of the legal service.

Service:

The determination of the type of service will be specific to the engaged services requested by the client.

If the service was just advice on whether to foreclose against the BC property, the place of supply will follow the general rule for services. The place of supply would result in GST at 5% applying (recipient of the service is located in Saskatchewan). The disbursements subject to GST/HST will also be subject to GST at 5%.

If the engaged services are to obtain the advice and act on the advice provided, the service would be considered a single supply. The characterization of the service is considered in relation to the property on which foreclosure proceedings are occurring. HST at 12% applies to the legal fees.

The place of supply is in relation to the province in which the property is located at the time the service is performed. The mortgage interest is in relation to property. The service of foreclosing against the underlying property is the object of the service. There is a direct link of the service to the property as result. As the property is located in BC (an HST province), the fees charged for the advice and foreclosure proceedings is considered as a service in relation to real property. The taxable disbursements will be subject to HST at 12%.

Question 4

If I am doing work under the Mobility Agreement in B.C. am I required to charge the HST. If so do I charge for work actually done in B.C. such as court appearances, registrations in B.C. and meetings in B.C. or do I have to charge HST for everything including services actually performed in Sask? Am I required to pay HST for services and supplies provided by B.C. or Ontario firms? Is there a difference between services such as advice from agents and purchase of equipment or supplies?

Deloitte's Response:

Unfortunately, the GST/HST and relevant provincial retail sales tax ("PST") regimes must be followed with regards to the sales tax application of the supplies being made irrespective of the mobility agreements in place between provinces.

This is a general question that requires a breakdown of the different components contained within the supplies that could be made:

A distinction must be made between litigation services and non-litigation services in terms of where the place of supply will be considered to occur. Coupled with this is to distinguish non-litigation services in terms of being a general service or services in relation to real or tangible personal property.

- Litigation services (criminal, civil, or administrative) – upon commencement of the litigation, the place of supply is considered to be made in the province that is under the jurisdiction of a court or tribunal established under the laws of a province.
- Non-litigation Services – refer to our response in question 2. It must be distinguished if the service is in relation to real or tangible personal property or being a general service. The appropriate place of supply rules must be followed to arrive at the correct GST/HST conclusion.
- Disbursements – refer to our response in Question 1 for guidance.
- Purchases – vendors will be required to follow the correct place of supply rules. If HST is paid, it will be recoverable providing it is in relation the acquisition, use or consumption in commercial activities. We anticipate incorrect invoicing practices with some vendors until they become familiar with the new place of supply rules. We also caution you to be aware of any requirements to self-assess PST, or collect PST on certain legal services. The Saskatchewan PST rules do not follow the place of supply rules applied under the GST/HST regime.

Question 5

The Extra-provincial corporation = We act for a British Columbia corporation. The corporation is owned by a sole shareholder, who is a resident of B.C. Our firm has been asked to extra-provincially register the corporation in Saskatchewan, so that it can carry on business in Saskatchewan. Our office also acts as the mailing address for Saskatchewan matters and is the attorney for service. We will also be filing the annual returns in Saskatchewan each year. Should Saskatchewan PST be charged or HST.

Deloitte's Response:

The correct characterization of the service is a general service. The registering of the corporation is not in relation to real or tangible personal property. The general rules for services in terms of the place of supply would be considered.

Under the general rules, this would fall under "Rule 1"¹. However, there may be multiple addresses in connection with this supply to be considered. The agreement to engage the law firm for providing this service should be reviewed closely. We have assumed the corporation located in BC is the recipient of your services for purposes of this example. The place of supply of the services to register the corporation is considered to be in BC (client's address) with the appropriate fees being subject to HST at 12%.

In terms of Saskatchewan PST, while the services may be provided to a person not resident in Saskatchewan, the PST would apply at 5% because the service is in relation to the registration of a corporation as an extra provincial corporation in Saskatchewan. Legal services to file the annual returns will be in connection to a business located in Saskatchewan and will be subject to PST at 5%.

¹ Technical Information Bulletin "Harmonized Sales Tax – Place of supply rules for determining whether a supply is made in a province" (June 2010), Page 26.

Question 6

The Saskatchewan Corporation = We are asked by an individual resident in British Columbia to incorporate a Saskatchewan business corporation. Our firm will act as the registered office, mailing address and attorney for service for the Saskatchewan business corporation. We will also prepare annual resolutions of the directors and the annual resolutions of the shareholders. Will Saskatchewan PST or HST be charged?

Deloitte's Response:

The response is the same as Question 5. As with Question 5, we have made an assumption - the individual, in this case, is the person who has engaged your firm to provide the services and is therefore the recipient of the service.

While multiple addresses may exist, the address of the individual in this case would be applied. The general rule for services is used to determine the place of supply. The place of supply is considered to be in BC (client's address) and therefore the appropriate fees are subject to HST at 12%.

In terms of Saskatchewan PST, while the services may be provided to a person not resident in Saskatchewan, the PST would apply at 5% because the service is in relation to the registration of a incorporating a business in Saskatchewan. Legal services to file the annual resolutions will be in connection to a business located in Saskatchewan and will be subject to PST at 5%.

Question 7

Saskatchewan Corporations as Guarantors of larger facilities = Our office acts for a Saskatchewan corporation that is wholly owned by a resident of British Columbia ("Saskco"). The B.C. resident is also the shareholder of a Manitoba corporation ("ManCo") that is obtaining a loan from a financial institution. As part of the loan arrangement with ManCo, the lender is requiring the Saskatchewan corporation, Saskco, to provide a guarantee and mortgage real property that Saskco owns in Saskatchewan. Our firm is registering the security against the Saskco lands and providing a legal opinion that Saskco is duly incorporated and has the authority to execute, deliver and perform the obligations in the documents. Is PST or HST chargeable?

Deloitte's Response:

Refer to our response to Question 2 for guidance on how we arrived at this conclusion. Based on the description in the question, we are assuming SaskCo is the party who has engaged your firm and is therefore the recipient of the supply.

The purpose of the service is in relation to real property. While ManCo is obtaining a loan, the person who has engaged your services (Saskco) is obtaining a service in relation to real property. The purpose is to support a security interest in real property and SaskCo will be able to execute, deliver and perform the resulting obligation. The service, while it will provide a legal opinion, has as the primary purpose or object of the service being in relation to property.

The place of supply rules for services in relation to property will apply. The property is located in Saskatchewan resulting in GST at 5% to apply on the appropriate fees for the services rendered. PST at 5% will apply on the legal services as the real property is located in Saskatchewan.

Question 8

Can we properly not charge HST on our fee to an Ontario or BC corporation, for whom we have both an Ontario or BC address and our own law firm address, for serving as the company's Saskatchewan Power of Attorney each year, and for the initial registration of that company in Saskatchewan which has resulted in it having a Saskatchewan address in our records?

Deloitte's Response:

The recipient of the supply must be established in order to further determine the place of supply. Generally, the revised place of supply rules for services focuses on the recipient.

From a GST perspective, having the Power of Attorney for the corporation is in the same context as acting as an agent on behalf of a person(s). Assuming an agency relationship exists, the services will have been performed on behalf of the principal in the relationship. In terms of the GST/HST treatment of the legal fees being charged by your firm, the recipient of the services would appear to be the principal, whom we would conclude to be the engaging party.

In terms of the place of supply rules to apply, the correct characterization of the services must be established. If the services are not in relation to real property or tangible personal property ("TPP"), the rules for general services are followed. If the services are in relation to real property or TPP, the place of supply looks to where the property is located or made available at the time the service is performed.

If the services provided fall under the general rules, the Saskatchewan address of your law firm may not be relevant for GST/HST purposes. The address of the person, who has engaged your services, as a recipient must be considered. If the person's address (e.g.; located in an HST province) is obtained in the ordinary course of business and is considered most closely-connected with the supply, the supply is considered to occur in that province. If it is an HST province, the applicable rate of HST would apply.

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