GST Input Tax Credits

May Be At Risk for Some Importers

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Importer of Record versus de facto Importer

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When it comes to claiming input tax credits (ITCs) with respect to GST paid on goods imported into Canada, CRA makes an important distinction between the importer of record and what CRA refers to as the de facto importer. Such a distinction may have a major impact on the application of the rules for claiming ITCs in cases where the importer of the goods is not the actual owner of the goods.

This administrative position taken by CRA, as set out in GST/HST Policy Statement P-125R, Input Tax Credit Entitlement for Tax On Imported Goods, disallows the ITC to the person that has imported the goods into Canada and paid the GST upon importation but that is not, as a general rule, the owner of the goods (i.e., that is not the de facto importer). The following is a short analysis of the application of CRA's administrative policy regarding the concept of importer of record versus de facto importer.

Subsection 169(1) of the Excise Tax Act (ETA) sets forth the requirements to be met for a person to be eligible to claim an ITC:

- the person must be registered during the reporting period;
- the person must acquire or import the goods;
- the tax in respect of the importation must be paid or become payable during the reporting period; and
- the imported goods are for consumption, use, or supply in the course of the commercial activities of the person.

In addition, as stated in the Department of Finance's explanatory notes to section 178.8 of the ETA:

New section 178.8 of the Act addresses circumstances in which a person […] is the recipient of a supply made outside Canada of goods that are imported into Canada for that person's consumption, use or re-supply and that are not supplied by that person outside Canada before their release, but is not the person by or on whose behalf the goods are accounted for under the Customs Act at the time of their entry.

However, for section 178.8 of the ETA to apply, there must also be an agreement entered into by the supplier and the recipient with respect to the goods intended to be imported into Canada.

In the absence of such an agreement between the supplier and the recipient, section 178.8 of the ETA does not apply and one must go back to the application of subsection 169(1) of the ETA as interpreted by CRA.

As per CRA's administrative policy, the de facto importer is essentially the person who is considered to have caused the goods to be imported. The place of supply of the good is a main factor in determining the de facto importer. Where the supply of the goods is made outside Canada, it is CRA's position that the supplier may not be considered to have imported the goods for consumption, use, or supply in the course of its commercial activities since the goods were already supplied outside Canada; hence, it is the recipient that could claim the ITC as the de facto importer. On the other hand, where the supply of the goods is made in Canada (i.e., the delivery of the goods is in Canada), the supplier will be considered to be the de facto importer and will be entitled to claim an ITC.

Where a person other than the de facto importer imports goods and is the importer of record, CRA's position is that only the de facto importer can claim the ITC with respect to the goods. In such case, the de facto importer will be deemed to have paid the GST upon importation and may claim an ITC provided that the goods were imported for consumption, use, or supply in the course of its commercial activity; and it maintains proper documentation from the importer of record to satisfy the documentary requirements of subsection 169(1) of the ETA.

Under the terms of section 212 of the ETA, every person who is liable under the Customs Act to pay duty on imported goods is required to pay the GST on the goods. Subsection 18(2) of the Customs Act states that any person who reports goods under section 12 of the Customs Act, and any person for whom that person acts as agent or employee while so reporting, are jointly and severally or solidarily liable for all duties levied on the goods. The glossary of terms in Customs D Memorandum D17-1-5, Importing Commercial Goods, defines an importer as "the person or entity who causes the goods to be imported and is responsible for accounting for the goods and paying applicable duties and taxes." As such, the importer of record, whether it is the de facto importer or not, is clearly liable to pay the duties and GST on the imported goods and, following subsection 169(1) of the ETA, would be entitled to claim an ITC provided that the other conditions are satisfied.

Nonetheless, CRA's administrative position is that the person who imports the property for the purposes of subsection 169(1) of the ETA needs to be the de facto importer and not only the importer of record.

Following such an interpretation of the ETA, problems may arise where there is no agreement between the supplier and the recipient or where a third party is involved in the importation of the goods. As discussed above, where there is no agreement between the supplier and the recipient, section 178.8 of the ETA cannot be applied. If the delivery of the goods takes place outside Canada and the non-resident supplier handles the importation of the goods, the non-resident will be liable to pay the GST upon importation.

However, the non-resident vendor will not be entitled to an ITC because it is no longer the owner of the goods (i.e., it cannot be considered to have imported the goods for consumption, use, or supply in the course of its commercial activities). The recipient will not be able to claim an ITC either as it will not have paid the GST at the border. Hence, no one can claim an ITC.

Where a third party that never takes title to the goods and is involved in the importation of the goods as part of an overall service to the supplier, including the handling of the importation of the goods, the third party, as the importer of record, will be liable to pay the GST on the goods imported. But it will not be eligible to any ITC unless the overall service is deemed to be a commercial service (in such case, if the supplier is a non-registered non-resident, subsection 169(2) or section 180 of the ETA may apply). This is simply because the third party never owns the goods. The third party would have to turn to the supplier and seek a refund for the GST paid upon importation of the goods into Canada. Where the non-resident supplier is not registered for GST purposes, it will not be entitled to an ITC and, as a result, there will be a GST cost for the supplier.

CRA's administrative policy for differentiating the de facto importer from the importer of record seems to be to avoid situations that could give rise to revenue loss. For example, say a person not entitled to an ITC enters into an agreement with a non-resident supplier to have goods supplied outside Canada and have a registered third party import the goods into Canada on its behalf. The non-resident supplier would not charge the GST to the person as the supply is made outside Canada. The registered third party, as the importer of record, would be liable to pay the GST at the border. If the registered third party claims an ITC in relation to the GST paid upon importation, this would result in nil GST cost for all the parties.

This would be inconsistent with the overall intended scheme of the ETA where a person not entitled to an ITC is not relieved from the GST paid on its expenses.

Conversely, CRA's administrative policies do not have any effect at law and one could argue that the position of CRA with respect to this matter contradicts the provisions enacted in the ETA.

Furthermore, if the legislator intended for the person who imports to be a specific type of importer for the purpose of section 169 of the ETA, it would have specified it in the legislation.