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INTERPRETATION LETTER CRS-0001

September 15, 2008

Custom Computer Programs

Thank you for your email of August 20, 2008 regarding the application of Ontario retail sales tax (RST) to custom computer programs.

This interpretation is based on the information provided and which is conveyed in the "Understanding of Facts" portion of this interpretation. Please review the information for its completeness and accuracy. If it is determined that the information is incomplete or inaccurate, this interpretation will not be binding. In the event that our understanding of the facts is inaccurate or incomplete, please notify the undersigned, in writing, so that we may reconsider our opinion.

UNDERSTANDING OF FACTS

You are enquiring about a specific statement in **RST Guide 650 – Computer Programs and Related Services**, wherein it states the following:

> A computer program does not qualify as custom if:
>
> - The intent at the time of development is to resell the computer program to others (e.g. the developer retains the rights to the source code or the program)…

In particular, you wish to confirm whether a computer program created for one entity, where a formal written contract stipulates that the program will be for the exclusive use of that entity, would qualify as a custom computer program, despite intellectual property rights being retained by the developer (yourself).

LEGISLATION AND/OR ADMINISTRATIVE POLICY

Tax Payable on Purchaser of TPP

Subsection 2(1) of the *Ontario Retail Sales Tax Act* (Act) imposes tax at the rate of 8% on the purchaser of tangible personal property (TPP). Section 1 of the Act defines "TPP" as, personal property that can be seen, weighed, measured, felt or touched or that is in any way perceptible to the senses, and includes computer programs.

LEGISLATION AND/OR ADMINISTRATIVE POLICY (Cont'd)

Computer Programs

The Act defines a "sale" to include the transfer or delivery in any manner of a computer program including the assumption of, or adherence to, a licence to use the program. We consider the sale of a computer program to include leases, licencing agreements, or "right to use" arrangements. A computer program is taxable even if there is no formal licence agreement.

The sale, licence or the right to use a taxable computer program, and/or a program that is licenced to more than one person, is taxable and does not qualify for exemption as a custom computer program.

Paragraph 7(1)(62) of the Act provides for an exemption from RST on the purchase of computer programs designed and developed to meet the specific requirements of the initial purchaser, but only in such circumstances as the Minister may prescribe.

The owner of a custom computer program must provide a valid Purchase Exemption Certificate (PEC) when claiming an exemption from RST on services provided in relation to that program. The PEC must be retained by the service provider to support sales where no RST was charged. In the absence of a PEC, service providers are required to charge, collect, and remit RST.

Subsection 14.2 (1) of Regulation 1012 under the Act defines the following terms:

> A "pre-written computer program" is a pre-packaged computer program that may be purchased off-the-shelf and ready for use without modifications or a computer program that is designed and developed for the use of more than one person.
>
> A "custom computer program" is a computer program that is designed and developed solely to meet the specific requirements of, and that is intended for the exclusive use of, a particular person.

ANALYSIS & CONCLUSION

Paragraph 7(1)(62) of the Act provides an exemption for computer programs which are "designed and developed to meet the specific requirements of the initial purchaser, but only in such circumstances as the Minister may prescribe". Under section 14.2 of Regulation 1012 to the Act, in order to qualify for the exemption, the computer program must be a "custom computer program", being "a computer program that is designed and developed **solely** to meet the **specific requirements of**, and that is intended for the **exclusive use of**, a particular person..."

Although the transfer of intellectual property rights would support the claim that the computer program is intended for the exclusive use of the purchaser, retaining such rights would not, in and of itself, render the computer program a taxable computer program. Provided the developer explicitly states (by way of a contract or other legal documentation) that the program being developed for the customer will be for the exclusive use of that customer, then such a program may qualify as a "custom computer program" despite intellectual property rights being retained by the developer.

If you have any further questions, please contact our office.