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Vendor Collection of RST

Some question has always existed as to whether a vendor can collect retail sales tax (RST) from a purchaser long after the RST-taxable sales transaction occurred.

Typically, a vendor has failed to collect RST at the time of the sale as required by most retail sales tax acts and is assessed for a non-collection penalty (see, for example, sections 2(6), 10, and 12, and section 20(3), respectively, of the Ontario act). The purchaser is often unsure whether to reimburse the vendor, especially if the purchaser is also running close to the four-year limitation period for assessment and will be able to defend against any assessment to recover the RST unpaid. Ontario's administrative policy of assessing only one of the vendor and purchaser also works in the purchaser's favour, because the purchaser may be generally confident that it will not be assessed if the vendor is assessed a non-collection penalty, which is equal in amount to the original RST. Thus the purchaser often need only concern itself with whether it must now pay the vendor the amount of RST that should have been collected at the time of sale if the vendor has been assessed a non-collection penalty. It appears that the purchaser is under no obligation to indemnify the vendor, barring a contractual obligation to do so. This is especially true if the vendor is trying to force reimbursement of the penalty rather than the tax.

A recent case in British Columbia deals with this issue directly and seems to suggest that there may well be a hiatus in the Ontario act. In *IRL Truck Centre Ltd. v. Troga Contracting Ltd.*, the British Columbia Supreme Court considered an action brought by a vendor to recover a non-collection penalty imposed under section 115(5) of the BC Social Services Tax Act ("the BC act"), which is similar to section 20(3) of the Ontario act. In *IRL*, the vendor sold two trucks to Troga and neglected to collect the RST: the fact that Troga's principal was a status Indian suggested to the vendor that the exemption for status Indians applied to the corporation too. IRL paid the penalty and brought an action against Troga for reimbursement thereof. A newly enacted provision of the BC act allows such actions and was in force when the penalty was assessed: persons subject to such penalties could, "in a court of competent jurisdiction, sue the person who was liable to pay

the tax in order to recover the amount imposed [as penalty]" (section 115 (7)). The BC Supreme Court concluded that the new provision applied and that IRL could collect the amount of the penalty from Troga.

The decision in *IRL* leaves the impression that absent the new express provision in the BC act, IRL would not have been successful. As a consequence, Ontario vendors trying to recover amounts paid under section 20(3), or perhaps trying to collect RST from purchasers well after the time it was due to be collected under the statute, may find themselves without a remedy. It is certainly noteworthy that British Columbia has seen fit to amend its legislation. Similarly, the federal government expressly dealt with this issue in the GST legislation and included a statutory claim-over right to suppliers for uncollected GST (section 224 of the Excise Tax Act).

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