

ABORIGINAL LAW UPDATE

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RAISING REVENUE WITH THE *FIRST NATIONS GOODS AND SERVICES TAX ACT*

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The federal *First Nations Goods and Services Tax Act* ("FNGSTA") was enacted in 2003 and significantly expands First Nations' taxation powers. That legislation enables a First Nation to generate revenues from all commercial activity on its lands by levying a 7% First Nations Goods and Services Tax ("FNGST") on supplies of taxable goods and services. The tax exemption contained in section 87 of the *Indian Act* will not apply to shield members of First Nations from paying the FNGST as it is expressly overridden by the FNGSTA.

The FNGST was introduced in the 2003 federal budget as part of a series of measures that set out a legal framework for First Nations to generate tax revenue. Since then the FNGST has been received rather unenthusiastically by First Nations across Canada. At the time of this writing only 20 First Nations have enacted laws imposing FNGST. The overarching benefits from introducing the FNGST relative to the political costs of imposing it may not be readily apparent in many First Nations communities. This perception will likely change where commercial activity on First Nations lands and consumption of taxable goods and services among its community members increases. When this occurs the FNGST will present itself as an attractive means of supplementing a First Nation's public revenues.

Some key points to consider about the FNGST, which will be elaborated upon below are:

- Everyone pays the FNGST (ie. Indians and non-Indians);
- Only "taxable supplies" of goods and services are subject to FNGST;
- Some FNGST revenues could be retained by the Government of Canada and some GST revenues could be gained by the First Nation; and
- Businesses making taxable supplies of goods and services have an obligation to collect the FNGST.

Everyone Pays the FNGST

Everyone has to pay FNGST on the taxable supplies made on First Nations lands where FNGST applies. This means that Indians and non-Indians alike

would be subject to the FNGST. The FNGST applies to the same supplies of goods and services on these lands and in the same way that the GST applies to supplies of goods and services within the rest of Canada.

The FNGST is a value added tax and therefore only the end consumer of a taxable good or service is ultimately burdened with the tax. Businesses that pay FNGST in the course of their commercial activities would be entitled to credits (input tax credits, or "ITCs") that may be realized when FNGST is collected from subsequent taxable supplies or is refunded pursuant to the filing of a GST return.

For example, Charles is in the business of painting cars. Charles pays \$7 of FNGST when he purchases \$100 of car paint. When Charles charges his customer \$1000 for his services he will collect \$70 in FNGST. Because Charles paid \$7 FNGST in the course of his business he has a \$7 ITC and will only remit \$63 of FNGST to the Canada Revenue Agency ("CRA").

FNGST Applies only to Taxable Supplies

Supplies of goods and services subject to FNGST at the rate of 7% are called taxable goods and services. Examples of goods and services taxable at 7% include clothing, haircuts, gasoline, coffee and sales and leases of motor vehicles.

Some goods and services will be subject to FNGST, but at a rate of 0%. These supplies are referred to as "zero-rated" and include, for example, basic groceries, agricultural products and exports. The purpose of having a category of goods and services that is zero-rated is to ensure that producers and vendors of these products are considered to be engaged in commercial activity and therefore eligible to claim ITCs. In contrast, where a good or service is exempt from FNGST (eg. financial services) the producer or vendor of that good or service is not considered to be engaged in commercial activity and could not recover the FNGST paid in respect to their business expenses (eg. stationary and machinery).

Some FNGST Revenues Could be Retained by the Government of Canada and Some GST Revenues Could be Gained by the First Nation

The FNGST is administered by the CRA and operates in an identical manner to the GST which applies generally across Canada. The FNGSTA enables the Minister of National Revenue to enter into an administration agreement whereby the Government of Canada, through the CRA, collects, administers and enforces the First Nation's FNGST law. The administration agreement would also serve to allocate the portions of the FNGST that are "attributable to the First Nation" or the Government of Canada.

Whether or not the FNGST is attributable to the First Nation or eligible to be retained by the Government of Canada ultimately depends on where the goods or services are consumed. Amounts of FNGST imposed under the law of a First Nation are not included in the tax attributable to the First Nation if that FNGST is attributable to property or a service that is consumed off its lands. However, the tax attributable to a particular First Nation *will include GST* if a taxable supply of property or a service is made off the lands of the particular First Nation but is consumed or used on those lands. Ostensibly, this means that a First Nation could impose the FNGST and receive tax revenues for goods and services consumed on its lands even if no sales of goods or services are made on those lands.

Establishing an appropriate formula to employ in the administration agreement for determining the tax attributable to the First Nation is not an exact science. For example, the template FNGST administration agreement used by the CRA measures the FNGST "attributable to the First Nation" to be based on the taxable consumption of the population living on the First Nation lands. The taxable consumption is determined in the template agreement by referring to data from tax filings collected by the CRA of the First Nation. This method of determining the taxable consumption of a First Nation may not be accurate and result in a First Nation receiving less tax monies than it is otherwise entitled to. Measuring taxable consumption by referring to, for example, the employment records of the band, including other significant employers, would generate a more accurate picture of the taxable consumption on the reserve.

Obligation to Collect FNGST and File a Return

Where the FNGST applies, all businesses, including those owned by Indians, Indian bands, or band-empowered entities, must register with the CRA for the GST. Once a business is a GST registrant it automatically becomes registered for FNGST. A business does not have to register and collect FNGST if it is a "small supplier", meaning generally that its worldwide revenues from taxable supplies of goods and services, including zero-rated supplies, have been \$30,000 or less over the past year.

All registrants must collect the FNGST from everyone who purchases taxable supplies of goods and services on First Nations lands. Once FNGST is collected it is held in trust for the CRA until it is remitted through the filing of a GST return. A business' net tax for each reporting period is calculated on the GST return. The difference between the FNGST collected and the ITCs is the net tax. If the number is positive the amount is remitted to the CRA; if it is negative the business will be eligible for a refund.

In summary, the FNGSTA enables the application of a 7% goods and services tax on First Nation lands. This tax can be an attractive means of supplementing a First Nation's public revenues. Where the FNGST applies it will be applicable to both First Nations and non-First Nations persons. Depending upon where a good or service is consumed either the First Nation or the Government of Canada would be entitled to the FNGST paid. In some circumstances a First Nation that has imposed the FNGST could be eligible to receive payments of GST revenues from the Government of Canada. The FNGSTA would place an obligation on businesses to collect FNGST and file a GST return.

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For more information on our services, please contact Rosanne Kyle at 604.643.1235 or rkyle@millerthomson.ca or Martin Gifford at 604.643.1264 or mgifford@millerthomson.ca.

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