

# Taxation Law Bulletin

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## Application of Canadian Provincial Sales Taxes (PST) to Computer Hardware, Computer Software, and Internet-Related Services

The application of Canadian provincial sales and use taxes (PST) to computer hardware, computer software, and related services has been one of the most confusing and controversial tax issues facing the high tech sector -- both providers and users alike -- over the past decade. The table below is designed to assist businesses and their advisors by being a starting point for determining whether computer hardware, computer software, and internet-related services are subject to PST.

reviewed are set out below the table and links to the websites where they can be found are provided.

This document was originally prepared as part of a presentation to the Tax Executives' Institute's 54<sup>th</sup> Midyear Conference held in Washington, D.C. in March of 2004. This portion of the paper was sent to the provincial tax authorities in British Columbia, Saskatchewan, Manitoba, Ontario, and Prince Edward Island for their review and comment. As of July 27, 2005, British Columbia, Manitoba, Ontario, and Prince Edward Island have provided comments and corrections.<sup>1</sup>

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New York

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Johannesburg

Only five Canadian provinces – British Columbia, Saskatchewan, Manitoba, Ontario, and Prince Edward Island – impose sales and use taxes of general application. The other provinces either do not impose a provincial sales tax of general application (i.e. Alberta, Yukon Territory, Northwest Territories, and Nunavut) or they impose a value-added tax (i.e. Quebec, Nova Scotia, New Brunswick, Newfoundland & Labrador) which is similar or identical to Canadian federal goods and services tax. The table attempts to summarize the application of PST in the five sale and use tax provinces only, and is based on the information contained in PST bulletins and guides published by each of the province's tax authorities. The bulletins and guides

<sup>1</sup> Comments from the Ontario Ministry of Finance Retail Sales Tax Branch were by letter dated April 14, 2005;

Comments from the British Columbia Consumer Taxation Branch were by email dated March 3, 2004.

Comments from the Manitoba Finance were by letter dated July 5, 2004;

Comments from the Prince Edward Island Ministry of Finance were by telephone in March 2004.

*Despite the review by these provincial tax authorities, this table is intended as a guideline only. Due to the complex nature of this topic and the variety of means by which computer and internet-based hardware, software, and services can be delivered, the table is not specific enough to address all circumstances. Accordingly, you should not rely on the information set out in the table to determine whether a particular good or service is subject to PST. You should review the applicable sales tax laws, as well as the bulletins or guides published by the provincial tax authorities. You should also seek independent legal advice and consider obtaining a written ruling with respect to your specific circumstances from the appropriate tax authority.*

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PRODUCT/SERVICE	BC 7.5%	SK 7%	MB 7%	ON 8%	PEI 10% <sup>2</sup>
Computer Hardware (Purchased or Leased)	Y	Y	Y	Y	Y
Software					
– Packaged, Pre-Written, Shrink-Wrapped, “Canned”, “Off-the-Shelf”	Y	Y	Y	Y	Y
– System programs & operating systems	Y	Y	Y	Y	Y
– Application Programs, such as word processing, spreadsheet, database, Internet browsers and games	Y	Y	Y	Y	Y
– Computer programs produced from modules	Y	Y	Y	Y	Y
– Add-on application utilities sold or leased to more than one person	Y	Y	Y	Y	Y
– Programs designed for a number of different users in a particular industry	Y	Y	Y	Y	Y
– Compilations of pre-written software modules	Y	Y	Y	Y	Y
– Software purchased “exclusively” to make copies for resale	N	Y	Y <sup>3</sup>	N <sup>4</sup>	N
“Custom Computer Software” <sup>5,6,7</sup>	N	Y	N	N	N
– Add-on application utilities programmed and designed for a particular person	N	Y	N	N <sup>8</sup>	N

<sup>2</sup> For Prince Edward Island provincial sales tax purposes, federal goods and services tax is included in the amount upon which the 10% PEI PST is calculated.

<sup>3</sup> Manitoba Retail Sales Tax Bulletin No.033 *Computer Software and Programming Services*: “Normally when a business acquires the right to copy and resell software, the price paid for the software is much greater than the price that would be paid if purchased for their own use. Businesses acquiring software for this purpose are not required to pay [Manitoba PST] on the purchase price of the software, but must self-assess and remit tax on their regular selling price of one copy of the software.”

<sup>4</sup> Ontario PST does not apply to software acquired for the purpose of making copies of the software for resale provided the purchaser qualifies as a “manufacturer” for Ontario PST purposes.

<sup>5</sup> British Columbia – “Software” means packaged or prewritten software programs or modifications to such programs, or the right to use such programs or modifications, whether the software is delivered by electronic, disk, tape or other means, but does not include

(a) modifications that involve changes to the source code of software and that are made solely to meet the requirements of a specific person if

(i) the purchase price or lease price, as applicable, of the modifications is separate from that of the unmodified software, and

(ii) the purchase price or lease price of the modifications is greater than the purchase price or lease price, as applicable, of the software in its unmodified form,

(b) software that is modified in a manner that involves changes to the source code, and that is modified solely to meet the requirements of a specific person if

(i) the purchase price or lease price, as applicable, is for the software as modified, and

(ii) that purchase price or lease price is greater than double what it would have been for the software in its unmodified form, or

(c) custom software, being

(i) software programs developed solely to meet the requirements of a specific person, and

(ii) modifications to software referred to in subparagraph (i) when performed for the person for whom the software was originally developed, unless the software is a copy of software referred to in paragraph (a), (b) or (c), or the right to use such software, that is sold or leased to someone other than the specific person for whom the software was originally modified or developed.

<sup>6</sup> Manitoba: “Custom Software” – (a) software programs developed solely to meet the requirements of a specific person and modifications to such software programs performed for the person for whom the software was originally developed, (b) software modified solely to meet the requirements of a specific person if the purchase price is for the software as modified and the purchase price is greater than double what it would have been for the software in its unmodified form, or (c) modifications to or of software solely to meet the requirements of a specific person if the purchase price of the modifications is separate from that of the unmodified software and the purchase price of the modifications is greater than the purchase price of the software in its unmodified form.

<sup>7</sup> Ontario: “Custom Computer Program” – a computer program designed and developed to solely meet the specific requirements of, and that is intended for the exclusive use of, a particular person. If, as a condition of sale, a pre-written program is modified (modification means changes to the original source code) and the total price of the modifications is greater than the price to purchase the original pre-written program without modifications, then the total sale (pre-written computer program and modifications) is considered to be a custom computer program.

<sup>8</sup> Comment from Ontario’s Retail Sales Tax Branch: “The add-on application utilities must meet the definition of a custom computer program as defined in Section 14 [editor: 14.2] of Regulation 1012.” Ontario RST Regulation 1012 can be found at: [http://www.e-laws.gov.on.ca/DBLaws/Regs/English/901012\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Regs/English/901012_e.htm)

PRODUCT/SERVICE	BC 7.5%	SK 7%	MB 7%	ON 8%	PEI 10% <sup>2</sup>
<b>Hardware-related Services</b>					
Hardware Installation	Y	Y	Y	Y	Y
Hardware Repair	Y	Y	Y	Y	Y
Hardware Maintenance					
– Maintenance Contracts that are a mandatory condition of the purchase or lease of the hardware	Y	Y	Y	Y	Y
– Optional Maintenance Contracts that provide for scheduled or predeterminable maintenance	Y	Y	Y	Y	Y
– Optional Maintenance/Warranty Contracts that provide for maintenance only in the event of malfunction	N	Y	Y	Y	N
Computer time sharing	Y	Y	Y	Y <sup>9</sup>	Y
Cleaning	N	Y	Y	N	Y
Diagnostic & Testing Services (No further work performed at the same time)	N	Y	Y	N	N
Diagnostic & Testing Services (Repairs or maintenance performed at the same time)	N <sup>10</sup>	Y	Y	Y	Y
Remote Access					
– Accessing from within the province hardware located outside the province	N	Y	N	N <sup>11</sup>	Y
– Accessing from outside the province hardware located within the province	Y	Y	Y	Y <sup>12</sup>	N
<b>Software-related Services (Other Than Custom Computer Software)</b>					
Upgrades, and add-on utilities	Y <sup>13</sup>	Y	Y	Y	Y
Copies of software	Y	Y	Y	Y	Y
Licence fees and the “right to use” software	Y	Y	Y	Y	Y

<sup>9</sup> Comment from Ontario’s Retail Sales Tax Branch: “We require further details to render a definitive answer.”

<sup>10</sup> Diagnostic & Testing Services are not taxable in BC when repairs or maintenance are performed at the same time but only if the fees for the diagnostic and testing services are stated separately on the invoice.

<sup>11</sup> Comment from Ontario’s Retail Sales Tax Branch: “Page 6 of the Retail Sales Tax Guide #650 - Computer Programs and Related Services clarifies our position on remote access to computer programs. The application of RST is determined by the location of the program, consequently the program will reside on hardware.”

<sup>12</sup> See footnote 11.

<sup>13</sup> Pursuant to BC’s Social Services Tax Act Regulations, paragraph 2.46(j), the services of installing, modifying, or configuring software are exempt from BC PST if

- the services are provided solely to meet the requirements of a specific person,
- the services are purchased separately from the purchase or lease of that software, and
- the cost of the services is greater than the cost of that software.

Furthermore, paragraph 2.46(k) of these regulations also exempt services respecting the installation, modification or configuration of software if:

- the services are provided solely to meet the requirements of a specific person,
- the purchase or the lease price, as the case may be, is the price for the software, as installed, modified or configured, and
- the purchase or lease price, as the case may be, is greater than double the price of purchasing or leasing the software without the installation, modification and configuration services.

With respect to modifications after the purchase of software, if they do not qualify as being excluded from the definition of “software” (see footnote 5), they may well qualify under the taxable services exemption under regulation 2.46(j).

Note, however, there is a distinction between excluding modifications from the definition of software, and providing an exemption. The exclusion from the definition of software was established in recognition that changes to the source code are like creating custom software. This distinction is important because of subsection (b) of the definition of “software”. Under subsection (b), if the purchase is for the modified software and the modifications include source code changes and cost at least twice as much as the unmodified software, the whole purchase - packaged software and modifications - is excluded from the definition of software and therefore not subject to tax. This is because it is considered similar to the development of custom software. However, under regulation 2.46(k), if the modifications do not include source code changes, only the modifications are exempt from tax. The packaged software remains taxable.

PRODUCT/SERVICE	BC 7.5%	SK 7%	MB 7%	ON 8%	PEI 10% <sup>2</sup>
Installing software	Y <sup>13</sup>	Y	Y	Y	Y
Reinstalling software	Y	Y	Y	Y	Y
Repairing software	Y	Y	Y	Y	Y
Restoring software	Y	Y	Y	Y	Y
Configuring software	Y <sup>13</sup>	Y	Y	Y	Y
Maintenance or Support Agreements/contacts that involve physical and/or remote program contact					
– Maintenance Contracts that are a mandatory condition of the purchase or lease of the software	Y	Y	Y	Y	Y
– Optional Maintenance Contracts that provide for scheduled or predeterminable maintenance or provide software updates or new releases	Y	Y	Y	Y	Y
– Optional Maintenance/Warranty Contracts that provide for maintenance only in the event of malfunction, but provide for software updates or new releases	N	Y	Y	Y	N
– Optional Maintenance/Warranty Contracts that provide for maintenance only in the event of malfunction, and do not provide for software updates or new releases					
Maintenance or Support agreements/contracts that do not involve physical and/or remote program contact, and do not provide for updates or new releases	N	Y	N	N <sup>14</sup>	Y
Software modification (changes to the original source code) where the charge for the modification is not greater than the price of the original computer program	Y	Y	Y	Y	Y
Software modifications (changes to the original source code) where the charge for the modification is greater than the price of the original computer program	N	Y	N	N <sup>15</sup>	Y
Eradicating software viruses	Y	Y	Y	Y	Y
Writing, designing, developing and improving software (other than custom computer software)	Y	Y	Y	Y	Y
Diagnostic & Testing Services (No further work performed at the same time)	N	Y	Y	N <sup>16</sup>	N
Diagnostic & Testing Services (Repairs or maintenance performed at the same time)	N <sup>17</sup>	Y	Y	Y	Y

<sup>14</sup> Comment from Ontario's Retail Sales Tax Branch: "Taxable service" is defined in Section 1 of the [Retail Sales Tax] Act and includes (d.1) any contract entered into on or after July 19, 2002 for the service, **maintenance** or warranty of a computer program, as those expressions are defined by the Minister, . . ." Assistance or support either in person, over the phone, electronically or via e-mail, but not hands-on is not subject to RST. For additional information, please refer to the top of page four of the **Backgrounder** the section dealing with "hands-on" and "hands-off" services." The Backgrounder to which the Branch is referring can be found at: [http://www.trd.fin.gov.on.ca/userfiles/page\\_attachments/Library/3/Rsie\\_In38Bkgnd.pdf?N\\_ID=3](http://www.trd.fin.gov.on.ca/userfiles/page_attachments/Library/3/Rsie_In38Bkgnd.pdf?N_ID=3)

<sup>15</sup> Comment from Ontario's Retail Sales Tax Branch: "Please refer to page six of the **Backgrounder** for clarification on the application of RST to cumulative modifications." The Backgrounder to which the Branch is referring can be found at: [http://www.trd.fin.gov.on.ca/userfiles/page\\_attachments/Library/3/Rsie\\_In38Bkgnd.pdf?N\\_ID=3](http://www.trd.fin.gov.on.ca/userfiles/page_attachments/Library/3/Rsie_In38Bkgnd.pdf?N_ID=3)

<sup>16</sup> If the testing is provided in connection with a taxable service (i.e. one that is subject to Ontario Retail Sales Tax) and the value of the taxable service exceeds 10 per cent of the value of the testing, then the charge for both services may be considered to taxable. See page 3 of the Ontario Ministry of Finance's September 2004 Backgrounder located at: [http://www.trd.fin.gov.on.ca/userfiles/page\\_attachments/Library/3/Rsie\\_In38Bkgnd.pdf?N\\_ID=3](http://www.trd.fin.gov.on.ca/userfiles/page_attachments/Library/3/Rsie_In38Bkgnd.pdf?N_ID=3)

<sup>17</sup> See comment in footnote 10

<b>PRODUCT/SERVICE</b>	<b>BC 7.5%</b>	<b>SK 7%</b>	<b>MB 7%</b>	<b>ON 8%</b>	<b>PEI 10%<sup>2</sup></b>
Remote Access					
– Accessing from within the province software located outside the province (no downloading of software involved)	Y	Y	N	N	Y
– Accessing from within the province software located inside the province (no downloading of software involved)	Y	Y	Y	Y	Y
– Accessing from outside the province software located within the province (no downloading of software involved)	N	N	Y	Y	N
<b>Custom Computer Software-related Services (see footnotes defining “custom computer software”)</b>					
Upgrades, and add-on utilities (designed for and provided to the original purchaser)	N	Y	N	N	N
Copies of custom computer software (provided to original purchaser)	N	Y	N	N	N
Licence fees and the “right to use” custom computer software	N	Y	N	N	N
Installing custom computer software	N	Y	N	N	N
Reinstalling custom computer software	N	Y	N	N	N
Repairing custom computer software	N	Y	N	N	N
Restoring custom computer software	N	Y	N	N	N
Configuring custom computer software	N	Y	N	N	N
Maintenance or Support Agreements/contacts that involve physical and/or remote program contact	N	Y	N	N	N
Maintenance or Support agreements/contracts that do not involve physical and/or remote program contact	N	Y	N	N	N
Software modification (changes to the original source code) where the charge for the modification is not greater than the price of the original custom computer program	N	Y	N	N	N
Software modifications (changes to the original source code) where the charge for the modification is greater than the price of the original custom computer program	N	Y	N	N	N
Eradicating software viruses	N	Y	N	N	N
Writing, designing, developing and improving custom computer software	N	Y	N	N	N
Diagnostic & Testing Services (No further work performed at the same time)	N	Y	N	N	N
Diagnostic & Testing Services (Repairs or maintenance performed at the same time)	N	Y	N	N	N
Remote Access					
– Accessing from within the province custom computer software located outside the province	N	Y	N	N	N
– Accessing from outside the province custom computer software located within the province	N	Y	N	N	N
<b>Consulting services</b>					
Training	N	N	Y/N <sup>18</sup>	N	N
Telephone support / help-desk (no “hands-on” support)	N	Y	N	N	Y

<sup>18</sup> Training is only not subject to Manitoba PST if the charges for the training are billed separately and was optional to the purchase of the software or hardware.

PRODUCT/SERVICE	BC 7.5%	SK 7%	MB 7%	ON 8%	PEI 10% <sup>2</sup>
E-mail / On-line / Fax support (no “hands-on” support)	N	Y	N	N	Y
In-person support (no “hands-on” support)	N	Y	N	N <sup>19</sup>	Y
Consulting Services related to the delivery of an “automated business solution” to fulfill defined requirements	N	Y	Y <sup>20</sup>	Y/N <sup>21</sup>	Y
Consulting services relating to defining and establishing business requirements	N	N	N	N <sup>22</sup>	Y
Charges for sustenance, accommodation, travel time, mileage and fuel	N <sup>23</sup>	N	N	Y/N <sup>24</sup>	N
Printed material sold with a taxable computer program, such as technical bulletins and manuals, where charges are segregated on the customer’s invoice	N	N	Y	Y <sup>25</sup>	N
In-house computer services (part of same legal entity)	N	N	N	N <sup>26</sup>	N
<b>Data &amp; Data-Related Services</b>					
Accessing databases	N	Y	N	N	Y
Mapping of computers	N	Y	N	N <sup>27</sup>	N
Data management (making, reorganizing and removing directories)	N <sup>28</sup>	Y	N	N	N
Creating & maintaining data files	N	Y	N	N	N
Data conversion	N	Y	N	Y/N <sup>29</sup>	N
Imaging and scanning services	N	Y	N	N <sup>30</sup>	Y
Data entry and data processing services	N	Y	N	N	N
Transferring data to software	N	Y	N	N <sup>31</sup>	N
Data back-up and storage	N	Y	N	N	N
Disaster recovery service/subscription fees	N <sup>32</sup>	Y	N	N	Y

<sup>19</sup> Comment from the Ontario Retail Sales Tax Branch: “Please refer to the top of page four of the **Backgrounder** the section dealing with “hands-on” and “hands-off” services and the section dealing with Fair Value.” The Backgrounder can be found at: [http://www.trd.fin.gov.on.ca/userfiles/page\\_attachments/Library/3/Rsie\\_In38Bkgnd.pdf?N\\_ID=3](http://www.trd.fin.gov.on.ca/userfiles/page_attachments/Library/3/Rsie_In38Bkgnd.pdf?N_ID=3)

<sup>20</sup> Consulting services in Manitoba are subject to Manitoba PST if provided in conjunction with the sale of software.

<sup>21</sup> Comment from the Ontario Retail Sales Tax Branch: “We require further details to render a definitive answer.”

<sup>22</sup> In Ontario, Project Planning “is considered to be the initial stage of a project where the implementation approach is determined, as well as the scope of the project, work parameters and deliverables. This phase may also include developing detailed blueprints for business functions, determine the exact business requirements of the client, and detailed mapping of the computer program(s). Traditionally, this phase of a project involves significant information-gathering, planning, and process design.”

<sup>23</sup> In BC, Charges for sustenance, accommodation, travel time, mileage and fuel are not taxable in relation to consulting services (not a taxable service). If these amount are in relation to a taxable service, travel time would be taxable; charges on a cost-recovery basis for food, accommodation, mileage and fuel are not subject to tax, if separately stated on the invoice.

<sup>24</sup> Comment from the Ontario Retail Sales Tax Branch: “Charges for local travel include expenses incurred during the course of a normal working day, such as mileage, meals, parking, telephone, and miscellaneous, **form part of the fair value** of the sale. Local travel expenses do not include accommodation and airfare.” Accordingly, whether these charges are subject to Ontario PST or not will depend upon the product or service to which they relate.

<sup>25</sup> Comment from the Ontario Retail Sales Tax Branch: “Where a shrink-wrapped package that contains a taxable computer program and a publication, such as an instructional manual, are sold, RST applies to the total selling price. The amounts cannot be separated to avoid RST on the exempt publication.”

<sup>26</sup> Comment from the Ontario Retail Sales Tax Branch: “We require further details to render a definitive answer. For further information, please refer to page seven of the **Backgrounder** the section dealing with “In-House Modifications”. The Backgrounder can be found at: [http://www.trd.fin.gov.on.ca/userfiles/page\\_attachments/Library/3/Rsie\\_In38Bkgnd.pdf?N\\_ID=3](http://www.trd.fin.gov.on.ca/userfiles/page_attachments/Library/3/Rsie_In38Bkgnd.pdf?N_ID=3).

<sup>27</sup> Comment from the Ontario Retail Sales Tax Branch: “We require further details to render a definitive answer.”

<sup>28</sup> In BC, charges to make, reorganize, or remove directories are not subject to BC PST provided these services are not performed as part of a taxable service, such as the installation or servicing of computer hardware or software.

<sup>29</sup> Comment from the Ontario Retail Sales Tax Branch: “Data conversion service performed at the same time as the installation of a taxable computer program is subject to RST. However, if the data conversion is performed by a third party, not the installer of the program, it is the provision of a non-taxable service.”

<sup>30</sup> Comment from the Ontario Retail Sales Tax Branch: We require further details to render a definitive answer.”

<sup>31</sup> Comment from the Ontario Retail Sales Tax Branch: We require further details to render a definitive answer.”

PRODUCT/SERVICE	BC 7.5%	SK 7%	MB 7%	ON 8%	PEI 10% <sup>2</sup>
<b>Internet Related Services</b>					
Internet Access	Y	Y	Y	N <sup>33</sup>	Y
Membership or subscription fees to access a Website	N	Y	N	N	Y
Internet e-mail services	Y	Y	Y	N	Y
Arranging for live chat or conferencing sessions directly on the Internet	N	Y	N	N	Y
Web hosting	N <sup>34</sup>	Y	N	N	?
Domain name registration	N	Y	N	N	N
Advertising fees charged to place ads within a web page	N	Y	N	N	N
Real-time streaming video and/or audio	N	Y	Y	N	Y
Webpage design (Does not include computer software or applets and design is delivered electronically – Not on disk, CD, or paper)	N	Y	N	N	Y
Webpage design (Delivered on disk, CD, or paper to customer)	N <sup>35</sup>	Y	N	Y	Y
Applets	Y	Y	Y	Y/N <sup>36</sup>	Y

<sup>32</sup> In BC, the first copy of a back-up file is not subject to PST. However, additional copies are subject to PST.

<sup>33</sup> Comment from the Ontario Retail Sales Tax Branch: “The intent of the legislation is to tax the charge made for the transmission of information, rather than any charge made for access to information (i.e., Internet access). In other words, if the service being purchased simply uses telecommunication services in its delivery, then it is not taxable as a telecommunication service. However, if the service is acquired to transmit messages, then it is a taxable telecommunication service.”

<sup>34</sup> In BC, web hosting is not taxable provided it is not sold along with internet access.

<sup>35</sup> Effective February 18, 2004 – the date of the BC Budget speech – the application of tax to tangible personal property to a customer in the course of delivering a non-taxable service has been clarified. Tax does not apply to the tangible personal property if: (a) the provision of the tangible personal property is merely incidental to the contract for a non-taxable service, and (b) there is no separate charge for the tangible personal property. ‘Incidental’ means that the object of the contract is the delivery of the service rather than the production of tangible personal property. In the case of a website design (non-taxable service) provided on a disk, CD, or paper, the provision of the disk, CD, or paper is incidental to the provision of the service and, therefore, not taxable.

<sup>36</sup> Comment from the Ontario Retail Sales Tax Branch: “When a scripting language is used to produce an applet within a design, we do not consider the applet to be a taxable computer program because it is not in an executable format and requires a web browser to interpret it. For more information, please refer to page eight of the **Backgrounder** the section dealing with “Computer Programs”. The Backgrounder can be found at: [http://www.trd.fin.gov.on.ca/userfiles/page\\_attachments/Library/3/Rsie\\_In38Bkgnd.pdf?N\\_ID=3](http://www.trd.fin.gov.on.ca/userfiles/page_attachments/Library/3/Rsie_In38Bkgnd.pdf?N_ID=3).

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