# GST/HST on Exports From Canada — Ships, Carriers, and Place of Delivery

**March 13, 2019**

Goods exported or otherwise delivered to a recipient outside of Canada are typically not subject to the GST/HST and usually zero-rated. To qualify for zero-rated treatment, a GST/HST registrant must either satisfy one of the zero-rating provisions in Schedule VI of the *Excise Tax Act* (ETA) or establish that the good was delivered outside of Canada. The place of delivery is determined with reference to the applicable sale of goods legislation.

*Montecristo Jewellers Inc. v. The Queen* (2019 TCC 31) is an important decision from the Tax Court which closely examined the requirements for zero-rating under s. 12(a) of Schedule VI and adds to jurisprudence on the meaning of "delivery" when determining the place of supply. For an importer or exporter of goods, *Montecristo* provides useful analysis of the requirements to zero-rate exports under s. 12(a) and the criteria to determine the place of delivery.

## Overview of GST/HST Assessment

Montecristo disputed a GST/HST assessment for failure to charge, collect and remit GST/HST in the amount of $2,298,898.13 on its exported sales of jewellery. Montecristo argued that the subject sales were either zero-rated exports under para. 12(a), Schedule VI or, alternatively, that the jewellery was delivered to the customer outside of Canada and was not subject to GST/HST.

## TCC Decision

The TCC concluded that the subject sales were not zero-rated and that the jewellery was delivered in Canada. Accordingly, Montecristo should have charged, collected and remitted GST/HST on those sales. Montecristo Jewellers adopted a narrow interpretation of the meaning of "contract for carriage" and "shipped" for purposes of para. 12(a) as well as the "place of delivery" under the *BC Sale of Goods Act* (BCSGA).

## Background

During its April 1, 2010 to March 31, 2013 reporting period, Montecristo was a retailer of jewellery and luxury watches in Vancouver, B.C. Most of Montecristo's loyal clientele were members of the Chinese community who lived in and around Vancouver and purchased items from Montecristo to gift to family and business relations in China. Some customers requested a GST/HST exemption on their purchase because it was destined for China and, effectively, exported. Montecristo accommodated those clients by following a procedure to zero-rate the goods.

## The Procedure

Montecristo produced a hand-written invoice for the purchase inclusive of the customer's flight information. Physical possession of the jewellery remained with Montecristo until the customer was departing for China at which point an employee would take the jewellery, invoice, and a partially-completed Form E15, Certificate of Destruction/Exportation to the Vancouver International Airport (VIA) where they met the customer at the Canada Border Services Agency (CBSA) office. The employee would hand the jewellery, boarding pass, and Form E15 to the CBSA official for inspection. If satisfied with the inspection, the CBSA Officer completed the balance of Form E15 and stamped it with a copy to the employee. The customer took possession of the jewellery and boarded.

## Zero-Rated Exports — paragraph 12(a) of Schedule VI

Paragraph 12(a), Part V, Sch, VI provides that a supply of tangible personal property (TPP) is zero-rated if the supplier ships the property to a destination outside Canada that is specified in the contract for carriage of the property.

Lyons, J. read para. 12(a) to mean that a third party carrier was required for a supply of TPP to satisfy paragraph 12(a):

[71] … in my view the most plausible interpretation of paragraph 12(a), applying the unified approach, denotes an intention that a third party carrier would need to be engaged where the supplier "ships" the property to a destination outside Canada. …

The Appellant argued that para 12(a) did not preclude the customer from being a party to a contract to ship the jewellery outside of Canada and referred to Form E15, the sales invoice and airplane ticket as evidence. Lyons, J. did not accept that the evidence proved para 12(a) was satisfied. At paragraph 78 she stated:

[78] … As no third party carrier was engaged under a contract for carriage, I find that the appellant did not ship the Jewellery within the meaning of paragraph 12(a).

The TCC adopted a narrow interpretation of para 12(a) which excludes a contract for carriage other than those with a third party. For businesses that have not used a third party carrier to export goods and relied on para 12(a) to zero-rate, this should be cause to revisit their contract for carriage for compliance.

## Delivery of Jewellery was made in Canada

Paragraph 142(2)(a) provides that a supply of TPP shall be deemed to be made outside Canada if the property is, or is to be, delivered or made available outside Canada to the recipient of the supply. Montecristo argued that the jewellery was delivered outside of Canada either on board the airplane or at the destination on the airline ticket.

To determine the place of delivery, the TCC relied on the BCSGA, which defined "delivery" as a "voluntary transfer of possession from one person to another". In finding that the place of delivery was in Canada, Lyons, J. explained that:

[a]t the time the Customers were physically handed the Jewellery at VIA, they had full possession, use and assumed the risks inherent in the Jewellery thereby acquired it regardless of their intent. …

… I find that there was a full voluntary transfer of possession, without restriction, when supplies of Jewellery were physically handed to Customers who accepted possession of the Jewellery.

Under the BCSGA, parties may contractually, whether express or implied, specify the place and intended time of delivery. The Appellant argued that the evidence demonstrated their intent, whether express or impliedly, was to deliver the goods outside of Canada. Lyons, J. could not reconcile that intent with the fact that customers had unencumbered possession and control of the jewellery while in Canada and found "the stated intent to be implausible in the circumstances".

Montecristo has appealed the decision to the FCA.

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**BLG Offices**

**Calgary**
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

**Ottawa**
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

**Vancouver**
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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