Hootsuite Inc. v British Columbia: cloud computing services not subject to B.C. PST

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On March 10, 2023, the British Columbia Supreme Court (BCSC) released its decision in *Hootsuite Inc. v British Columbia (Finance)*,[1] allowing the taxpayer's appeal against assessments by the B.C. Ministry of Finance (the Ministry). The BCSC found that B.C. provincial sales tax (PST) did not apply to certain cloud computing services, pursuant to Part 4 – *Taxes in Relation to Software* – of B.C.'s *Provincial Sales Tax Act* (the PSTA). The BCSC distinguished between "software" and "software programs", notably stating that the cloud computing services comprised opaque software such that users cannot interact with it to create an output.

What you need to know

- Although the PSTA's definition of software includes software programs, not all software will constitute a software program. PST should only apply to software programs where users can interact with and use the software comprising such software programs.
- Cloud computing services that remain opaque to users and restrict user interactions (public-facing applications) are not subject to PST, as applied to both SaaS and IaaS.
- In determining whether PST may apply to the acquisition of cloud computing services, purchasers should assess the fundamental nature of such transactions. If software is merely incidental to the services being purchased (*e.g.* technical expertise), this suggests that the transaction may be exempt from PST.

Background

Hootsuite Inc. developed a social media platform that it offers to individuals and businesses (the Platform). The Platform serves as an online social media management system, allowing users to streamline the ways they engage with their customers, manage their online presence and communicate across various social media platforms. Users can access the Platform through Hootsuite Inc.'s website or through mobile applications.

Given the volume of users and demand for the Platform, Hootsuite Inc. contracted with Amazon Web Services (AWS) to host, run and operate the Platform. The specific AWS services acquired by Hootsuite Inc. are as follows:

- AWS support (Support Services) – the provision of technical support through an online chat feature;
- Amazon elastic cloud compute (Cloud Computing) and Amazon simple storage services (Storage Services) – allow users to access remote hardware virtually through the use of a software stack; and
- AWS direct connect (Direct Connect) – a dedicated telecommunication service in the United States that allows AWS to maximize efficiency of virtual hardware (collectively, the AWS Services).

The agreements with AWS merely provided Hootsuite Inc. with a right to use the AWS Services and the software related thereto. As part of the AWS Services, Hootsuite Inc. acquired access to the AWS management console, a web interface that allowed Hootsuite Inc. to manage its AWS Services (the Console).

The Ministry took the position that Hootsuite Inc. failed to self-assess PST, as it acquired taxable software or telecommunication services through purchasing the AWS Services. The BCSC considered each AWS Service, with the bulk of its decision focusing on whether the Support Services, Cloud Computing and Storage Services constituted “software” pursuant to the PSTA.

Software vs software programs

The BCSC differentiated between “software” and a “software program”, stating that software broadly entails system software, application software and programming software. These various forms of software generally comprise a “software stack”, whereby each layer consists of one or more software programs. The top layer identifies software that is a public facing application (*e.g.* Microsoft 365) or non-public facing application (*e.g.* web portals). The BCSC referenced a “user-based” distinction between top layer applications. It noted that non-public facing applications are “opaque” to users, meaning they are restricted from interacting with the software and cannot create outputs from such interactions.

After outlining this distinction, the BCSC interpreted the relevant provisions of the PSTA in accordance with the principles of statutory interpretation. It clarified that all software programs are software, but not all software constitutes software programs for purposes of the PSTA. In particular, a software program requires a user to utilize the software as an “application”. Consistent with its user-based distinction, a user must be capable of interacting with the software for it to be a software program.

British Columbia Supreme Court decision

The BCSC applied the user-based distinction to each AWS Service, ultimately holding that PST did not apply in any instance.

Support Services

The Ministry assessed the Support Services on the basis that Hootsuite Inc. received technical guidance from AWS engineers through the Console. Hootsuite Inc. accessed the Console via its web browser; however, this was simply a conduit or interface, resulting in the Console being opaque to Hootsuite Inc. It was restricted from interacting with or modifying the Console. Although the Support Services included software in the form of "cached resources"[2], these were incidental to the nature of the transaction – Hootsuite Inc. acquiring technical expertise from qualified AWS engineers. The BCSC further held that the Support Services were not used on or with an electronic device situated in B.C., as this also required direct interaction by the user.

The BCSC acknowledged that the Support Services do qualify as a "telecommunication services" under the PSTA. That said, it confirmed that the Support Services also fall within the "incidental exemption" for the same reasons mentioned immediately above.

Cloud computing and storage services

The BCSC described cloud computing services as existing on a spectrum, with two primary types:

- Software as a service (SaaS) – offers built in application software for users that store data on the cloud and includes public facing applications; and
- Infrastructure as a service (IaaS) – offers access to computational services whereby a vendor provides the storage, network, servers and virtualization.

It held that Cloud Computing falls within IaaS, as it creates a "virtual machine" to provide computing resources to Hootsuite Inc. The components of the virtual machine are also opaque to the user, thereby preventing Hootsuite Inc. from manipulating or directly accessing it. Storage Services are separate from Cloud Computing, but functionally and technically similar for purposes of the PSTA. It provides a virtual machine that serves as a hardware storage product. Users can install an application program to store and back-up data on the virtual machine.

Due to the diverse nature of cloud computing services, the BCSC acknowledged that some may be taxable while others may not. In this case, Cloud Computing and Storages fundamentally provided Hootsuite Inc. with an "on-demand" IaaS.

Direct connect

The Ministry assessed Hootsuite Inc.'s use of Direct Connect on the basis that it constituted a taxable telecommunication service under the PSTA. Similar to its above analysis, the BCSC held that Direct Connect is opaque to Hootsuite Inc. and is unilaterally controlled by AWS. It dismissed the Ministry's argument that Hootsuite Inc. utilized Direct Connect on computers situated in B.C., finding that the "dedicated line" and "transmission" was solely contained within the United States.

Takeaways

Although certain cloud computing offerings may appear to be taxable software under the PSTA, such as the AWS Services, these offerings may be exempt from PST where the fundamental or essential nature of the supply is technical expertise rather than an executable software program or application. Technical expertise that is provided in the "cloud" and facilitated through telecommunications channels and software components should not change the taxable character of the transaction for PST purposes in B.C.

Advisors, businesses, or participants in cloud-computing space should consider the impact of this decision as it relates to past, present or future transactions involving cloud computing services with a presence in or connection to B.C.

If you have further questions about the BCSC's decision and its effect on cloud computing services and PST, reach out to your BLG lawyer, the authors of this piece, or a member of BLG's Tax Group.

[1] *Hootsuite Inc. British Columbia (Finance),* 2023 BCSC 358.

[2] Web browsers commonly create cached files to improve the loading time of web pages. The cached files or resources are not "runnable" or "executable" on their own, meaning the user cannot interact with them in any meaningful way.

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