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Income and Commodity Tax Considerations for the Sharing Economy

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Abstract

In recent years, a new category of Internet-based businesses has emerged—often referred to as belonging to "the sharing economy." These businesses engage in a range of different activities but operate according to certain common principles. The sharing economy involves a new model of economic organization in which the centralized businesses that have traditionally supplied goods and services are replaced by the activities of many individual suppliers who coordinate through a "platform." The large-scale use of this form of business organization had not been conceived of when most Canadian tax legislation was enacted, and its appearance therefore raises new challenges for the existing system in terms of compliance and potential tax leakage. This paper discusses the sharing economy and its consequences from a tax perspective, and outlines some of the challenges arising from it along with possible solutions.

Keywords Electronic commerce; information technology; Internet; sharing; tax policy; technological change.

Introduction

In very general terms, "the sharing economy" describes a certain category of Internet-based businesses that have emerged over the past several years with similar business models. Examples include such well-known enterprises as Uber (for automobile transportation), Airbnb (for temporary accommodations), Etsy (for the purchase and sale of handmade goods), and many similar businesses. Collectively, such firms constitute a substantial and growing part of the economy, with at least tens of millions of users and tens of billions of dollars in aggregate value, and they operate in a wide range of commercial areas.[1]

The appearance of this new form of business organization has raised a number of legal, economic, and other questions[2] and has attracted attention from government, industry, and others.[3] In this paper we will discuss some of the consequences of the sharing economy from a Canadian income and commodity tax perspective and, in particular, explore some of the challenges posed to our tax system by these new developments.

We begin by briefly describing the nature of the sharing economy and providing a simplified model of a sharing economy business structure to guide the subsequent discussion. We then discuss some of the threshold characterization issues relevant to the tax treatment of such sharing economy arrangements before turning to the more specific income and commodity tax consequences for participants in sharing economy structures. We conclude with a brief discussion of possible tax policy changes that might be pursued in response to the rise of the sharing economy.

The Origin and Nature of the Sharing Economy

The concept of the sharing economy appears to trace its origins back to the first decade of the 20th century. For the purposes of this paper, it is not necessary to fully recount the history of the idea, which has been covered in other sources.[4] However, it is important to recognize that the actual term "sharing economy" (which is not, to the authors' knowledge, legally trademarked or otherwise under the control of any person or organization) has no precise and universally recognized definition and has been somewhat malleable over time. This malleability has led to some inconsistency in how the label has been applied.[5] Commentators have created further confusion by using a variety of distinct but similar terms that focus on different features of such businesses.[6]

For the purposes of this paper, when we refer to the sharing economy we mean a system of economic activity with the following characteristics:

1) the activity is arranged through a (typically Internet-based) platform (such as a website or a smartphone application known as an "app") operated by a party not directly involved in the underlying activities ("the platform provider"),
2) the platform connects individuals offering goods or services ("suppliers") with other individuals interested in purchasing such goods or services ("customers"),[7] and
3) the platform allows the suppliers and customers to transact with each other.[8]

Example of a Sharing Economy Structure

In order to make this somewhat abstract definition, and the discussions that follow, more concrete, it is useful to consider a simple, hypothetical example of

Figure 1 Traditional Business

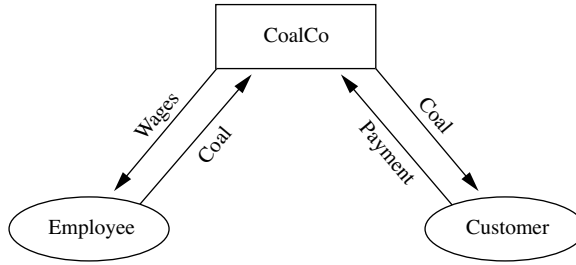
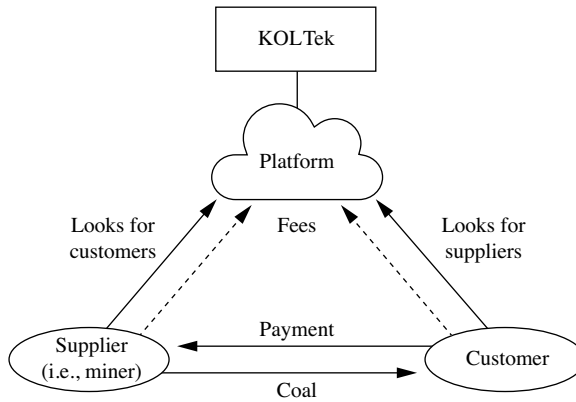


Figure 2 Sharing Economy Business



how a traditional form of business organization might translate into the sharing economy. This is illustrated in figures 1 and 2.

Figure 1 shows the operations of CoalCo, a corporation engaged in mining coal in a traditional way. CoalCo hires individual miner employees, those employees mine coal for CoalCo, and CoalCo then sells that coal to customers. CoalCo earns profits based on the difference between the price it receives from its customers and the amount it spends on employees' salaries and other costs of production.

Figure 2 illustrates the somewhat more complicated picture of how such coal mining activities could be carried on through a sharing economy structure. In this picture, CoalCo is replaced by KOLTek, a corporation that, instead of mining, operates an Internet-based platform (in this case, a website also accessible through a smartphone app). Potential individual suppliers and customers of coal[9] can access the platform and be automatically matched with each other. Once matched, the platform facilitates the entry into a contract directly between the supplier and the customer providing for the purchase and sale of a specific amount of coal.[10] Various mining-related expenses (such as the cost of pickaxes) that would be borne by CoalCo in figure 1, are instead paid for by the suppliers

out of the proceeds of their contracts with customers. In this arrangement, KOLTek earns income by charging fees for the use of the platform, paid by the suppliers and/or the customers.

The arrangements shown in figure 2 are highly simplified, and many elaborations of the basic picture are possible. For example, beyond merely facilitating the formation of a contract between the supplier and the customer, the platform might also support their interactions in other ways, such as by handling payment processing, arranging for deliveries, or assisting suppliers with the acquisition of necessary tools and other logistics. Likewise, KOLTek might be only one entity in a larger corporate group with affiliates supporting the platform in Canada or in other jurisdictions. Despite these potential complications, the basic KOLTek arrangements shown in figure 2, notwithstanding that they may be impractical for non-tax reasons, provide a good model for thinking about some of the potential tax implications of a shift to the sharing economy.

Preliminary Observations Concerning Traditional and Sharing Economy Models

Before we turn to a detailed tax analysis of sharing economy arrangements, it is useful to reflect on the similarities and differences between the traditional and sharing economy structures in order to understand the changes that the tax system will be required to confront.

Beginning with the similarities, there is little difference between the two structures in terms of actual physical activities. In both cases the coal is mined by individual miners (although in one case they are employees of CoalCo, and in the other case they contract directly with a customer) and acquired by the customers. Furthermore, it is not clear that the economics will necessarily have changed for the participants. All else being equal—and assuming that the relative bargaining power of the employees/suppliers and customers remains unchanged—one might expect that the customers continue to pay the same market price for coal and that the suppliers are willing to work for the same net compensation (after deducting the expenses pushed down to them in the sharing economy structure) that they would have earned in wages as employees of CoalCo.[11]

Furthermore, although the overall legal structures implemented by CoalCo and KOLTek are quite different, the constituent elements in the sharing economy structure are not fundamentally new. There have always been, and the tax system has always had to deal with, sole proprietor businesses and outsourcing of work to independent contractors. There have also previously been platforms for connecting independent suppliers and customers (such as the newspaper classified pages). There have even been some whole industries historically organized along somewhat similar lines.[12]

Whereas in the past, however, sharing economy-type arrangements may have been workable only in specific circumstances, modern developments in data

processing and communications technology appear to have expanded the range of situations in which such arrangements can be used. Considering the operations of KOLTek without the Internet or computers illustrates the problem. Such an enterprise would have required armies of clerks and lawyers to handle the data concerning all of the suppliers and customers and draw up contracts between them. Absent the Internet, suppliers and customers would have needed to use other (slower and more cumbersome) channels to interact with the platform. They would also have faced their own data management problems when potentially dealing with a myriad of counterparties instead of a single employer or seller. We expect that such complications would have made the comparative organizational efficiency of CoalCo's centralized operations an insurmountable advantage for the traditional model.

The main change brought about by the sharing economy from a tax perspective, therefore, is not one of fundamental novelty, but rather of scale and scope. The tax questions raised by the sharing economy are not, in general, qualitatively new or issues of first impression for the tax system. However, they are questions that have taken on a new significance in light of the continued growth of the sharing economy, and for that very reason they may demand new thinking and different answers. In effect, the potential scale and quantity of the challenges posed by the sharing economy gives them a quality all of their own.

Tax Characterization of Sharing Economy Structures

The threshold tax question for a sharing economy structure is whether the form of the arrangements will be respected for tax purposes. That is, will the tax system accept that a sharing economy structure involves independent suppliers and customers contracting directly with each other, and that the platform provider provides information technology (IT) services to the customers and suppliers but is not otherwise a party to the underlying economic activity or contracts? As a practical matter, such a characterization will generally be preferred, at least by the platform providers; however, the nature of the sharing economy raises some potential impediments on the way to achieving that result.

It is a well-known and basic principle of Canadian tax law that, absent a sham, the legal form of a taxpayer's transactions will generally be respected for tax purposes.[13] Therefore, achieving the desired tax characterization of a sharing economy structure is largely an exercise in drafting appropriate contractual language to embody the desired legal relationships among the parties, and then ensuring that those relationships are respected by the parties.[14] Thus, taxpayers seeking to implement sharing economy structures will face many issues common to all taxpayers that seek to have the legal form of their transactions respected for tax purposes.

While these drafting exercises may often be relatively straightforward, and the technology of the sharing economy facilitates the necessary contracting between parties, the sharing economy's multiplication of direct legal relationships

imposes some costs and complexity. Indeed, this complexity has apparently been enough in some cases to cause a shift away from a pure sharing economy structure. One example of this is seen in the "peer-to-peer lending" industry, where some platforms have moved away from direct loans from individual lenders to individual borrowers, and instead inserted the platform itself (or a related entity) as a central counterparty in the borrowing and lending transactions.[15]

A particular area of contention regarding the characterization of some sharing economy structures has been the classification of suppliers as independent contractors rather than employees.[16] The employee/contractor distinction has been particularly fraught in the sharing economy as the result of a confluence of legal and technological factors.

On the legal side, the nature of the employee/contractor test invites a particularly open-ended and substantive inquiry into the interactions between the parties to determine their "total relationship" and whether the potential employee is in fact engaged in business on his or her own account.[17] Potential employee status therefore cannot be "fixed" by any simple tweak to the contractual language.

On the technological side, the sharing economy offers novel opportunities for the platform provider to exercise effective control over its suppliers, even without any explicit legal right to direct their activities. For example, because sharing economy platforms are typically accessed through a smartphone app that is able to continuously collect and report data to the platform, the platform provider may have much more information about exactly where, when, and how a supplier is working than might typically be the case with an independent contractor. At the same time, because all supplier/customer matching and contracting is moderated through the platform, and because the platform may be in contact with a large pool of readily deployable suppliers, the platform provider may be able to easily reward (or punish) particular suppliers by selectively streaming desirable customer matches to (or withholding then from) such suppliers. By combining such information and tools a platform provider might be able to effectively compel suppliers to adhere to very specific policies, while theoretically giving suppliers the choice whether to do so. Similarly, it might be possible for a platform provider, using its detailed knowledge of supplier activities and control over supplier-customer interactions, to arrange the terms of contracting so that suppliers earn a particular predetermined amount of profit on their activities. As a result, the actual risks borne by suppliers may be effectively mitigated despite a theoretical pushing down of risks to the suppliers as part of the sharing economy arrangements. These examples are far from exhaustive. Furthermore, in situations where a sharing economy platform is competing with a traditionally structured business, there may be a particular incentive to exercise such tools of effective control in order to compete with the standardized goods and services offered by more centrally managed businesses.

Whether any particular platform crosses the line of effective control to create an employment relationship with suppliers is a question of fact that would depend heavily on the operations and circumstances of the particular platform.[18] While

it is therefore impossible to draw any universal conclusions, some cases currently being litigated provide illustrative examples.

For example, on October 28, 2016, the UK employment tribunal released a decision in *Aslam v. Uber BV* holding that certain drivers in the United Kingdom were employees of a subsidiary of Uber Technologies Ltd. ("Uber").[19] Although a number of factors are listed as supporting this conclusion, the judge appears, generally speaking, to have been impressed by the lack of real control exercised by the drivers over their putatively independent businesses.[20] In the United States, a significant class action lawsuit brought against Uber in the state of California is still awaiting a final resolution. The case has survived a summary judgment order in which the court concluded that the relevant drivers were at least "presumptive employees" of Uber on the basis that the drivers "render[ed] service to Uber."[21] The authors understand that a similar class action has been brought in Ontario, but it is still at a very preliminary stage.[22]

It should also be noted that in some jurisdictions, judicial interpretation of the traditional classification rules is being overtaken by legislative fiat. For example, the state of Arkansas has enacted a rule deeming certain drivers of "transportation network companies" to be independent contractors, and North Carolina has introduced a rebuttable presumption to the same effect.[23] As part of the 2017 federal budget, released on March 22, 2017, the government of Canada proposed changes to the goods and services tax/harmonized sales tax (GST/HST) treatment of "ride-sharing" services that will be discussed below.[24] However, the changes in the budget appear to leave open the question of whether the drivers involved in such services should be classified as employees or independent contractors. The potential to address the challenges of the sharing economy with new classification regimes for tax purposes will be discussed in greater detail below.

A platform provider that wants to implement a sharing economy structure will, therefore, need to carefully manage the terms and operation of the platform to ensure that it is correctly regarded for tax purposes. For the balance of this paper, as we discuss the specific tax consequences of operating in the sharing economy, we will assume that the platform has been correctly set up to achieve that result.

Income Tax Considerations for Sharing Economy Participants

As the sharing economy continues to expand in Canada, the operators, employees, and customers of traditional businesses may increasingly find themselves transformed into (or replaced by) the platform providers, suppliers, and customers of the sharing economy. In this section, we will discuss some of the income tax consequences of these transformations for each category of participants as well as some of the resulting implications for the integrity of the Canadian tax system.

Suppliers

For suppliers, the main income tax consequence will be a significant increase in the complexity of their tax affairs when compared with those of an employee of a traditional business. Employees are subject to a comparatively simple set of rules for determining their income under subdivision a of division B of part I of the Income Tax Act.[25] As business proprietors, sharing economy suppliers are instead subject to the more extensive regime for business and property income set out in subdivision b. To cite just a few of the consequences of this difference, suppliers will be expected to

- track their expenses and make determinations regarding deductibility,
- categorize their depreciable capital property by capital cost allowance class and track the resulting undepreciated capital cost balances,
- maintain adequate books and records,
- apply the various income tax rules applicable to the division and transfer of property between business and other use,[26] and
- apply other special rules in the Act that may apply to the supplier's particular area of activity (such as Canadian exploration expenses for the KOLTek suppliers in our earlier example).

Beyond the added complexity of calculating their income, suppliers would operate outside the system of information reporting and payroll withholding that facilitates compliance and tax collection for employees. In some cases, suppliers might also need to provide information to their customers in order to corroborate aspects of the supplier's tax situation, as discussed further below.

Apart from whatever effect this complexity has on the individual supplier (and it likely creates both burdens and opportunities), it creates a threat to the efficient operation of the income tax system as a whole. A key feature of the Canadian income tax system is that it provides a (comparatively) simple, easy to comply with, and easy to enforce set of rules applicable to the large mass of employee taxpayers, while it reserves the more complicated rules for the subset of taxpayers to whom they are most relevant.[27] An erosion of that division threatens the efficiency and administrability of the tax system. It is not hard to imagine the added difficulties for the Canada Revenue Agency (CRA) if it suddenly needed to assess the compliance of millions of additional individual income tax returns reporting business income and business expense deductions.

If the advent and continued growth of the sharing economy means that the employee category is no longer able to fulfill its historical function (of rationing out the application of more complicated tax rules), perhaps the boundaries of the category should be revisited. For example, the definition of an "employee" for tax purposes could be expanded or a new category could be created for sharing economy suppliers with a similarly simplified compliance regime. Such possibilities are discussed in greater detail below under the heading "Concluding Thoughts Regarding Legislative Change."

Customers

The sharing economy also creates income tax complications for its customers, although likely to a lesser extent than for its suppliers. In particular, any tax rules that turn on the identity or activities of the supplier become more difficult to comply with once the customer switches from dealing with a single monolithic business enterprise, as in the traditional economy, to potentially dealing with a different individual supplier for each transaction. Difficulties are likely to be further compounded, given that such individual suppliers are likely to be less sophisticated in regard to tax matters.

The most obvious context in which the supplier's identity will be significant to customers concerns withholding taxes. A customer that contracts with, and makes payments to, a supplier will in principle need to know whether that supplier is a non-resident of Canada in order to determine whether Canadian withholding taxes might apply. Tax residence may be difficult for an unsophisticated supplier to determine, and even if the supplier knows his or her residence status, it may be difficult for the supplier to communicate this status to the customer unless the design of the platform facilitates the exchange of such information. If the customer determines that the supplier is a non-resident, further inquiries might be required to determine the applicable form of withholding.[28] If the customer is not satisfied that withholding tax does not apply, the need to actually arrange such withholding adds further complication to the transaction.

These complications, and the impracticality of customers inquiring into the affairs of the many different individual suppliers that they might deal with over a series of transactions, could be addressed by centralizing compliance burdens with the platform provider, as suggested below under the heading "Concluding Thoughts Regarding Legislative Change."

Platform Providers

For platform providers, the transition to the sharing economy has a range of income tax implications that complement those discussed above for suppliers and customers. The increased complexity faced by those other parties is accompanied by relatively reduced complexity for the platform provider. For example, the platform provider is free from responsibility for withholding from and reporting employee compensation and dealing with the other tax aspects of the underlying transactions carried on through the platform.

However, what may be more significant for the platform provider is the (potentially advantageous) change in the character of the income it earns in comparison with a traditional business. Referring back to the example of CoalCo and KOLTek, while both corporations earn income that ultimately economically derives from the same types of underlying mining activities, legally KOLTek earns income from providing services to suppliers and customers through its IT platform rather than from mining per se. A coal mine must be located where the coal is, but an IT platform can be located almost anywhere. The potential mobility

of such income therefore offers the platform provider considerable opportunity to source the income in a favourable jurisdiction for tax purposes.

The ability of taxpayers to avoid taxation by shifting income between jurisdictions has attracted increasing attention in recent years, as exemplified by the Organisation for Economic Co-operation and Development's (OECD's) ongoing project on base erosion and profit shifting (BEPS). In light of that attention, it is worth considering how the profit-shifting advantages of the sharing economy for platform providers may be affected by possible future developments.

Of most direct relevance for the sharing economy is a report released by the OECD on action item 1 of the BEPS project, *Addressing the Tax Challenges of the Digital Economy*.[29] That report briefly discusses the sharing economy as part of a larger survey of the digital economy. However, the sharing economy does not appear to have been a major focus and none of the report's proposals are tailored specifically to the sharing economy.[30] The report's conclusion is that the income tax challenges posed by the digital economy may be largely addressed by a number of measures being taken under the other BEPS action items, including new rules to deal with treaty abuse, permanent establishment avoidance, and transfer-pricing issues.[31]

It is not clear that the measures recommended by the report would actually address the situation of a "pure" sharing economy business similar to KOLTek. The measures suggested by the report largely address situations in which a multinational group uses intragroup transactions in order to shift income between countries. However, such intragroup arrangements are not the basis for any tax advantage in the KOLTek structure—indeed, in our example no subsidiary or affiliate of KOLTek engages in mining in Canada (all of the actual mining activities are instead conducted by the arm's-length third-party suppliers) and no mining income is shifted within the KOLTek group. As a result, KOLTek might be unaffected by the measures recommended by the OECD.[32]

The OECD report did consider, and reject, one alternative measure that might have a more direct impact on sharing economy structures. This alternative involves supplementing the current permanent establishment concept with what might be described as a "digital presence" threshold for taxation, to be established on the basis of the location of users, local platform customizations, sources of revenue, and similar factors.[33] However, the report concluded that such a new threshold was unnecessary given the other steps that were being proposed as part of the BEPS program.[34] If the sharing economy continues to expand, it will be interesting to see whether the OECD ultimately decides to revisit its conclusion regarding the sufficiency of existing thresholds for tax liabilities.

Commodity Tax Considerations

By "commodity taxes," we mean the broad variety of federal and provincial taxes, other than income taxes, that could apply to actions or transactions in the

sharing economy. Our main focus is the broad-based, federal GST/HST imposed under the Excise Tax Act (Canada) (ETA),[35] which is a value-added tax (VAT). The GST/HST applies to nearly all sales or leases (or "supplies," to use the broad terminology of the ETA) of property and services in Canada. Additional commodity taxes could also apply in specific provinces and in specific industries, each of which require their own analysis, and they will be discussed here only in passing as the context requires.[36]

The Canadian VAT analysis of the typical sharing economy structure described earlier focuses on two distinct taxable transactions. The first is the taxable transaction between the supplier and the customer, which is a supply of whatever the supplier is providing in its business (accommodation, transportation, coal, etc.). We call this the "level 1 transaction." The second is the taxable transaction between the platform provider and the supplier, which is a supply of intangible property (that is, a right to use the platform) or a service. We call this the "level 2 transaction." Each of these two supplies is distinct, and below we will analyze the level 1 and level 2 transactions separately. Finally, we will consider under what circumstances the platform provider bears any responsibility, or should bear any responsibility as a policy matter, for the taxes applicable to the level 1 transactions, which are not legally supplied by the platform provider.

The Level 1 Transactions: Small Suppliers Everywhere?

Every person who is the recipient of a taxable supply in Canada is required to pay GST/HST on that supply, unless the supplier is a non-registered "small supplier."[37] A "taxable supply" means a supply that is made in the course of a commercial activity, which includes a business (except to the extent to which the business involves the making of exempt supplies by the person).[38] While it is possible that a supplier in the sharing economy may be making exempt supplies (for example, financial services, residential rent, or certain medical services), we will assume that most suppliers in the sharing economy are, prima facie, making taxable supplies.[39] The definition of "business" in the case of individuals requires a reasonable expectation of profit, which we will also assume is present for suppliers in most sharing economy endeavours.[40]

A person is a small supplier during any particular calendar quarter and the following month if the total value of the consideration for taxable supplies (other than supplies of financial services and sales of capital property) made inside or outside Canada by the person or an associate of the person at the beginning of the particular calendar quarter, that became due, or was paid without becoming due, in the previous four calendar quarters does not exceed $30,000.[41]

In the case of a taxable supply by a small supplier who is not a registrant, no GST/HST is applicable to the supply.[42] Accordingly, if the supplier in a level 1 transaction is (1) a small supplier and (2) not registered for GST/HST purposes, the supply is not subject to GST/HST. Since most suppliers in the sharing economy are individuals who are trying to earn some extra money in their spare

time, many sharing economy transactions are not subject to GST/HST. The result is that many transactions in the sharing economy may not be subject to GST/HST because the suppliers are small suppliers, whereas the same supplies provided by a traditional business would be subject to GST/HST.

The "Taxi Business" Exception

One significant exception to the small supplier rule arises indirectly through the mandatory GST/HST registration rules. Because the relief from GST/HST applies only to sales by small suppliers who are not registrants (that is, not registered and not required to be registered), a mandatory requirement for a supplier to register would negate the small supplier relief. Small suppliers are generally not required to register for GST/HST,[43] with the exception that "every small supplier who carries on a taxi business is required to be registered for the purposes of [GST/HST] in respect of that business."[44]

A "taxi business" is defined to mean "a business carried on in Canada of transporting passengers by taxi for fares that are regulated under the laws of Canada or a province."[45] "Taxi" is not defined in the ETA. A taxi business is subject to a unique set of rules under the GST/HST legislation, in that the operator of the business is required to be registered and, unlike any other GST/HST registration, the taxi business registration does not apply to any other activities of the person—that is, the operator is not considered a GST/HST registrant for any other purposes.[46] The question whether ride-sharing drivers in the sharing economy could be considered small suppliers, or whether they are caught by the taxi business exception, was at issue in the recent Quebec decision in *Uber Canada inc. c. Agence du revenu du Québec*.[47]

In that case, Uber Canada pointed to the definition of a "taxi" in the Highway Safety Code (Quebec)—"a motor vehicle operated under a permit issued in compliance with the Act Respecting Transportation Services by Taxi"[48]—to argue that since its drivers did not hold permits (whether or not permits were legally required), they were not driving taxis and therefore not engaged in a "taxi business." Additionally, Uber Canada argued that the fares of UberX drivers are not set in accordance with the prices regulated by the Act Respecting Transportation Services by Taxi, and are therefore not "regulated under the laws of Canada or a province."

The motions judge, Cournoyer J, found against Uber Canada on these points. He was apparently troubled by the idea of allowing Uber Canada and its drivers to benefit from a decision to (illegally) operate without permits, stating that: "[w]e cannot affirm that one escapes the application of a law on the basis of one's criminal activity [*délinquance*]."[49] Cournoyer J appears to read subsection 240(1.1) of the ETA purposively as applying to any business activities subject to the provincial taxi regimes, regardless of whether the vehicle involved is specifically designated as a taxi.[50] Indeed, there is no indication in the ETA that it adopts or is limited to the definition of taxis found in the Highway Safety Code

(Quebec) or other similar provincial jurisprudence. Furthermore, the ETA only requires that the fares be regulated by law, not that the taxi operator actually charge the required fees.[51] This case is discussed in more detail below, in connection with GST/HST-related offences and penalties that may be applicable to platform providers.

In the 2017 federal budget, the government proposed changes to the definition of "taxi business" in the ETA to ensure that ride-share drivers and taxi operators are treated in the same way. In particular, the definition is proposed to include the following language:

> a business carried on in Canada by a person of transporting passengers for fares by motor vehicle—being a vehicle that would be an *automobile*, as defined in subsection 248(1) of the *Income Tax Act*, if that definition were read without reference to "a motor vehicle acquired primarily for use as a taxi," in paragraph (c) and without reference to paragraph (e)—within a particular municipality and its environs if the transportation is arranged or coordinated through an electronic platform or system.[52]

The new definition is intended to come into force on July 1, 2017. By not making the proposed amendment retroactive, the government leaves open the argument that the amendment is a true change to the definition and not a mere clarification. This argument potentially undermines any position that might be taken by the Crown that Uber drivers in Canada were involved in a "taxi business" all along.

Quebec's 2017 budget included measures relating to the taxi and ride-share industry,[53] but it did not include a similar amendment to the definition of "taxi business" for Quebec sales tax (QST) purposes. Given that Quebec has already succeeded with its arguments in court that Uber drivers are captured by the existing definition of taxi business, it will be interesting to see whether Quebec amends its definition for QST purposes to harmonize it with the federal definition, and if so, whether the amendment is treated as prospective or retrospective.

The Level 2 Transactions: Uncertainty in the E-Commerce Age

As noted above, there is a taxable transaction between the platform provider and the supplier, which is a supply of intangible property (that is, a right to use the platform) or a service. If the platform provider is resident in Canada, it is required to register for GST/HST purposes and to charge GST/HST on the fees that it charges to the supplier. If the supplier is registered for GST/HST purposes, the supplier should be eligible to claim an input tax credit; if the supplier is an unregistered small supplier, no input tax credit is available.

If the platform provider is resident in Canada and the supplier is a non-resident of Canada who is not registered for GST/HST purposes (for example, a Canada-based platform that sells craft goods from around the world), the services of the platform should be zero-rated.[54]

By contrast, if the platform provider is not a resident of Canada, and is not registered for GST/HST purposes, all of its supplies of property and services are deemed to be made outside Canada and are not subject to GST/HST, unless the platform provider is "carrying on business in Canada."[55] If we assume that the platform provider is not carrying on business in Canada, no GST/HST is payable on the platform providers' fees by the suppliers, even on a self-assessment basis.[56] Accordingly, there is an economic imbalance between non-resident, non-registered platform providers, which do not charge unrecoverable GST/HST to small suppliers in Canada, and Canadian platform providers, which have to charge unrecoverable GST/HST.

This potential imbalance violates the intended VAT neutrality between domestic and imported supplies by favouring supplies provided by a non-resident platform provider with a lower net cost to the Canadian suppliers. Similar to the imbalances between sharing economy businesses and traditional businesses noted above with regard to income taxes, there are apparently unintended GST/HST imbalances owing to the proliferation of small suppliers in the sharing economy.

One final point to note in regard to non-registered non-resident platform providers is that they are protected from GST/HST registration and reporting obligations only if they are not carrying on business in Canada. The phrase "carrying on business in Canada" is not defined in the ETA for GST/HST purposes. A "business" is defined to include

> a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment.[57]

There is no GST/HST jurisprudence specifically addressing the meaning of the phrase "carrying on business in Canada." The CRA applies an administrative policy regarding the meaning of "carrying on business in Canada" derived in part from income tax jurisprudence with modifications to take into account the definition of business.[58] On the basis of the CRA's administrative policy regarding services supplied over the Internet, as long as a platform provider has no computer server in Canada and no agents or employees in Canada, the company likely is not carrying on business in Canada.

In *Equustek Solutions Inc. v. Google Inc.*,[59] the British Columbia Court of Appeal expanded the scope of "carrying on business" in the province for the purposes of giving the British Columbia Supreme Court in personam jurisdiction over Google Inc., a non-resident of Canada. Google Inc. had relied on the leading Supreme Court of Canada jurisprudence, which stated that "[t]he notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction."[60] However, in concluding that Google Inc. was

carrying on business in Canada, the British Columbia Court of Appeal made the following observations:

> While Google does not have servers or offices in the Province and does not have resident staff here, I agree with the chambers judge's conclusion that key parts of Google's business are carried on here. The judge concentrated on the advertising aspects of Google's business in making her findings. In my view, it can also be said that the gathering of information through proprietary web crawler software ("Googlebot") takes place in British Columbia. This active process of obtaining data that resides in the Province or is the property of individuals in British Columbia is a key part of Google's business.[61]

Although it originated outside of the tax context (that is, in the context of extra-territorial reach of a provincial court), the relevance of this kind of reasoning for GST/HST purposes remains to be seen. If such reasoning were applicable to the GST/HST context, a non-resident platform provider could potentially be found to be carrying on business in Canada, in which case it could be required to register for GST/HST purposes and collect GST/HST on its fees.

Is the Platform Provider Responsible for Level 1 Taxes of the Suppliers?

Although the platform provider in the sharing economy is positioned as a supplier to the sharing economy participants (suppliers), for practical purposes the platform provider is generally more than a mere supplier of intellectual property. Rather, through its control of the platform through which the supplier interacts with its customers, the platform provider is often able to control the supplier-customer relationship in ways that differ from the traditional model of freelance business owners.[62]

In the event that a supplier does not charge the GST/HST, there are several ways in which the platform provider can be held responsible for the GST/HST that should have been collected by the supplier. In particular, the platform provider could be responsible for the GST/HST (or similar taxes) on supplies made to customers by the supplier in the following situations:

1) The platform provider acts as an agent in making a supply of tangible personal property on behalf of the supplier.
2) The platform provider and tax authorities come to an agreement under which the platform provider accepts responsibility to remit taxes on behalf of the suppliers.
3) The platform provider is assessed for penalties in connection with failure by the suppliers to appropriately remit taxes.
4) A legislative amendment imposes tax obligations on platform providers.

We will consider the first three of these possibilities before concluding with some thoughts regarding possible legislative changes to address the tax issues described in this paper (related to both income tax and commodity tax).

Platform Provider Is an Agent

When a person that is registered for GST/HST purposes (or that is required to be registered) acts as agent in making a supply of tangible personal property (other than an exempt or zero-rated supply) on behalf of a principal who is not required to collect GST/HST (for example, a small supplier or a non-resident), a specific rule in the GST/HST legislation deems the agent to have made the taxable supply, rather than the principal.[63] This rule could be relevant for online marketplaces, where the platform provider lists the goods of multiple suppliers and provides various services (such as payment processing) to facilitate sales by suppliers to customers.

In a GST/HST ruling,[64] the CRA considered the case in which an operator of an online shopping portal displays products for sale by third-party vendors and shoppers visiting the portal can order products online. The shopper completes the online order form and pays for the products online using a credit card. The order is transmitted via e-mail to the vendor, and the vendor is responsible for accepting and filling the orders. The portal operator has no contractual relationship with the shoppers. With respect to the supply made by the vendors, the portal operator does not act as a vendor. The CRA determined that the portal operator in this scenario "has no liability under the ETA to charge the GST/HST in respect of the sales made by the vendors." However, in that ruling the CRA accepted as fact that "[w]ith respect to the supply made by the vendor, [the portal operator] does not act as agent in making the supply."

The determination of whether an online portal operator is an agent requires a detailed review of the facts. "Whether an agency relationship exists is a question of fact. If there is no evidence proving that one party intended another to act as his or her agent, there is no agency."[65] It is well established that there are three generally accepted components of an agency relationship:

1. The [express or implied] consent of both the principal and the agent;
2. Authority given to the agent by the principal allowing the former to affect the latter's legal position;
3. The principal's control of the agent's actions.[66]

Clearly the most important factor is the second, since the purpose of the agency relationship is to permit the agent to affect the principal's legal position. In the context of an online marketplace, the question becomes whether the platform provider is able to conclude contracts on behalf of a supplier. Since a contract has three elements—an offer, acceptance, and consideration—each element of the contract formation must be considered to determine whether the platform provider is in fact an agent.

For example, it has been suggested that if an online platform lists the exact number of vendor items left in stock, that could be interpreted as an offer made by the platform provider on behalf of the supplier, which a customer could accept to complete the contract. Since the online marketplace is run by the platform provider, this could be viewed as an action performed by the platform provider that affects the supplier's legal position.[67]

Similarly, when a customer clicks a "button" to submit his or her purchase order for a supplier's item, if acceptance of the customer's offer to purchase the product is communicated by the platform provider directly to the customer, the contract may be formed by the platform provider on behalf of the supplier.[68] As a practical matter, to avoid forming an agency relationship, suppliers should confirm acceptance of orders directly to the customers, or, alternatively, the supplier may ship the product and the shipment itself may constitute an acceptance.[69]

Platform Provider Voluntarily Remits on Behalf of Suppliers

Even without a statutory obligation to remit sales taxes, platform providers may want to voluntarily collect and remit sales taxes on behalf of their suppliers for a variety of reasons. Because suppliers in the sharing economy often view their participation as an informal "gig," tax compliance by suppliers may not be optimal. By voluntarily collecting and remitting sales taxes on behalf of suppliers, the platform providers benefit the suppliers by protecting them from tax audits and assessments, which also protects the platform provider's brand from being associated with tax misfeasance. For example, Airbnb collects certain state and municipal lodging taxes on behalf of its "hosts" (that is, its suppliers).[70]

However, because the sharing economy often "disrupts" some established industry and operates in "interstitial areas of the law,"[71] regulatory authorities are often concerned that the businesses operate without sufficient oversight. For example, Airbnb petitioned New York City to allow it to facilitate the collection and remittance of occupancy taxes from its hosts, without success.[72] A tax authority may be uncomfortable accepting taxes from a platform provider, especially where the platform provider is not liable under the law for such taxes, if the platform provider is seen to be flouting other laws in the regulatory sphere.

Another useful example pertains to Uber in Quebec. Revenu Québec and the Ministry of Transportation worked together to reach agreements with Uber on a pilot project that complied with both regulatory and tax laws. Under the agreement with the regulatory authority,

> UBER will comply with any agreement reached with Revenu Québec to respect government requirements on taxation. Compliance with such agreement is an essential condition for the implementation of the pilot project and its continuance.[73]

In fact, Uber did reach an agreement with Revenu Québec to permit Uber to remit GST and QST on behalf of Uber drivers (that is, suppliers) in Quebec, while

specifically maintaining that Uber has no liability as an agent of the drivers. The agreement was effective from October 15, 2016.[74]

Offences and Penalties

Although Uber reached a GST/QST agreement with Revenu Québec for the period beginning October 15, 2016, Uber remains locked in litigation with Quebec regarding its role for any under-collection and under-remittance of GST/QST by drivers for periods before that date. The *Uber* case discussed above in the context of mandatory registration for operators of a "taxi business" is also instructive in connection with potential liability for platform providers when their suppliers are considered by the tax authorities to be non-compliant.

On May 13, 2015, a judge issued two search warrants and an order for production in connection with Uber's operations in Quebec. The next day, during the execution of the warrants, Revenu Québec investigators found that Uber's computers, smartphones, and tablets had been remotely rebooted. They were informed that the data was the subject of a remote encryption by engineers from Uber Technologies Inc. in San Francisco. The investigators then reappeared before the same judge and asked that the items seized the previous day without a warrant be brought to the offices of Revenu Québec. Revenu Québec claimed that it had reasonable grounds to believe that Uber was (1) evading collection of QST and, more significantly, (2) helping its driver "partners" in the UberX business to evade the collection of QST.

The allegation that Uber helped the drivers to avoid collection and remittance of QST and GST was essentially based on the assumption that Uber, as the platform provider, had significant knowledge and control over the rides provided by the drivers. Revenu Québec stated its case as follows:

1) Uber is the provider of the app that UberX drivers must download on their smartphones;
2) the app enables Uber to manage the payment of trips and issue receipts; and
3) the app does not record the driver's QST number, nor is any amount of tax charged for a trip.

Uber could be reasonably assumed to have knowledge that the drivers were not registered for GST and QST on the basis that it does not require driver applicants to provide their tax numbers at the time of application and registration with Uber. Revenu Québec alleged that Uber was not merely an intermediary between drivers and customers, and that it deliberately neglected to provide the drivers with the "necessary tools to comply with their tax obligations."[75] In Revenu Québec's view, Uber had helped the drivers to commit the offence of evading their tax collection obligations, which itself is an offence under the legislation.

Uber has various legal arguments to support its position that the UberX drivers were not clearly required to charge GST/QST and that Uber had no responsibility for the taxes. At the time of writing, the litigation remains at a preliminary

stage.[76] However, this case demonstrates that in the sharing economy, where suppliers rely heavily on the platforms to sell their goods and services, the platform providers should be especially careful that they are not causing their suppliers to err in their tax obligations. Although they are not technically suppliers of the goods and services for which the monies are paid, platform providers could be subject to significant harassment by the tax authorities, and even charges of tax evasion, if the taxes are not properly charged and collected and if there is any suspicion of deliberate omissions (that is, intentional conduct) by the platform provider.

Concluding Thoughts Regarding Legislative Change

The continued growth of the sharing economy will require the government to consider appropriate legislative responses for the tax system. One possible response, of course, would be to change nothing, and allow the existing tax regime to continue to apply to sharing economy arrangements. Such an approach would not be wholly unreasonable, given that the component parts of sharing economy structures are all items that the tax system has encountered before. This paper has suggested some reasons why further changes may be appropriate. However, the status quo may make sense as a "wait and see" position pending further developments.

A somewhat less passive approach would be to legislatively clarify which categories sharing economy participants fall into under existing tax law (for example, whether the suppliers are considered employees or independent contractors, and what business the platform provider should be considered to be engaged in), but to otherwise leave their taxation (subject to that determination) unchanged. As we have discussed, some jurisdictions are already pursuing these approaches in particular situations.[77]

Going beyond such conservative changes, the government could also consider introducing new regimes tailored to the specific circumstances of the sharing economy. There are many precedents for such an approach for arrangements that do not fit cleanly within existing categories.[78] Several possible avenues suggest themselves to us in the context of the sharing economy.

Imposing Responsibilities on Platform Providers

One possible set of changes would be to impose additional responsibilities on some or all sharing economy platform providers that go beyond what might be normal for a third-party supplier of IT services. Placing such responsibilities on the platform provider would recognize that the platform provider, although it does not operate the underlying businesses, may have more information about the transactions that occur than the other participants because the platform is at the centre of the relevant information flows. Several commentators have suggested similar approaches.[79]

The responsibilities that might be placed on platform providers include requiring the platform providers to report to the tax authorities information about suppliers' and customers' transactions through the platform, or to determine and certify relevant tax statuses of the participants (for example, residency). If the platform also facilitates payments between customers and suppliers, responsibility could extend to administering and collecting relevant taxes owed by the participants. Revenu Québec is already taking some steps in this direction.[80]

Reduced Burdens for Suppliers

Simplified regimes for sharing economy suppliers could go hand in hand with greater responsibility for platform providers. If information-reporting responsibilities are shifted to platform providers, suppliers might be released from the need to maintain certain books and records typically involved in operating a business (which individual small suppliers may have difficulty maintaining). Suppliers' tax affairs could be further streamlined by simplifying the rules under which their income is calculated—for example, by limiting deductions available to them in a manner analogous to employees.[81] Tax collection might be facilitated by a system of withholding on payments received through the platforms. Where platform providers are made responsible for the collection of certain taxes, the suppliers could be removed from process entirely.[82]

Removal of Other Tax Distortions Between Traditional and Sharing Economies

Apart from rebalancing responsibilities between platform providers and suppliers, the government may also want to consider tax changes that would place sharing economy structures, as a whole, on an even footing with traditional business organizations. As discussed in this paper, the use of sharing economy structures may result in better tax outcomes for some or all of the participants. In some instances, this will represent an aggregate improvement for the overall structure, rather than merely a zero-sum adjustment among the participants. For example, non-employee characterization of suppliers in the sharing economy may prevent some payroll taxes from applying at all, and may make additional international tax-planning opportunities available to platform providers. Similarly, for GST/HST purposes, sharing economy platforms may allow a multiplication of small supplier exemptions that would not be possible with a traditional business. To the extent that these distortions are not addressed by the potential changes discussed above, the government may want to take additional steps to equalize overall tax burdens between traditional and sharing economy arrangements so as to avoid undue tax biases affecting the choice of business structure.

Notes

1 See PricewaterhouseCoopers LLP, *The Sharing Economy* (PwC, April 2015) (http://pwc.com/CISsharing) (herein referred to as "the PwC SE report").

2 See, for example, Vanessa Katz, "Regulating the Sharing Economy" (2015) 30, annual review 2015 *Berkeley Technology Law Journal* 1067-1126, and articles from popular press. Several authors have also specifically considered tax implications of the sharing economy: for example, Shu-Yi Oei and Diane M. Ring, "Can Sharing Be Taxed?" (2016) 93:4 *Washington University Law Review* 989-1069; Jordan M. Barry and Paul L. Caron, "Tax Regulation, Transportation Innovation, and the Sharing Economy" (2015) 82 *University of Chicago Law Review Dialogue* 69-84; and a forthcoming article by Kathleen DeLaney Thomas, "Taxing the Gig Economy" (draft available at https://papers.ssrn.com/abstract=2894394) (an early version was kindly provided by the author).

3 For examples of such attention, see "Supporting the Sharing Economy," in Ontario, Ministry of Finance, 2016 Budget, Budget Papers, February 25, 2016, at 46-49; the PwC SE report, supra note 1; and Ontario Chamber of Commerce, *Harnessing the Power of the Sharing Economy: Next Steps for Ontario* (Toronto: Ontario Chamber of Commerce, 2015) (www.occ.ca/wp-content/uploads/2013/05/Harnessing-the-Power-of-the-Sharing-Economy.pdf).

4 Katz, supra note 2, and the sources cited therein.

5 For example, the PwC SE report, supra note 1, includes music services such as iTunes under the rubric of the "sharing economy," but they will not be so regarded for the purposes of this paper.

6 For example, one will encounter references to the "on demand," "peer-to-peer," "gig," and "access" economies, and to "collaborative consumption" and "digital matching firms." Each has its own nuances but all of these terms arguably describe the main examples of "sharing economy" businesses set forth above. However, it is interesting to note that there is debate as to whether even such prototypical examples should be included in the "sharing economy"—some authors have the view that "sharing" does not encompass the activities of commercial enterprises. See Katz, supra note 2, at note 9.

7 In practice, there is no reason that other types of legal entities might not also participate as suppliers or customers in the sharing economy. However, this paper will focus on the more usual case of participation by individuals.

8 The term "sharing economy" is, as mentioned above, not precisely defined and the definition we are adopting here does not capture all of the features that have been focused on by different commentators. Some authors, for example, have focused on the use of rating systems to foster trust between suppliers and customers or on the ability of electronic platforms to rapidly satisfy orders. However, the definition we are adopting does capture certain main features of these businesses that are salient for the tax analysis. This paper will not wade further into this semantic debate surrounding the sharing economy.

9 Coal suppliers in this case would include individuals that happen to have access to mining tools and coal-bearing land.

10 Depending on the exact business model, different contracts might also be possible. For example, in other versions of the platform, a supplier might contract to provide mining services to a customer who already owns a right to mine coal from a particular site.

11 However, relative bargaining powers might be different, for non-tax reasons, if the change to a sharing economy structure allows access to a different pool of potential suppliers or customers or offers of different goods or services. In practice, it appears that this has been the case for many sharing economy businesses.

12 The taxi industry is one example of this. Typically, independent contractor drivers contract directly with passengers, often coordinating through a central dispatching service. It is notable that this industry was one of the first seriously affected by sharing economy competitors.

13 This principle goes back to *Inland Revenue Commissioners v. Westminster (Duke)*, [1936] AC 1 (HL) and has been repeatedly affirmed by the Supreme Court of Canada. For example, in *Shell Canada Ltd. v. Canada*, [1999] 3 SCR 622, at paragraph 39, stating that "we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect."

14 Such documentation would make it clear, for example, that the supply of goods and services is made pursuant to a contract solely between a supplier and a customer.

15 We understand that this change has, at least in part, been motivated by a desire to allow large credit suppliers to make significant investments without needing to interact with myriad individual borrower/customers.

16 Beyond the direct effects on the supplier-platform relationship, characterizing the suppliers as employees would also suggest that customer contracts are entered into with the platform, and that the actual legal structure is more in line with a traditional business.

17 See, for example, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, at paragraphs 46-47.

18 The risk will be greater in some types of business than others. It seems unlikely, for example, that lenders on a peer-to-peer lending platform could be considered employees.

19 *Aslam v. Uber BV*, October 28, 2016, case no. 2202550/2015 (UK Employment Tribunal).

20 The judge in this case also appeared to doubt that the contractual language reflected the actual legal relationships of the parties, stating, ibid., at paragraph 91, that "we are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties." We understand that this decision is under appeal.

21 *O'Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133 (ND CA 2015). A number of other cases are also making their way through courts and arbitration in the United States.

22 See *Heller v. Uber Technologies Inc. et al.*, ONSC file no. CV-17-567946-CP. However, certain other Canadian cases appear to reflect at least a tacit understanding by the parties that Uber's activities were limited to the provision of information technology services. For example, *Uber Canada inc. c. Agence du revenu du Québec*, 2016 QCCS 2158 (a case in which Revenu Québec alleged that that Uber assisted drivers in evading GST and QST obligation—apparently accepting the characterization of the drivers as independent contractors).

23 Arkansas Code, title 23, chapter 13, subchapter 7, section 719; and North Carolina General Statutes, chapter 20, section 280.8.

24 Canada, Department of Finance, 2017 Budget, Tax Measures: Supplementary Information, March 22, 2017, at 30-31.

25 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act").

26 For example, the rules found in paragraphs 13(7)(a) to (d) of the Act. These rules are likely to be a particular concern in the sharing economy context, involving, as it often does, the mobilization of assets otherwise held for personal use, and semi-casual suppliers that may repeatedly transition in and out of the sharing economy over time.

27 This design feature was not accidental. See, for example, the 1969 government of Canada white paper (E.J. Benson, *Proposals for Tax Reform* (Ottawa: Queen's Printer, 1969)), which rejected suggestions in the 1967 report of the Royal Commission on Taxation (Canada, *Report of the Royal Commission on Taxation* (Ottawa: Queen's Printer, 1967) (the Carter commission)) that employees be given a broad ability to deduct expenses, similar to businesses. In rejecting that suggestion, the white paper (supra, at paragraph 1.32) states that "millions of taxpayers are involved, and a very wide range of expenses could be related to earning their employment income. These taxpayers do not keep detailed records. The government has found no practical

way to permit employees to deduct actual costs as do those carrying on a profession or other business."

28 For example, in a sharing economy arrangement to provide accommodations, it might be necessary to consider the degree of activities involved to determine whether the customer's payment is for the provision of services, and thus potentially subject to withholding pursuant to regulation 105 under the Act, or whether it is instead for the use of real property, and thus subject to withholding under paragraph 212(1)(d) of the Act. In the past, the CRA has indicated the operation of a hotel involves the provision of services (see *Interpretation Bulletin* IT-73R6 (Archived), "The Small Business Deduction," March 25, 2002, at paragraph 13), and that the same result would "normally" apply for a "full-service motel," but that a campsite with "no more than normal services" would give rise to property income (CRA document no. 9501215, March 31, 1995). Navigating such boundaries may not be easy for suppliers and customers.

29 Organisation for Economic Co-operation and Development, *Addressing the Tax Challenges of the Digital Economy, Action 1—2015 Final Report* (Paris: OECD, October 5, 2015) (herein referred to as "the digital economy report").

30 While the report recognizes that the sharing economy provides an alternative to traditional business models, and that this area is in continuing flux and will require continued monitoring, it is not clear that the potential income-shifting possibilities *for the platform providers* was an issue of particular focus for the authors.

31 See the digital economy report, supra note 29, at 87-92. One recommendation that the report does make specifically in view of the sharing economy is a tightening of the permanent establishment rules regarding activities of a preparatory or auxiliary nature: ibid., at 137.

32 Of course, as discussed above, in practice a sharing economy arrangement might involve the platform provider and its affiliates undertaking a broader range of activities than are reflected in the simplified example of KOLTek. Any such activities carried on in Canada might provide bases for Canadian taxation, including of income derived from operating the platform.

33 Digital economy report, supra note 29, at 107-11.

34 Ibid., at 137.

35 RSC 1985, c. E-15, as amended.

36 For example, KOLTek suppliers might be subject to Ontario mining tax if they are not eligible for an exemption. The analysis of each commodity tax in Canada that might apply to the sharing economy is beyond the scope of this paper.

37 ETA subsection 165(1) and section 166.

38 ETA subsection 123(1), definitions of "business," "commercial activity," and "taxable supply."

39 Suppliers engaged in making exempt supplies would not be required to charge GST/HST.

40 The meaning of a "business" for GST/HST purposes, as opposed to a hobby, for example, is discussed in *GST/HST Policy Statement* P-167R, "Meaning of the First Part of the Definition of Business," rev. March 29, 2000.

41 ETA subsection 148(1). See also *GST/HST Memorandum* 2.2, "Small Suppliers," rev. October 13, 2000. Where the person is a public service body, the threshold is $50,000.

42 ETA section 166. There are certain exceptions not relevant for the sharing economy, namely, a supply by way of sale of real property and certain supplies by municipalities and designated municipalities.

43 ETA paragraph 240(1)(a).

44 ETA subsection 240(1.1). The Department of Finance technical notes regarding this rule indicate that without such a rule, many taxi operators would not be required to register by virtue of their qualifying as small suppliers, and the rule was intended to eliminate the "competitive inequities that would otherwise have been created between registered and unregistered taxi

operators." See Canada, Department of Finance, *Explanatory Notes to Legislation Relating to the Goods and Services Tax* (Ottawa: Department of Finance, February 1993), at subclause 100(1).

45 ETA subsection 123(1).

46 ETA subsection 171.1(1). A taxi business operator can choose to have the registration apply to his or her other line or lines of business in accordance with ETA subsection 240(3.1).

47 Supra note 22. The case deals with the correctness of certain search warrants.

48 Section 4 of the Highway Safety Code, CQLR c. C-24.2.

49 *Uber Canada*, supra note 22, at paragraph 207 (informal translation).

50 In *Uber BV v. Commissioner of Taxation*, [2017] FCA 110, Griffiths J of the Australian Federal Court arrived at a similar decision regarding the status of UberX services as "taxi travel" for purposes of Australian GST.

51 See the CRA's GST/HST Headquarters Ruling RITS no. 55206, November 9, 2004, which does not even require that the fees actually be set by anyone. As the CRA stated in that ruling: "When a province delegates its power to regulate fares to municipalities, this is considered to be the regulation of fares 'under the laws of . . . a province,' as required" and this is so "whether or not the [municipality] has passed a by-law on the subject of taxi fares."

52 Supra note 24, Notice of Ways and Means Motion to Amend the Excise Tax Act, at clause 2.

53 The budget proposes to require "conventional taxis or vehicles using a new approach" to have sales recording modules that issue invoices to customers and transmit sales information to Revenu Québec in real time. See Finances Québec, Budget 2017-2018, Additional Information 2017-2018, March 28, 2017, at B.19.

54 The CRA considers an operator of an online shopping portal to be supplying an "advertising service," which is zero-rated when supplied to non-registered non-residents under section 8 of part V of schedule VI of the ETA. This same characterization is set out by the CRA in *GST/HST Technical Information Bulletin* B-090, "GST/HST and Electronic Commerce," July 2002, at 9 (example 12). See also GST/ HST Headquarters Ruling RITS no. 40372, March 28, 2003. Depending on the level of involvement in sales by the platform provider, there may be some question as to whether the service may be broader than a mere "advertising service," and may be zero-rated under some other provision (for example, sections 5 or 7 of part V of schedule VI of the ETA).

55 ETA subsection 143(1). If the platform provider were carrying on business in Canada and making taxable supplies, it would be required to register under ETA subsection 240(1).

56 There is no self-assessment required for "imported taxable supplies," even for small suppliers, if the property or service in question was acquired for consumption, use, or supply in the course of GST/HST "commercial activities" of the recipient. See paragraphs (a) and (c) of the definition of "imported taxable supply" in ETA section 217.

57 ETA section 123. A "business" is defined more broadly for GST/HST purposes than for Canadian income tax purposes because, unlike for income tax, in the GST/HST context there is no requirement for the existence of a reasonable expectation of profit. Additionally, the law contains a specific reference to supplying property by way of lease licence or similar arrangement. See Zen Nimeck and Yola Szubzda, "Carrying On Business in Canada—Income Tax Concepts in a GST World," in *2010 CPA Canada Commodity Tax Symposium* (Toronto: CPA Canada, 2010), paper 10.

58 For example, the CRA appears to consider a non-resident who acquires property in Canada and leases it to a lessee in Canada to be "carrying on business in Canada." See example 1 of *GST/HST Policy Statement* P-051R2, "Carrying On Business in Canada," rev. April 29, 2005.

59 2015 BCCA 265; appeal to Supreme Court of Canada heard on December 6, 2016, but the decision and reasons were not yet published at the time of writing.

60 *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, at paragraph 87, quoted in *Equustek*, supra note 59, at paragraph 52.

61 *Equustek*, supra note 59, at paragraph 54.

62 See Sarah A. Donovan, David H. Bradley, and Jon O. Shimabukuro, *What Does the Gig Economy Mean for Workers?* CRS Report R44365 (Washington, DC: Congressional Research Service, February 5, 2016), at 3.

63 ETA subsection 177(1). The same rule also deems the agent not to have made a supply of services to the principal.

64 RITS no. 40372, supra note 54.

65 *Club Intrawest v. The Queen*, 2016 TCC 149, at paragraph 77, quoting G.H.L. Fridman, *Canadian Agency Law*, 2d ed. (Markham, ON: LexisNexis Canada, 2012), at paragraph 6.

66 *Intrawest*, supra note 65, at paragraph 78, citing *Royal Securities Corporation Ltd. v. Montreal Trust Company et al.*, 1966 CanLII 173 (ONSC).

67 See Barry B. Sookman, *Sookman: Computer, Internet and Electronic Commerce Law* (Toronto: Carswell) (looseleaf), at chapter 10.3. An "advertisement" can constitute an offer if it is clear, definite, and explicit and leaves nothing open to negotiation.

68 "The general rule is that an acceptance has no legal effect until it is communicated to the offeror." *Chitty on Contracts*, 31st ed., vol. 1 (London: Sweet & Maxwell, 2012), at paragraph 2-045.

69 "[W]here an offer to buy goods is made by ordering them, it may sometimes be accepted simply by dispatching them." Ibid., at paragraph 2-047. In *Reseau Publi-Maison Inc. v. Geomedia Inc.*, [2000] OJ no. 5237, at paragraph 30 (SCJ) the court wrote: "In the present case, there was no formal offer-acceptance exchange between the parties. It is well established, however, that receipt of an order for goods or services, followed by delivery of the goods or performance of the services is sufficient acknowledgement and acceptance to establish a contract. See *Re Hudson Fashion Shoppe Ltd.* (1925), [1926] 1 D.L.R. 199 (S.C.O. App. Div.)."

70 For a complete listing of jurisdictions where Airbnb collects and remits taxes on behalf of hosts, see Airbnb Inc., "In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?" (www.airbnb.ca/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available).

71 Ibid.

72 See Roberta A. Kaplan and Michael L. Nadler, "Airbnb: A Case Study in Occupancy Regulation and Taxation" (2015) 82 *University of Chicago Law Review Dialogue* 103-15, for an interesting recounting of Airbnb's legal struggles by two of its lawyers.

73 From www.transports.gouv.qc.ca/fr/salle-de-presse/nouvelles/Documents/2016-09-09/entente-uber.pdf, section 2.8 (informal translation).

74 See "Entente relative aux exigences de conformité fiscale au Québec à l'égard des chauffeurs utilisant les plateformes « uberX », « uberXL » ou « uberSELECT »" (www.revenuquebec.ca/documents/ententeuber.pdf). The agreement is interesting in that it states explicitly that Uber is not responsible for the taxes as agent for its customers. Is there a legal basis for Uber to remit the taxes on behalf of the drivers, or is this a pure administrative concession? In the CRA's RITS no. 40372, supra note 54, the CRA makes the puzzling comment that where an online portal collects an amount as, or on account of, GST/HST, it is required to include those amounts in its net tax for the reporting period, notwithstanding that the portal is not an agent. Where amounts collected are passed on to the vendor, the CRA's position is that the online portal's liability is only extinguished when the vendor accounts for the taxes and remits any net taxes owing. It appears that the CRA considers any money collected, even as a mere conduit for another person, to form part of the conduit's net tax under section 225 of the ETA. The "extinguishment" of the conduit's tax liability upon remittance by the true supplier appears to be, in the CRA's view, an administrative concession not to collect tax on the same supply twice

(see also *GST/HST Policy Statement* P-131R, "Remittance of Tax Collected by a Person Other Than the Supplier in Limited Circumstances," September 15, 2004, for a formal statement of this administrative policy in other circumstances). In the authors' view, this interpretation of the words "amounts collected by the person . . . as or on account of tax" in item A of ETA subsection 225(1) does not accord with the general scheme of the ETA, which imposes an obligation to collect taxes on a "supplier." Additionally, this interpretation renders completely moot the agency election under ETA subsection 177(1.1), pursuant to which an agent can elect to remit the taxes of a principal, and to become jointly and severally liable for the taxes with the principal. However, to the extent that there is a legal basis for Revenu Québec's agreement with Uber, it may be informed by the reasoning in this CRA ruling.

75 *Uber Canada*, supra note 22, at paragraph 75 (informal translation).

76 Uber Canada's application for leave to appeal to the Supreme Court was dismissed on February 23, 2017, effectively ending the parties' procedural skirmish regarding the validity of the search warrants issued against Uber Canada. However, no charges have been laid against Uber Canada at the time of writing.

77 See supra note 23 and accompanying text.

78 For example, the special GST rules for taxis (discussed supra note 44); special GST rules for "direct sellers"; the rules in the Act regarding personal services business (which straddle the line between employees and truly independent businesses); and the Canada Pension Plan rules regarding temporary placement agencies (including in section 34 of the Canada Pension Plan Regulations, CRC, c. 385).

79 Oei and Ring, supra note 2, at 1065; also Thomas, supra note 2. The OECD's digital economy report, supra note 29, at 124-25, also suggests the possibility of imposing tax compliance obligations on a certain "intermediaries."

80 See commodity tax discussion above under the heading "Platform Provider Voluntarily Remits on Behalf of Suppliers."

81 For example, suppliers might be limited to only certain types of deductions relevant to their industry, or allowed to deduct only notional (rather than actual) amounts of expenses based on the extent of their activities (on the basis of information reported by platform providers). Thomas, supra note 2, suggests a highly simplified deduction regime that would allow certain small suppliers a standard deduction equal to 80 percent of their revenue.

82 In the context of GST/HST, this might involve not only releasing the suppliers from the responsibility to collect tax from customers, but also excluding them, to some extent, from the chain of entities claiming input tax credits. In that case, a corollary rule might specify that platform providers are not required to charge GST/HST to suppliers on platform-related services, and that for GST/HST purposes such supplies should be treated as flowing directly from the platform provider to the customer. This is similar to the rule in existing paragraph 177(1)(e) of the ETA, which states that supplies by an agent to the principal are deemed not to be supplies.