Bennett Jones LLP

Import or Incorporate?

Presented to JETRO

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Introduction

- Businesses in the U.S. often look to Canada as a principal export market

- **Two common options** for foreign businesses to enter the Canadian market or to expand sales or operations in Canada:

  - Import goods for sale as a **non-resident importer** (“**NRI**”)

  - Incorporate a Canadian subsidiary

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Basic concepts

- There is a border.
- Canada is a sovereign country
- Important differences in law, policy, and procedures.
- Different regulatory regimes for goods and for services

Agenda

- NRI program
  - NRI program benefits, responsibilities and limitations
  - NRI registration processes
    - Business Number
    - CARM Client Portal registration
    - Security and tax registrations
    - Service providers
- Incorporating a Canadian subsidiary
  - Benefits, responsibilities and limitations of incorporating
  - Incorporation process
    - Business Name
    - Incorporation documents
    - Directors, officers and employees
    - Service providers

- NRI:
    - A foreign company with no place of business in Canada, who imports goods into Canada, declares the importation to the Canada Border Services Agency, pays duties and taxes owing on the importation, and complies with any additional import requirements.

What are the benefits of the NRI Program?

- **Benefits:**
  - Improved customer service
  - Satisfy contractual obligations
  - Increase Canadian market share
  - Streamline and control of customs clearance
  - Determination and management of landed price
  - Cost savings, especially relative to incorporating a Canadian subsidiary

NRI Responsibilities

- **Payment of all duties and taxes to the CBSA**
  - Customs duties
  - Goods and Services Tax (GST), and provincial sales taxes (PST)
  - Anti-dumping and/or countervailing duties
  - Surtaxes (as known as tariffs)

- **Reporting and accounting for imported goods**

- **Payment of fines or penalties** resulting from missing or inaccurate information

- **Compliance with product-specific regulations**

Product Specific Regulations




- **Examples** of OGD regulations commonly affecting Canadian imports:
  - **Consumer product safety** (*Canada Consumer Product Safety Act*)
  - **Food and Drugs** (*Food and Drugs Act*; *Controlled Drugs and Substances Act*)
  - **Cosmetics** (*Cosmetics Regulations*)
  - **Cultural Property** (*Cultural Property Export and Import Act*)
  - **Ozone Depleting Substances and Products** (*Ozone-depleting Substances and Halocarbon Alternatives Regulations*)
  - **Hazardous Waste and Recyclables** (*Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*)
  - **Import Controlled goods** (textiles, dairy products, firearms, specialty steel products) (*Import Control List*)

Limitations on NRIs

- Certain regulatory regimes require that an importer be a "resident of Canada" to import goods, in which case an NRI would not qualify
  - For example: only a resident of Canada can obtain a permit to import dairy products (milk, cheese, yogurt etc.) at a lower duty rate
- A non-resident performing or subcontracting services (e.g. warranty work) are subject to withholding taxes

Registrations: Business Number

- Importers must have a Canadian Business Number (BN)
- Two key **program accounts** for NRIs:
  - Import/Export (RM identifier)
  - GST/HST (RT identifier)
- Payroll and corporate income tax accounts also available
- A BN is also required for **residents** and companies with a **permanent establishment** in Canada
  - Careful about creating a permanent establishment in Canada – it creates tax obligations!

Registrations – CARM Client Portal

- The CBSA Assessment and Revenue Management (CARM) Client Portal (CCP) is an online self-service portal to declare and pay duties and taxes on goods imported into Canada.
- As of October 21, 2024, all importers (including NRIs) must be registered on CARM.

Registrations: CARM Client Portal

- General Process:
  - An individual uses a GCkey or "Sign-in partner" to create a CCP user account
    - A GCKey is a unique credential used for certain online Government of Canada programs and services
    - Sign-In Partners are certain financial institutions (e.g. banks). An individual can use their online banking credentials to create a CCP user account.
  - The CCP then registers the business on the CCP
    - A BN with an import and export number (RM) is required to register a business on the CPP

CARM Resources

- CARM Resources – Critical resources on CARM and the CCP
- Onboarding Documentation
- CARM Client Support Help Desk
- Client Support Contact Form
- CARM Help Desk Telephone #: 1-800-461-9999 (Monday to Friday, 7am to 5pm EST)
- Email: CBSA.CARM_Engagement-Engagement_de_la_GCRA.ASFC@cbsa-asfc.gc.ca

New Security Requirements (Release Prior to Payment)

- All importers will be required to post financial security directly with the CBSA **(no more relying on a customs broker’s bond)** for release prior to payment (RPP) privileges.

- **RPP** permits an importer to obtain release of goods before payment of duties and taxes.

New Security Requirements (CARM)

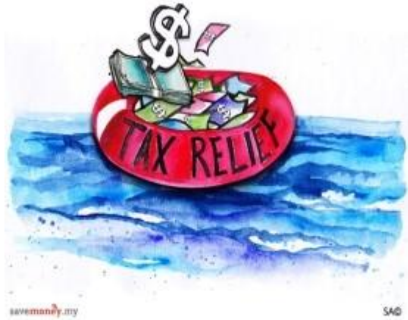
- Importers registering in RPP have the following options:
  - **Option 1:** a financial security instrument for 50% of their highest monthly accounts receivable (inclusive of GST)
  - **Option 2:** cash deposit for 100% of highest monthly accounts receivable (inclusive of GST)
- Maximum bond is capped at $10,000,000
- Minimum bond is $5,000
- Security must be obtained through an approved financial institution and is processed through the CCP

GST/HST Registration

- **Mandatory Registration:** NRIs must register for GST/HST if:
  - (1) "carrying on business in Canada", and
  - (2) ~~worldwide~~ GST/HST taxable revenues (over up to 4 consecutive quarters) are more than $30,000

- **Voluntary Registration:** Many NRIs voluntarily register because registration is required to claim **input tax credits (ITCs)** to offset GST paid on imported goods. The alternative to voluntary registration (application for rebates) is cumbersome

- **Obligations** after registration
  - File returns (annual, quarterly, or monthly)
  - Collect and remit tax from customers
  - Recordkeeping



Provincial Sales Tax Registrations

- **HST provinces:** Ontario (13%), New Brunswick (15%), Newfoundland and Labrador (15%), PEI (15%), and Nova Scotia (15%)
  - No provincial registrations required if registered for a GST/HST program account with CRA
- **Non-HST provinces:** British Columbia, Saskatchewan, Manitoba, Quebec
  - Federal GST (5%) applies and provincial sales tax may apply
  - Non-residents are generally required to register for provincial sales tax if making sales in the ordinary course of carrying on business in the province
- No provincial sales tax in Alberta, Nunavut or the Yukon, but federal GST (5%) applies

Recordkeeping Requirements

- Failure to comply with a **CBSA request for records** may attract a penalty

- **Records must be kept in Canada**, in either paper or electronic format, for six years

- *Agreement to Maintain Records Outside of Canada* for NRIs

Service Providers: Customs Broker

- The majority of importers in Canada utilize the services of a customs broker to manage their imports and to act on their behalf at time of release and in the confirmation of their entries.

- Although the customs broker is under certain obligations, it is ultimately the importer who bears the responsibility for the information that is presented by the customs broker to the CBSA.

Incorporating a Canadian Subsidiary

Corporate Law Considerations

1. **Registration / Licensing**
   - Regardless of whether you operate your business in Canada as a non-Canadian entity (e.g. branch), or through a Canadian subsidiary, corporate filing in the relevant jurisdiction(s) are required.
   - If incorporating a Canadian subsidiary, consider home jurisdiction.
2. **Filing Costs**
   - A Canadian subsidiary will require initial incorporation. A non-Canadian entity will likely need to extra-provincially register. Ongoing (annual) filing costs are similar.
3. **Directors' Canadian residency requirements**
   - If incorporating a Canadian subsidiary, in a few jurisdictions (including under the *Canada Business Corporations Act*), Canadian director residency requirement (25%) apply.
   - No residency requirements in Ontario, Alberta, British Columbia, Quebec etc.
4. **Transparency Registers - Individuals With Significant Control**
   - No requirement: Alberta and the 3 territories
   - Otherwise, corporations need to maintain transparency registers (e.g. Ontario)
   - Public filing requirement: *Canada Business Corporations Act and* Quebec + soon British Columbia

Tax Law Considerations

Tax Law Considerations		
Issue	***Operating as Non-Resident (i.e. through branch in Canada)***	***Incorporating a Canadian Subsidiary***
Income Tax	23-31% (rates vary by province): BC is 27%, AB is 23%, and ON is 26.5%~~)~~, in respect of general business income.	
Branch Tax	25% (may be reduced by applicable treaty) on amounts not reinvested in Canada, subject to exemption on first Cdn. $500,000	N/A
Excise Tax (GST / HST)	Need to register for GST/HST and collect same on sales to Canadian customers. Input tax credits can be claimed for GST/HST on expenditures. GST/HST returns need to be filed.	
	Non-residents may have to provide a security deposit, in order to register for GST.	N/A
Withholding Tax	On services provided by non-resident to third parties in Canada, payer must withhold 15% of the payment. Must obtain tax clearance certificate for dispositions of "taxable Canadian property", or purchaser will be required to withhold a portion of the gross purchase price (25% or 50%, depending on the asset)	25% on dividends (and certain other amounts) paid or credited to non-resident parent corporation (may be reduced via treaties to 15% or 5%)
Transfer pricing		Must adhere to transfer pricing rules in *the Income Tax Act* (Canada) for transactions between subsidiary and related non-residents. E.g. Services arrangements between non-Canadian parent and Canadian subsidiary needs to be on arms' length term.

Incorporation

1. **Incorporation Process not complicated**
   - Electronic filings permitted in various provinces (Ontario, British Columbia, Alberta, and also under *Canada Business Corporations Act*)
2. **Provide following information**
   - Name
   - Authorized share capital, restrictions on transfer
   - Restriction on business (if any)
   - Directors (number of directors, names, addresses)
   - Registered Office (Bennett Jones can act), business address
3. **Incorporation Process**
   - Order name searches and reserve name (name approval and other consents, in some cases).
   - Review Articles of Incorporation and sign.
   - Consider if there will be any unanimous shareholder agreements.
   - Counsel will file Articles of Incorporation and other forms – certificate of incorporation will be issued.
   - Organizational documents (initial shareholders resolutions confirming by-laws, affixing number of directors, dispensing of auditor requirement etc., and board resolutions appointing officers, adopting by-laws, setting fiscal year end, authorizing issuance of shares, approving banking matters etc.) prepared.

Questions

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