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# **GST/HST and Real Property Transactions**

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# Agenda

- General Rules
- Taxable Supplies of Real Property
- Exempt Supplies of Real Property
- Ownership
- Bare Trust/Nominee Corporations
- Joint Ventures
- Partnerships
- Self assessments
- GST/HST New Housing Rebates
- GST/HST Rental Property Rebates
- Documentary Requirements for Input Tax Credits
- Current State of Affairs

# General Rules

- GST/HST will apply to every “supply” of real property in Canada unless there is an exemption provided for in the Excise Tax Act (the “Act”).
- A supply of real property includes:
  - a sale of real property where ownership and possession is transferred under an agreement,
  - lease of real property,
  - an option to purchase real property,
  - an assignment of a lease of a real property,
  - an assignment of an agreement of purchase and sale,
  - the building of a residential complex and “self-supply” for leasing out,
  - an increase and decrease in the extent to which a business uses real property in commercial activities.

# General Rules

- Persons engaged in a “commercial activity” in Canada are generally required to register and collect and report the GST/HST on taxable supplies made in the course of the activities.
- Registrants are also eligible to recover any GST/HST paid on expenses incurred in the course of commercial activities by claiming input tax credits in its GST/HST return.
- The definition of a commercial activity under the Act includes the supply of real property unless specifically exempted;
  - The inclusion of a supply of real property in the definition makes any supply of real property subject to GST/HST unless the supply is an exempt supply or the supplier is a small supplier (exclusion does not apply to the sale of real property) such that they are not required to be registered and charge GST/HST.

# Taxable supplies of Real Property

- Taxable supplies of Real property generally include:
  - non-residential rent,
  - sale of a non-residential real property,
  - sale of a new residential house or condominium unit,
  - sale of land by non-individuals.

# Exempt Supplies of Real Property

- The nature of the property and use by the vendor determines the exemption not the nature of the purchaser.

# Exempt Supplies of Real Property

- Exempt supplies of Real property generally include:
  - sale of a used residential property,
  - residential rent where the purpose of occupancy is as a place of residence or lodging by the same individual under the arrangement for at least one month,
  - short term accommodation for the purpose of its occupancy as a place of residence or lodging by an individual for a rental cost not exceeding \$20 per day,
  - head lease where the person holds the property for the purpose of a re-supply that is exempt,
  - farmland sold by famers to their children or grandchildren who are acquiring the property for their personal use and enjoyment.

# Exempt Supplies of Real Property

- A supply of real property made by way of sale of personal use property (i.e. vacant land) by an individual or a personal trust where:
  - a land parcel was subdivided or severed into two parts and the individual, trust or settlor did not subdivide or sever that parcel from another parcel of land or,
  - the recipient of the supply is an individual who is related to or is a former spouse of the individual or settlor of a trust and is acquiring the part for personal use and enjoyment,

# Exempt Supplies of Real Property

- Other than (supply would be GST/HST taxable):
  - supply of capital real property held for use primarily in a business with a reasonable expectation of profit.
  - the individual or trust is a registrant and the real property was last used as a capital property primarily in making taxable supplies by way of lease, licence or similar arrangement,
  - supply in the course of a business,
  - a supply of real property as an adventure or concern in the nature of trade with an election to treat it as taxable,
  - supply of land that has been subdivided or severed into more than two parts,
  - land that has been expropriated will be deemed not to have been subdivided or severed; and
  - when individual or personal trust is deemed to sell property under the change in use rules for capital property this exemption would not apply to affect the tax status of the deemed transaction.

# Exempt Supplies of Real Property

- Section 194 of the Act - Incorrect statement as to use of real property:
  - if a vendor were to make a taxable supply by way of real property and incorrectly state or certify in writing that the supply is an exempt supply, the consideration for the sale is deemed to be GST/HST included,
  - in this case, unless the purchaser knew or should have known that the supply was not exempt, the supplier is considered to have collected and the recipient is considered to have paid the tax on the day on which ownership or possession of the property was transferred to the recipient.

# Ownership

- Various structures for owning real property:
  - Individuals
  - Joint Ventures
  - Corporations
  - Partnerships
  - Trusts

# Ownership

- The owner of the real property is required to be registered for GST/HST and report the tax.
- Under subsection 123(1) of the Act a person is defined to include an individual, a partnership, a corporation and a trust.
- It is important that the correct entity is registered and reporting the GST/HST activity of the real property.
- Currently there are many cases where the wrong parties are reporting the GST/HST for the properties activities;
  - The CRA is assessing all entities involved plus interest even if the correct amount is reported on a timely basis.

# Ownership

- If someone other than the required entity reports the GST/HST transactions for the real property, tax, interest and penalties could be assessed against the entity for the non-reporting of GST/HST collected on revenue.
- There may also be an issue with respect to the required entity's eligibility for input tax credits for GST/HST paid, whether because the entity was not registered when the tax was incurred or because the time to claim the input tax credit has lapsed.
- The person who has incorrectly reported the GST/HST can be assessed for claiming input tax credits if they were not theirs to claim, i.e.:
  - General partner on behalf of a limited partnership,
  - Bare trustee on behalf of members of a joint venture.

# Bare Trust/Nominee Corporations

- In many cases legal title to real property may be held in the name of a corporation acting as nominee or bare trustee for the beneficial owner(s).
- If the bare trustee or nominee has no discretionary powers and all powers or responsibilities to manage the trust property are retained by the beneficial owner(s), the CRA will consider the beneficial owner, rather than the bare trustee, to be involved in commercial activities related to the trust property.
- This nominee corporation may take all actions necessary to facilitate the acquisition, financing, leasing and sale of the particular property as agent for, and under the instructions of, the beneficial owner(s).
- As a result of this arrangement, the nominee corporation is typically shown as the mortgagor, lessor and/or purchaser/vendor on all agreements pertaining to the property.

# Bare Trust/Nominee Corporations

- In this case the beneficial owner generally would:
  - be required to register for GST/HST;
  - collect and remit the GST/HST payable; and
  - be eligible to claim any related input tax credits under the normal rules
- The bare trustee would not be considered to be engaged in a commercial activity in respect of the trust property, and therefore would not be allowed to account for the GST/HST in respect of the trust property.

# Bare Trust/Nominee Corporations

- To determine whether agency principles or trust principles apply, the provisions of the bare trustee agreement must be reviewed to see who has discretionary decision-making powers and carrying out the commercial activity.
- The CRA position on bare trust is outlined in their policy statement P-015,
  - the CRA will consider a corporation to be a bare trustee if the corporation has no independent or discretionary powers in the decision-making related to the properties held in trust.
- If incorrectly registered the problem is highlighted by bare trustee/nominee's RC account where the corporate tax return is filed as a NIL return.

# Joint Ventures

- A joint venture is not included in the definition of a person in subsection 123(1) of the Act.
- Therefore, unless a joint venture election is in place, all participants in a joint venture must account separately for their prorated share of the GST/HST collectible on any sales, as well as the GST/HST paid on the joint venture purchases.
- This reporting could be very cumbersome for a joint venture with many participants.

# Joint Ventures

- Many builders and real estate owners are incorrectly using bare trustee/nominees to report HST for joint ventures.
- Bare trustee/nominee is not an owner, nor is it carrying on a commercial activity in respect of the real property and therefore cannot be registered to report the joint venture's GST/HST activity.

# Joint Ventures

Joint Venture Election in accordance with section 273 of the Act:

- The joint venture election under the Act provides flexibility in the reporting of the GST/HST for certain prescribed joint ventures.
- The election is particularly helpful when there is a single operator and the other participants are not directly involved in day-to-day operations.
- The elected joint venture operator is responsible for accounting for the GST/HST on all sales made by participants through the joint venture and will claim allowable input tax credits for tax paid on expenses and other outlays made through the joint venture.

# Joint Ventures

- The operator and the participants remain jointly and severally liable for the collection and remittance of GST/HST for the joint venture operations.
- Participants will still be permitted to claim input tax credits for tax paid on expenses related to the joint venture that they incur directly (that is, not through the joint venture), to the extent that they would be entitled to do so if the election had not been made.

# Joint Ventures

To be eligible for the joint venture election:

- Must be a joint venture under an agreement evidenced in writing
- Joint venture's activities must be for the exploration or exploitation of mineral deposits or a prescribed activity.
- A prescribed activity includes:
  - a. The construction of real property, including feasibility studies, design work, development activities and the tendering of bids, where the undertaken in furtherance of a joint venture for the construction of real property
  - b. The exercise of the rights or privileges, or the performance of the duties or obligations, of ownership of an interest in real property, including related construction or development activities, the purpose of which is to derive revenue from the property by way of sale, lease, licence or similar arrangement

# Joint Ventures

- Operator must be a participant:
  - A person who, under a written joint venture agreement, makes an investment by contributing resources and takes a proportionate share of any revenue or incurs a proportionate share of the losses from the joint venture activities; or
  - A person, without a financial interest, who is designated as the operator of the joint venture under a written agreement and is responsible for the managerial or operational control of the joint venture.

# Joint Ventures

- What is managerial or operational control?
- GST/HST Interpretation November 2012:

*“For a person to have managerial or operational control of a joint venture the person must have authority to manage the joint venture's daily activities without needing the input or approval of any financial participant. This may include the management of the accounts, the filing of the GST/HST returns and the daily administration of the joint venture's activities. Evidence of a person having the necessary managerial or operational control may also include having the authority to engage personnel or contractors on behalf of the joint venture. Where the person has engaged no staff to perform any of the operator's duties it is doubtful whether they have managerial or operational control. However, managerial or operational control does not necessarily include any authority to initiate significant business decisions such as the acquisition of or selling of certain core business assets. It can be limited to the daily functions necessary to run a business but must include all or at least most of the significant duties required to maintain managerial or operational control of the joint venture.”*

# Joint Ventures

- Apply for a separate divisional number under operator's GST/HST registration using Form GST 10.
- Form GST 21 should be filled out, not required to file with CRA.

# Joint Ventures

- The CRA takes the position that the joint venture operator election applies only to post-acquisition conduct and, in the case of real property, does not apply to pre-acquisition costs and the purchase of the real property.
- Each member of a joint venture needs to be registered prior to an acquisition of real property.
- claim any available input tax credits for its share of the GST/HST paid on any expenses prior to the purchase (ie. soil testing, surveyors and feasibility studies) and acquisition costs.

# Joint Ventures

- Each member of a joint venture needs to self assess the GST/HST due on the purchase for its pro-rated share of the real property.
- If a member is not registered, the GST/HST for their share is not recoverable as an input tax credit and becomes a “real cost”.
- Subsequently, the joint venture participants can elect an operator to account for the GST/HST on post-acquisition activities related to the real property.

# Joint Ventures

## Notice No. 284

- A recent CRA announcement grants taxpayers a temporary reprieve for a bare trustee or nominee that reports GST/HST on behalf of the members of a joint.
- Notice No. 284 announced that, for reporting periods ending before January 1, 2015, GST/HST will not be reassessed if a bare trustee or nominee was reporting the tax on behalf of a joint venture as its operator, when it was not eligible to do so.

# Joint Ventures

- This policy will apply when:
  - the bare trustee was reporting on behalf of a joint venture (not apply to partnerships or other structures)
  - all returns have been filed all taxes have been remitted
  - the joint venture members are otherwise fully compliant

# Joint Ventures

- It will allow joint ventures to review how they currently report GST/HST and ensure that their practices are in compliance, without fear of CRA reassessments on this issue.
- Although this temporary reprieve is available only to joint ventures, all taxpayers should review their reporting procedures to make sure all requirements are met to avoid costly reassessments.
- The 2014 Federal Budget proposes to allow more commercial joint ventures and their participants to rely on the joint venture election. While the details of these proposed changes have yet to be announced, it is hoped that the election will be expanded to encompass the type of pre-acquisition activities previously discussed.

# Partnerships

- Under subsection 123(1) of the Act a partnership is a person.
- If carrying on a commercial activity, the partnership must be registered for and report the GST/HST on its activities.
- A partnership cannot designate a partner, in an equivalent manner to the operator under a joint venture election, to handle all the GST/HST accounting for the partnership.
- Partnerships incorrectly using a partner for GST/HST reporting.
- Problem highlighted by RZ accounts assigned by Canada Revenue Agency used to file Partnership Returns for tax purposes.

# Self Assessment

Registered Purchaser who is acquiring real property for use primarily in a GST/HST commercial activity:

- The vendor is not required to collect GST/HST on the sale of the real property if the purchaser is a registrant and in the case of a recipient who is an individual, the property is not a residential complex or cemetery plot or place of burial in accordance with 221(2)(b) of the Act.
  - The purchaser is required to self assess the tax pursuant to subsection 228(4) of the Act.
- Registered purchasers should self assess the tax due on the acquisition on line 205 of their Return if the purchaser is acquiring the property for use primarily (greater than 50%) in a GST/HST commercial activity, they are eligible to claim a corresponding input tax credit in the same return.

# Self Assessment

- The net result is that the purchaser has no cash outlay for the GST/HST when acquiring the property exclusively in a commercial activities
- The purchaser generally warrants in the agreement of purchase and sale that it is buying the real estate for its own account and not as an agent or bare trustee

# Self Assessment

- For real estate transactions in which the GST/HST is required to self assess on the purchase the owner(s) should:
  - provide its GST/HST registration number to the vendor, so GST/HST is not charged on the sale;
  - must self-assess the GST/HST and claim any available corresponding input tax credit; and
  - for joint ventures each participant must self-assess its respective share of the GST/HST on the purchase and if eligible claim a corresponding input tax credit

# Self Assessment

- According to a CBA/CRA Q&A in March 2010, the CRA indicated an administrative tolerance that no penalty/interest will be assessed where a person has failed to report the tax on line 205 and has not claimed an input tax credit, provided there are no revenue implications (i.e. the purchaser is entitled to claim a full input tax credit)

# Self Assessment

Registered Purchaser who is acquiring real property for use **NOT** primarily in a GST/HST commercial activity:

- If the purchaser is registered but the property is not being used primarily in a GST/HST commercial activity (ie. exempt supplies such as health care services or financial services), then the tax is reported on Form GST60.
- 228(4)(b) provides that the Form GST60 return must be filed and the GST/HST paid by the end of the calendar month following the month of the purchase. For example if a registered incorporated doctor purchases a non-residential building for its medical practice that will not be used primarily in a commercial activity on September 20<sup>th</sup> the corporation must pay the tax by October 31<sup>st</sup>.

# Self Assessment

- The registered purchaser will be eligible to claim an input tax credit to the extent the building is being used in a commercial activity in its GST/HST return that covers the period when the ownership of the real estate is transferred:
  - There may be a cash flow issue if the reporting period of the purchaser does not correspond to the filing requirement of the GST 60 i.e.:
    - ❖ GST Form 60 is required to be filed and the tax payable is due October 31<sup>st</sup> and the purchaser is an annual filer with a calendar year end such that the allowable input tax credit that can be claimed to recover tax cannot be filed until the annual return is due in the following year.

# Self Assessment

## ➤ Example:

- ❖ Ownership of real property is transferred to a registered purchaser on September 20, 2013,
- ❖ The registered purchaser will not be using the real property primarily in commercial activities,
- ❖ Registered purchaser is required to file the form GST60 and pay the GST/HST by October 31, 2013,
- ❖ The registered purchaser is an annual GST/HST filer with a calendar year. The purchaser cannot file a claim for the allowable input tax credit until 2014
- ❖ Tax payable due by October 31, 2013 and allowable input tax credit claim in 2014 when the return is filed.

# Self Assessment

- Self supply of a single unit residential complex (ie. a freehold home) or residential condominium unit where:
  - A builder of a new or substantially renovated residential complex or condominium unit who leases it out is deemed to have made a taxable supply and repurchased the property
  - The builder is liable to pay GST/HST computed on the fair market value of the property at the later of the time the construction or renovation is substantially completed and when the tenant begins to occupy the property

# Self Assessment

- Substantial completion typically means 90% or more completed but the facts of each case must be examined.
- Self assessment removes the advantage of any tax savings (ie. profit) from a person who purchases such units from a third party builder by the self assessment being based on the fair market value as opposed to cost.
- Builder/landlord may be eligible for the GST/HST Rental Rebate.
- The subsequent resale should not be subject to GST/HST.

# Self Assessment

- The self supply rules also apply to:
  - a person who builds a residential apartment complex for the purpose of renting out the units for the purpose of the occupancy of the units by individuals as a place of residence,
    - ❖ mirrors the self assessment for single unit residential complex (ie. a freehold home) or residential condominium unit
    - ❖ a builder/landlord is treated as having made a taxable supply of the entire complex at the time the first unit is rented out even if the other units in the complex are vacant
  - Additions to existing apartment building:
    - ❖ self supply later of the time when the first unit in the addition is leased out and the time the addition is substantially complete

# Self Assessment

- When a person converts a non-residential property into a residential complex without constructing or substantially renovating the complex, the person is deemed to be the builder and the conversion is deemed to be a substantial renovation
  - ❖ The GST/HST rules for the sale or self supply of a new or substantially renovated residential complex will apply
  - ❖ i.e. purchaser acquires hotel and converts building into a residential complex

# Self Assessment

- For those situations that the self supply rules do not apply the builder cannot claim input tax credits to recover any GST/HST paid.
- The self supply rules do not apply to the following:
  - ❖ An individual builder who constructs a residential complex for use primarily as a place of residence of the individual, a related individual or a former spouse or common law partner and claimed no input tax credits to recover GST/HST paid in respect of the purchase of the land and construction costs.
  - ❖ Residences built by a university, public college or school authority to be used primarily for the purpose of providing a place of residence for students attending school.
  - ❖ Certain religious communal organizations who construct or substantially renovate a residential complex for the purpose of providing a place of residence for members of the community, society or body.
  - ❖ registrants who acquire, construct or substantially renovate a residential complex to be used for the purpose of accommodating contractors or employees at a special work.

# Self Assessment

- Where a builder has given possession of a residential condominium unit to a purchaser under an agreement of purchase and sale prior to registration of the condominium complex and the agreement is terminated without renewal, the builder is deemed to have sold and repurchased the unit at the time that the agreement is terminated and must self assess the GST/HST at the fair market value which is not recoverable.
- The subsequent resale should not be subject to GST/HST.

# GST/HST New Housing Rebates

New constructed and substantially renovated homes:

- The sale of newly constructed or substantially renovated residential properties is generally subject to GST/HST.
- A substantially renovated home is one in which all or substantially all (typically more than 90%) of the property, other than the foundation, exterior walls, interior supporting walls, floors, roof and staircases, has been removed or replaced.

# GST/HST New Housing Rebates

CRA's B-092 outlines in further detail what the CRA's interpretation of the term "substantial renovation" as it relates to the GST/HST new housing rebate:

- Substantial renovation is considered to have taken place where all or substantially all of the interior of a building, with the exception of certain structural components (the foundation, external walls, interior supporting walls, roof, floors and staircases), has been removed or replaced,
- Generally, all or substantially all is interpreted as meaning 90% or more. To meet this requirement, at least 90% of the building that existed before the renovations began must be renovated to some minimum degree. This determination applies to the interior area of the building.

# GST/HST New Housing Rebates

- The Bulletin outlines acceptable methods that can be used for determining whether all or substantially all of a building has been renovated:
  - ❖ Square footage of floor space of the areas renovated compared to the total floor space of the building
  - ❖ Square footage of floor and wall space of the areas renovated compared to the total floor and wall space of the building
  - ❖ Number of rooms renovated compared to the total number of rooms in the building
- The method used must be fair and reasonable in the circumstances ie. if one room represented half the area of the building and it was not renovated, it would not be fair and reasonable to use the number of rooms as a method. This does not mean that the rooms have to be the same size, but the size of any one room should not distort the result.

# GST/HST New Housing Rebates

- Neither the cost of the renovations nor the fair market value of the improvements made is an acceptable basis for determining whether the “all or substantially all” requirement is met. This requirement is based on the actual physical renovations to the building rather than the cost or value of such renovations.

# GST/HST New Housing Rebates

## Federal New Housing Rebate

- To be eligible for this Rebate :
  - Homes that qualify for this rebate include new detached and semi detached homes, row houses, duplexes, mobile homes, floating homes and condominium units
  - Purchaser must be an individual buying the home as its primary place of residence or a relation or current or former spouse or common-law partner
    - ❖ for a home to be an individual's primary place of residence, the individual must live in the home more than half of the time

# GST/HST New Housing Rebates

The CRA's position on what constitutes a primary place of residence is outlined in CRA's P-228 for purposes of GST/HST new housing rebates that are claimed by purchasers or owners, or paid or credited by builders:

- The term primary place of residence is not defined in the *Excise Tax Act* and therefore the CRA's position that whether a residential complex or residential unit is a primary place of residence is a question of fact, determined on a case-by-case analysis.
- The intention test
- Criteria Indicative of a Primary Place of Residence:
  1. The residential complex or residential unit should be, or should be demonstrably intended to be, the particular individual's place of residence, or that of a qualifying relative, for purposes of:
    - mailing address,
    - income tax (e.g. forms or returns),
    - voting,
    - municipal/school taxes, and
    - telephone listing.

# GST/HST New Housing Rebates

2. After possession or substantial completion, as the case may be, the individual or qualifying relative should demonstrate occupancy by moving most of his or her personal effects (in terms of use and value) into the residential complex or residential unit.
3. Where the individual or qualifying relative does not occupy the residential complex or residential unit after possession or substantial completion, as the case may be, there should be evidence that the occupation of the complex or unit was frustrated (e.g. by relocation due to employment or lack of financing).
4. Where the individual or qualifying relative has taken out insurance, the stated use of the place of residence for purposes of the insurance policy should be as the insured's personal residence, i.e. homeowner's or tenant's insurance rather than seasonal or rental property.
5. Where the individual owned or leased another place of residence at the time the residential complex was acquired, constructed or substantially renovated, the disposition of that place of residence or clear evidence that that place of residence is offered for sale or rental at or before the occupation of the complex or residential unit may indicate that the complex or unit is the individual's primary place of residence.

# GST/HST New Housing Rebates

6. Where an individual or qualifying relative owns or leases more than one place of residence and continues to occupy both of them, the following factors may indicate which one is the primary place of residence:
  - the amount of time spent at any one of the places of residences,
  - the location of the individual or qualifying relative's place of work,
  - the availability of amenities particular to the personal needs of the individual or qualifying relative, and/or individual residing with him/her, and
  - the suitability of the property for use by the individual or qualifying relative as a place of residence throughout the year.

# GST/HST New Housing Rebates

- Purchaser must pay the federal GST on the acquisition of the home and the purchase price must be less than \$ 450,000
- The federal GST New Housing Rebate is currently 36% of the total GST paid on the purchase to a maximum of \$ 6,300 which is at a selling price of \$350,000 (36% of the 5% GST on \$ 350,000)
- for purchase prices above \$ 350,000 the rebate is reduced such that the rebate is zero for homes at selling prices of \$ 450,000 or greater
- The rebate applications must be filed with the CRA within two years after the day ownership of the home is transferred to an eligible purchaser

# GST/HST New Housing Rebates

## Provincial New Housing Rebate:

- Some of the provinces that have harmonized their provincial sales tax with the federal GST offer a partial rebate of the provincial component of the HST.
- The provincial New Housing Rebate is available to purchasers of newly constructed or substantially renovated homes as their or relative's primary place of residence.

# GST/HST New Housing Rebates

- To complicate matters, the provincial rebates' calculations differ from those used for the federal New Housing Rebate .
- For homes in British Columbia where ownership is transferred prior to April 1, 2013 when the province de-harmonized and Ontario the maximum rebate amounts for a purchaser who paid HST for the land and building are:
  - BC – 71.43% - maximum rebate of \$ 42,500 at selling price of \$850,000
  - Ontario – 75% - maximum rebate of \$ 24,000 at selling price of \$400,000

# GST/HST New Housing Rebates

- The rebate applications must be filed using the prescribed forms with the CRA within two years after the day ownership of the home is transferred to an eligible purchaser.

# GST/HST New Housing Rebates

- Most homes sold GST/HST included with purchasers assigning the New Housing Rebate to the builder and the builder required to either pay the amount of the rebates directly to the purchaser or credit the amount against the total amount payable for the home.
- When the rebates are assigned to the builder the purchasers do not have to apply for the New Housing Rebates and wait for the CRA to process the claim.
- Purchase price of the housing includes a component of GST/HST and the New Housing Rebates can partially offset this tax cost for eligible purchasers immediately on closing.

# GST/HST New Housing Rebates

- On an assignment of the Housing Rebate the builder is jointly and severally liable if “knows or ought to know” that the purchaser is not entitled to the rebate or the amount paid or credited by the builder exceeds the amount of the rebate that the purchaser is entitled.
- In the current market, there are many purchasers who are “flippers” or landlords.
- Typically purchasers sign statutory declarations declaring that the home will be used as their primary place of residence – is this sufficient evidence for builders to determine purchaser’s use of the home?
  - under an audit the CRA will generally not accept a statutory declaration signed by a purchaser as evidence of a purchaser’s use of the home.

# GST/HST New Housing Rebates

- It is common practice for builders to include in the purchase and sale agreement the right to take legal action against purchasers who it is found later that do not qualify for the rebates but have been paid or credited the rebate amount.
- As the builder and purchasers are jointly and severally liable to the CRA for incorrectly filed rebates it is important for builders to ensure purchasers qualify for the rebate before accepting an assignment of the rebates from a purchaser to avoid costly and time consuming legal ramifications.

# GST/HST New Housing Rebates

## Owner built home:

- The GST/HST Rebate is also available to individuals who construct or substantially renovate their own home or hire someone else to do so.
- Generally same requirements as for the GST/HST New Housing Rebates when an individual buys a home from a builder.
  - Primary place of residence for the individual, a relation or a former spouse or common law partner;
  - Same dollar limitations and calculations for the fair market value of the home, including both land and building;
  - Rebate application must be filed with the CRA within two years after the earlier of the date that the home is (i) first occupied (ii) the day in which construction or substantial renovation is substantially completed.

# GST/HST New Housing Rebates

- GST/HST must have been paid on the land and construction costs and services:
  - items that are included such as land, architectural fees and building materials,
  - items that are not included such as free-standing appliances and tools used during the construction.

# GST/HST Rental Property Rebates

- Mirrors operation of New Housing Rebate, same thresholds and phase out amounts per rental unit.
- In British Columbia (for homes that ownership transferred prior to April 1, 2013 when the province de-harmonized) and Ontario, the provincial rental rebate allows landlords to recover a portion of the provincial component of the HST, calculated in a similar manner to the provincial New Housing Rebate.
- The rental rebate is available to eligible purchasers or builders of new residential properties who intend to lease the units as their primary place of residence for periods of continuous occupancy of at least one year, under one or more leases.

# GST/HST Rental Property Rebates

- **Boissonneault Groupe Immobilier Inc. v. R., [2012] G.S.T.C. 104 (TCC):**
  - After purchasing a 26-unit residential building with a 90 per cent retention rate near a college, the company in question decided to build a 78-unit building nearby
  - The company built a 78-unit residential building next to a CEGEP college in Quebec. It planned to rent out the units under one-year leases. As a result of delays in construction due to environmental problems, the building was not ready on time, and many of the initial leases were to students for an 11-month period. The next year, it allowed students who wanted to continue with 11-month leases to renew them. Most (over 70%) but not all students moved to 12-month leases.
  - The company claimed the GST/HST New Residential Rental Property Rebate for all 78 unites under section 256.2. Revenu Québec, which administers the GST in Quebec, denied the rebate in respect of 42 of the 78 units, on the basis that these leases were not intended to be for 12 months or more. The company appealed to the Tax Court of Canada.

# GST/HST Rental Property Rebates

- The court found that the company was providing long-term housing within spirit of law — purpose and nature of investment relied heavily on the need for long-term leases and its tenants remained in the area for at least two to three years or duration to complete college program — Based on its experience and data from first building, company made realistic, reasonable plan for long-term rental of units in the 78-unit building.
- The Judge allowed the appeal. At the time it was constructing the building, the company intended the leases to be for 12 months. In sub-paragraph (a)(iii) of the definition of “qualifying residential unit” in sub-section 256.2(1) of the Act requirement that it be “reasonably expected” that the first tenant use will be under a lease of one year or more, and that indeed was the company's original intention

# GST/HST Rental Property Rebates

- Eligible purchasers are those who paid GST/HST on the following:
  - Newly constructed or substantially renovated rental properties,
  - additions to existing rental properties,
  - properties converted to residential rentals; or
  - leasing of land used for residential rental
    - ❖ The rental rebate is reduced for leased residential land because it applies only to the land.

# GST/HST Rental Property Rebates

## Purchaser/Landlord:

- Different than the New Housing Rebates purchasers cannot assign the Rental Rebate to the builder:
  - Eligible purchasers must file on their own and wait for cheque from CRA;
  - Purchasers must be prepared to fund the amount of the rebate until the amount is approved and paid by the CRA;
  - Incentive for purchasers to falsely state that they are eligible for the New Housing Rebate that is eligible to be assigned and can receive immediate credit.

# GST/HST Rental Property Rebates

- Must be filed within two years of transfer of ownership using the prescribed forms,
- The threshold and phase out amounts used in calculating the rental rebate are based on the fair market value at the time ownership is transferred to the purchaser rather than the purchase price:
  - due to increasing value in real estate CRA using fair market value at time of transfer of ownership as opposed to purchase price for HST Rental Property Rebate calculations,
  - CRA requesting taxpayers to get valuations by accredited professionals.

# GST/HST Rental Property Rebates

- Particularly in the case of a purchase of a condominium unit there may be a period of three or four years between the time that the purchase and sale agreement is signed and the time that the ownership is transferred
  - in this period the market value of the unit can substantially increase that can reduce the rebate amount that an eligible purchaser is expecting or even result in the purchaser being ineligible for the rebate because the market value has increased over the threshold amounts
  - In markets where real estate values increase, particularly Toronto and Vancouver, this can cause problems for purchasers who are expecting the rebate amount based on a computation using the purchase price to finance part of the purchase of the property who later realize they either do not qualify or may receive less than expected.
  - To avoid any surprises purchasers must be aware of this situation when planning the purchase of a residential rental property and keep informed of market conditions.

# GST/HST Rental Property Rebates

- The rental rebate plus interest may be subject to recapture and have to be repaid to the CRA if the property is sold within one year from the time it is first occupied unless the sale is made to a purchaser who is acquiring the property for use as the primary place of residence of the purchaser or a relative.
  - If it is uncertain what the use of the home will be to avoid the potential recapture of the rental rebate owner/landlords should consider waiting to sell the home for at least one year from the time the home is first occupied.

# Documentary Requirements for Input Tax Credits (“ITCs”)

- ITCs can only be claimed if sufficient evidence obtained
- Input Tax Credit Information Regulations require:
  - name of Supplier & HST Registration Number
  - recipient’s name, name under which it carries on business or name of its agent

# Documentary Requirements for Input Tax Credits (“ITCs”)

- The required information is to be provided in “supporting documentation” which includes:
  - An invoice
  - A receipt
  - A credit card receipt
  - A debit note
  - A book or ledger of account
  - A written contract or agreement

# Documentary Requirements for Input Tax Credits (“ITCs”)

- The “recipient” – the person liable to pay – claims the ITC. Where agent purchases on behalf of principal, ITC remains that of the principal:
  - Effects the claiming of ITCs by joint ventures, partnerships and land owners cost sharing arrangements,
  - Cannot arbitrarily allocate a supplier invoice among various joint ventures or housing projects,

# Documentary Requirements for Input Tax Credits (“ITCs”)

- For mixed use rental properties, subsection 136(2) of the Act treated as two separate supplies therefore important to not claim input tax credits for residential portion and need to allocate between taxable and exempt.

# Documentary Requirements for Input Tax Credits (“ITCs”)

## “Moral of the Story”

- GST/HST should not be paid if supplier not registered & / or has not provided sufficient ITC Documentation
- CRA Web-based HST Registry allows you to confirm supplier’s GST/HST registration number

# Documentary Requirements for Input Tax Credits (“ITCs”)

- For the sale of real property has HST been collected by the vendor?
- If vendor is not required to collect HST on the sale of real property
  - It is important for vendors to verify the HST registration number of the purchaser and ensure that the number provided is that of the owner and not a bare trustee
    - ❖ Sale of land or commercial properties
    - ❖ Sale of new housing to a corporate GST/HST Registrant
- Confirmation should be maintained on file.

# Documentary Requirements for Input Tax Credits (“ITCs”)

- Claiming ITCs in a Real Estate Holding Company can be supported if (this is not an exhaustive list):
  - Holdco directly owns real property, including vacant land, to be used in commercial activities (C.A.);
  - Holdco has an interest in a JV that is involved in CA & hasn’t elected under s273;
  - Holdco has elected under s273 but it incurs expenses directly (not through the JV operator) relating to the taxable activities of the JV;
  - Holdco incurs expenses in relation to shares or debt of a related company whose assets used exclusively in CA\*
  - Holdco is the GP & incurs expenses on its own account. \*

**\*subject to certain conditions**

# Current State of Affairs

## **Audits, Audits and more Audits!**

“Desk” audits

usually specific return

taxpayers need to be diligent to follow up for refunds

Full audits → 2 to 4 year period

# Current State of Affairs

## Special Projects

- Bare Trustees
- Partnerships
- Refunds or unusual filings

## Notice 284

# Current State of Affairs

- GST/HST on purchase price adjustments on the sale of a new home
- Upgrades purchased from a home builder:
  - A standard purchase and sale agreement contemplates that a purchaser will purchase upgrades to the home prior to the closing of the sale such that the costs of these upgrades are part of the sale price.
  - Consequently, upgrades should be included in the computation of the GST/HST New Housing Rebate such that it can decrease/increase the rebate amount.

# Current State of Affairs

- Development Charges
  - GF Partnership v. R., [2013] G.S.T.C. 22 (TCC) : development charges are not incurred by a builder as agent for home purchaser and appellant liable for the GST on the "additional consideration" related to the levies.
  - Existing liability for Builders that did not charge GST/HST on development charges to homeowner
  - Court also ruled that for over calculated GST/HST New Housing Rebates, where appellant credited too much Rebate to the purchaser, appellant was liable for the excess under subsection 254(6) of the Excise Tax Act because it “ought to have known” that the development charges formed part of the consideration for the home. The judge went so far as to say that the appellant’s actions were extremely careless. If Rebates would have been higher when including the development charges in the calculation, the appellant is not entitled to the increase
  - Decision upheld by the Federal Court of Appeal

# Current State of Affairs

- Work/Live Units
  - the “work” portion is the non –residential portion that could be used for a commercial activity
  - the “live” portion is for individuals who will be using the residential portion as their primary place of residence
  - The availability of a new housing rebate where part of a property is used as an individual's primary place of residence and part is used for commercial purposes depends upon the proportion of use of the property.
    - ❖ CRA has stated that "where an individual purchases a single unit residential complex or residential condominium unit that is used primarily as the individual's place of residence or that of a relation, the individual may be eligible to claim the new housing rebate for the tax paid on the entire unit because the entire unit is considered to be a "residential complex" (and no portion will be deemed to be used for non-residential use) even though part may be used for other purposes. "Primarily" generally means more than 50% of the use of the unit."

# Current State of Affairs

- ❖ If an individual purchases a work/live unit and uses it primarily in commercial activities, the person would not be eligible to claim a new housing rebate computed based on tax paid on the purchase of the entire property. However, a new housing rebate may be available based on the tax paid for the part of the building that the individual uses as his primary place of residence (i.e. residential complex) along with any tax paid for the land that is considered necessary for the unit's use and enjoyment as a place of the residence. Under these circumstances, an input tax credits may be available for the portion that is used in commercial activities.

Thank you!  
Questions?

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